Neutral Citation Number: [2024] EWHC 1716 (KB)

Case No: KA-2023-00074

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04 July 2024

Before :

MR JUSTICE CONSTABLE

- -

Sitting with Costs Judge Simon Brown as Assessor

Between :

RHETT St. JAMES	**Claimant/ Appellant/ Cross-Respondent**
- and -	
WILKIN CHAPMAN LLP	**Defendant/ Respondent/ Cross-Appellant**

- -
- -

Roger Mallalieu KC (instructed by JG Solicitors Ltd) for the Claimant
Robert Marven KC (instructed by Kain Knight (North & Midlands) Limited) for the Defendants

Hearing date: 21 June 2024

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 4th July 2024.

Mr Justice Constable:

Introduction

1. Mr Rhett St. James, the Claimant, appeals by permission of Sir Stephen Stewart, against three decisions by Costs Judge Rowley made during the course of a part heard solicitor-client assessment. The Defendant, Wilkin Chapman LLP ('WCL') had pursued a personal injury claim on behalf of Mr St. James and on 3 July 2019, Mr St. James accepted an offer for £65,000, including previous interim payments. WCL settled costs *inter partes* for £52,000. Mr St. James received the sum of £51,250 and WCL received a damages deduction of £13,750. WCL's entitlement to the whole of this sum, as opposed to only that part of which represents a success fee, is in issue.

2. The three decisions were:

   (1) the decision on 7 November 2022 [2023] EWHC 739 (SCCO) that Mr St. James' liability to WCL in respect of base costs was not limited to the sums in respect of base costs recovered from the opponent to the underlying claim ('the CFA Lite Point');

   (2) the decision on 20 July 2023 that WCL's base costs are not otherwise limited to the sums recovered from the opponent by virtue of the fact that such costs were unusual in amount and therefore were presumed unreasonable pursuant to CPR 46.9(3)(c) and/or of WCL's failure to have obtained Mr St. James' informed consent to the incurring of costs in excess of the approved between the parties costs budget ('the budget point').

   (3) the decision on 20 July 2023 [2023] EWHC 1856 (SCCO) that WCL's base costs are not otherwise limited to the sums recovered from the opponent by virtue of WCL's failure to provide any or any proper costs estimates to Mr St. James (and in addition therefore a failure to seek the Claimant's informed consent to the incurring of such costs) ('the estimate point');

3. I am grateful to the input of Costs Judge Simon Brown, who has sat with me on this appeal as assessor, given his extensive experience as a costs judge. Although the content of this judgment is my own, there is nothing in this judgment in which my analysis departs from that of the assessor.

The Retainer

4. Mr St James was provided with a Client Care Letter ('CCL') dated 22 May 2015. This was provided with a standard form CFA Agreement, which itself included the Law Society Conditions. There is a dispute about the contractual status of the CCL.

5. The CCL stated at the outset:

> '*This letter is designed to inform you of our terms of business and also our client care standards. I enclose a copy of this letter and would be grateful if you would please sign and return the same to me as evidence of your agreement to these terms of our instruction on your behalf*'.

6. At the conclusion of the letter, Mr St. James signed '*I acknowledge and agree the above*.'

7. The CCL set out the following in relation to Costs, the Conditional Fee Agreement ('CFA') and Costs Estimate:

> '***Costs***
>
> *The general rule is that the winning party will recover their legal costs from the losing party. If you succeed in your claim for compensation, ordinarily costs will be payable by the other party's insurer.*
>
> *…*
>
> *Recovery of your legal costs is dependent on you receiving more than what is called "the small claim limit", which is currently £1,000 in Personal Injury claims. If you are awarded a lesser sum than £1000 you will almost certainly not be able to recover your legal costs and these will be deducted from your damages. We would warn you if this were likely once we are in a position to value your injuries.*
>
> *It is always important to think about whether the potential outcome of any legal work will justify the expense or risk involved. Please keep this in mind and speak to me if you are concerned about this.*
>
> ***Conditional Fee Agreement (CFA)***
>
> *We have agreed to act on your behalf under a Conditional Fee Agreement (CFA) and two copies of that agreement are enclosed with this letter. Please sign and date one copy of the agreement and return it to us in the stamped addressed envelope provided.*
>
> *The Solicitor's costs that you incur are the "Solicitor's base costs" which are charged at an hourly rate as set out in the attached CFA and a "success fee" which is deducted from your damages in the manner set out below.*
>
> *Under the regulations governing a CFA entered into after 1 st April 2013 we are able to charge the "success fee" of up to a cap of 25% of your general damages and past losses inclusive of VAT. This is calculated once any other statutory deductions are made such as repayments to the Compensation Recovery Unit, and payment of any disbursement insurance. The success fee will be calculated as a percentage increase on base costs and in your case it will be applied up to 100%.*

All your "base costs" will be recovered from the Defendant at the successful conclusion of these proceedings. However, for smaller cases only certain fixed base costs may be recoverable from the Defendant. ***We will not charge you for any additional liability for these base costs above the 25% cap after the application of the success fee unless you fail to honour your obligations under the Agreement.***

Such as if you:

• fail to provide prompt instructions

• fail to act on our advice

• fail to attend medical or other appointments arranged for you

• mislead us, the Court or the Defendant in any way

In which case we will put you on notice that we may seek to recover our base costs from you:

• in excess of those recovered from the Defendant and

• in excess of the 25% cap.

…

Costs Estimate

Due to the nature of this case it is not possible for us to give you a fixed quotation but based on the assumption that your case may proceed to a contested final hearing, your estimated costs could amount to as much as £5,000.

I consider there to be sufficient reason to confidently believe that your case can and will be settled without any need for Court proceedings and on that basis I would estimate your costs to be in the region of £1,000 to £2,000 plus VAT and any payments incurred on your behalf, such as medical report fees.

Under the terms of the CFA, we will be seeking payment of these costs and any payments made on your behalf from your opponents, while you being responsible for any success fee as outlined above.

As part of our commitment to you we will keep your cost estimate under review and update you regularly.

…

> ***Insurance Premium***
>
> …
>
> *As long as you co-operated with us and abide by our advice, the insurance premium is only payable at the end of the case and then only if your claim is successful; and is in addition to the cap at 25% deduction for the success fee.'*
>
> (**Bold** and underlined as per original)

8. The CFA provided:

> '*This agreement is a binding legal contract between you and your solicitor/s. Before you sign, please read everything carefully. This agreement must be read in conjunction with the Schedules and the Law Society Conditions attached.*
>
> …
>
> ***Paying us if you win***
>
> *If you win your claim, you pay our basic charges, our expenses and disbursements and a success fee together with the premium for any insurance you take out. You are entitled to seek recovery from your opponent of part or all of our basic charges and our expenses and disbursements, but not the success fee or any insurance premium.*
>
> *The overall amount we will charge you for our basic charges, success fees, expenses and disbursements is limited as set out in Schedule 2 below.*
>
> ***Schedule 2***
>
> **…**
>
> ***Overall cap on your liability for costs***
>
> *We will limit the total amount of charges, success fees, expenses and disbursements (inclusive of VAT) payable by you (net of any contribution to your costs paid by your opponent) to a maximum of 25% of the damages you receive.'*

9. The CFA incorporated the Law Society's Conditions as they were. These include the following:

> *'**Dealing with costs if you win***
>
> *• Subject to any overall cap agreed with you you are liable to pay all our basic charges, our expenses and disbursements and the success fee (up to the maximum limit) together with the premium of any insurance policy you take out.*
>
> *• Normally, you can claim part or all of our basic charges and our expenses and disbursements from your opponent. You provide us with your irrevocable agreement to pursue such a claim on your behalf. However, you cannot claim from your opponent the success fees or the premium of any insurance policy you take out.*
>
> *• If we and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basis charges and our expenses and disbursements, then you pay the difference up to any maximum agreed with you.'*

The Estimates, Budgets and Bills

10. The cost estimate element of the CCL (suggesting '*as much as £5,000*') is set out above.

11. On 22 November 2017, a further estimate was provided ('the November 2017 Estimate'). The letter was written by the solicitor then taking conduct of the case, describing himself as a senior solicitor with over twenty-five years' experience in personal injury matters. The section on costs within the letter stated:

> '*Please do not be alarmed by what follows but I need to provide you with some information regarding our costs.*
>
> *…*
>
> *To ensure that I can recover our costs form the other side if successful I need to advise you of the following:*
>
> 1. *The costs incurred to date are £6,500 for the work that we have done on your behalf plus relevant VAT. In addition we have so far incurred expenses (known as disbursements) totalling £2,100 in order to pursue your claim. I estimate that we are likely to incur further costs of around £8,000 to £10,000 plus VAT and disbursements of around £6,700 to £7,000. These disbursements include (but are not limited to) court fees, medical records, expert evidence and counsel's fees.*
>
> 2. *My charge out rate is £220 per hour.*
>
> ***Provided you co-operate fully with us throughout and comply with any deadlines that might in due course be set by the court none of the above requires any payment from you.***'

12. No further estimate was provided to Mr St. James.

13. Following commencement of proceedings, there was cost-budgeting. The Claimant's budget was submitted without reference to Mr St. James, and he was not informed that the sums both incurred and estimated were considerably in excess of the sums set out in the 22 November 2017 estimate.

14. The Costs Judge recorded that the Claimant's budget was approved in the total sum of £77,214.45 with £31,864.45 referred to incurred costs and £45,350 in respect of budgeted costs. The table with the Cost Judge's second judgment shows that the budget from Issue/Pleadings through to Trial including Settlement phases was in fact £34,350, so it seems likely that the latter was in fact the approved sum and £45,350 was the budget prior to reduction by the court during the cost budgeting process.

15. Following settlement of the claim, there was a negotiation with the tortfeasor's solicitors about the extent of costs payable. This was prior to the PTR, trial prep or trial phases being substantially incurred: only £1,000 out of a budgeted £14,750 had been spent. Nevertheless, across the relevant phases from Issue/Pleadings to Expert Reports, the actual costs claimed were £13,926.25 over the £16,500 budget – an increase over budget of nearly 85%.

16. Costs were settled *inter partes*, without any recourse to Mr St. James in relation to the negotiation or costs settlement, in the all inclusive sum of £52,000 (profit costs and disbursement split not being identified).

17. Mr St. James was sent a statutory bill following settlement in which WCL claimed £42,030.87 plus VAT charges, and £15,312.95 (curiously, inclusive of only £8 VAT) disbursements, totalling £65,750 inclusive of VAT. This was then accompanied by a statement of account in which the '*amount due to you*' was calculated simply by £65,000 less '*success fee limited to 25% of general damages and past losses as agreed*' in the sum of £13,750, making £51,250. The base costs upon which the success fee was calculated was stated as being £76,215. Clearly a 100% uplift on this sum far exceeds 25% of the claimant's damages.

18. It was only upon challenge to the success fee percentage of 100% (which the Costs Judge in fact reduced to 10%, and which is not subject to appeal) that WCL contended that their charges contributed to the 25% capped entitlement to £13,750. WCL accept that if the success fee is limited to 10% of the base costs recovered from the tortfeasor, it amounts to £3,668.71.

19. The bill then submitted for assessment was different to any of the previous sums: it was now £57,271.50 plus success fee and VAT, prior to disbursements.

The CFA Lite Argument

20. The relevant section of the Cost Judge's conclusions which are the subject of the first point of appeal were:

> *'27. 'The standard wording of the Law Society CFA used by the solicitors in this case clearly entitles them to claim any unrecovered base costs from the client in addition to a success fee or indeed disbursements.*
>
> *…*
>
> *29. …Similarly, the standard wording of the CFA is not in any way ambiguous so as to bring about consideration of the contra proferentem rule. The description of the general rule regarding costs lends no support to any supposed ambiguity. The argument rests almost entirely on the word "all" in the phrase "all your "base costs" will be recovered from the Defendant". For if that sentence did not begin with the word all there would be nothing in it to suggest any more than a general description of the recovery of costs (as indeed is described under the heading "costs estimate" regarding the seeking of payment from the opponent.)*
>
> *30. I do not accept therefore any of Mr Simpson's alternative arguments regarding the construction of the retainer. Mr Simpson's stronger argument seemed to me the description under "costs estimate" of recovery of base costs from the opponent and success fee from the client and the subsequent correspondence and telephone calls at the time of settlement. Those documents do, to my mind, clearly suggest that the solicitors were not expecting to seek any shortfall directly from the client in respect of base costs.*
>
> *31. However, I consider this to be a product of the catchall nature of the percentage fee claimed from the client rather than from the opponent. As Mr Brighton pointed out, in order for the claimant to reduce the percentage fee that has been paid, he has to do more than simply reduce the percentage increase reflected in the success fee itself. For a reduction to the percentage increase could be made up by additional base costs which were not recovered from the opponent. They are set out in the breakdown and could at least in theory be used to make up that shortfall.'*

The Parties' Positions

21. Mr Mallalieu submits that the CCL forms part of the package of agreement documents, which taken together, is poorly drafted, the fault for which lies with WCL. He contends that, notwithstanding, there is an clear hierarchy in which the CFA and the CCL qualify the broad basis of liability stated within the Conditions. The overall effect is that, he contends, the client is told that they

are liable for all base costs and success fee in principle, but that the liabilities are limited in various ways. Those limits include:

(1) That the success fee is limited by statute to 25% of general damages and past loss for first instance cases;

(2) That base costs will ordinarily be paid by the opponent insurer, but that this depends on the claim escaping the small claims track. That if it does not, the Claimant may have to pay base costs from damages;

(3) That (subject to the small claims point) all base costs will be recovered from the opponent and that the Claimant will not be liable (beyond the success fee) unless he does not comply with his responsibilities;

(4) That if the Claimant is at risk of having to pay unrecovered base costs he will be given express notice of that;

(5) That, otherwise, it is only the success fee that will be deducted from his damages.

(6) That there is an overall guarantee that the client will receive at least 75% of his damages (even after payment of any success fee).

22. Mr Mallalieu also prays in aid the following considerations by way of the approach to the construction of contracts in addition to the well known dicta from Wood v Capita Insurance Services Ltd [2017] UKSC 24:

(1) in the context of poorly drafted agreements – which Mr Mallalieu says this contract plainly is, ' *the interpretation of such an agreement is likely to call for more emphasis on the factual matrix and contextual considerations and less principal emphasis on close textual analysis'*. Malone v Birmingham Community NHS Trust [2018] EWCA Civ 1376, [2018] 3 Costs LR 627;

(2) in the event of ambiguity (in the alternative) to the Claimant's primary case in which the contract is, objectively construed, clear in its limitations, the contra proferentem rule. If there is doubt as to whether the words confer on the solicitor a particular benefit in circumstances where the solicitor can be expected to have made that benefit clear, if intended, then the contract should be interpreted against the solicitor in that regard;

(3) in the context of bespoke terms which may qualify or conflict with standard terms, '*the first task is to see if the clauses can sensibly be read together. If they cannot, there is inconsistency and the special condition is to prevail over the other clause in the printed form. But, if they can be read together, they should be and there is no inconsistency'* (Pagnan SpA Tradax Ocean Transportation SA [1987] 3 All ER 565, as reaffirmed in Septo Trading Inc v Tintrade Limited [2021] EWCA Civ 718 (unreported elsewhere);

(4) given that this was plainly a consumer contract within the meaning of s.61 of the Consumer Rights Act 2015, in accordance with s.69, if there was any ambiguity as to the contractual terms, the construction most favourable to the Claimant has to prevail.

23. Mr Mallalieu contends, that there are material terms ('the bespoke terms') in the contract which, objectively construed, provide that the Claimant will not be liable for unrecovered base costs. He relies in particular on the following within the CCL:

(1) Under the 'CFA' section, '*All your 'base costs' will be recovered from the Defendant at the successful conclusion of these proceedings'.*

(2) Under the 'Costs Estimate' section, '*…we will be seeking payment of these costs any payments made on your behalf from your opponents, while you will be responsible for the success fee, as outlined above*'.

(3) Under 'the Insurance Premium' section, '*As long as you co-operated with us and abide by our advice, the insurance premium is only payable at the end of the case and then only if your claim is successful; and is in addition to the cap at 25% deduction for the success fee'.*

24. He also contends that the CCL then makes plain that that there were circumstances – small claims track or breach of obligations – where this would not apply and he might be liable for base costs, but that the client would be given express notice if this was to be the case. Mr Mallalieu entirely recognised that the standard terms of the CFA appeared to allow for the Claimant to be liable for unrecovered base costs. He argues that, as such, it was impossible to read the bespoke terms consistently with the standard terms to reach a position where the Claimant was liable for unrecovered base costs, as this would mean effectively ignoring the bespoke terms. This then leaves two possibilities: firstly, the bespoke terms could be read in a way which allowed them to be read consistently together with the standard terms. It was argued that this was entirely possible if the standard terms were seen for what they were – standard terms (providing for a general liability for base costs on success) which were then modified by the bespoke terms, such that that liability was limited to sums recovered from the opponent save in specified circumstances. There was, he says, a hierarchy of terms, with general and broad liability giving way to specific exclusions as expressed within the CCL. Second, if incapable of being construed this way, there was an inconsistency which required resolution: the specific over the general and/or against the solicitor given any ambiguity arising out of the inconsistency.

25. Mr Marven contended that the CCL was not part of the contract. Even if he was wrong about this, he argued that, as the Costs Judge had observed, the Claimant's argument boiled down to reliance upon only one word in the client care letter, namely the word 'all' at the beginning of the sentence at paragraph 12(1) above. He argued that 'all' was to be read as qualified by the emboldened wording at the end of the paragraph, which, he says, qualifies the whole of the foregoing paragraph:

> '**We will not charge you for any additional liability for these base costs above the 25% cap after the application of the success fee unless you fail to honour your obligations under the Agreement.**'

26. Thus, it is said, the Claimant was told in terms that 'base costs' can be included in the capped damages deduction. Mr Marven accepted that this has the effect of 'undoing' the word 'all' – effectively deleting it - but contends that this is the correct construction because it reads the CCL consistently with the clear provisions in the CFA which explicitly imposed upon the client liability for basic charges and disbursements beyond *inter partes* recovery.

27. Mr Marven also argued that even if the emboldened wording can only be read as qualifying the second sentence alone of this paragraph, this sentence applied to the Claimant: the term 'smaller cases' was not defined and therefore can be read as applying to his claim; and the term 'fixed base costs' was apt to cover his claim as costs were essentially fixed in that they were budgeted.

28. Finally, it is said that even if, contrary to the above, the word 'all' cannot be read in this way so as to be consistent with the terms of the CFA, it is said that this does not override the terms of the CFA. The issue is then to determine which provision gives effect to the parties' true contractual intention (*Walker v Giles* (1848) 6 CB 662). It is said that the reasonable person would conclude that (a) the CFA was intended to be the governing contractual document, as addressed above, and thus its terms reflect the true intention; and (b) even if the CCL could be promoted to equal status with the CFA itself, the clear and extensive terms of the CFA express the true bargain between the parties, and this single use of the word 'all' is thus in error.

29. Mr Marven also contends that any recourse to the *contra proferentem* principle and/or the Consumer Rights Act 2015 s 69 is irrelevant where there is no true ambiguity. The issue is not a term with different meanings but (potentially) the determination of which of two allegedly inconsistent provisions is to be understood as reflecting the true contractual intention. Mr Marven also says that the principle in Pagnan SpA Tradax Ocean Transportation SA does not apply where there was no negotiation between the claimant and WCL, so from the perspective of Mr St. James all the provisions presented to him by WCL were equally bespoke or equally standard.

Analysis

30. It is necessary first to consider the parties' competing contentions as to whether the CCL formed part of the agreement. Mr Mallalieu contends that it does. Mr Marven contends instead that the status of the client care letter is as an explanatory document and its provisions are not to be treated as if they appeared in the CFA itself.

31. Both contend that their approach is consistent with *Jones v Wrexham Borough Council* [2008] 1 WLR 1590 at [27]. In that case, Waller LJ gave consideration to the extent to which, in determining whether a CFA fell within the regulations,

regard should be had to the rule 15 letter (effectively the CCL), or whether it was the formal CFA alone which should be considered. In the instant case subject to the consideration by the Court of Appeal, the district judge had held that the CCL set out the intention of the solicitors to forego any shortfall, notwithstanding the terms of the policy, and to the extent that there was conflict considered that the CCL would override the policy. The circuit judge, on first appeal, considered to the contrary, that the CFA was the primary document. Waller LJ said at [27] and [30]:

> '*[27] I can see no reason why the court should not look at the whole package produced by the solicitor, the CFA agreement, the Rule 15 letter explaining to the client the effect of the agreement, and indeed the insurance policy recommended by the solicitor. In that way it can be ascertained whether, as between client and solicitor, the proper understanding was that (save in the circumstances described in paragraph 5 of the Regulation 3A) the client will not be liable for any own-side costs whatever the result of the proceedings, save to the extent that they can be recovered from the other side or under the insurance policy. I use the word "costs" but would emphasise that, as between client and solicitor, it is unlikely that a client will have at the forefront of his mind a distinction between expenses and disbursements or between client's disbursements and solicitor's own disbursements.*
>
> *…*
>
> *[30] The important point is that if and insofar as Mr Morgan would seek to look at the CFA on its own, and construe that CFA strictly, I would reject that approach. I would further emphasise that the construction of the arrangement with which one is concerned is one between solicitor and client, with the Rule 15 letter being an explanation by the solicitor of what is in the CFA to a client unfamiliar with the technicalities of costs' assessment. The correct approach in my view is to ask the question, has the solicitor produced an arrangement for a CFA under which the client would not be liable for any own-side costs or expenses (apart from the circumstances defined by paragraph 5), other than those that are actually recovered from the other side or from insurers.*'

32. The thrust of Mr Marven's submissions is that, by virtue of its explanatory nature and/or the reference the CFA '*enclosed with this letter…*', the letter was somehow subordinate to the CFA when considering the agreement between the parties. I do not consider that this submission sits easily with *Wrexham* in which Waller LJ concluded that all the documents together should be construed as a package. It is clear to me that it is necessary to consider the whole package to answer the central question, which is whether the agreement as between solicitor and client objectively ascertained from that package as a whole was that the client would not be liable for own-side fees and expenses, save to the extent that they could be recovered from the other side, or in circumstances where the client failed to honour his obligations or the amount recovered meant the claim was a 'small claim' subject to fixed cost recovery.

33. Indeed, *Wrexham* itself was a case in which there was a direct inconsistency between the CFA (which made clear that the basic charges and disbursements would be waived to the extent they exceed those recovered from the other side, but this waiver did not extend to the success fee) and the Rule 15 letter (which said in terms that the success fee would also be waived to the extent it was not recovered from the other side – this was at a time when recovery of success fee from the unsuccessful defendant was permitted). In Wrexham, the Court clearly relied upon the Rule 15 letter to conclude that, notwithstanding the terms of the CFA if construed within its own four corners, the success fee would be waived if not recovered : Waller LJ said in terms at [44], '*….That may be the proper construction of the CFA provision but the rule 15 letter and the last sentence of the paragraph in the letter relating to success fee…makes clear that the solicitors waive their right to come for any balance as against the client.'*

34. Contrary to the submission of Mr Marven, this approach is also entirely consistent, by way of the application of general principles, with the Supreme Court decision in Gavin Edmonson Solicitors Ltd v Haven Insurance Company Limited [2018] UKSC 21. In that case, the client entered into a CFA on the basis of the Law Society standard terms CFA. The client care letter said, '*You are responsible for our fees and expenses only to the extent that these are recovered from the losing side. This means that if you win, you pay nothing*' – see [22]). The Court of Appeal had decided that this had the effect of turning the standard Law Society CFA into a CFA-Lite:

> '*18. I agree with the judge that there is a tension between these two provisions. The former contemplates that the claimants, when successful, would pay to their solicitors the charges and other sums referred to and would then recover them from their opponent. The latter contemplates that upon success the solicitor will recover such sums from the opponent. The solicitor has no recourse against his client for the fees and is limited to what he can recover from the losing side. I also agree with the judge that the provision in the client care letter must prevail because it is expressed to be for the avoidance of any doubt.*

35. The point at issue in the Supreme Court was the effect of this conclusion on the existence of a lien, rather than the Court of Appeal's conclusions as to the proper meaning of the contract. Nevertheless, the Supreme Court proceeded on the basis that the CCL formed part of the overall contractual package, notwithstanding the fact that, as observed at [22], it was '*not primarily drafted as a contractual document*', and on that basis concluded that the CCL limited or qualified the broader liability expressed in the CFA.

36. I accept, of course, that the Gavin Edmundson case (whether at Court of Appeal or Supreme Court) cannot be read as authority which establishes some sort of legal principle that a CCL will always be part of the contractual arrangement: whether it is depends upon the language used and what it would mean to the objective recipient. A letter could, for example, clearly say that it is *not* part of the contract, the terms of which were contained, and contained only, in the attached document. It is, however, an example – like *Wrexham* – where in the face of inconsistency between the standard CFA terms and the bespoke CCL, (a) the CCL formed part of the agreement and (b) prevailed. Whilst each

agreement will necessarily turn on their facts, I consider that the approach adopted in both authorities reflects the fact that it is objectively reasonable for a client to take a specific explanation or summary of what the agreement constituted as an accurate summary of the offeror's intention, which is then accepted by signature or conduct. It would not be reasonable to expect a client to carry out a close and lawyerly textual comparative analysis of the documents to identify inconsistencies between the specific letter and what is set out in standard terms.

37. In the present case, although language such as '*for the avoidance of doubt'* is not used in the CCL, it does make clear that it was '*designed to inform you of our terms of business*', and required a signed version to be returned. Signing the CCL itself was entirely consistent with the document forming part of the overall contractual package from which the agreement is to be derived by way of construction. As such, I reject Mr Marven's submission that the CCL forms no part of the agreement between the parties.

38. Turning to the proper construction of that package of documents, it is not right, as I set out below, to conclude that Mr St. James' argument about the proper construction of the arrangement as a whole comes down to the word '*all*', but, even if it did, that is not an answer. It is plainly an important word and has a readily understood meaning.

39. The CFA section within the CCL starts by identifying what 'base costs' are, and the difference between the 'base costs' and the 'success fee'. Having identified that the success fee is charged against general damages and past losses, the CCL states that '*all*' your base costs will be recovered from the Defendant.

40. The meaning of this sentence is clear, at least unless qualified (as Mr Marven contends is the case) by the following sentences.

41. The second sentence of this short paragraph starting with 'however' is indeed a clear qualification: it relates to 'smaller cases' where only certain fixed base costs may be recoverable from the Defendant. This is, in my judgment, plainly a reference back to the last paragraph on the preceding page of the CCL which explains that, '*recovery of your legal costs is dependent on you receiving more than what is called 'the small claim limit; which is currently £1,000 in Personal Injury claims. If you are awarded a lesser sum than £1,000 you will almost certainly not be able to recover your legal costs and these will be deducted from your damages'*. This qualification is not a relevant exception in the present case.

42. The last, emboldened, sentence of the paragraph then provides that the client may be charged for '*any additional liability for these base costs above the 25% cap*'. The question arises: what does '*these base costs'* refer to? Contrary to Mr Mallalieu's argument, it cannot mean just base costs incurred over and above fixed costs in a small claim. If this were their meaning, there would not be any entitlement to claim additional costs on the basis of a failure to honour obligations in cases other than small claims cases, which is improbable and illogical.

43. Thus '*these base costs*' must mean base costs which have not been recovered from the Defendant, whether in the small claims situation or the general situation.

44. This then gives rise to the need to construe what, at first glance, may appear to be two inconsistent sentences: the first suggesting that all 'base costs' will be recovered from the Defendant; and the last suggesting the existence of a shortfall between recovery from the Defendant and an 'additional liability' for these costs.

45. However, the objective construction answers this possible inconsistency by consideration of the circumstances in which, by reference to the emboldened sentence, the shortfall of recovery is anticipated (in addition to small claims): it is explicitly where the client has failed to honour obligations under the Agreement. Examples of this are where the client fails to provide instructions or misleads the solicitor, the other side or the Court. It is readily conceivable that in these circumstances such conduct would cause costs to be incurred which would obviously not be recoverable from the Defendant after the successful conclusion of the proceedings – they would be costs caused by the client's conduct in breach of the agreement.

46. Seen in this context, there is no tension between the first and third sentences: the first deals with the ordinary case (where there has been no breach by the client and where the small claims limit is exceeded) in which all base costs will be recovered from the Defendant; and the third with circumstances in which this may not be the case, and where there is, in the identified circumstances, an entitlement to claim in respect of any shortfall both up (in the context of a small claim) and in excess of (in the case of breach) the 25% limit. If the qualification is read as Mr Marven contends, he accepts that it is in reality a complete negation of, rather than a qualification to, the first sentence. The Court should strive to give meaning to all the words used. This can be achieved if the third sentence is construed as a qualification relating to the breach of obligations. It cannot be achieved upon WCL's construction, as this requires deletion of the word '*all*'.

47. This reading is also consistent with the general meaning of the third sentence under 'Costs Estimate' which distinguishes between the base costs in respect of which '*we will be seeking payment of…from your opponents, while you being responsible for any success fee*'. This clearly suggests in general terms that the client is not '*responsible*' for the base costs, in contrast to the success fee. It is also supported by the section under '*Insurance Premium'*, which makes clear (in words emphasised by underlining) that the cap at 25% relates to the '*deduction for success fee*'. There is no suggestion that base costs not recovered from the other side contribute towards the 25% cap.

48. I do not consider that there is anything in the distinction Mr Marven sought to draw, in his oral submissions, between the language of the first sentence which appears to be a representation that all costs would be recovered from the other side and a waiver of liability in circumstances where WCL were unsuccessful in doing so. It is, in the context of the CCL, a distinction without a difference. It makes clear to the client that, subject to the two qualifications identified, they

will not be responsible to pay WCL's base costs (because they 'will' 'all' be recovered), and, subject to the qualifications, the only deduction from damages will be the success fee capped at 25%.

49. The CCL, if read in this way and isolation from the CFA, therefore conveys the objective meaning that the client would in no circumstances be required to pay the solicitors costs which have not been recovered from the other side, subject to the two specific exceptions identified above.

50. There is then an inconsistency between the provisions within the CCL and the CFA and the Conditions. However, this inconsistency is resolved by construing the arrangement as a whole consistent with the implicit documentary hierarchy advocated for, correctly, by Mr Mallalieu. It is not necessary to resort to *contra proferentem* or consumer legislation (but if it was, this would of course favour the Claimant's construction). Neither is the distinction between bespoke and standard – with the latter generally taking precedence unless there is a particular reason why this would not be the case – blunted by the fact that both the bespoke and the standard come from one side and have not been drafted. If a boiler plate agreement/set of conditions contained a limit of liability clause and a bespoke covering letter forming part of the contractual arrangement said, '*Limit of liability: None'*, it is likely that the specific would trump the boilerplate. As with *Wrexham* and *Gavin Edmondson*, this is a case where the correct construction is one in which the content of the CCL prevails over the general wording of the CFA and Conditions.

51. In the circumstances, I conclude that the Costs Judge erred in his finding that in this case WCL had the right to recover costs which were not recovered from the other side from Mr St. James as a matter of contract. The CCL turned the CFA into a 'CFA-Lite'. It follows that Mr St. James is only liable to a deduction of the success fee from his £65,000 damages, in the agreed sum of £3,668.71.

52. In these circumstances, it is not necessary to consider the 'estimate' or the 'budget' arguments, but in deference to the submissions, I will do so.

The 'Budget' Argument

53. WCL produced a costs budget. Mr Mallalieu emphasises that WCL did not seek the Claimant's approval for this. A budget was approved by the Court in a modestly reduced sum, and the fact of the approved budget was also not communicated to Mr St. James. By virtue of CPR 3.18, on any between the parties assessment on a standard basis, Mr St. James would be unable to recover post budget costs in excess of the approved budget without good reason.

54. As set out above, WCL then incurred costs substantially over that budget, in the sum of £13,926.25. Mr Mallalieu argues that it is unsurprisingly that the overspend was not recovered from the opponent. WCL now seeks – on the assumption, contrary to my conclusion above, that its retainer permits it to do so - to claim that overspend from Mr St. James to make up for the reduction in recoverable success fee from 100% to 10%.

55. The argument before me focussed on CPR 46.9, and in particular 46.9(3)(c). CPR 46.9 provides:

> '*(1) This rule applies to every assessment of a solicitor's bill to a client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1988 or the Access to Justice Act 1999*[5] *or by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.*
>
> *(2) Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.*
>
> *(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –*
> *(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;*
>
> *(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;*
>
> *(c) to have been unreasonably incurred if –*
> *(i) they are of an unusual nature or amount; and*
> *(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.*
>
> *(4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.*'

56. Mr Mallalieu then relies upon the case of ST v XY (SCCO, 21 February 2022). In this case, the Senior Costs Judge held that;

> *"46…It seems to me that the purpose of the rule is to apply the presumption that the costs were unreasonably incurred if they were unusual and the client was not told that they might not be recovered from the other party by reason of being unusual. Costs can be unusual either because of their nature (not of a type usually incurred) or because of their amount…. The amount can be unusual without the nature being unusual.*
>
> *47. Mr Waszak also submitted that "unusual" should be read as being between solicitor and client. However that seems to me to ignore the purpose of the rule. To avoid the presumption the solicitor is required to explain to the client that the costs may not be recovered because they were unusual. "Unusual" must therefore be read in the context of a between the parties assessment.*
>
> *…*

> *49. Were the excess costs unusual in amount? …. These figures are so far over what they should be, and what the court has already decided that they should be, that they must be unusual in amount".*

57. It is then submitted that the extent of excess in the present case places this case in the same category. It is said that the Costs Judge should have, but did not, consider first whether the costs were unusual and whether the presumption applied. Had he done so, it is said that he would have decided as per *ST* that they were so far in excess of budget that they should have been regarded as unusual in amount, and that there was no evidence from WCL submitted so as to rebut the presumption.

58. Mr Marven argues, first, that this point has changed out of all recognition from the way the point was put before the Costs Judge. He says that the word 'unusual' was used but once in the lengthy Points of Dispute, and no reference to the CPR 46.9(3)(c) presumption was made at all.

59. The difficulty with this submission is that the Costs Judge himself considered whether the Points of Dispute were sufficient to bring the CPR 46.9.(3)(c) presumption into play by use of the word 'unusual'. Whilst it was submitted on behalf of WCL that the Points of Dispute were insufficient in this regard, the Costs Judge concluded the opposite. He said at [8] of the relevant judgment (]2023] EWHC 1856 (SCCO)], '*That seems to me to be taking the Court of Appeal's guidance to far too high a level of compliance. In my view, the defendant has been put on notice of the claimant's arguments and reference to the specific rule has not cast any new light on the points made*.'

60. Having so decided, it is clear that the argument before the Costs Judge focussed on *ST* and whether the approach taking in that case were applicable to the instant case: that is the same argument in substance being advanced on appeal.

61. The conclusion of the Costs Judge which is subject to Mr Mallalieu's criticism was as follows:

> *"69. It may be that such a view is not justified in any event. But if ST is taken to mean that work over and above the budget caused, in whole or in part, by the client cannot be recovered from the client then it seems to me that the Senior Costs Judge's words have been taken too far. It may be the costs are presumed to be unreasonable, but the solicitor must be entitled to argue that the additional work lies at the feet of the former client. If the unusual nature is no more than a presumption, then there is room for that argument. In the circumstances of ST, as a protected party, the conclusion about unusual work essentially disallowed it entirely.*
>
> *70. I have to say that I differ slightly from the sentiment expressed by the Senior Costs Judge in paragraph 56 of his judgment. A solicitor may simply ignore the budget and, despite them having been in the rules for more than a decade, that regrettably is still the case on some occasions. But it is also quite possible that the solicitor knows that the budget is going to be insufficient but that there are no significant*

> *developments on which an amended budget can be put before the court. Where, as here, there is a buffer against those unrecovered costs in the shape of a "success fee" the solicitor may be sanguine about the unrecovered costs being generated. Short of a conversation with the client as to the extra costs the client is causing the solicitor to incur (in the solicitor's view), the die is cast. It is easy to admonish the solicitor for not having that conversation, but adding to the client's stress in the litigation by trying to prevent the client engaging with their case, is not always an option that can realistically be taken. Accepting there will be a shortfall which will only be partially covered by any success fee is not, in my view, the cause of unnecessary costs or indeed acting in breach of any professional or contractual duty. Indeed, it might well be viewed as looking after the client's interest at the solicitor's own expense.*
>
> *71. Outside the requirements of CPR 46.4, it seems to me that the solicitor must still be able to seek recovery of costs incurred in excess of a budget in appropriate circumstances. That view is also strengthened by the fact that the budget is judged on the standard basis as to what is proportionate as well as reasonable. This assessment is on the indemnity basis between solicitor and client and has no need to consider proportionality. For these reasons, I do not consider it appropriate to disallow costs above the budget as a matter of principle.*"

62. Mr Marven argued that the Costs Judge was correct to dismiss the argument that the costs incurred substantially excess of budget did not make the disallowed as a matter of principle. He relied, in particular, on Lavender J's observation in Karatysz v SGI Legal LLP [2021] EWHC 1608 (QB), [2021] 1 WLR 5624 at [102] that:

> '*… the question of what is usual or unusual as between solicitor and client is a very different question from the question of what is recoverable inter partes.*'

63. It is important to note, however, that Karatysz was a case concerning the recovery of costs as between solicitor and client in a fixed costs case (i.e. a fixed limit on the costs recoverable from the other side). As a matter of generality, in a fixed costs case it would be very usual for the actual costs incurred by the solicitor will exceed the fixed costs allowed. There is no necessary contradiction, in my judgment, between the general observation made by Lavender J in Karatysz and the conclusion reached by the Senior Costs Judge in ST.

64. I note that this is the conclusion also reached by Costs Judge Leonard in JXC v NIS [2923] EWHC 1000. Brief submissions were invited from Counsel on this case when it was brought to their attention following oral argument. I am

grateful to both Counsel for the expedition and brevity with which those further submissions were made. In the context of submissions from Counsel contending, as Mr Marven has done before me, that ST is inconsistent with Karatysz, the Costs Judge concluded in JXC:

> "*105. I would however respectfully agree with the conclusions of the Senior Costs Judge in ST v ZY as to the nature of the CPR 46.9(3)(c) criteria and the way in which they are to be applied when it comes to expenditure over budget.*
>
> *106. The observations of Lavender J at paragraphs 102 and 103 of his judgment in SGI Legal v LLP v Karatysz were, expressly, obiter. In any event, they are not in my view in any way inconsistent with the conclusions reached by the Senior Costs Judge. Lavender J was I believe making the point that it could not be right to characterise a solicitor's costs as "unusual" to the extent that they exceed the recoverable costs under the fixed costs regime applicable to claims under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. That is a view with which I would respectfully agree.*
>
> *107. Lavender J's underlying point was, I believe, that costs are not unusual in themselves simply because they are irrecoverable from an opponent. It remains the case that whether costs are "unusual" in nature or amount for the purposes of CPR 46.9(3)(c) has to be judged by reference to whether they may, in consequence, be irrecoverable from an opponent. So much seems to me to be evident from the combined wording of the rule itself and paragraph 6.1 of the accompanying Practice Direction.*
>
> *108. Ms Bedford is entirely correct to point out that on this interpretation of CPR 46.9(3)(c), the presumption that costs of an unusual nature or amount have been unreasonably incurred cannot arise if those costs are already, by their nature, irrecoverable against an opponent. Such costs cannot be said to be irrecoverable "as a result" of their unusual character, because they are already irrecoverable. That follows, unavoidably, from the way in which CPR 46.9(3)(c) and the Practice Direction are worded, but it does not in itself have any bearing on the correct interpretation of the rule.*
>
> *109. In ST v ZY the Senior Costs Judge found that the costs incurred by IM in excess of budget were unusual in amount, in particular because of the remarkable extent by which costs for three specific budget phases had been exceeded. Although the excess costs, on a phase by phase basis, are not in this case so wildly in excess of budget as in ST v ZY, at almost a quarter of a million pounds inclusive of VAT the total figure speaks for itself. As in ST v ZY, the correct conclusion is that whilst the overall budget overspend was not unusual in nature, it was unusual in amount. The*

> *presumption of unreasonableness does apply, and I have seen nothing to rebut it.*
>
> *110. For all those reasons, I conclude that the budget overspend was in its entirety, as between IM and the Claimant, unreasonably incurred and unreasonable in amount*."

65. In my judgment, it would be wrong to conclude that costs in excess of a budget will, by definition, always fall to be considered '*unusual*.' Were there to be such a principle, it would bring, or at least come close to bringing, section 74(3) of the Solicitors Act 1974 (referred to in CPR46.9(2)) in by the back door. However, similarly, there is in my judgment no principle by which the fact of a significant overspend against budget can never have the effect of making those costs 'unusual' for the purposes of the CPR 46.9(3) presumption, which appears to be the effect of Mr Marven's submission. In the ordinary use of language, the amount of costs may be regarded as 'unusual' where a solicitor has significantly exceeded the budget set by the Court. The budget is, although determined prospectively, and potentially subject to adjustment, a judicial determination or agreement of a reasonable and proportionate sum for the necessary work. To have significantly exceeded the budget, it is likely that the number of hours incurred, or the rate at which they are charged, has changed significantly from the budgeted assumptions and, unusually, that the solicitor has taken no steps to have the budget increased to reflect the changes which have caused the extra hours/increased rate. True it is that proportionality plays no role in the indemnity - solicitor/client – basis of assessment; and to this extent there may be a good reason that actual costs exceed the between the parties budgeting exercise which is premised on the basis of both reasonableness and proportionality. But incurring costs disproportionately is itself 'unusual'. It is also the sort of thing that should plainly be discussed with the client. The client should be told that the disproportionate nature of spend means that the costs may not be recovered from the other side. It is easy for solicitors to protect themselves against the presumption: if the client has been told, the 46.9(3)(c) presumption does not apply. If the client has been kept in the dark, as in this case, the application of presumption of unreasonableness does not seem inappropriate.

66. The effect of the Costs Judge's approach in the instant case is that, if right, there must always be a 'bottom up', line by line analysis of costs in order to determine whether they are unusual. I do not see that CPR46.9(3)(c) requires that as a matter of principle. There will be cases where that is the right approach; there will be other cases, like ST and JXC, in which the size of the overspend against the budgeted costs is so significant that (if the client has not been told about the overspend) the presumption may be engaged. Once engaged, there must be evidence to rebut the consequential presumption of unreasonableness. If there is no evidence, the costs can be deemed unreasonable without more. If there is an explanation seeking to rebut the presumption, it may need to be considered on an item by item basis – but that of itself may depend upon the nature of the explanation.

67. I consider therefore that the Costs Judge was in error in effectively failing to engage in the question of whether the presumption applied when considering

the extreme disparity of the actual costs against the budget (over 70% increase), particularly in the circumstances here where it is plain that the solicitors took no steps whatsoever to tell Mr St. James that as a result of the significant excess the costs might not be recovered from the other party. Had the Costs Judge put his mind to the question of the presumption properly, he would have concluded that this was a case where the substantial excess over budget would render the costs being incurred 'unusual', such that, in light of the lack of communication, the presumption of unreasonableness applied.

68. Finally, I note that it is probable in this case that that absence of communication was borne from a misplaced confidence that the application of a 100% success fee would not be challenged. The Cost Judge's decision that this was inappropriate, substituting 10%, demonstrates how misplaced this was in the instant case. I suspect the solicitors genuinely considered that the client would not in fact be responsible for costs not recovered from the other side, because they were anticipating that the success fee would account for the maximum they could by law recover. However, that misplaced confidence is no reason to depart from the golden rule that the client should be kept informed.

69. Indeed, to the extent that it played a role in the Cost Judge's conclusion, it was perverse for him to suggest that *not* keeping the client informed about costs which were being incurred, '*might well be viewed as looking after the client's interest at the solicitor's own expense*'. It is no such thing. It is conduct wholly inconsistent with a core duty imposed on solicitors under the Code of Conduct (r.8.9) which requires solicitors to;

> "…*ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred."*

70. Particularly in circumstances where – as WCL have contended (wrongly) is the case – a shortfall in recovery of costs from the other side may be the client's responsibility up to the 25% cap, a failure to allow the client to have knowledge of the potential liability is a complete failure to look after the client's interests, and at the client's expense.

71. It is not necessary for me to deal with the further question as to whether I should conclude that the Judge should have found that there was no evidence to rebut the presumption, or whether the Judge should have permitted WCL a further opportunity to submit evidence/submissions on the point. This is complicated in the present case by the fact the Judge had allowed Mr St. James effectively another bite at the cherry. Given it is entirely academic, it does not seem sensible to dwell on what the Costs Judge may or may not have concluded, in the round, by way of further case management if he had not made the error identified above.

The 'Estimates' Argument

72. In a short passage in the Points of Dispute headed '*Estimate of costs within the Retainer*', the submissions made refer only to the original retainer. No reference is made to the November 2017 Estimate, or the statement made in that estimate. However, it is clear from the Costs Judge's judgment ([2023] EWHC 1856 (SCCO)) at 50-60, the case expanded in submissions to include reference to the November 2017 Estimate, the statement in that estimate that '*none of the above requires any payment from you*' (paragraph [50]) and the complaint that Mr St. James was not kept informed as to the increasing amount of base costs as the case progressed (paragraph [52]).

73. The Costs Judge concluded that Mr St. James could not demonstrate any reliance upon the estimates he was given, and that absent that reliance, the amount he can be reasonably required to pay was not limited by any estimate he was given which provided to be insufficient, just as if he had not been given any estimate at all (see [60]).

74. It is accepted by Mr Mallalieu that there was no evidence of particular reliance submitted by Mr St. James in the assessment before the Costs Judge. Nevertheless, Mr Mallalieu argued the Costs Judge erred because he failed to recognise the unusual feature of this case, namely that Mr St. James was told explicitly within the November 2017 Estimate that (providing he did not breach his obligations) he would not have to pay any of the estimated costs. Thus, in this case, reliance was not on the estimate itself but on the statement alongside the estimate, the effect of which was, in essence, to suggest Mr St. James did not need to 'rely' on the estimate in any particular way because he would not have to pay any costs. In these circumstances, Mr Mallalieu contends that focussing on the question of reliance on the estimate simply missed the point.

75. Mr Marven characterises the Claimant's argument as a barely disguised attempt to impose a sanction or punishment for an alleged breach of duty. He contends that this is not the role of a solicitor- client assessment. He also contends that, where a party contends that costs recovery by a solicitor should be restricted to an estimate, the Court should determined whether, and if so, how the client in fact relied upon the estimate, and the Cost Judge's conclusion based on the absence of evidence of reliance was entirely orthodox. For both these propositions, he relies upon Mastercigars Direct Ltd v Withers LLP (No 2) [2009] 3 Costs LR 393 in which Morgan J held that:

> '*In my judgment, the legal process involved in a case where a client contends that its reliance on an estimate should be taken into account in determining the figure which it is reasonable for the client to pay is as follows. The court should determine whether the client did rely on the estimate. The court should determine how the client relied on the estimate. The court should try to determine the above without conducting an elaborate and detailed investigation. The court should decide whether the costs claimed should be reduced by reason of its findings as to reliance and, if so, in what way and by how much. Whether there should be a reduction, and if so to what extent, is a matter of judgment. Specific deductions can be made from the costs otherwise recoverable to reflect the impact which an*

> *erroneous and uncorrected estimate had on the conduct of the client. Such an approach requires the court to form an assessment of the impact of the estimate on the conduct of the client. The court should consider the deductions which are needed in order to do justice between the parties. It is not the proper function of the court to punish the solicitor for providing a wrong estimate or for failing to keep it up to date as events unfolded.'*

76. Whilst referred to below and, indeed, on appeal as the 'estimates point', it is clear that as the argument developed before the Costs Judge, this was somewhat of a misnomer. The clearest articulation of the argument appears at paragraph 55 of the Cost Judge's decision, where he summarised the thrust of the Claimant's argument:

> "*…. Morgan J concludes that the key question is ultimately "what is reasonable for the client to pay?" Work reasonably done by the solicitor may prove to be more than that figure. It is based on these comments, as I understood Mr Carlisle, that he invited me to take a broad view of the reasonable sum for his client to pay.*"

77. As was submitted to him, the fundamental question with which the Costs Judge should have been ultimately concerned was: what overall amount would it be fair and reasonable for the client to pay? The Costs Judge appears to have lost sight of this, by focussing exclusively on the question of what evidence existed as to the Claimant's reliance upon the estimate(s).

78. However, the substance of the case was not about the estimate itself: it was about the clear assurance that the client would never be required to pay the solicitor's costs if there was a shortfall in recovery from the other side. Unless it was suggested that, for some reason, a client ought *not* to have relied on this assurance (because they should have known, for some reason, it was false or wrong), reliance can, in a case such as this, readily be presumed. In this particular case, the absence of further estimates or involvement in the settlement of costs with the other side only fortified the reliability of the assurance. Put another way, why would the client *not* rely upon the fact that he or she was told they would not in fact be required to pay any of the solicitors costs? It is obvious that, by making such a statement (echoing, of course, the statement in the CCL), Mr St. James was deprived of the opportunity to find an alternative solicitor who was prepared to act on a true CFA-Lite basis.

79. Had the Costs Judge focussed on what overall amount would it be fair and reasonable for the client to pay, the fact of the assurance should have been a determinative factor in all the circumstances of this case in deciding that it was reasonable to limit the solicitors costs to those recovered from the other side: i.e. it was reasonable in all the circumstances to hold the solicitors to their assurance. In concluding that this conclusion was not open to him because of the absence of specific evidence of reliance, the Costs Judge fell into error. Moreover, to the extent that the Costs Judge considered that the absence of 'evidence' specifically in the form of e.g. a witness statement was determinative of the point against Mr St. James, I consider that this would not be consistent with Morgan J's guidance that any investigation by the Court into questions of reliance should not, in any event, be elaborate and detailed. In many

assessments, particularly involving relatively small sums, a Costs Judge may well be able properly to form a view on questions such as reliance on the papers and/or by reference to statements within the Points of Dispute without the formality and cost of a witness statement.

The Defendant's Cross-Appeal

80. The Defendant's cross-Appeal is also academic in light of my conclusions above as to the proper construction of the retainer.

81. The cross-Appeal related to a case Management decision in which the Costs Judge permitted the Claimant to amend his Points of Dispute. Mr Marven contends that falls outside the wide case management discretion in circumstances where (a) it was granted without sight of the proposed Points of Dispute and (b) it was in any event too late and to permit yet further submissions rendered the process wholly disproportionate to the sums at stake.

82. Mr Mallalieu relies upon CPR 46PD 6.15. This says:

> "*If a party wishes to vary that party's breakdown of costs, points of dispute or reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties. Permission is not required to vary a breakdown of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation.*"

83. As such, he contends, correctly, that no permission to amend was required and that the Order permitting Mr St. James the right to do so was unnecessary. He argues that the decision to do should be seen in context of the WCL submissions at the time which were that Mr St. James should certainly *not* be permitted to do so. Mr Mallalieu contends that, if Mr St. James had then done so, the Court would still be able to disallow the variation or permit it only upon conditions should it consider it appropriate.

84. Other than to observe that the decision to permit yet more submissions in a case in which around £10,000, at most, was in dispute; which had given rise already to two hearings and two fully reasoned decisions; and in which both sides had already made extensive rounds of submissions, is rather surprising, there is no particular benefit in the present case of determining, on analysis, which side of the broad boundary permitted by case management discretion it fell. I therefore shall refrain from doing so.