



Neutral Citation Number: [2023] EWHC 1568 (Ch)

Case No: BL-2023-MAN-000040

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN MANCHESTER
BUSINESS LIST (ChD)

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

Date: Friday 30 June 2023

Before :

HIS HONOUR JUDGE HODGE KC
Sitting as a Judge of the High Court

Between :

Catherine Joan Brassington

Claimant

- and -

Knights Professional Services Limited
(Trading as 'Knights')

Defendant

Mr Neil Berragan (instructed by **Excello Law Limited**, Chester) for the **Claimant**
Mr Sean Kelly (instructed by **Knights**, Newcastle-under-Lyme) for the **Defendant**

Hearing date: 7 June 2023
Judgment circulated: 26 June 2023
Judgment handed down remotely: 30 June 2023

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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HIS HONOUR JUDGE HODGE KC

Remote hand-down: This judgment was handed down at a remote hearing at 10.00 am on Friday 30 June 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

Court of Protection – Deputyship – Whether a professional deputy who engages her solicitors’ practice to act in a professional capacity in connection with the deputyship assumes any personal liability for payment of fees, disbursements and expenses – Whether the deputy contracts solely as agent for the protected person – Construction of terms of engagement

The following cases are referred to in the judgment:

Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)

Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173

His Honour Judge Hodge KC:

I: Introduction

1. This is my considered judgment following the hearing in Manchester, on Wednesday 7 June 2023, of an application by the claimant for summary judgment on a Part 8 claim, issued on 11 April 2023, by Mrs Katie Brassington, a solicitor who, since qualifying in September 2004, has specialised in private client work. This includes Court of Protection (**COP**) matters in which Mrs Brassington accepts appointments to act as a professional deputy for persons lacking in mental capacity. The defendant (**Knights**) is a company which practises as solicitors, operating from 24 offices, and employing over 1,100 fee earners (of whom only eight are COP deputies). The claimant is represented by Mr Neil Berragan (of counsel) and the defendant by Mr Sean Kelly (also of counsel).
2. Although the hearing lasted only half a day, at its conclusion I reserved judgment because this application seemed to me to raise issues whose importance extended beyond the immediate parties to this claim. In particular, it involves consideration of the extent to which a person acting as a COP-appointed deputy for a person (**P**) who lacks capacity under the Mental Capacity Act 2005 (the **MCA**) assumes any personal liability for payment of the fees, disbursements and expenses of a solicitors' practice which they have engaged to act in a professional capacity in connection with their deputyship. Although, by chance, I am also authorised to sit as a COP Judge, this application has come before me sitting in my capacity as a Judge of the High Court in the Business and Property Courts in Manchester.
3. For structural reasons only, this judgment is divided into the following parts (although these are not self-contained, and the contents of any one part have informed other parts):
 - I: Introduction
 - II: Background
 - III: The proceedings
 - IV: COP deputyships
 - V: Submissions
 - VI: Analysis and conclusions

II: Background

4. Mrs Brassington was a partner in Walker, Smith & Way when that practice was acquired by Slater & Gordon Solicitors and she moved over to that firm. In May 2016, she joined Knights' Chester office from Slater & Gordon, bringing eight deputyship files with her. Mrs Brassington had previously entered into a written contract of employment with Knights on 25 February 2016. This included post-termination restraints. By clause 2.1, it also required Mrs Brassington, during her employment, to "*diligently and faithfully devote the whole of [her] working time and attention to such duties as may be reasonably assigned by Knights and perform them*

to the best of [her] ability". Although Mrs Brassington's job title was 'Partner', and she worked with, and supervised, a team of junior solicitors and paralegals, earning (by the time she left Knights) a gross yearly salary of £110,000, Mrs Brassington's status was in truth that of an employee. Knights is managed by office rather than specialism, and each solicitor reports to a Client Services Director (CSD) for their particular office. Since 2013 Knights has operated a computerised system for case management, including billing.

5. A typical, standard-form COP order, dated 6 March 2018, appointing Mrs Brassington to act as P's deputy for property and affairs is to be found at pages 32-3 of the hearing bundle. Paragraph 1 (a) appoints Mrs Brassington, of Knights' Chester office, as P's deputy "*to make decisions on behalf of [P] that he is unable to make for himself in relation to his property and affairs, subject to any conditions or restrictions set out in this order*". Paragraph 1 (c) requires the deputy to "*apply the principles set out in section 1 of the Mental Capacity Act 2005 ('the Act') and have regard to the guidance in the Code of Practice to the Act*". Paragraph 2 (a) "*confers general authority on the deputy to take possession or control of the property and affairs of [P] and to exercise the same powers of management and investment, including purchasing, selling and letting property, as he has as beneficial owner, subject to the terms and conditions set out in this order*". Paragraph 2 (e) of the order enables the deputy to execute or sign any necessary deeds or documents for the purpose of giving effect to any decision. Paragraph 4 (headed '*Costs and expenses*') provides that:

The deputy is entitled to receive fixed costs in relation to this application, and to receive fixed costs for the general management of [P's] affairs. If the deputy would prefer the costs to be assessed, this order is to be treated as authority to the Senior Courts Costs Office to carry out a detailed assessment on the standard basis.

Mr Berragan points out that the term '*general management*' is not defined in the MCA, nor is it mentioned in the Code of Practice issued under it.

6. Mr Berragan emphasises that as a professional deputy, Mrs Brassington provides legal and other services for the benefit of P for which her practice is entitled to payment in accordance with the order appointing her as deputy and the applicable COP rules. These services are provided both by Mrs Brassington and by other employees of Knights, which raises interim bills throughout the year. Each year's final bill is issued following assessment by the Senior Courts Costs Office (the SCCO). All payments are made to Knights out of P's assets (typically a damages payment); and Mrs Brassington obtains no personal benefit other than her salary from Knights. The present case arises from Knights' practice of treating any time costs disallowed by the SCCO as '*work in progress*' (WIP) rather than writing them off.
7. When Mrs Brassington moved to Knights, she prepared and signed letters of retainer with Knights. A sample letter, dated 7 June 2016, is at pages 107 to 110 of the hearing bundle. The letter is addressed to Mrs Brassington c/o Knights' Chester office. It is headed (in bold type): '**Deputyship for [name of P] (Engagement)**'. The letter begins:

Thank you for appointing us to act on your behalf in connection with the Engagement.

This letter, together with the enclosed standard terms and conditions, sets out the basis of our contract with you. The terms of this letter take priority over the standard terms and conditions if they conflict in any respect.

1. SERVICES

1.1 We will provide the following services to you in connection with the Engagement (**Services**):

(a) acting as professional deputy, with you, for [P].

1.2 The provision of the Services will not include:

(a) tax advice;

(b) advice which does not directly relate to the Engagement;

(c) advice in respect of any jurisdiction other than England and Wales.

1.3 If further advice is requested, or the extent of the Services changes, we will discuss this with you including any amended estimate of fees and any changes to the timescale.

2. YOUR LAWYER/TEAM

2.1 I am a Partner and will be carrying out the work in relation to the Engagement. I will be assisted by Angharad Hird who is a Solicitor and Gail Powell who is a Paralegal.

2.2 Charles Jones, a Partner, will have overall responsibility for the management and supervision of the Engagement and delivery of the Services.

2.3 Other employees of Knights may assist in the provision of the Services as required from time to time.

3. FEES

3.1 Our fees will be calculated on a time spent basis adopting the following hourly rates:

Partner	£ 217
Solicitor	£ 161
Paralegal	£ 118

3.2 We will advise on an appropriate budget for fees, disbursements and expenses and agree timescales as the matter progresses.

3.3 All fees are exclusive of VAT which will be payable in addition.

3.4 Our fees are not contingent upon completion of the Engagement. Please refer to Section 8 of our standard terms and conditions in respect of the fees we will charge if the Engagement becomes abortive.

4. INVOICES

4.1 Invoices will be sent to you monthly unless agreed otherwise.

4.2 All invoices are strictly payable within thirty days of the date of the invoice.

4.3 You remain responsible for payment of our fees, disbursements and expenses even if a third party has agreed to pay our fees, disbursements and expenses on your behalf. If a third party has not paid our fees, disbursements and expenses in accordance with paragraph 4.2 of this letter you agree to settle our invoice forthwith upon written notification.

Subsequent paragraphs of the retainer letter address Knights' commitment to Mrs Brassington, her commitment to Knights, client care, and limits to Knights' liability, and provide for the retainer to be governed by English law, and to confer exclusive jurisdiction on the courts of England and Wales. The hourly rates specified in paragraph 3.1 are the guideline hourly rates that were then set out in the SCCO guide to the summary assessment of costs. (The significance of this will become apparent from Part IV below.) When these guideline hourly rates were subsequently increased (with effect from 30 September 2020 and 1 October 2021), the parties apparently entered into replacement letters in similar terms, prepared on 17 December 2020 and 20 January 2022 respectively, incorporating the new approved rates. These letters were expressed to be written by Mrs Brassington on behalf of Knights, and are signed by Mrs Brassington as addressee. I shall refer to this standard form of engagement letter as '**Mrs Brassington's standard deputyship letter**'.

8. Mrs Brassington prepared retainer letters in similar terms for her co-deputies. These were not originally in evidence; but copies of nine letters of engagement, relating to five separate deputyship matters, and also bearing the same dates in 2016, 2020 and 2022, were supplied to me after the hearing.
9. Mr Kelly points out that retainer letters were required because the office of deputy is a personal one. However, after she moved from Slater & Gordon, Mrs Brassington could only provide her services, and those of more junior staff, by purchasing legal services from Knights. Mrs Brassington's evidence is that she understood that she had no choice but to use a standard template letter, generated by Knights' computer systems; and that she complained to the compliance department about the unsuitability of the same at the time. However, Knights have adduced evidence directed to showing that Mrs Brassington had been free to draft the retainer letters as she saw fit, provided they were sufficiently clear and complied with regulations. Knight's case is that it has no standard template for deputyships, and that the compliance department's control over retainer letters was limited to regulatory compliance. They have put in evidence (as pages 3 to 7 of JN1, at pages 300-304 of the hearing bundle) a retainer letter appointing CL Medilaw, a trading name of Knights, to act on behalf of P's court-appointed deputies in the management of his property and affairs on behalf of P. This too expressly provides (at paragraph 4.3) that

P “remains responsible for payment of our fees, disbursements and expenses even if a third party has agreed to pay our fees, disbursements and expenses on your behalf”. Mr Berragan points out that this retainer letter is dated 5 December 2022, after Mrs Brassington had already given notice, and after the present dispute had arisen.

10. More pertinently, Mr Kelly also points to a retainer letter, apparently drafted and signed on behalf of Knights by an associate called Ms Bridie Conboy, addressed to Mrs Brassington and dated 9 November 2017 (at pages 127-130), whereby Knights (acting principally by Ms Conboy) agreed to act on Mrs Brassington’s behalf in relation both to (a) “all work required in connection with the application to appoint you as [P’s] deputy in relation to his property and affairs”; and (b) “all work required in connection with your appointment as [P’s] deputy in relation to his property and affairs”. Paragraph 4 of that letter reads:

4. INVOICES

4.1 Invoices will be sent to you each quarter of the reporting period. We will have the ability to bill up to 75% of our work in progress for three out of the four quarters per annum before our bill is formally assessed by the Senior Court Costs Office. Once our bill has been assessed, we will send you the final invoice for that reporting period.

4.2 All invoices are strictly payable within thirty days of the date of the invoice from the deputyship account.

4.3 You remain responsible for payment of our fees, disbursements and expenses even if a third party has agreed to pay our fees, disbursements and expenses on your behalf. If a third party has not paid our fees, disbursements and expenses in accordance with paragraph 4.2 of this letter you agree to settle our invoice forthwith upon written notification.

Mr Berragan points out that paragraph 4.3 of this retainer letter is in the same terms as paragraph 4.3 of Mrs Brassington’s standard deputyship letter. He also draws attention to a later retainer letter for the same P, dated 17 December 2020 (at pages 131-4) and incorporating the recently revised guideline hourly rates, which reverts to the terms of that standard deputyship letter (with Mrs Brassington again acting as partner, assisted by Ms Conboy and another named solicitor employed by Knights). I should emphasise that the 2017 letter of engagement related not to an existing deputyship, but to a new deputyship application. I shall refer to this form of letter as ‘**Ms Conboy’s deputyship letter**’. By the time of the 2020 letter, Mrs Brassington’s appointment as deputy was already in place, so the engagement reverted to one simply “to act on your behalf as professional deputy for [P]”. A similar pair of letters, in relation to a different P, dated 11 October 2019 and 17 December 2020, can be found at pages 135-8 and 139-142 of the hearing bundle; although, right from the outset, these provided for invoices to be sent out monthly unless otherwise agreed.

11. Mrs Brassington served notice to resign from her employment at Knights on 1 November 2022 in order effectively to become a self-employed solicitor in Chester, and she was immediately placed on garden leave. Since then, Mrs Brassington has been in dispute with Knights over their claim that she is personally liable for time costs, described as ‘WIP’, which had been recorded on her deputyship files whilst she was employed by

Knights but which cannot properly be billed to, or recovered from, the protected persons in relation to whom she had been appointed deputy. Knights informed Mrs Brassington that she was free to instruct another firm of solicitors to act in relation to files on which she was the deputy, attorney, executor or trustee, and that files could be released subject to *“payment of our work in progress and all outstanding invoices”*. By the time Mrs Brassington’s employment with Knights ended on 31 January 2023, she had been acting as the COP-appointed deputy for six individuals; and there is a seventh person, for whom she had previously been acting as deputy, but who had sadly died after her resignation, on whose file there was WIP still recorded as outstanding. Consequential upon its claim for unpaid WIP, Knights has refused to deliver up to Mrs Brassington (as deputy) the files and papers which it holds for P on their various matters, in relation to which Knights claim to have a retaining lien which they are claiming to rely upon unless and until it receives payment of a satisfactory sum in respect of the recorded WIP.

12. On 24 November 2022 Ms Jessica Neyt, the relevant CSD, wrote to Mrs Brassington stating that she had looked at the retainers which Mrs Brassington had prepared *“and note that they all refer to monthly billing and say that you, as our client, remain responsible for payment of our fees and disbursements in full at all times even if recovery is to be made by a third party.”*
13. On 16 December 2022 Knights sent an email attaching a spreadsheet of matters in which Mrs Brassington was deputy and asking for her *“proposals for payment of our total current work in progress of £211,632.76.”* At that time, Knights raised no invoice in respect of this amount. Of this sum, £166,468.97 represents amounts which have not been billed, and could not be billed, to P because they represent fees which have been disallowed by the SCCO. This WIP in question has accumulated over some six years. No previous claim for payment has ever been made; and Mrs Brassington maintains that no other deputy has ever been required to make any similar payment.
14. For Mrs Brassington, Mr Berragan contends that the approach taken by Knights is unprincipled and unprofessional. He argues that the issue is ultimately one of law and construction: Do the terms of the engagement letters prepared by Mrs Brassington make her personally liable for this unbillable WIP? He submits that this issue is eminently suitable for summary determination, and should be determined in the interests of all parties, including, in particular, P. Mr Berragan contends that the retainer letters prepared for each deputyship matter do not provide that the deputy is personally liable for unbillable WIP.
15. Mr Kelly accepts that there is no dispute as to how Mrs Brassington operated her deputyships from 2016. Invoices were submitted to the SCCO; and where costs were allowed, Mrs Brassington was billed and such sums were paid from P’s funds. Where costs were not allowed, the costs remained on the system as WIP. By September 2022 WIP of this nature in relation to deputyship files had reached £166,468.97. According to the table at paragraph 28 of Ms Neyt’s witness statement, this represents a recovery rate of just under 64%. There is a dispute as to whether Knights was aware of the reason why this position had been reached. Through one of her assistants, in September 2022 Mrs Brassington had made a request to Knights’ accounts team to write-off this WIP. This request was not processed as the value of the WIP was too large for approval to be given by the accounts team, with approval being required either from the appropriate CSD or from Knights’ chief executive officer. Mr Kelly

maintains that before Mrs Brassington handed in her notice, there had been no prior discussions as to what attitude Knights might take in relation to her deputyship files. Knights assert that Mrs Brassington is personally liable for all costs incurred on the deputyships (save as previously recovered from P) and has threatened to exercise its lien over the documents in its possession. Mrs Brassington has decided not to terminate Knights' retainers, and its junior staff continue to deal with routine deputyship matters, including the payment of general expenses for P. Knights accept that its lien over the deputyship files cannot be exercised whilst it continues to act, and that Mrs Brassington is free to see any documents which she requires to assist her in her duties as deputy. Knights have now submitted bills to Mrs Brassington and her co-deputies for each deputyship; and, as Knights continues to act, further bills will be sent in due course.

III: The proceedings

16. Mrs Brassington issued her Part 8 claim form on 11 April 2023 seeking determinations and declarations from the court that:
 - (1) Mrs Brassington is not personally liable to pay for time recorded on any deputyship file which cannot properly be billed to P.
 - (2) Knights is not entitled to a lien over any deputyship file in respect of claims for payment for time recorded on a file which cannot properly be billed to P.
 - (3) In the alternative (and only if and insofar as may be required), orders under s. 70 of the Solicitors Act 1974 for each of Knights' bills of costs set out in the schedule to the claim form to be assessed.
 - (4) An order under s. 70 of the Solicitors Act 1974 that no action on any bill may be commenced until such assessment is complete.
 - (5) Further or other relief.
 - (6) Costs on the indemnity basis.
17. The claim is supported by a witness statement from Mrs Brassington dated 11 April 2023 which exhibits various documents as exhibit CJB 1. This addresses the whole history of her dealings with Knights. Mr Kelly contends that many of the allegations made in that witness statement were entirely new. Whilst the witness statement makes no express reference to estoppel or to rectification, he says that many of the assertions can only be of relevance to such claims. The evidence goes beyond the mere factual matrix in relation to which the retainer letters were written and entered into.
18. On 28 April 2023 Knights filed an acknowledgment of service stating its intention to contest the claim. Section B asserts that the claimant has failed to fully particularise her claim and Knights therefore reserves its right to file and serve supplemental evidence to deal in detail with the factual issues arising on the claim. Reference is made to an accompanying witness statement, also dated 28 April 2023 (and exhibiting, as LMB 1, an email exchange between the parties' solicitors), from Ms Lisa Maria Bridgwood, a solicitor and director of Knights, who acts as its General Counsel and Company Secretary, for further details of Knights' contention that this

dispute ought to proceed by way of Part 7 claim. In section D Knights object to Mrs Brassington using the Part 8 procedure as inappropriate, asserting that there are very significant issues of fact which need to be properly pleaded and established, with the precise estoppel arguments being advanced by the claimant needing to be set out.

19. On 15 May 2023 Mrs Brassington issued her application under CPR 24 for summary judgment on the whole of her claim, on the footing that Knights has no real prospect of defending the claim and there is no other compelling reason for the case to be disposed of at trial, and for an order that Knights should pay her costs of these proceedings, including the costs of the application, on an indemnity basis. That application is supported by the witness statement, dated 15 May 2023, of the claimant's solicitor, Ms Alexandra Collett of Excello Law Limited, together with exhibit AC 1. Mr Kelly submits that this witness statement clarifies that Mrs Brassington is not seeking to rely upon any estoppel or like claim; but more than this is not clear. Mr Kelly says that the claim now appears to be advanced on the sole basis that Mrs Brassington is not, as a matter of law, personally liable to pay Knights' costs, and that it cannot, as a matter of law, exercise any lien over the deputyship files. This is said to be inconsistent with the way in which the claim has previously been put in correspondence. Mr Kelly cites from paragraph 5 of a letter from Excello Law dated 30 January 2023 (at pages 160 to 165) as follows:

5. In short, Knights' engagement letters are not particularly relevant; they are neither an accurate record of the terms on which the Deputyship Matters have been conducted nor do they reflect the custom and practice during the approximately 6 years during which Katie has worked at Knights whilst being a professional deputy. Moreover, the engagement letters do not say that Katie (and/or her co-deputies on certain files) assumes any personal liability whilst she is undertaking general management on behalf of the various patients.

20. Mr Kelly comments that whilst it may appear helpful for Mrs Brassington to narrow the scope of her arguments, it is difficult to see how this can be done given the detailed allegations made in her witness statement. Due to the uncertainty of Mrs Brassington's position, Knights has been forced to file a detailed witness statement dealing with such allegations as best it can. Knights' evidence in opposition takes the form of a witness statement, dated 1 June 2023, from Ms Jessica Tuesday Neyt, a solicitor employed by Knights as the CSD for its Chester, Birmingham and Stoke offices, together with exhibit JTN 1.
21. Mrs Brassington has made a second witness statement, dated 5 June 2023, responding to Ms Neyt's evidence, together with exhibit CJB 2. Mrs Brassington explains that she had never previously seen the retainer letter dated 5 December 2022, nor (to her knowledge) any retainer letters prepared on deputyship matters by other solicitors at Knights. She states that whilst she understood that it was (necessarily) open to solicitor employees to amend the Knights' retainer letter insofar as the scope and explanation of the services section required, and also to amend the basis on which fees would be charged to clients, she always understood that Knights took a restrictive approach to any amendments to any other terms of the standard letter of engagement. Mrs Brassington also states that it never occurred to her that Ms Neyt did not appreciate or understand how deputyship files are costed. At no time had Ms Neyt ever sought to discuss the outstanding WIP, or the recovery rates on COP matters,

with Mrs Brassington. Even if Ms Neyt did not understand the billing process, it was clear from the historic figures that deputyship costs were not recoverable in full. Mrs Brassington sets out her approach to billing on deputyship files; and she explains that she had not been aware that the irrecoverable WIP from previous years had not been written off on the various deputyship matters at Knights, and that she has no idea why this did not occur. Mrs Brassington explains that by September 2022, she had become aware that there was historic, irrecoverable WIP on her deputyship matters, and that she had asked her colleague, Ms Emma Scott, to ensure that this irrecoverable WIP was written off. From memory, they had recently received final costs certificates on several of the deputyship cases, so it made sense to *'tidy up'* matters at this time. She states that this had no connection whatsoever to Mrs Brassington's subsequent departure from Knights, not least because she had never considered that she was personally liable for any such WIP in any event. In light of Ms Neyt's evidence that Knights' position is that all deputies are personally liable for all irrecoverable WIP on their files, Mrs Brassington does not understand how or why this was never explained to her at any time before she served her notice of resignation.

22. Mrs Brassington produces a report from Clarion, the costs lawyers who were instructed by Knights on her deputyship matters for several years, which, she says, shows both that she had delegated regularly and appropriately on her deputyship matters and that the irrecoverable WIP is neither a function of the manner in which she had conducted her files, nor out of the ordinary when compared to other Knights' solicitors who have acted as deputies. Mrs Brassington comments that it would not have seemed wrong for her to be referred to as *'the client'* in her capacity as deputy for each P. Had it been made clear to her that either Mrs Brassington or her co-deputies were personally liable for P's costs, this would have raised a red flag for her to address at the time. I should observe that whilst all of this may be helpful in explaining how we have arrived at the position we are now at in this litigation, and may serve to excite the court's sympathy for Mrs Brassington's present unhappy situation, none of this evidence assists me in determining the issues of law and construction which arise on this summary judgment application.
23. At the outset of the hearing, I expressed my concern that I was being invited to determine this summary judgment application without any of the protected parties for whom Mrs Brassington was acting as deputy, or any of her co-deputies, having been joined to these proceedings, and in the absence of any representations from any of them. The cause of my concern was twofold: (1) If it were to be contended that any P were liable for any unpaid WIP on their deputyship file, whether alone or jointly with Mrs Brassington, then I considered that P should be joined as a co-party to the proceedings (requiring the appointment of a litigation friend who, because of the obvious potential conflict of interest, could not be any existing deputy). (2) If, as I was told, Mrs Brassington's co-deputies had entered into similarly worded letters of engagement with Knights, then, logically, their liability for unpaid WIP should be co-extensive with her own. Whilst recognising that, as non-parties, P and any co-deputy would not strictly be bound by any decision in these proceedings, I was also conscious that, sitting as a Judge of the High Court, my decision would count as a persuasive authority in any later High Court proceedings, and as binding authority in any subsequent county court proceedings. I was also concerned that if she were to be put on notice of these proceedings, the Public Guardian might wish to make representations relating to any potential liability, whether on the part of P or any

family or other lay deputy, for unpaid WIP represented by costs and expenses disallowed on assessment by the SCCO.

24. Having raised these concerns, I received assurances that neither party was contending that there was any obligation on the part of any P to pay Knights for unpaid WIP which could not properly be billed to, and recovered from, P in accordance with the MCA and related COP and SCCO guidance and practice. Rather, both parties were in agreement that P could not be liable for anything more than the remuneration and expenses as assessed by the SCCO. As regards any family or other lay co-deputy, their liability could be no more extensive than that of Mrs Brassington, who, as a professional deputy, would be the primary recourse for any unpaid WIP. On that basis, I was prepared to proceed with the hearing of the summary judgment application.
25. I can understand the pragmatic reasons why these assurances were given. Were there to be any liability on the part either of P, or of any family or lay co-deputy, then they might well seek a remedy over against Mrs Brassington for breach of duty in having entered, or caused them to enter into, terms of engagement which had rendered them liable to Knights for unpaid WIP. As Mrs Brassington's employer, Knights would also be vicariously liable for any such breach of duty on her part. By giving these assurances, both parties would thereby avoid further unwelcome potential litigation. Nevertheless, these assurances do give rise to this practical difficulty for the court: If, under the terms of the letters of engagement, P cannot be held liable to Knights for unpaid WIP, representing sums by way remuneration and expenses that have been disallowed by the SCCO, how can Mrs Brassington be held liable for such sums? How can the same words bear different meanings for Mrs Brassington and for P?
26. CPR 24.2 provides, so far as material, that the "*court may give summary judgment against a ... defendant on the whole of a claim or on a particular issue if – (a) it considers that – (i) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.*" At the outset of the hearing I indicated to counsel, without any dissent, that I proposed to direct myself by reference to the principles identified by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (as approved in later decisions of the Court of Appeal) and set out at paragraph 24.2.3 of the current (2023) edition of Volume 1 of *Civil Procedure*:
- (1) The court must consider whether the claimant has a '*realistic*' as opposed to a '*fanciful*' prospect of success ...
 - (2) A '*realistic*' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ...
 - (3) In reaching its conclusion the court must not conduct a '*mini-trial*' ...
 - (4) This does not mean that the court must take at face value, and without analysis, everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents ...

(5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ...

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case ...

(7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question, and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim, or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction ...

27. The principles stated at sub-paragraphs (6) and (7) have a particular resonance in the present case. I understand both counsel to agree that, as the claimant's evidence and case have developed, this Part 8 claim gives rise to a short point of law and construction which the court can, and should, determine on the present application for summary judgment since all the evidence necessary for the proper determination of that issue is before the court, and both parties have had an adequate opportunity to address it in submissions. It is on that basis that I will turn to consider the arguments advanced by counsel in support of, and in opposition to, this summary judgment application. Before doing so, however, it is appropriate to say a little about COP deputyships.

IV: COP deputyships

28. A deputy is appointed by order of the Court of Protection pursuant to s. 16 of the MCA. This section applies if a person ('P') lacks capacity in relation to a matter or matters concerning P's personal welfare or (and relevantly here) P's property and affairs. By s. 16 (2):

The court may –

...

(b) appoint a person (a ‘deputy’) to make decisions on P’s behalf in relation to the matter or matters.

By s. 16 (5):

The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

Section 18 (1) sets out the extensive powers which may be conferred upon a deputy as respects P’s property and affairs. These include (by para. (a)) “*the control and management of P’s property*”. S. 19 (1) sets out the qualifications to be a deputy, which are:

(b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.

A deputy does not have to be a solicitor, or otherwise professionally qualified. However, it is common for COP to appoint professional deputies; and the court may appoint two or more deputies. Mrs Brassington is either the sole deputy, or a co-deputy with a family member of P, in respect of each of the cases in question. S. 19 (6) of the MCA states:

A deputy is to be treated as P’s agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part.

29. The Lord Chancellor has issued a Code of Practice under ss. 42 and 43 of the MCA. This supports the legal framework of the MCA by providing “*guidance and information about how the Act works in practice*”. The Code has statutory force, which means that certain categories of people (including COP deputies and anyone who is either acting in a professional capacity for, or in relation to, P, or is being paid for acts for, or in relation to, P) have a legal duty to have regard to it when working with or caring for adults who may lack capacity to make decisions for themselves.

30. Para 8.35 of the Code explains that:

The court will appoint a deputy to manage a person’s property and affairs (including financial matters) in similar circumstances to those in which they would have appointed a receiver in the past. If a person who lacks capacity to make decisions about property and affairs has not made an EPA or LPA, applications to the court are necessary:

- for dealing with cash assets over a specified amount that remain after any debts have been paid
- for selling a person’s property, or
- where the person has a level of income or capital that the court thinks a deputy needs to manage.

31. The responsibilities of deputies are addressed at paras 8.47 and 8.48 of the Code as follows:

8.47 Once a deputy has been appointed by the court, the order of appointment will set out their specific powers and the scope of their authority. On taking up the appointment, the deputy will assume a number of duties and responsibilities and will be required to act in accordance with certain standards. Failure to comply with the duties set out below could result in the Court of Protection revoking the order appointing the deputy and, in some circumstances, the deputy could be personally liable to claims for negligence or criminal charges of fraud.

8.48 Deputies should always inform any third party they are dealing with that the court has appointed them as deputy. The court will give the deputy official documents to prove their appointment and the extent of their authority.

This emphasises the need for a deputy to disclose the fact of their deputyship when dealing with third parties. The effect of MCA s. 19 (6) is confirmed by para 8.55 of the Code of Practice, which reads:

Section 19 (6) states that a deputy is to be treated as ‘the agent’ of the person who lacks capacity when they act on their behalf. Being an agent means that the deputy has legal duties (under the law of agency) to the person they are representing. It also means that when they carry out tasks within their powers, they are not personally liable to third parties.

I note that para 8.55 says nothing expressly about the capacity in which a deputy acts when entering into a contract in the course of their duties when acting on behalf of P.

32. Section 19 (7) of the MCA provides that:

The deputy is entitled -

(a) to be reimbursed out of P’s property for his reasonable expenses in discharging his functions, and

(b) if the court so directs when appointing him, to remuneration out of P’s property for discharging them.

33. Effect is given to this provision by paragraph 4 of the standard-form COP deputyship order (cited at paragraph 5 above). Mr Berragan points out that it is common practice for a professional deputy to seek a detailed assessment of their costs by the SCCO rather than relying upon the entitlement to receive fixed costs.

34. COP Practice Direction 19B (supplementing Part 19 of the Court of Protection Rules 2017) sets out the fixed costs that may be claimed by solicitors and public authorities acting in COP proceedings, and the fixed amounts of remuneration that may be claimed by solicitors and office holders in public authorities appointed to act as a deputy for P. Para 4 states that:

Rule 19.2 provides that, where the proceedings concern P's property and affairs, the general rule is that costs of the proceedings shall be paid by P or charged to P's estate. The provisions of this practice direction apply where the professional or deputy is entitled to be paid costs out of P's estate. They do not apply where the court order provides for one party to receive costs from another.

35. Paragraph 6 of COP Practice Direction 19B (headed '*Payments on account*') makes specific provision for professional deputies to take three quarterly payments on account, before submitting their annual bill of costs. Each quarterly bill must not exceed 25% of the estimated annual management charges. The paragraph reads:

Where professional deputies elect for detailed assessment of annual management charges, they may take payments on account for the first three quarters of the year, which are proportionate and reasonable taking into account the size of the estate and the functions they have performed. Interim quarterly bills must not exceed 25% of the estimated annual management charges – that is up to 75% for the whole year.

Interim bills of account must not be submitted to the Senior Courts Costs Office (SCCO). At the end of the annual management year, the deputy must submit their annual bill to the SCCO for detailed assessment and adjust the final total due to reflect payments on account already received.

36. In July 2016 the Office of the Public Guardian (the **OPG**) and the SCCO published good practice guidance for professional deputy costs (the **OPG Guidance**) with the aim of promoting best practice and transparency in the matter of professional deputy costs and, as a result, supporting the deputy and fulfilling the OPG's responsibility to safeguard P's best interests. This includes guidance that, save in the most exceptional circumstances, hourly rates should be as described in the SCCO guide to the summary assessment of costs, and the expectation that work will be delegated to the appropriate level of fee earner, meaning that routine general management activities should be carried out by an administrative assistant or a Grade D fee earner at best. The OPG Guidance also states that three-minute units will usually only be allowed in respect of paying bills and for routine correspondence. Mr Berragan observes that this is of significance as Knights records time in minimum units of six minutes: see paragraph 4.1 (a) of Knights' standard terms and conditions. I also note that (except for paralegals) the SCCO's guideline hourly rates are less than the default rates set out at paragraph 4.2 of Knights' standard terms and conditions.
37. Mr Berragan points out that the effect is that a professional deputy, such as Mrs Brassington, is only entitled to charge fees to P for general management activities either on the basis of fixed costs or subject to detailed assessment in accordance with the SCCO guide to the summary assessment of costs; and to submit quarterly interim bills and one annual bill for that purpose. The express requirement in the OPG Guidance to delegate to the appropriate level of fee earner means that, in practice, a solicitor deputy (such as Mrs Brassington) will have to work with a solicitor's practice, charging P not only for her own time but also for time appropriately spent by other fee earners on general management activities.
38. At paragraph 10 of her first witness statement, Mrs Brassington explains that the tasks typically carried out by or on behalf of the deputy include: (a) employing carers; (b)

paying carers (via an external payroll team); (c) making gratuitous payments to parents and family members; (d) ensuring P receives all the state benefits to which they are entitled; (e) purchasing aids, vehicles, property or equipment to support P's disability; (f) assessing and paying P's contribution to household bills; (g) making decisions about investments; (h) meeting family members; and (i) discussing financial planning with family members.

39. Mr Berragan points out that no distinction is made for billing purposes between 'routine' non-legal general management activities and legal services as the assessment of fees is subject to the same regime in both cases. Consequently, the effect of paragraph 4 of the standard deputyship order is not only to fix the remuneration of the deputy under s.19 (7) (b), but also to fix the expenses which can be incurred under s.19 (7) (a), in the absence of any additional special authority.
40. In summary, Mr Berragan says that the position after the making of a deputyship order in favour of a solicitor is as follows:
- (1) The deputy is entitled to remuneration either at fixed rates or as assessed by the SCCO.
 - (2) General management activities are carried out by the deputy or by other fee-earners employed by the legal practice on behalf of P.
 - (3) The deputy only has authority to incur costs in accordance with the relevant deputyship order and the COP/SCCO costs regime.
 - (4) There may be occasions when P requires non-routine legal services but this would require specific authority from COP, which would be able to impose conditions and restrictions on fees. In such cases, a solicitor deputy would engage either their own, or (if appropriate) another, legal practice, in either case as agent for P.
41. Mr Berragan refers to Knights' letter of 13 January 2023 to Excello Law Limited, representing Mrs Brassington, which includes (on the 2nd page – page 87 of the bundle) the assertions that:

Neither you or Katie appear to grasp, or are seeking to obfuscate, that Katie's distinct personal appointments are issues and responsibilities for Katie alone and not Knights. **Knights has no duty or obligation to the various patients whom Katie accepted responsibility for.** Those responsibilities are entirely for her to manage as she did so when employed by Knights ...

You and Katie refer to the vulnerability of Katie's patients. Katie accepted her patient's appointments as their deputy, and these are her responsibilities. **We are not involved in Katie's patient relationships or her duties and responsibilities to the OPG or her patients.** We are employed in a professional capacity by Katie as a deputy (not the patients) ... [**Emphasis supplied**]

Mr Berragan submits that these are startling claims for a firm of solicitors which provides deputyship services to advance. In respect of each professional deputyship,

Mrs Brassington did not receive any payment from P; rather, her time was billed to P by Knights. She obviously owed duties as deputy to P; but she performed those duties as an employee of Knights, who are said to be vicariously liable for her acts or omissions; and work was carried out for P by other Knights' employees and billed by Knights.

42. The position in practice is that since Mrs Brassington joined Knights in 2016:
- (1) All files have been opened in the name of P as the client. Knights have not elected to put any of the client files in evidence; but I was taken to Knights' statements of account for eight deputyships (at pages 99 to 106 of the hearing bundle). In each case P is shown as the client (with a file reference beginning with the first three letters of P's surname, followed by a number with three or four digits); and the matter is described as "*Deputyship for [P]*". The invoices now submitted for unpaid WIP bear the same file references: compare pages 101 and 207 of the hearing bundle. There is no evidence that any client file has ever been opened in the name of Mrs Brassington personally. Mr Berragan points out that the logic of Knights' position is that the family co-deputies are also personally liable to pay for work carried out on behalf of P; but no files have ever been opened in their names either.
 - (2) All billing has been carried out in accordance with the regime governing COP deputyships. Interim bills have been prepared and rendered quarterly, in accordance with PD19B, with final bills being submitted each year for assessment by the SCCO. All authorised bills have been paid by each P out of their estate.
 - (3) Annual bills have been prepared and submitted for assessment in accordance with PD 19B, the SCCO guide and the OPG Guidance.
43. As a result, Mr Berragan submits that Knights have at all times treated P, and not Mrs Brassington, as their client; and they have accepted that bills can only be submitted to P in accordance with the relevant deputyship order, PD 19B and associated guidance. Bills are paid by a transfer of funds held on behalf of P.

V: Submissions

(a) Mr Berragan

44. Mr Berragan recognises that Knights' claim that Mrs Brassington is personally liable for the unbillable WIP is founded upon the terms of the engagement letters she had prepared and signed for each deputyship. Knights seem to accept that, in each case, Mrs Brassington is an agent for P; but they do not explain how this is consistent with her supposedly engaging Knights personally. Knights' case simply comes down to the claim that paragraph 4.3 of the engagement letters (cited at paragraph 7 above) imposes a personal liability on Mrs Brassington. The real issue for the court is whether, in the case of each deputyship, this was an engagement by Mrs Brassington on behalf of P alone, as Knights' client, solely in her capacity as P's agent; or whether she was contracting personally, either in place of, or as well as, P. Mr Berragan submits that the engagement letters cannot be construed as casting any greater obligation upon the deputy personally than the obligation that they impose upon the deputy as agent for P.

45. Mr Berragan refers to the reliance Knights have placed on paragraph 21-093 of *Chitty on Contracts* (34th edition) in support of their claim that the engagement letters impose personal liability for unbillable WIP on Mrs Brassington. This reads as follows:

The fact that a person is an agent and is known to be so does not therefore of itself necessarily prevent his incurring personal liability, and there are many examples of this. Similarly he may be entitled to sue. **Whether this is so is to be determined by the construction of the contract, if written, and by its nature and the surrounding circumstances.** The fact that agents may often be of more substance than their principals suggests that such involvement in the contract may be more appropriate nowadays than in former times. When the agent does contract personally, the scope of the contract which he makes requires careful analysis. He may undertake sole liability to the exclusion of his principal; he may undertake joint or joint and several liability on the main contract together with his principal. He may act as surety for his principal, or enter into a collateral contract with its own terms. The possibilities shade into one another, and there is no general rule. An agent may undertake liability without being entitled to sue, but he cannot easily be entitled to sue if he is not liable, for there would usually be no consideration to support the liability of the other party. [Emphasis supplied]

46. Mr Berragan submits that the question is therefore one of construing (or interpreting) the engagement letters in the light of all the relevant surrounding circumstances. The principles of interpretation (or construction) of contracts are well known to the court, having recently been stated, and restated, in a series of decisions of the House of Lords and the Supreme Court to which it is unnecessary for me to refer expressly. The basic principles to be extracted from these authorities are summarised at the start of the first chapter of *Lewison: The Interpretation of Contracts* (7th edition) as follows (with numbering added by Mr Berragan for ease of reference):

(1) Interpretation is the ascertainment of the objective meaning of the language in which the parties have chosen to express their agreement, in its documentary, factual and commercial context. That meaning is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. Both the text and the context are tools in the process of interpretation.

(2) The text must be assessed in the light of (i) the natural and ordinary meaning of the words, (ii) any other relevant provisions of the contract, and (iii) the overall purpose of the clause and the contract. The factual context includes facts and circumstances known or assumed by the parties at the time that the document was executed. It also includes background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(3) The process is a unitary and iterative one by which each suggested interpretation is checked against the provisions of the contract, and its commercial consequences are investigated. The weight to be given to each will depend on a number of factors, including the formality of the agreement and the quality of the drafting.

(4) If the language of the contract is unambiguous the court must apply it. But if there are two possible interpretations, the court is entitled to prefer the interpretation which is consistent with business common sense as at the date of the contract and to reject the other. Nevertheless, the commercial consequences of one interpretation as against another do not detract from the importance of the words.

(5) In exceptional circumstances the court may conclude that the parties have used the wrong words. If it is clear what the error is, and the nature of the correction required, the court may correct it.

(6) In carrying out its task, the court must disregard the parties' subjective intentions, and (except for limited purposes) the negotiations that preceded the making of the contract.

47. Mr Berragan contends that the engagement letters here should be read and construed against the relevant factual background, including all matters relevant to the engagement known or reasonably available to both parties. These extend to the statutory framework governing COP deputyships; the fact that Mrs Brassington was acting both as a COP deputy and as a solicitor employed by Knights, who was required to devote the whole of her working time and attention to such duties as might reasonably be assigned by her by Knights, and to perform them to the best of her ability; and the way in which her deputyships had been dealt with at her previous solicitors' practice, and might reasonably be expected to be dealt with as part of her employment at Knights. Mr Berragan recognises (as does Mrs Brassington at paragraph 34 of her first witness statement) that Mrs Brassington's standard deputyship letter is not suitable for any retainer of solicitors by a COP-appointed deputy. He points to the fact that paragraph 4.1 of that letter provides for invoices to be sent to Mrs Brassington monthly "*unless agreed otherwise*". In practice, however, Mr Berragan contends that there was some other agreement, because invoices could only be submitted every three months, in accordance with paragraph 6 of COP Practice Direction 19B; and, in practice, this was the way that invoices were actually dealt with.
48. Mr Berragan submits that principles (3) and (4) of particular relevance to the present case. He contends that there is no ambiguity in the language of the engagement letters, and Knights have simply misread the words used; but if there is any ambiguity, then Mrs Brassington's interpretation is said to accord with business common sense, whilst Knights' does not.
49. First, and on the footing that there is no ambiguity, Mr Berragan submits as follows:
- (1) The letters are addressed to Mrs Brassington to come from Mrs Brassington. They cannot be addressed to, or accepted by, P as P is lacking in capacity. For the same reason, paragraph 4.1 provides for invoices to be sent "*to you*" (i.e. Mrs Brassington) monthly unless agreed otherwise.
- (2) The engagement in the letter is defined as '*Deputyship for [P]*'. The letter then states that: "*We [i.e. Knights] will ... act on your behalf as professional deputy for [P].*" The engagement is expressly between Knights and Mrs Brassington "*as professional deputy for [P].*" Sections 16 (2) & 19 (6) of the MCA confirm that the deputy acts as agent for P. There is nothing in the relevant parts of the engagement

letter which indicates that Mrs Brassington is also contracting personally with Knights. Mr Berragan submits that there can only be one client, and that is P and not the deputy.

(3) This is therefore an engagement of Knights by the deputy, acting in her capacity as such, and in no other capacity.

(4) Paragraph 4.3 is a standard clause included in all Knights' engagement letters. It distinguishes between "you" and a third party who may have agreed to pay the fees. This has no application to the engagement in question. The only agreement is that which is set out in the engagement letter itself; this is an engagement by the deputy as agent on behalf of P. P is not "a third party" who has separately agreed to pay the fees.

(5) Paragraph 4.3 says no more than *the client* will remain liable for Knights' fees, even if *a third party* (e.g. a funder, or an insurer, or an opponent) has agreed to pay those fees. This paragraph is inserted for the avoidance of doubt, to make it clear that the client remains liable for Knights' fees, and it cannot change the identity of *the client*. There is no suggestion that there is any separate retainer letter under which either P, or any deputy, assumes any separate liability for Knights' fees.

(6) Thus, in Mr Berragan's submission, there is simply nothing in Knights' argument. It is absurd to suggest that P is not the true client. The solicitors' services were being provided by Mrs Brassington for P's benefit. As an employee of Knights, she was carrying out the work for P's benefit, and not for her own benefit.

50. Second, and if the court does consider that there is some potential ambiguity, Mr Berragan submits that the following additional facts and matters militate firmly against Knights' proposed interpretation that Mrs Brassington incurred personal liability, either instead of, or in addition to, contracting on behalf of P:

(1) Each file was opened in the name of P.

(2) WIP was recorded against the file of each P, and not against Mrs Brassington.

(3) Knights does not suggest that it was ever proposed that Mrs Brassington should incur personal liability, either when she joined Knights, bringing her existing deputyships with her, or when she accepted further appointments, or at any time prior to her giving notice.

(4) Whilst Mrs Brassington and all other deputies and fee earners employed by Knights were required to record all their time *fearlessly*, inevitably Knights was unable to charge for that time in full on all cases following assessment by the SCCO, not least because of the SCCO's practice (unlike Knights) of only allowing three (rather than six) minute units for paying bills or routine correspondence. Unbilled WIP therefore accumulated on the deputyship files managed by Mrs Brassington and other deputies. No steps were taken by Knights to recover this WIP, or even to discuss it with Mrs Brassington or the other deputies. It is inconceivable that Knights should have allowed fees to accumulate unbilled for 6 years. Mr Berragan also points out that the rates set out at paragraph 3.1 of each engagement letter were the guideline hourly rates for summary assessment set by the SCCO and not Knights' standard hourly

rates; and that new engagement letters were entered into, reflecting the new guideline hourly rates, when these changed with effect from 30 September 2020 and 1 October 2021. Mr Berragan submits that it is inconceivable that new engagement letters would have been entered into in materially the same terms if substantial unbilled WIP remained outstanding under the original engagement letters.

(5) Mrs Brassington was an employee of Knights, entering into the engagement letters in a professional capacity, as a solicitor and as the appointed deputy. There was no reason why, in either capacity, she should have intended to accept personal liability for fees incurred on behalf of P.

(6) It is obviously uncommercial and unrealistic to suggest that Mrs Brassington would ever have agreed to be personally liable for the fees which both she and her colleagues at Knights had generated in the performance of her duties as deputy, in circumstances where there are strict limits on the fees which she is entitled to incur and recover as deputy.

(7) As Knights have expressly acknowledged, their interpretation necessarily means that each co-deputy (typically a member of P's family) is personally jointly liable with Mrs Brassington for these costs. Any such liability would be an onerous and unusual one which should have been drawn expressly to the attention of each co-deputy if this were the intended effect. Again, this is a wholly unrealistic and uncommercial interpretation.

51. In her witness statement (at paragraph 35) Ms Neyt refers to another partner (in the Stoke office private client team) who was also a COP deputy, Ms Rachel Watkinson, who left Knights in October 2021 (over a year before Mrs Brassington gave notice) and who is apparently now returning to Knights. Ms Neyt confirms that Ms Watkinson's deputyship engagement letters included the same paragraph 4.3 as Mrs Brassington's standard deputyship letter. Ms Neyt states that on her departure, she made it clear to Ms Watkinson that she was personally liable for the time costs of Knights. Ms Neyt continues:

As with the claimant on all matters where Rachel Watkinson was executor, trustee or attorney the files were billed and paid in full before they were released and transferred to her. On the deputyship matters, there was no dispute with Rachel Watkinson as on her departure date she decided to instruct Knights to continue acting for her or to step down as deputy and to leave the files at Knights.

52. Mr Berragan comments that, extraordinarily, neither Ms Neyt, nor anyone else at Knights, is said to have raised this issue with Mrs Brassington, or with any other deputy at the time. Moreover, despite the threats which Ms Neyt says that Knights made, she does not state that any bills were ever actually raised against, or issued to, Ms Watkinson on any deputyship matters; nor does Ms Neyt suggest that any payment has been made by Ms Watkinson, or that any purported claim will be pursued once she rejoins Knights.
53. In the course of his oral submissions, Mr Berragan advanced the following propositions:

- (1) The starting point is the appointment of the deputy by COP under s. 16 of the MCA to act as P's agent.
 - (2) Mrs Brassington acted by providing her professional services as an employed solicitor.
 - (3) As her employer, Knights were entitled to charge for Mrs Brassington's professional services provided to P during the course of her deputyship. That included charging for services provided by other fee-earners to whom Mrs Brassington had delegated appropriate activities. Mrs Brassington did not purchase her own services from Knights in order to sell them to P. Nor did she purchase them in order to provide them gratuitously to P. Rather, Mrs Brassington's services were purchased by P from Knights so that they might be provided to P.
 - (4) Knights' client is P. P engages Knights through Mrs Brassington, acting as P's deputy and statutory agent.
 - (5) There is only one single engagement in each case. Knights do not assert otherwise. That engagement is contained in or evidenced by each engagement letter. Although each co-deputy signs a separate engagement letter, they are all in the same terms. It is not suggested that any work is provided separately for any co-deputy, or that any separate client file is opened for any co-deputy.
 - (6) The engagement letter creates or evidences a contract between (1) Mrs Brassington (and any co-deputy) in her capacity as the deputy for P and (2) Knights.
 - (7) There is no provision in the engagement letter itself which can be read as creating any joint liability. The only capacity in which the deputy engages Knights and enters into any contract is as deputy for P.
 - (8) If there is any potential ambiguity, business common sense comes down firmly in favour of Mrs Brassington's interpretation, i.e. that the engagement letter does not create any joint liability.
 - (9) This conclusion is reached by one of two routes: either (1) the engagement letter is only a contract with P, acting through their deputy; or (2) if the deputy is contracting personally, either alone or jointly, it would defy common sense for the deputy to be construed as accepting any personal liability for the costs of the engagement.
54. In support of these propositions, Mr Berragan points to paragraph 46 of Ms Neyt's witness statement, which asserts that, "*Each co-deputy needs to be billed as there is a single debt*"; and confirms that Mrs Brassington "*prepared and produced identical retainer letters for her co-deputies which they also signed*". Mr Berragan emphasises that Ms Neyt does not suggest that there was ever any commercial imperative requiring the retainer to be structured in the way Knights suggest, i.e. so as to impose any personal liability on the deputy for costs and expenses; merely that this is how Mrs Brassington's standard deputyship letter was actually drafted. This echoes Ms Neyt's assertion at paragraph 16 that, "*As regards deputyships, there is no requirement to use any template.*" Mr Kelly counters that, conversely, there was no commercial imperative that had required Mrs Brassington to draft the terms of her

engagement (and that of her family co-deputies) in the form of her standard deputyship letter. Since Mrs Brassington's standard deputyship letter has been drafted in this form, and its terms are clear, the court should give effect to them.

55. For all these reasons, Mr Berragan invites the court to determine the correct interpretation of the engagement letters; to give summary judgment on Mrs Brassington's claim; to make the declarations proposed in his draft order, namely: (1) that Mrs Brassington is not personally liable to pay for time recorded on any deputyship file of Knights which cannot be properly billed to the person who lacks capacity for whom she has been appointed deputy ('P'); and (2) that Knights is not entitled to exercise any lien over any deputyship file in respect of claims for payment for time recorded on a file which cannot properly be billed to P; and to order Knights to pay Mrs Brassington's costs of the claim, including the costs of this summary judgment application, to be summarily assessed on the indemnity basis.

(b) Mr Kelly

56. In his written skeleton argument in opposition to the summary judgment application, Mr Kelly identified four arguments that were being raised by Mrs Brassington: (1) Whether a COP-appointed deputy can be personally liable on a contract made within the scope of the deputyship. (2) Whether (as a matter of construction) the retainer letters make Mrs Brassington personally liable for costs. (3) Whether Mrs Brassington was a client of Knights. (4) Whether the court should interfere with Knights' lien.
57. Mr Kelly suggests that even if the issues are treated in this limited way, they beg the question as to what Mrs Brassington understood the position to be when she attempted to persuade Knights to write off the WIP in September 2022, having made no such request over the previous six years. He invites the court to infer that, by then, Mrs Brassington had already decided to resign from Knights; and he points out that if she was subject to no personal liability, then the whole exercise of writing off the WIP on each P's file was unnecessary.
58. Mr Kelly addresses each of his suggested issues in turn.
- (1) Whether a deputy can be personally liable on a contract.
59. Mr Kelly points out that as P lacks capacity, he or she cannot appoint an agent to act on their behalf. Statute has intervened to enable this to be done by s. 19 (6) of the MCA; but Mr Kelly suggests that this operates to protect P, and not the deputy, limiting P's liability to acts undertaken by the deputy within the scope of their appointment, and in accordance with Part I of the MCA. Mr Kelly points out that the Code has no legal effect, and is only meant to assist deputies in understanding their role. He submits that paragraph 8.55 is merely a short, and only partially accurate, summary of the law of agency. The argument advanced by Mrs Brassington assumes that either the principal or the agent will incur personal liability under, or be able to sue upon, a contract. Mr Kelly submits that this is not correct because in many cases, both will be liable. Whether an agent is personally liable on a contract is to be determined by the construction of the contract (if in writing), and by its nature and the surrounding circumstances: see para 21-093 of *Chitty on Contracts* (previously cited). There is no rule of law that a deputy can never be personally liable on a contract made in order to fulfil his duties to P. Mr Kelly suggests that there is an obvious analogy with the instruction of counsel. A solicitor

is the agent of the lay client. However, the most common standard terms of engagement of counsel require the solicitor to pay fees personally: see, e.g., the Chancery Bar Association's current terms of engagement.

(2) Construction of the retainer letters

60. In the case of a written contract, the question of whether an agent is to be treated as having contracted personally is ultimately a question of construction. The retainer letters need to be construed against their factual matrix. Mr Kelly submits that this factual matrix includes the following:

(1) The engagement letters were drafted by Mrs Brassington, who is an experienced partner with substantial experience of COP work.

(2) The personal liability of a deputy was never previously an issue as all other deputies employed by Knights had recovered close to 100% of their costs on SCCO assessment.

(3) Only the deputy can apply to the SCCO for an assessment of costs. Accordingly, Knights have no control over the assessment process or when payments will be made.

61. Mr Kelly points out that we do not know the terms of the retainer letters that Mrs Brassington had previously entered into with Slater & Gordon. He emphasises that it is not for the court to re-write a contract in a way which is more beneficial to the parties. Apart from the cashflow difficulties resulting from the requirement for monthly billing, Mrs Brassington was not at any risk provided she achieved 100% recovery; and she may have taken the view that Knights would not pursue her for any shortfall in recovery (as it refrained from doing for around six years, and until she handed in her notice).

62. Mr Kelly submits that the retainer letters are clear as to who Knights' client is, and who it is not. They could not make the personal liability of Mrs Brassington any clearer. They are drafted by Mrs Brassington and sent to her. The reference to "you" is clearly a reference to her. Paragraph 1.1 provides that the services are being provided to Mrs Brassington. Paragraph 4.3 provides that she remains responsible for the payment of the fees, disbursements and expenses of Knights even if a third party (that is to say P) has agreed to pay the same. Mr Kelly appeared to accept that, ideally, the retainer letters should have mirrored the arrangements for the invoicing and payment of fees and expenses operated by COP and the SCCO; but paragraph 4.1, in particular, makes it clear that they do not do so. By drafting Mrs Brassington's standard deputyship letter in the form that she did, she rendered herself, and her co-deputies, personally liable for any shortfall between the fees and expenses charged by Knights and those properly allowed on assessment by the SCCO, and also for addressing the cashflow difficulties of satisfying any fees falling due in the interval between the receipt of Knights' monthly invoices and the quarterly billing mandated by COP and the SCCO.

(3) The identity of the client

63. As solicitors, Knights are entitled to exercise a lien over any documents received by them from the client. The common law solicitors' lien is limited by the following principles:

(1) The costs must have been incurred on the instructions of the client against whom the lien is being asserted.

(2) The client must be personally liable for such costs.

(3) The solicitor can have no greater right to possession of the documents than that of the client.

Mr Kelly says that the common law lien is supplemented by Knights' standard terms and conditions. I did not understand Mr Berragan to take issue with any of these propositions as matters of law.

64. Mr Kelly states that no lien has yet been exercised. In practical terms, it is not possible to do so whilst Knights remain instructed on Mrs Brassington's deputyships.

65. Mr Kelly refers to Mrs Brassington's claim that no lien can be asserted by Knights because she was never Knights' client, and was never personally liable for any costs. Mr Kelly contests the second of these propositions for the reason already given. As to the first, he says that the argument presupposes that there is only one client; but, on any matter, a solicitor may have more than one client. Solicitors are free to choose their clients. Law Society standards and regulations do not prescribe who is, and who is not, a client. The term "*client*" is merely defined as "*the person for whom you act and, where the context permits, includes prospective and former clients*". Since the relationship is contractual, the retainer letter is the obvious starting point when determining who is the solicitor's client. Again, Mr Kelly says that this could not be clearer. All references to "*you*" are to Mrs Brassington. She instructs Knights, and they provide their services as solicitor to her. Mrs Brassington is the client. Mr Kelly submits that the only person who could instruct Knights to take any step was Mrs Brassington. Only she could decide what actions were required.

(4) Interference with the lien by the court

66. Mr Kelly accepts that the court can interfere with the exercise of a solicitor's lien. However, where it is the client who has terminated the retainer, that is a weighty factor against doing so. Mr Kelly says that Knights have no intention of terminating any of Mrs Brassington's deputyship retainers. He disputes that the threatened exercise of the lien has prejudiced Mrs Brassington in any case. Each deputyship continues to operate as before, with Knights' junior staff dealing with routine matters and Mrs Brassington dealing with high level decisions. She has never requested the transfer of any funds. Knights would do so upon receipt of written authorisation from Mrs Brassington and any co-deputy. As a matter of practicalities, Knights' junior staff continue to need access to P's funds in order to make routine payments on their behalf.

67. During the course of his oral submissions, Mr Kelly pointed out that there is contemporaneous evidence of what Ms Conboy's deputyship letter (referenced at paragraph 10 above) was understood to mean in the form of an email from Ms

Conboy (copied to Mrs Brassington) dated 8 November 2017 (at page 331 of the hearing bundle). Responding to an email from Ms Sarah Evans, a legal secretary, inquiring after a letter of engagement to the client, and also client ID, Ms Conboy stated:

On the deputyship files, Katie is acting as a professional deputy for a person who lacks mental capacity to look after their own financial affairs. Katie is our client and we act on her behalf as her solicitors, so the letter of engagement will be signed by Katie.

I will arrange for Katie to sign the engagement letter this week and we will send a copy to [the family co-deputy] for her records.

68. In his reply, Mr Berragan emphasised that Mrs Brassington was Knights' "*client*" in her capacity as a professional COP deputy. He submits that as an employee of Knights, it would have been commercially absurd for Mrs Brassington to have been engaging her own employer in any personal capacity of her own, rather than as agent for P. The email response records that a copy of the engagement letter was to be sent to the family co-deputy merely "*for her records*", and not by way of any separate engagement. Mr Berragan points out that the original 9 November 2017 engagement letter referred, exceptionally, to invoicing in accordance with COP/SCCO guidance; yet the later 17 December 2020 engagement letter (incorporating the then recently revised guideline hourly rates) reverted to the standard position of monthly invoicing. Mr Berragan suggests that this cannot have been viewed as representing any actual change in practice, which was that Knights would always comply with the COP/SCCO guidance when invoicing any P. Certainly, there is no suggestion in the evidence that any change in the practice contemplated by the earlier letter was ever communicated to Mrs Brassington, still less to her family co-deputy. Nor could it ever have been intended that the revised engagement letter should operate to effect any change in the identity of Knights' client.
69. Assuming, without deciding, that Ms Conboy's contemporaneous, subjective declaration of intent is admissible in evidence, not as an aid to the true construction of this particular engagement letter, but rather to identifying the capacity in which Mrs Brassington was entering into the same, I do not find that it helps me to identify whether she was Knights' '*client*' in her personal capacity rather than as deputy and agent for P.
70. Mr Kelly emphasises that a COP deputyship is a personal appointment and is not the property of Knights. Mrs Brassington was wearing a number of different hats. As a full-time employee of Knights, she had no available billable hours, so she had to purchase the services of Knights for herself and for her principal, P. Mr Berragan counters that Mrs Brassington received no remuneration personally for doing so; any benefit resulting from her appointment enured for the benefit of Knights, who should bear the risk of any shortfall in remuneration or expenses. Mr Kelly reiterates his suggested analogy of solicitor and counsel; just as a solicitor purchases the services of counsel to assist the solicitor in performing the retainer in hand, so Mrs Brassington was purchasing services from Knights (including her own) in order to fulfil her retainer. However, in the case of instructing counsel, the solicitor should be entitled to full reimbursement of counsel's fees from their lay client whereas, because of the peculiar position of a COP-appointed deputy, Mrs Brassington has no recourse to P

over and above that allowed by the COP/SCCO guidance and practice. In response to my suggestion that Mrs Brassington's position was analogous to that of an insolvency office-holder, such as an administrator, liquidator or supervisor, who instructs solicitors to act on their behalf, Mr Kelly also suggested the analogy of an executor or trustee. However, in none of these situations would the office-holder typically be exposed to any risk of personal liability for any cashflow or other shortfall between the sums chargeable by the solicitors and those properly recoverable from the relevant insolvency or trust estate or fund; and, if they were, the office-holder would typically require a full indemnity from the person who had appointed them. No such indemnity is available to a COP-appointed deputy because of P's lack of capacity otherwise than through the processes authorised under the MCA and the ancillary practice and guidance issued and operated by COP and the SCCO. Mr Kelly's response was that Mrs Brassington could, and should, have entered into a contract of engagement which made it clear that she was assuming no personal liability for any services rendered to P, but she had not done so.

71. Mr Kelly's submission was that there was no contract between P and Knights, which owed contractual duties only to Mrs Brassington and her family co-deputies; although Mr Kelly acknowledged that Knights might owe tortious duties of care towards P. It was not paragraph 4.3 of the engagement letter that created any liability on the part of Mrs Brassington for Knights' unbilled WIP but the fact that she, as P's deputy, was Knights' client. Paragraph 4.3 merely served to confirm that liability on her part.
72. Mr Kelly seeks to counter Mr Berragan's point that all files have been opened in the name of P as the client, rather than the names of Mrs Brassington or any of her family co-deputies, by suggesting that this was a pure matter of administrative convenience; and that, as Mrs Brassington held a number of COP deputyships, it avoided having a number of different client files all in her name. Mr Kelly also suggests that, in any event, the naming of a file post-dated the engagement letters. In the course of argument, I suggested to Mr Kelly that an analogy might possibly be drawn with a large corporate property developer, which might have a number of property transactions on the go at any one time, with a different file opened for each. However, I note that each statement of account has separate headings for '*client*' (identified as P) and subject matter (identified as '*Deputyship for P*'); and, in any event, the three letters of P's surname in the client reference are followed by three or more digits, thereby making it possible to differentiate between different matters for the same client.
73. Mr Kelly acknowledges that, as Mrs Brassington now puts her case, this dispute is capable of determination on an application for summary judgment under CPR 24 since the issues are ones of law and construction and do not require the determination of any disputed factual issue. I should approach the case on the basis that Mrs Brassington had not been required to use her standard form deputyship letter but had enjoyed free rein to adapt it to make it more suitable for the engagement of solicitors to act for a COP-appointed deputy, although Mrs Brassington may well have believed that she had no such freedom.

VI: Analysis and conclusions

74. Having fully considered the carefully crafted submissions of Mr Berragan and Mr Kelly, and despite the latter's forceful representations to the contrary on Knights'

behalf, I have no hesitation in preferring the competing submissions of Mr Berragan (representing Mrs Brassington). In my judgment, on the true construction of the engagement letters, and for the reasons which Mr Berragan has so persuasively given (which I do not propose to repeat in full, having previously set them out in detail in this judgment), Mrs Brassington was contracting solely as agent for P. I further find that she accepted no personal liability for Knights' remuneration or expenses.

75. Both Mr Berragan and Mr Kelly are in agreement that the issue for the court is to construe the terms of the engagement letters in the light of all the relevant and admissible surrounding circumstances. I agree with Mr Berragan that these include all those matters relevant to the engagement that were known or reasonably available to both parties. I find that these extend to: (1) the statutory framework and ancillary practice and guidance governing COP deputyships; (2) the fact that Mrs Brassington was acting both as a COP deputy and as a solicitor employed by Knights, who was required to devote the whole of her working time and attention to such duties as Knights might reasonably assign to her, and perform them to the best of her ability; and (3) the way in which Mrs Brassington's deputyships had previously been dealt with at Slater & Gordon, and might reasonably be expected to be dealt with during the course of her employment as a *'partner'* at Knights.
76. In common with Mr Berragan, Mrs Brassington, and – I think – Mr Kelly, I recognise that Mrs Brassington's standard deputyship letter is not an apt document to govern the retainer of solicitors by a COP-appointed deputy, not least because the provision (in paragraph 4.1) for invoices to be sent to Mrs Brassington monthly "*unless agreed otherwise*" is wholly inconsistent with the practice applied by COP and the SCCO, under which invoices are only to be submitted by a deputy every three months, in accordance with paragraph 6 of COP Practice Direction 19B. Instead, each letter of engagement should have incorporated a term along the lines of paragraph 4.1 of Ms Conboy's deputyship letter (cited at paragraph 10 above). I recognise that it is not for the court to re-write the contract of retainer that the parties have chosen to enter into, to the advantage of Mrs Brassington and her co-deputies, and contrary to Knights' own interests. But the authorities make it clear that when construing a written contract, the worse the drafting, the more ready the court can properly be to depart from the natural meaning of the words the parties have chosen to use. As Lord Hodge JSC (speaking for the Supreme Court) observed in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [11]:

... in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause ...

In any event, the focus of the present debate about the true meaning and effect of the engagement letters is upon the true identity of the contracting parties rather than the actual terms of their engagement.

77. As I observed (at paragraph 10 above), Ms Conboy's deputyship letter related not to an existing deputyship, but to a new deputyship application. I recognise that, logically, the court should approach the issue of construction by considering, first, a letter of engagement that relates to a new deputyship application, before turning to construe a retainer letter in respect of an existing deputyship. In the instant case, however, although relating only to existing deputyships, since, chronologically Mrs

Brassington's standard deputyship letter pre-dated Ms Conboy's deputyship letter, the former document should fall to be construed first. Each deputyship letter was addressed to Mrs Brassington and she is therefore the "you" referred to in the letter; but that was inevitably the case: Because each P lacked capacity, they were unable to engage solicitors to act on their own behalf, and they therefore had to act by a COP-appointed deputy. Necessarily, Mrs Brassington, as P's COP-appointed deputy, had to act for them by signing the letters of engagement. The issue for the court is whether, in doing so, Mrs Brassington was acting in a personal capacity, or solely as deputy and agent for P, or jointly for P and herself personally.

78. For the reasons Mr Berragan has so elegantly articulated, in my judgment, by subscribing to her standard deputyship letter, Mrs Brassington was, in each case, contracting with Knights solely in her capacity as deputy, and as agent, for and on behalf of P. That seems to me to be the clear meaning and effect of the language of the standard-form letter, construed in the statutory context against which both parties subscribed to it. Both parties understood that P, rather than Mrs Brassington, was Knights' true client, as evidenced by the way the client was identified and referenced in Knights' statements of account and, by inference, its files and other records. That conclusion accords with both the common sense, and the commercial reality, of the retainer, with Knights owing duties in contract, and not only in tort, to P, rather than to Mrs Brassington, who was the person charged with carrying out the work in relation to the deputyship, which was the relevant engagement. After all, the work Knights was being engaged to carried out was for the benefit of P, rather than Mrs Brassington personally. That conclusion also accords with the provisions of s. 19 (6) of the MCA, which treat the deputy as P's agent, and the explanation of its effect at para 8.55 of the Code of Practice. I agree with Mr Kelly that this explanation is only a short, and necessarily, incomplete, rather than a comprehensive statement of the law concerning the personal liability of an agent; and that the terms of any contract signed by the deputy, its nature, and the surrounding circumstances, all have to be scrutinised carefully to determine whether the deputy is thereby assuming any personal liability.
79. However, in the instant case I do not accept that, by her standard deputyship letter, Mrs Brassington, still less her family co-deputies, were assuming any personal liability for any irrecoverable remuneration and expenses incurred by Knights, as Mrs Brassington's employer, and the entity through which she was discharging her deputyship responsibilities, and that they were doing so without any recourse against P personally or their estate. Mr Kelly submits that this is what Mrs Brassington agreed to by the terms of her standard deputyship letter; and that she persuaded her family co-deputies to do likewise. However, Mrs Brassington's standard deputyship letter says nothing expressly about the capacity in which she is appointing Knights to act on her behalf, and with her, in connection with her deputyship. Nor is there any shred of evidence that Mrs Brassington, or anyone else at Knights, ever informed any of the family co-deputies that the true meaning and effect of Mrs Brassington's standard deputyship letter was that they were assuming any personal liability to Knights, so those co-deputies certainly never gave their informed consent to the assumption of any such supposed personal liability.
80. Nor can I understand why, if Knights ever considered and understood that Mrs Brassington (or any of her co-deputies) had assumed the risk of non-recovery of Knights' remuneration and expenses through the SCCO process, this was never drawn

to her (or their) attention at any time during the period of more than six years that unbilled WIP was mounting up (to a level in excess of £166,000), either through the partner with overall responsibility for the management and supervision of the engagement and delivery of Knights' contracted deputyship services, or through the Chester office's CSD. I recognise the inadmissibility of post-contract conduct as an aid to the construction of a written contract; but where a contract is capable of more than one interpretation, in my judgment it is permissible to test alternative permissible constructions against the way in which that contract was actually performed in practice, as a guide to the parties' common understanding of how that contract falls to be understood and applied. Further, the way each deputyship had been conducted in practice under the original deputyship letters is clearly admissible as an aid to the construction of the later engagement letters, when these were issued following increases in the permissible guideline hourly rates. Such evidence extends to the way client files were opened and styled, and the frequency and the manner in which each deputyship was invoiced and billed.

81. Mr Kelly seemed to accept that paragraph 4.3 of the engagement letters created no independent liability on the part of Mrs Brassington if none already existed, acknowledging that her supposed liability for Knights' unbilled WIP derived from the fact that, on his case, it was she who was Knights' client. Clearly, from its opening words, paragraph 4.3 can have no application unless Mrs Brassington is already "*responsible for payment of [Knights'] fees, disbursements and expenses*".
82. I have previously raised the question (at paragraph 25 above) of how the terms of Mrs Brassington's standard deputyship letter might be capable of rendering her (and her family co-deputies) liable to Knights for unpaid WIP, representing sums by way of remuneration and expenses that have been disallowed by the SCCO, if (as both parties accept) P is not liable for such sums. I find it difficult to understand how the same words can bear different meanings, and produce different effects, for Mrs Brassington and for P. Counsel have supplied me with no satisfactory answer to this conundrum.
83. Subject to any further argument that might be presented to the court on this aspect of the case, it seems to me that the position can only be reached whereby P is not liable under Mrs Brassington's standard deputyship letter for any remuneration and expenses that have been disallowed on assessment by the SCCO if the terms of that letter are subject to an overarching implied term to that effect. Such a term could only be implied on the grounds either of business efficacy, or of obviousness, on the basis that, without it, the deputy's engagement of Knights would lack all practical or commercial coherence. Even then, there is the obvious problem that a term cannot properly be implied which would contradict an express term of the contract. Such a term would have to be justified by reference to the peculiar position of a COP-appointed deputy, and the constraints imposed by the MCA and ancillary COP and SCCO practice and guidance. The difficulty I entertain about all of this, however, is that identical, or similar, considerations would seem to me to militate in favour of the implication of such a term into any contract of retainer whereby solicitors are engaged to act in connection with a COP deputyship, whether the counter-party is P, a professional deputy, or a family co-deputy, since the constraints operate in precisely the same manner in all such situations. Fortunately, these are matters that call for no final determination as part of this judgment.

84. It follows from my conclusion about the true parties to Knights' retainer that no lien can be asserted by Knights against Mrs Brassington, both because she was never Knights' client, and she was never personally liable for any of their costs and expenses. In principle, Knights could have asserted a lien as against any P, had they been liable to Knights for payment of any outstanding fees, disbursements and expenses. However, Mr Kelly accepts that P is not liable for any remuneration and expenses that have been disallowed on assessment by the SCCO; and it is this which constitutes the unbilled WIP.
85. I propose formally to hand this judgment down at a remote hearing on 30 June 2023 without the need for any attendance by the parties or their legal representatives. In my draft judgment I invited the parties to seek to agree a substantive order to give effect to this judgment. Unfortunately, I am told that the parties are unable to agree the terms of any substantive order. I therefore propose to proceed in accordance with the practice recommended at paragraph 12-91 of the 2nd update to the *Chancery Guide* (issued earlier this month) and to determine on paper all consequential matters (including questions relating to costs, and any application for permission to appeal) that cannot be agreed between the parties. I direct that by 4.00 pm on Friday 14 July 2023 the parties are to provide a draft composite order, concise grounds of appeal (where relevant), and brief written submissions, which should be no longer than necessary and, in any event, no longer than 15 pages. Unless I consider it necessary to direct a further remote hearing, or counsel certifies (in accordance with para 12-92) that a that a hearing is needed to dispose of any consequential matter, I will proceed to determine the outstanding matters on paper when I return to Manchester at the end of July. I therefore formally adjourn all consequential matters, including consideration of all issues relating to costs and to any application for permission to appeal. I will extend the time for appealing until 21 days after my paper determination is released to the parties, or 21 days after the conclusion of any further remote hearing. I invite the parties to agree an order to give effect to these interim arrangements. I conclude by expressing my thanks to both counsel for their considerable assistance in this case.
86. That concludes this reserved judgment.