Case No: SC-2020-APP-00039

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2021

Before :

Costs Judge Brown

- -

Between :

ACHARA TRIPIPATKUL **Claimant**

- and –

WH LAWRENCE LIMITED (trading as WH Lawrence Solicitors) **Defendant**

- -
- -

Mr. Robert Marven QC (instructed by **Defendant**) for the **Defendant**

Hearing date: 28 April 2021
Draft sent out: 23 June 2021

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Judgment Approved by the court

Introduction

1. The Defendant, a limited company, is a firm of solicitors practising from offices in Chancery Lane. The Claimant is an experienced property investor and the freeholder of several properties, including 45 Wilton Crescent and 45 Belgrave Mews, London , a mansion

block in Central London. On 20 December 2017, the Claimant instructed the Defendant pursuant to a written retainer of the same date, to act for her in relation to a dispute with a long leaseholder in the ground and first floor flat at 45 Wilton Crescent, a Mr Paraskevas ('the Respondent').

2. The dispute was litigated in the First Tier Tribunal (Property Chamber) ('the FTT'). On 11 February 2020 after the handing down of the decision of the FTT, at a time when an appeal from the decision of the FTT was in contemplation and shortly before the time limit for appeal was to expire, the parties entered into an agreement as to fees ('the Agreement'). The terms of the Agreement are set out below at [58] and provide, inter alia, for a fixed fee of £250,000 plus VAT in respect of work done or to be done by solicitors.

3. The parties agree that the Agreement is a 'contentious business agreement' within the meaning of section 59 of the Solicitors Act 1974 ('the 1974 Act'). The issue I am required to determine is whether, pursuant to section 61 of 1974 Act, the terms of this Agreement were unfair or unreasonable and, if so, whether the Agreement should be set aside or the sums which are to be paid under it, reduced.

4. The context in which the issue arises is a Part 8 claim issued on 7 July 2020 by the Claimant whereby she sought the delivery up of a final bill pursuant to section 68 of the 1974 Act or a detailed assessment pursuant to section 70 of the 1974 Act of various bills which are said to have been delivered to the Claimant by the Defendant. In its defence to these claims the Defendant relies upon the Agreement: it is said that the sums due are fixed, and hence a liquidated sum, and that the Agreement may be sued upon such that the Defendant's costs are not subject to any such assessment. The Claimant says that the Agreement should be set aside and seeks a declaration to this effect. At a directions hearing on 16 October 2020, Costs Judge Nagalingam determined that the issue raised as a defence to the claim for an assessment should be determined as a preliminary issue, effectively in the terms set out above.

5. Included in the hearing bundle are three witness statements from Mr Lawrence: he is the managing partner of the defendant solicitors and had conduct of the Claimant's claim. He was involved in discussions and email communications with the Claimant and Mr. Kan. Mr. Kan is an accountant and is said by the Claimant to have been an old friend of hers helping her out with her financial arrangements but not paid for his work: the bundle contains a witness statement from Mr. Kan (prepared for the purpose of setting aside a statutory demand obtained by the Defendant in respect of its claim for costs) and three from the Claimant. A direction was made on 16 October 2020 that any application to cross examine the makers of the witness statements be made by 4 pm on 11th December 2020, but neither party so applied. The Claimant has also provided disclosure, pursuant to a direction, of documents relating to (non-privileged) communications with Mr Kan in respect of dealings with the Defendant.

6. The witness statements contain a significant amount of argument and assertion as well as a considerable amount of detailed evidence. I have considered all the points made, even if I have not specifically mentioned all of the points and evidence in this decision. If I have not

mentioned them it is because I did not consider them sufficiently central or important to deal with them expressly in what has turned out to be a lengthier judgment than might be anticipated.

7. Within the material provided to me there was reference to information which was privileged. I think it appropriate to refer to some of it in my judgment generally but I have excluded it from my judgment in public[1].

Claimant's breaches of orders and her debarring

8. By order of 16 October 2020 the Claimant was required to make an interim payment of £100,000. The Claimant failed to make the payment, and her application for an extension of time for payment was refused by myself on 30 November 2020 with costs payable to the Defendant of £2,500. On 26 February 2021 an order was made that unless payment was made of the sums ordered, the Claimant would be debarred from making further representations in these proceedings in accordance with the jurisdiction considered in *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC. This did not lead to any payment and on 16 March 2021 the Claimant was barred from making representations at the hearing. A representative of her solicitors did however attend the hearing (by videolink) on her behalf.

The parties' positions in outline

9. The Claimant says that the fees payable under the Agreement are grossly excessive for the kind and amount of work that had been done and was to be to be undertaken. Bills were not rendered monthly, as the retainer indicated would occur, and that she was not adequately informed of the work or fees that had been incurred. The Claimant says she took no legal advice in respect of the Agreement and had no opportunity to do so. She did not fully understand the nature of the agreement and she was not experienced in legal matters and entered into the Agreement at what is referred as a 'pressure point' in the litigation when she had no real choice but to accept the proposed Agreement put to her by the Defendant.

10. The Defendant says that it was a simple agreement which was adequately explained. Reliance was placed upon a meeting in which it was said that the Defendant explained the effect of the Agreement to the Claimant. The Agreement needed no further or substantial explanation and there was, in any event, nothing unfair about the mode in which it was obtained. There was, it was said, a long and troubled history of the Claimant failing to pay sums due, indeed, a wilful refusal to pay sums due under the retainer and meet promises to pay. This put the Defendant under time pressure and difficulties, given the need on the part of the solicitors to incur disbursements and to be put in funds. The Defendant, it was said, was entitled at the time of the Agreement to refuse to continue to act for the Claimant at all. The Defendant said that terms were reasonable having regard to past and anticipated future work, the indulgence, as it was put, that the Defendant had already given the Claimant and the further deferment of the date for payment of fees with the risk that there would be further delay and default.

[1] Replacing the material with [……..] in the judgment in public.

Section 59 and 61 of 1974 Act

11. Section 59(1) of the 1974 Act provides that:

> ***Contentious business agreements***
>
> *(1) Subject to subsection (2), a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated.*

12. Section 61 of 1974 Act provides:

> ***Enforcement of contentious business agreements***
>
> *(1)No action shall be brought on any contentious business agreement, but on the application of any person who—*
>
> *(a) is a party to the agreement or the representative of such a party; or*
>
> *(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates, the court may enforce or set aside the agreement and determine every question as to its validity or effect.*
>
> *(2)On any application under subsection (1) the court—*
>
> *(a) if it is of the opinion that the agreement is in all respects fair and reasonable, enforce it;*
>
> *(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;*
>
> *(c) in any case, may make such order as to the costs of the application as it thinks fit.*
>
> *(3)If the business covered by a contentious business agreement (not being an agreement to which section 62 applies) is business done, or to be done, in any action, a client who is a party to the agreement may make application to a costs officer of the court for the agreement to be examined.*
>
> *(4)A costs officer before whom an agreement is laid under subsection (3) shall examine it and may either allow it, or, if he is of the opinion that the agreement*

> *is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.*

……

13. There is, as others have commented, little modern authority on these provisions (notwithstanding, it might be said, the wide definition of a 'contentious business agreement'). They are similar in terms to sections 8 and 9 of the Attorneys' and Solicitors' Act 1870 which were considered in *In re Stuart, ex parte Cathcart* [1893] 2 QB 201. The agreement in that case concerned the employment of a solicitor to attend the taxation of costs in lunacy proceedings, the agreement being that the solicitors should be paid 5% of the amount taxed off the bill of costs. The bill contained items for daily refreshers for counsel which far exceeded the maximum daily amount allowed by the rule. The sum claimed on a percentage basis was nearly £100, whereas the taxing master had certified to the court below that proper remuneration would have been £20. Lord Esher MR held:

> *"With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression "fair" cannot be re-introduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the Court that the terms of that agreement are reasonable. If in the opinion of the Court they are not reasonable, having regard to the kind of work which the solicitor has to do under the agreement, the Court are bound to say that the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner. On this question it is quite clear to me that we cannot arrive at any other conclusion than that arrived at by the Divisional Court. It is impossible to say that work which according to information given by the taxing master to the Divisional Court would be properly remunerated by a sum of* [£200] *can be reasonably charged at nearly* [£100]. *The decision of the Court below must be affirmed, and the appeal dismissed.*" [my underlining]

14. In *Clare v Joseph* [1907] 2 K.B. 369 the Court of Appeal were concerned with an issue as to whether an oral agreement as to fees between a solicitor and client was unenforceable. The Divisional Court had held that such an agreement was unenforceable under the relevant provisions of the 1870 Act. In overturning the decision of the Lower Court, the Court considered that the provisions should be seen in the context of the law prior to the coming into force of the Act: Fletcher- Moulton LJ stated that "*the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense*. Lord Alverstone CJ commented that upon the application of the client, such agreements "*were considered and examined by*

the Courts, and they were not infrequently held to be binding both on the solicitor and the client". As to the new provisions in the 1870 Act Lord Alverstone CJ held:

> *"Instead of saying that the solicitor might enter into an agreement as to costs which should, as before, be subject to review of the Court, it provided that he might enter into an agreement in writing as to his costs, and went on to enact that, if he did so, there should be a further safeguard for the protection of the client, who should be entitled to have the agreement examined by the taxing Master to see if it was fair and reasonable, and if that officer was of opinion that it was not fair and reasonable he could require the opinion of the Court or a judge upon the point. The section is an empowering section, and in my opinion it does not affect the position of a client who sets up an agreement as to costs with a solicitor."*

15. In the event consideration of the provisions did not lead to the conclusion that an agreement which was oral in nature should not therefore be set aside under the relevant provisions. Further, as the agreement was considered manifestly advantageous to the client, being for less than the ordinary remuneration, it should not for other reasons be set aside.

16. The judgments in this case explain what, I think, might otherwise appear to be an anomaly - that written agreements should be the subject of the court's scrutiny under these provision whereas oral agreements are not. To my mind they also give some explanation of the concerns which underlie the provisions. It is however to be noted that the limitations on the role of the Taxing Master referred to this case no longer apply to a Costs Judge following an increase in the jurisdiction of Costs Judges to include matters arising under the relevant parts of Section III of the 1974 Act.

17. In *Bolt Burdon Solicitors v Tariq* [2016] EWHC 811 (QB) Spencer J was concerned with the parallel provisions in respect of non-contentious agreements in section 57 of the 1974 Act. He cited the extract from the judgment of Court of Appeal from *ex parte Cathcart* set out above and said this:

> *"I find the analysis in that case helpful to the extent of identifying that the issues of fairness and reasonableness must be considered separately. Fairness relates principally to the manner in which the agreement came to be made. Reasonableness relates principally to the terms of the agreement."*

18. The client in the *Bolt Burdon* case sought compensation from a bank under the Financial Conduct Authority Redress Scheme, his complaint being that he had been mis-sold an interest rate swap. The issue arising in this case concerned a contingency fee agreement between the solicitors and the client, which provided for the solicitors to receive 50% of any compensation recovered, plus disbursements. The learned judge noted that the work to be undertaken was non-contentious and hence the agreement was lawful notwithstanding that it was a contingency agreement: there could be no objection to such agreements on the grounds that the agreements was champertous (in contrast to contingency fee agreements in contentious business). He observed that the value of the charges was £50,000 and that the amount of the compensation was £821,045.06, of which the solicitors claimed half. In rejecting the contention that the agreement was unfair and unreasonable he held that the

Agreement "*represented a speculative joint business venture in which the solicitors were taking all the risk and the client was exposed to no risk at all*." He considered that the eventual charge were not unreasonable in the light of his findings which included a finding that when the client first approached the solicitors the prospects of an recovery at all from the bank were "extremely bleak".

19. In *Vilvarajah v West London Law Limited* (Westlaw citation: 2017 WL 02610570) Senior Costs Judge Gordon- Saker set aside a conditional fee agreement, pursuant to section 61 of the 1974 Act, on the grounds that it was unfair and unreasonable. In considering the issue of fairness, the Senior Costs Judge held that the client, who he considered to be of average sophistication in relation to legal matters, required particular care when matters are explained to him in English. In concluding that the agreement was not fair he said:

> "*There is no correspondence between the Defendant and the Claimant about the conditional fee agreement. I would expect to see a letter from the Defendant to the Claimant in advance of the meeting on 7th January 2013 explaining the options clearly. I would expect that letter or a subsequent letter, still in advance of the meeting, to enclose a draft of the proposed conditional fee agreement and to explain its terms so that the Claimant would have an opportunity to consider it before the meeting and think about whether there was anything which required explanation. I would expect the solicitor to be able to produce an attendance note of the meeting at which the agreement was signed recording precisely what explanation she gave of it to the Claimant. I would then expect to see a letter sent to the Claimant after the agreement was signed enclosing a copy of the agreement and explaining the key points."*

20. The Senior Costs Judge considered that the agreement in that case was complex and that the calculation of the success fee, which would increase the claimant's liability for the work done by all fee earners to £690 per hour, was peculiar, not being based on any assessment of risk but on the proportion of a discounted rate to the primary rate. He held that as these were arbitrary figures, neither of them reflecting the market rate, he considered the success fee was also arbitrary. He went on to say:

> *"Crucially there is nothing to suggest that the Defendant gave the Claimant any advice that the primary rate was unusual or that there was no prospect at all that he would recover these rates from his opponent in the Hodders Law claim in the event that he was awarded costs in that claim. There would have been no prospect at all that the Claimant would recover £420 for any of the three grades of fee earners. Given the nature of the case it is unlikely that, between the parties, the solicitors would be allowed rates much higher than the guideline rates for summary assessment."*

The underlying litigation in this case

21. The dispute in which the Defendant was instructed concerned a claim for service charges against the Respondent. The Claimant proposed carrying out building works for the entire building; the works were said by her to have a cost some £771,174. A claim was made by way of set off by the Respondent, relating to an alleged failure on the part of the Claimant,

in breach of a repairing covenant, to keep the common parts (including exterior) of the building in repair over, it was said, many years.

22. I do not have a full set of papers in respect of proceedings for the FTT or indeed, it seems to me, all of the Statements of Case. However the sum claimed against the Respondent appears from the account given the Applicant to have been in the region of £245,000. It also appears that whilst the Respondent may initially have denied any liability for any of the sums claimed (possibly before he was represented) by the time of the hearing, the dispute on the claim was more focused on the amount of service charge payable, in particular the costs of the works (the Respondent accepting that some works were required) and the apportionment of those costs to the Respondent. The Claimant (together with companies controlled by her) had control of all the other flats in the main part of the building, which were occupied by her and her family, save a mews property which was occupied by a leasehold owner. The works to be undertaken included the replacement of a lift. Since the main entrance of access to the flat was on the ground floor, he was concerned that he should not have to pay towards the lift replacement (as it was unclear whether the lift would, in the future, stop at the first floor or least there were complications with this). Importantly for these purposes, the Claimant was said to have failed to carry out appropriate works (including particular in respect of the water leak) and there was a dispute as to the amount payable by way of General Damages and Special Damages by way of set off only (it appearing that the FTT lacked jurisdiction to make an award exceeding a set off).

23. On 18 November 2019 the FTT viewed the property. It is unclear whether the FTT also sat on this day. I would assume so for current purposes. In any event the hearing proceeded until 21 November 2019 (I understand that the hearing had been listed to last until 22 November 2019). Thus, if 18 November is to be included in the hearing length, as I havefor for these purposes assumed it did, the hearing lasted 4 days.

24. There were three experts on either side. For the Claimant, witness statements were served from a Mr. McGlashan (who had assisted the Claimant with the carrying out work at the property) and a Mr Hall (who had been the Claimant's managing agent); a detailed witness statement was served by the Respondent dealing with the state of the property. I understand that the trial bundle ran to some 1600 pages.

25. A draft decision of the Tribunal was first promulgated on 7 January 2020. It was handed down in final form on or about 17 January 2020 and, so far as I can tell, sent on shortly afterwards to the Claimant on or about 21 January 2020. The FTT made determinations in principle, the precise sums being subject to calculation by the experts. There was a significant deduction from the claim given that the Respondent was unlikely to use the lift substantially. It appears from the findings of the FTT that the eventual award in the Claimant's favour on her claim may have been substantially less than that claimed (the Claimant's own account suggests it was in the region of £150,000). Importantly, the set off which, although not precisely calculated, I understand to have had a value put, at least at some stage, of potentially in the region of £350,000, or in any event in a sum which would appear to exceed the claim by a substantial margin (and thus extinguish it).

26. The deadline to appeal the decision was 14 February 2020; likewise, the deadline to deal with consequential directions of the FTT in respect of the calculations of the award and set off.

27. On 14 February 2020 Grounds of Appeal were or had been drafted by counsel (a copy of the Grounds was provided to me at the hearing).

28. Permission to appeal was sought by the Claimant in respect of the FTT's findings. The parties were, I understand, notified that permission to appeal was refused by the Upper Tribunal (Land Chamber) ('UT') on 15 June 2020 when the Defendant ceased acting for the Claimant (notably, I should say that I was not however provided with the decision refusing permission or details as the terms in which it was refused).

29. Mr. Marven QC urged me to take into account the value of the property in respect to which this dispute arose; he also argued that the dispute was complex. It is clear that the value of the mansion block was very high (the Respondent's flat was held by the FTT to have had a value which fluctuated between £11 million and £7 million during the period relevant for its determination of the set off: paragraph 48 of its decision). Nevertheless the Claimant's claim related to the service charge. The sums at stake on the claim were substantial and significant and I take all these matters into account. I am not, however, satisfied that the dispute was particularly complex, set against a broad spectrum. Whilst accepting that there was some factual and legal complexity in particular in respect of the amount of the set off (deriving, as it did from the rental value of the flat), a matter which appears to be well within the competence of specialist junior counsel, to my mind, and on the information available to me, the issues were ones of limited or, at any rate, moderate legal and factual complexity.

Events up to an including the entry into the Agreement

30. The retainer was specified as relating to an ongoing dispute with the Respondent in respect of the service charges at the property. The terms of the retainer are set out in a letter from the Defendant of 20 December 2017. The charging rate of Mr Lawrence was £275 per hour, increasing to £325 per hour on 1 January 2018. The firm's general practice was stated to be to bill monthly. The Terms of Business were, it appears, attached to and incorporated into the retainer; they set out the Claimant's right to seek an assessment of the Defendant's fees and the right of the Defendant to send the Claimant interim bills. Bills were stated to be final accounts for the period they covered and, I note, the Defendant reserved the right to terminate the retainer on non-payment. Interest was payable on bills at 4% above Barclays Bank base rates. There was stated to be a right to seek interim on account payments.

31. The witness statements set out in detail the history of the events which led to the Agreement. It is not necessary for me set out every letter, exchange by email or text message between those involved but it is appropriate, given the way both sides to put their case, for me to set out these events in some detail.

32. It appears that in the year from September 2018 invoices were delivered periodically. They were not paid, notwithstanding chasing by letters and verbally. On 25 September 2019,

Mr Lawrence emailed Mr. Kan stating that the Defendant's fees were £79,268.54 to date in respect of 5 bills[2] and that he anticipated incurring £60,000 more by way of costs to trial: £20,000 for counsel, £5,000 each for three experts, and £25,000 for his firm (all figures inclusive of VAT). This gave a projected total costs (including one bill relating to a matter concerning another property, 73/74 Eaton Square) of some £139,269. He said the figure of £60,000 was an estimate and not fixed but that payment was required urgently. He went on to say that he "*simply cannot instruct barrister or the experts (and be liable for their fees) without the monies up front from [the Claimant]*. He added:

> *"Given the length of time [the Claimant] takes to settle bills, it would have (and already has had) a serious impact on our cash flow. Secondly, all expert reports are due to be exchanged on 14 October, putting us under extreme pressure to comply with that date".*

33. On 2 October 2019, the same date that the witness statements were exchanged in the litigation and a week after setting out the sum sought by way of interim on account payment, Mr. Lawrence emailed Mr. Kan as follows:

> *"Just to explain my position in more detail, and putting aside the question of the experts, we also have a barrister booked for the trial in November.*
>
> *He is already owed fees for his work so far of £10,200, which has been outstanding since June.*
>
> *The relevance is that the barrister will not be willing to act on* [the Claimant]*'s behalf at trial without, firstly, payment of his outstanding fees and, secondly, payment of his brief fee (the work for preparation and attendance at trial) paid to him in advance, say early November.*
>
> *If no such funding is available, I will also need to release him from this diary commitment very soon.*

[2] All on their face relating to 45 Wilton Crescent save the first which it related to another property owned by the Claimant 74-75 Eaton Square). They were as follows:

Date of invoice	Invoice no.	Total Amount	Profit costs (excluding VAT)
24.09.18	285	£6,462.00	£5,355
12.02.19	332	£6,499.00	£5,330
02.05.19	346	£29,200.69	£24,082.50
11.06.19	354	£17,7 59.85	£6,272.50
16.09.19	399	£19,347.00	£16,120
Totals		£79,268.54	£57,160

In all the circumstances, unless [the Claimant] *can pretty much immediately send the funds to me I will unfortunately have no option to give notice that my firm is no longer acting and that the retainer ends on the grounds of the unpaid fees and failure to supply monies on account."*

34. He went on to say:

"I would also, in that scenario, need to notify the tribunal and the solicitors for the other party, that we are no longer acting. It would then be for [the Claimant] acting in person to deal with the tribunal and the other side direct.

Plainly if she withdraws her case, she is quite likely to receive a costs order against her.

I do not want to go down this route but will have little option: the failure to pay outstanding bills is already causing serious cash flow issues for my firm and, as indicated previously, my firm cannot fund the ongoing litigation itself."

35. By email dated 3 October 2019 Mr Lawrence gave notice that the Defendant would cease to act for the Claimant and that the retainer would be terminated at 2pm that day unless an agreement was in place in respect of fees. He said he would write to all other parties and the Court informing them of the same and that the barrister instructed for the trial would be cancelled.

36. No payment was then forthcoming but on 7 October 2019, it was proposed by Mr. Kan, on behalf of the Claimant, that she paid £10,000 that day to the Defendant, £50,000 by 11 October 2019, of which £25,000 be paid to the court's' fees and counsel's fees, and £80,000 by 25 October 2019. Mr Lawrence replied that the proposals were acceptable as long as the following terms were also accepted and which he needed "*in order to protect his firm*":

"a) My firm will act for [the Claimant] again on the same terms as existed prior to the termination of my firm's retainer.
b) I need confirmation that my firm's bills submitted so far are all agreed and undisputed.
c) In terms of my firm's fees going forward, it needs to be accepted that this is an agreed and undisputed fixed fee of £25,000 plus vat for my firm's work up to and including 22 November 2019 (being the last day of trial). For my part, I am happy to limit the ongoing fee to this amount, even if the work carried out exceeds this amount. This fee does not include disbursements, which will be payable in full in any event. Any work after 22 November 2019 will be payable on the same hourly rates as previously (£325 plus VAT per hour).
d) It needs to be agreed and understood that, in the event that any of your proposed payment dates are missed, my firm reserves the right again to cease acting and immediately to dis-instruct the experts and/or barrister. In such circumstances, my firm will be able to allocate any funds that it has received as it sees fit.

e) It needs to be agreed and understood that, given the lateness in instructing experts, we may well have difficulty in finding experts to assist at such short notice and/or that any who are instructed may be disadvantaged; and that no liability attaches to my firm as a result. In the time available, we will simply do our best. My firm may choose the experts based on availability.

Please confirm, on behalf of [the Claimant], that the above points are agreed. I am starting work again now in an anticipation but will not formally instruct anyone until confirmation is received."

37. I would note in respect of the matter set out at (a) that the terms proposed, being a fixed fee, were not as previously agreed, or at least contemplated, under the terms of the retainer (even noting that the retainer refers to the charging arrangements of the firm including those other than charging on a time basis). Clause 3.7 of the retainer refers to any work being undertaken in accordance with hourly rates and there is force in the assertion on behalf of the Claimant that what was being proposed was an amendment to the retainer. In any event the proposals were accepted and agreed by Mr. Kan the same day and on 8 October 2019, the Claimant paid £10,000 to the Defendant.

38. On 10 October 2019 Mr. Kan emailed Mr. Lawrence informing him that there would be a delay in the second payment, referring to the sale of another property (referred to as Palace Green) which, it was suggested, would lead to the release of funds such that at that point "*we will be able to settle all of your fee arrears*". He went on to say:

"I do appreciate that this changes our agreement. I am doing my best in an evolving landscape but I do think that we are making progress.

In view of the above, I do hope that you will agree to continue work on the case. I will also understand if you chose to "down pens".

Please call me if you wish to discuss matters further."

39. On 10 October 2019 Mr Lawrence emailed the Claimant and Mr Kan as follows:

"It is obviously very frustrating to receive this news, having reached an agreement for payment in good faith by tomorrow, which would have protected my firm. That said, I know that you are doing your best in difficult circumstances.

In light of the agreement we had reached, my firm has already instructed two experts with the third due to be instructed today.

It puts my firm significantly at risk, because on the one hand we were to be in funds tomorrow, whereas now you are saying we will be in full funds only in a further ten days. I note the correspondence you have provided merely refers to exchange of contracts "as soon as possible" and we all know that the date for exchange of contracts regularly gets put back, so I am more than a little concerned. It seems to me

that there is merely a possibility that the full funds will be available in ten days, but a distinct risk that they will not be available. Soon my firm will be receiving invoices from the experts that they will expect to have paid.

On a separate note, having met with two of the three experts yesterday (together with [the Claimant]), plus had email discussions with a third suitable expert, it has become apparent that the earlier fee estimate that I gave for their work is not realistic, now that I know their hourly rates. The availability of experts has been significantly reduced due to time constraints, leaving little option as to who to instruct and at what rate. In turn, they are requiring significantly more input from me than I had anticipated, which also means that my fixed fees at £25k plus VAT up to 22 November needs to be reconsidered.

[The Claimant] does, of course, have an argument for recovery of all of her fees from the tenant if successful, which I have already discussed with her.

In terms of the three experts, my revised estimate for their fees is as follows:

a) Building Surveyor: £15,000 plus vat
b) Lift consultant: £10,000 plus vat
c) Valuer: £20,000 plus vat.

If [the Claimant] expects me to take these risks, it can only be on revised terms as follows:

1. I am prepared to agree a fixed fee for the work of my firm relating to this matter from my firm's last invoice up to and including 22 November 2019 at £40,000 plus vat payable whether or not the case reaches trial. Any work after 22 November 2019 will be payable on the same hourly rates as previously (£325 plus vat per hour). It will remain the case that my firm's bills submitted so far (see below) are all agreed and undisputed.
2. The barrister's brief fee can remain the same as previously advised (£20,000 inc VAT). If our current barrister is unable to accept this level for his fees, we will find a different barrister who can stay within this budget. I will use the £10,000 paid recently in part payment of the barrister's outstanding invoice."

40. Mr. Lawrence went on to say he required payment of £191,268.54 (after accounting for £10,000 paid) for the earlier bills. The "*[m]onies on account"* (all inclusive of VAT) were required were in respect of following:

"Building surveyor: £18,000;
Lift consultant:£12,000;
Valuer: £24,000;
WH Lawrence Solicitors: £48,000;
Barrister's fees: £20,000"

41. The email of Mr. Lawrence continued:

"*4. I reiterate that the fees for the monies on account are only estimates (except for my own firm's proposed fixed fee). To the extent that any of the experts fees are less,* [the

Claimant] *will be refunded; and, if more, I will invoice her for the extra and will need prompt payment.*

5. The total sum above must be paid by 20 October 2019 to the account details that I have provided to you. It needs to be agreed and understood that, in the event that the total sum above is not paid by this date, my firm reserves the right again to cease acting and immediately to dis-instruct the experts and/or barrister. In such circumstances, my firm will be able to allocate any funds that it has received as it sees fit.

6. It remains the case and still needs to be agreed and understood that, given the lateness in instructing experts and barrister, that any experts and barrister who are instructed may be disadvantaged; and that no liability attaches to my firm as a result. My firm may choose the experts and barrister based on availability, expertise and price.

It remains the case that I still very much want to help [the Claimant] as outlined above but she should be under no illusion that she simply will not be represented at trial if appropriate funding cannot be made available in good time."

42. Mr. Kan replied on 10 October 2019 at 17.31:

"Thank you for your email. I perfectly understand your frustration.

We can agree to your proposal for the payment of £121,000 on account for work going forward plus all arrears by 20th October."

43. Mr. Lawrence then emailed to the effect that there had been misunderstanding on the part of the Claimant as to the sum required; being £191,268.54, not £121,000 on account of work going forward, plus all arrears. In a subsequent email of 14 October 2019 Mr. Kan emailed the Claimant's acceptance of the proposals (1) to (6) in Mr. Lawrence's email of 10 October 2019.

44. I would note, in passing, that from the email of 25 September the estimate in respect of experts' fees had increased from £15,000 (inclusive of VAT) to about £54,000, an increase of 360%. The overall estimated costs (allowing for a bill the Eaton Square property) had increased from c. £140,000 to c. £200,000. This was at a point just over a month before trial.

45. On 21 October 2019 Mr. Lawrence emailed the Claimant and Mr. Kan stating that no further payment had been received by the Defendant and that all three experts had been instructed. He went on to say:

"....as previously explained, no barrister will accept instructions without payment of their brief fee up front and I do need the entirety of the monies to be paid in order for my firm to continue to act. Time is very short as I will very soon have to make a payment to a barrister in order to secure their services for the trial."

46. It appears that on 24 October 2019 the Claimant called to let Mr. Lawrence know that she would try and let him have some funds then but that the full amount £191.268.54 would be paid by 1 November 2019. Mr. Lawrence wrote:

> "*As I have explained to you, we may have to change barristers in light of this delay and Friday 1 November must be considered the absolute deadline for payment, after which date (in the event that the monies have not been received) I would have to cease acting on your behalf."*

47. [……..] Mr. Lawrence says that there were difficulties instructing the barrister who had earlier been instructed who was said to have had to withdraw because of "*uncertainty over funding*" and "*lack of formal instructions*". A more experienced barrister was to be instructed and a higher fee had been agreed adding a further £10,000 to the sum claimed and taking it to £201,268.54. Mr. Lawrence said that this was agreed on 31 October 2021.

48. On 9 November 2019 Mr. Lawrence emailed stating that he had received no further funds. [……..] He went on to say:

> *"…*[……..]. *I acknowledge that you are trying to get funds together but, as yet, nothing has arrived. I told you last night that I would reluctantly have to stop acting. The failure to provide funding has placed my firm in difficulty.*
>
> *My suggestion is the following.*
>
> *1. I will continue to work on the settlement agreement and liaise throughout this weekend with* [the Respondent's] *solicitor regarding the settlement.*
>
> [……..]
>
> *3. I will very shortly receive invoices for payment from all three experts. In respect of those invoices, my firm will pay their fees on your behalf in accordance with each of their payment terms, but only on the following conditions:*
> *a. You send to my firm in cleared funds by 6pm on or before 16 November 2019 the sum of at least£50,000 (more if it becomes available).*
> *b. You will send to my firm in cleared funds by 6pm on or before 1 December 2019, the balance i.e. the sum of £201,268.54 less the sum sent at 3a above. So, for example, if you send £50,000 by 22 November 2019, you will then send £151,268.54 by 1 December 2019.*
>
> *4. In any event, your total liability to my firm in respect of my firm's work up to and including the date of settlement or, if later, the last day of the trial (22 November 2019) will be an agreed and undisputed sum of £201,268.54 inclusive of all disbursements and vat. This will include my firm's work not only on 45 Wilton Crescent but also on74/75 Eaton Square. You will have no liability over that sum to my firm or other professionals, assuming that no other professionals are instructed. This effectively will mean that, in return for my firm's continued support and assistance in trying to reach*

settlement and also in return for agreeing to your delay in paying fees, my firm will receive an overall uplift on fees.

[……..]

Please either call me to discuss today or reply by email to confirm that the above is agreed, so that I can press on with liaising with [the Respondent] *regarding settlement. Assuming the above is agreed, I would also urge you to put in place now alternative means of paying the above amounts. You cannot rely on your sale of another property proceeding intime, so you must look to secure other sources of funding elsewhere."*

49. Mr. Kan stated in an email in response on the same day that the proposed sale of the property at Palace Green was still proceeding but that there had been problems as the buyer was away and on business. He said the instructions had been given to transfer £30,000 to the Defendant and went on to say that the buyer (for Palace Green) was now back *"and focused on closing this deal".* He expressed the hope that Mr. Lawrence will continue to prepare for the case and appoint a barrister.

50. The Claimant made a further payment £30,000 on or around 11 November 2019.

51. Mr. Lawrence emailed Mr. Kan on 13 November 2019 as follows :

"Given the seriousness of the issues relating to the funding by you of the litigation, I have discussed matters in detail with my firm's other shareholder and set out the firm's position below. As you know, the £30,000 that you have sent to me recently will shortly be paid to our barrister.

As for the experts, none have been paid anything yet and their combined fees up to and including trial will be in the region of £70,000 inclusive of vat.

My understanding is that you propose to send to me £20,000 by Friday. Now that it is clear that the trial will be going ahead, I must insist that the full £70,000 (and not £20,000) is sent to me by Friday, so that my firm is not exposed to your liability for the fees of the experts. This is fully in accordance with what I have told you for some time, namely that you must be in a position to fund this litigation. As for my firm's fees, I have agreed to delay payment as previously discussed but you must be in a position to settle my firm's fees in full on the sale of the property and in any event by the date agreed of 15 December 2019 (whether or not the sale has then completed).

I am writing this email to you this morning so that you can take all necessary steps between now and Friday to arrange payment of the £70,000, in order that the experts may attend trial."

52. On about 15 November 2019 a further payment of £30,000 was made to the Defendant- bringing to £70,000 the sums that had been paid. Mr. Lawrence says this further sum was

used to pay the building surveyor's fees and lift consultant's fees and the said to leave a balance of £1,483.63 which was held in a bank account against the Defendants' fees.

53. Following the end of the hearing 21 November 2019, there were further requests of payment by the Defendant. On 26 November 2019, an invoice numbered 415, was rendered by the Defendant in the sum of £118,978.34 (by invoice no. 415). On 28 November 2019, Mr Lawrence chased by email the fees of the valuer, Mr Kan's fees and his firm's fees. He said this:

> *"You had indicated that monies would become available last Friday to pay Mr Kay's fees but I have heard nothing further from you. Mr Kay's fees are due for payment immediately.*
>
> *As for my firm's fees, I agreed (via Anthony Kan) that payment could be delayed to, at the very latest, 15 December2019 in the event that your property had not sold before then. However, as a reminder, I made that concession in order to allow you sufficient time to arrange payment through other means in case the sale has not proceeded by then. This remains the case and you should therefore be taking now whatever steps are necessary to rearrange your finances in order to make the payment by that date.*
>
> *As always, I am very grateful for the work that you have sent to my firm but the delays in payment have caused considerable difficulties. Accordingly, any further delay in payment of my firm's fees beyond 15 December will be unacceptable."*

54. By email sent on 12 December 2019 Mr. Lawrence wrote saying that had received a call from a Bangkok bank effectively seeking a return of £30,000 (with the suggestion that the sum had been paid by mistake) and expressing concern that the deadline for payment was 15 December 2019. He said that he had agreed to extend the date for payment to allow time to arrange alternative financing in the event that the Palace Green sale had not completed and asked for details of the steps taken to arrange funding and confirmation that payment deadlines will be met. He went to say that "*there was a limit to the number of times you can make promises of payment, which do not materialise*".

55. On 7 January 2020 the draft judgment of the FTT was sent to the Claimant. The Defendant passed the decision onto counsel. On 9 January 2020 Claimant was advised by Mr Lawrence that counsel considered that there were strong grounds of appeal and he requested a meeting with her.

56. I understand that further funds were again promised by the end of January 2020 but were not received by the Defendant. On 3 February 2020 Mr. Lawrence emailed indicating that they were running out of time as regards the appeal. The urgency of the situation was reiterated on 6 February 2021.

57. On 10 February 2020 the Defendant proposed a fixed fee arrangement to Mr. Kay, valuer, in respect of his fee and wrote to the expert valuer saying that the Claimant did want to appeal the decision of the FTT. It appears that on the same day, Mr Lawrence had a

discussion with the Claimant in which it was suggested that a fair fee for the Defendant's fees to include the fees in respect of an appeal would be £250,000 plus VAT and any new disbursements.

58. The Claimant and Mr. Lawrence met on the morning of 11 February 2020. No attendance note has been produced of the meeting (it being said that none had been made by Mr. Lawrence). Following this meeting and on the same day at 12.17 pm an email was sent to Mr Kan setting out the proposed terms of the Agreement as follows:

> *"Further to my meeting with* [the Claimant] *this morning, this email sets out the basis on which* [the Claimant] *agrees that my firm will act for* [the Claimant] *going forward in relation to an appeal of the tribunal decision relating to 45 Wilton Crescent.*
>
> *1. By no later than 23 March 2020,* [the Claimant] *will pay the sum of £250,000 plus VAT to my firm as a fixed fee in respect of:*
>
> > *a. Work carried out already as per the unpaid fees under invoice numbers 285 (relating to 74/75 Eaton Square); and invoice numbers 332, 346, 354, 399 and 415 (all relating to 45 Wilton Crescent); and*
> >
> > *b. my firm's work going forward in relation to the appeal.*
>
> *2. Work at 1(b) above will include all work relating to the appeal up to and including the appeal hearing or, if earlier, the conclusion of the tribunal case. It will also include settlement discussions, if necessary. As discussed, after my return from holiday (in week commencing 24 February), it would be sensible to engage with* [the Respondent] *regarding settlement.*
>
> 3. *The sum at 1 above is payable in full by that date, whether or not permission to appeal is granted or settlement has been reached. It is also payable irrespective of the outcome of any appeal hearing, should we get that far. The date of 23 March 2020 gives around six weeks from today, affording enough time to rearrange* [the Claimant]*'s finances.*
>
> *4. For the avoidance of doubt, the following is not included in the sum payable at 1 above and will be payable separately by* [the Claimant].
>
> > *a. Any disbursements, including counsel's fees, expert's fees and court fees; all of which are payable in addition to the sum at 1 above, together with vat as applicable. I will email you/*[the Claimant] *separately in relation to the expert's fees.*
> >
> > *b. Any work involved in defending any court claim brought by* [the Respondent]. *We do not know whether any such claim will be brought but my firm's work for this would be payable in addition to the sum to be paid at 1 above. Obviously, if we engage in settlement discussions, the aim would be to compromise any further claim Dimitris might have as part of that settlement.*
>
> *5. I will invoice*[the Claimant] *for the balance of monies due to my firm so that the total payable is £250,000 plus vat, taking account of the unpaid invoices referred to above.* [The Claimant] *agrees that this sum is an agreed and undisputed sum payable by* [the

Claimant] *to my firm, for which no cross claim or set off exists; and accordingly is payable as a in any event by no later than 23 March 2020*.

59. Mr. Lawrence stated that he needed "*confirmation*" of agreement to the terms urgently that day and that the deadline for filing papers at Court was on Friday (14 February 2020). The Claimant appeared to confirm in a text message that Mr. Kan would agree the proposal. Mr. Kan emailed back to say that the proposal was agreed.

60. Mr Lawrence then rendered a bill (number 452) for £111,021.66 the next day which Mr. Kan understood was intended to 'make up' the outstanding sum in respect of the Defendant's fees to £250,000 plus VAT (it appears that there was a calculations error in the bill, albeit anything turns on this). On or about 25 February 2020 further invoices, which I am not immediately concerned with, were served.

61. On 9 March 2020, the Defendant emailed the Claimant seeking payment of £340,902.02, including £300,000 (inclusive of VAT) in respect of work carried out and the Defendant's work going forward in the appeal and £39,076.89 inclusive of VAT in respect of the valuer's fees together with various other disbursements (including counsel's fees in the sum of £1,833 inclusive of VAT). A statutory demand was obtained by the Defendant on 15 June 2021 in the sum of £307,368.69 in respect, it, appears of the Defendant's own fee excluding the fees of valuer which were, as I understand it, the subject of a separate statutory demand made on 15 April 2020.

62. I should say that there is some dispute about the calculations and whether credit had properly given for the £70,000 paid but it is not necessary for me to get into the details of this. The broad picture as to the fees and disbursements is clear enough for current purposes.

- Fairness?

63. Although no attendance note was prepared of the meeting on 11 February 2020, I accept Mr. Lawrence's account of this meeting in so far as it is corroborated by the email set out above. It appears likely that the account in the email would substantially follow that which had been discussed earlier. I am satisfied that Mr. Lawrence explained the proposal to the Claimant, discussed the appeal and highlighted the deadline relating to the possible appeal. He set out his proposal regarding fees which he advised her that Mr Kan would need to advise her upon. I also accept that neither the Claimant nor (subsequently) Mr. Kan raised objections to the proposals. I am satisfied that the Claimant knew she was entering into a fixed fee agreement which would not give the same rights of challenge as delivery of a solicitor's bill ordinarily would.

64. I note also Mr. Lawrence says that the relationship (despite the lack of payment) was still very cordial and there was no indication that the Claimant might wish to dispute the level of any of his firm's fees; indeed the Claimant was apologetic that his firm's fees and those of the valuer were still unpaid.

65. Mr. Lawrence says that he advised that the fixing of the amount in respect of his fees had the effect that the fees were not capable of dispute later on and, if the Claimant agreed it,

she would be at risk of a statutory demand and then a bankruptcy petition if she failed to pay either sum on time. Although not appearing in the email, I accept that this was the case. The advice did not however make any mention of the procedure whereby a fixed fee agreement in writing amounted to a contentious business agreement and is subject to challenge (and consideration of the court) under section 61 of the 1974 Act. It is not however said by the Claimant that anything necessarily arises out of this, since -of course- the Agreement has been challenged.

66. It is difficult to see any unfairness arising out of any failure to bill on a monthly basis as the retainer stated that this was merely the Defendant's practice. It appears that time ledgers relating to bills 285, 332, 346, 354 and 399 were sent by the Defendant at some time shortly before the sending of the bills and they set out the work was that was done in the early stages of the retainer. But it is clear that the broader complaint of the Claimant was in respect of the period from the last of this series of bills, in particular from October onwards. The Claimant may well have known about some of the work done by Mr. Lawrence from any involvement by her in the claim. But the Claimant and Mr. Kan appear to have been given little other information about the solicitors' work done or to be done from the last of the conventional bills and they would have had greater difficulty assessing the reasonableness of the fees claimed from this point on.

67. Much reliance is placed by the Defendant upon the involvement of Mr. Kan who, the Defendant asserts, was the Claimant's "*trusted professional advisor*". He was not however a lawyer but an accountant by way of background. Although he could assist with what, to my mind, are complicated calculations involved in the Defendant's billing and changing costs proposals, I am not satisfied that he had any substantial experience of legal matters or indeed was in any position to assess whether the Defendant's various fixed fee proposals were reasonable.

68. I accept that the Claimant is an experienced property investor and business woman. The Claimant's assertion that she was "*not experienced in legal matters*" to my mind does not sit with her involvement in a case, *Scottish Widows PLC v Tripipatkul* [2003] EWHC 1874, which appears to relate to the insolvency of one of her businesses. It appears that she has been involved in other more recent litigation referred to by Mr. Lawrence concerning another property, 74/75 Eaton Square (following attempted re-possession by lenders). These matters suggest that she had indeed some significant experience as a party to litigation. However, it does not follow that she had a real appreciation of the extent of work undertaken by the Defendant in the FTT in the absence of any details of such work. Nor do I consider that she could be taken to appreciate the extent of the work likely to be undertaken in an appeal. To my mind she and Mr. Kan were unlikely to have had the knowledge or experience to consider the reasonableness of the proposal that were put to her by way of fixed fee agreement.

69. Were permission to appeal to be refused, the solicitors would inevitably receive large sums by way of fees, without having to do anything more than a modest amount of work. A non-lawyer not familiar with litigation in the tribunals might assume that the process of obtaining permission to appeal is quasi-administrative in nature, or least a relatively low bar and I do not think that I can make assumptions otherwise in respect of the Claimant's

understanding of the procedures. There appears to have been no clear explanation that this was a substantive hurdle (which it could not be assumed that the Claimant would overcome) or that the work involved in seeking permission to appeal could reasonably be assumed to be modest.

70. I accept that the Claimant took no independent legal advice on the terms of the Agreement before entering into the Agreement. In coming to this conclusion I have considered the disclosure provided by the Claimant. I understood from Mr. Marven that it was the Defendant's case that it is unlikely that the Claimant had given complete disclosure. I accept that the documents indicate that the Claimant was working with (or communicating with) other solicitors on other matters at or about this time: she was able to ask for the assistance of other solicitors on legal matters. Whether Mr. Marven is right about the adequacy of the disclosure (a matter it was open to complain about at earlier stage and to seek to cross examine the Claimant about) and there were other relevant communications potentially caught by the order (a matter I was not satisfied that I should infer), to my mind she probably did not have adequate time in which to seek advice even if she had considered it necessary to do so. The Claimant says in her witness statement that it was not suggested that she should seek independent advice and I accept that she was not indeed advised that it might be sensible for her to do so. As appears above, Mr. Lawrence required an almost immediate response to his proposal and it is unlikely in any event that lawyers would be able to advise her about these matters in the time available even if it had been possible to instruct them (as, it seems to me, Mr. Lawrence was likely to have appreciated).

71. The Claimant says that the Agreement was entered into only very shortly before she was required to file the Notice of Appeal, on 14 February 2020. If she had rejected the Defendant's proposal, she considers that the solicitors would have ceased to act for her. She says that she did not, at that time, have any practical alternative, aside from abandoning the appeal, but to accede to the proposal. There was no opportunity to instruct new solicitors to review the papers and prepare and file an appeal. She thus felt forced to enter into the Agreement if she were to appeal; and Mr Lawrence had advised her, she says, that she was likely to succeed in the appeal. She says that she did not even have time to go away and reflect on the proposal, given the tight timelines involved.

72. The Defendant does not appear to dispute that the Agreement was entered at what were referred to as **'**pressure points' such that there was limited time to make a decision on the proposal. It is difficult to see that the Claimant would have the expertise to draft a Notice of Appeal herself, to instruct other solicitors in time to lodge Grounds of Appeal such that in practical terms without the assistance of the Defendant she was unlikely be able to lodge a Notice of Appeal. It was much the same in respect of the first and second fixed fee proposals where the options raised were to continue with the claim or act without representation (I note in the email of 7 October 2019 no mention is made of the possibility of instructing other solicitors).

73. The Defendant's case is that these difficulties were of the Claimant's own making: she was in breach of the terms of retainer and had failed to make reasonable interim on account payments and had been given, they assert, considerable indulgence. Effectively, the same or

similar point made in respect of the issue of reasonableness and I address these matters below.

74. There are, perhaps, other points to consider which, although not canvassed in the Claimant's pleaded case, to my mind clearly arise. They are similar to those that concerned the Senior Costs Judge in *Vilvarajah* (a copy of the decision that the was provided to Mr. Marven in the course of the hearing). It appears that no advice was given as to the effect of the Agreement (or indeed the previous fixed fee agreement) on any costs recovery and as to whether the Agreement would affect the ability of the Claimant to recover costs in the litigation were she to have benefit of a costs order in her favour: in short whether, in the light of any possible costs recovery, it was in her interests to agree to an arrangement of this sort.

Reasonableness?

75. When considering the reasonableness of the terms of the Agreement, I have to leave out of account the issue of fairness: thus, even if the mode of agreement were fair the terms of agreement may be considered unreasonable. Also, I have to consider the reasonableness of the terms as at the date when the Agreement was entered to.

76. The fixed fee proposal related not only to all unpaid invoices but also to work in the appeal, with any further disbursements, including notably in respect of counsel, to be paid separately. Mr. Lawrence says that it was not possible for him to know how long any appeal process would take, the extent to which he would be involved in detailed work together with counsel or the extent of any further settlement discussions. He says he was also very concerned as to the lack of security as to his firm's fees, the Claimant's inability, or unwillingness, to provide further monies on account, and the real risk of having to pursue her for payment (as subsequently transpired with the Defendant's subsequent issue of a statutory demand) with cash flow problems for his firm as a result of the delays. He says that set against an initial claim of over £771,000 and a potentially very significant set off, he decided that "*a fair fee*" would be £250,000 plus VAT and any new disbursements.

77. I note that in the event there was very limited attempt to justify, at least in any detailed way, the fees by reference to the work done or to be done. Although, as noted above, I have been provided with ledgers in respect the earlier bills, and they do indicate the nature of the activity of the solicitors: writing emails etc and work on the witness statements, for example. (I note, in passing, that they also included a charge for work on any letter of engagement on 23 July 2018, not normally chargeable work). I have however not been provided with a breakdown of the work from the last of the bills up the date of the Agreement nor has there been detailed setting out of the work anticipated at the time of entry.

78. Mr Marven sought to argue that the fixed fee covered further work in the proceedings before the FTT; the work then anticipated involved the experts, primarily, in calculating the effects of the judgment (it later emerged, as I understand it, there were what were called 'legal' issues arising). I would have difficulty accepting that such work was included in the Agreement, save insofar it was relevant to settlement negotiations, since it is not work undertaken in respect of the appeal (cf paragraph 2 of the Agreement at [58] above); the

mere fact that it was not work excluded by para 4 did not seem to me determinative, as Mr. Marven argued. I am moreover not satisfied that any substantial work by the Defendant (as opposed to the experts) in respect of the working out of the FTT decision was anticipated at the time of the Agreement. The fact that the solicitors have not billed for this work separately from the Agreement could not to my mind be determinative, as Mr Marven also argued, as what happened after the Agreement could not alter the terms of the Agreement and because (inter alia) this would be to look at the matter with hindsight, which I am enjoined not to do.

79. My calculations of the billed fees, up the point when the first of the series of fixed fee agreement was entered into on 7 October 2019, suggest the Defendant's billed fees were of order £58,000 plus VAT. The fees due under the first fixed fee agreement were a further £25,000 plus VAT to the end of the trial. I am not persuaded that an increase to £40,000 was reasonable in the circumstances, in particular by the explanation that the experts required significantly more input from Mr. Lawrence than had anticipated: an additional £15,000 equates to over 46 additional hours work at the hourly rate claimed (which might ordinarily equate to substantially over a week's additional work) which appears unreasonably high. In any event, even if I were to allow the sum as agreed in the second (or revised) fixed fee agreement of 14 October 2019 to the end of the trial, that would account for some £100,000 (excluding VAT) in total of solicitors' fees. That would notionally leave a balance of some £150,000 in respect of interest (on unpaid bills) and appeal costs. Mr. Kan calculated the corresponding figure should be nearer £130,000. But my findings in relation to this matter apply whichever the correct calculation and, also, acknowledging that there may be a significant degree of approximation in this analysis.

80. I accept that this dispute was of some importance to the Claimant. Mr Lawrence appears to rely upon the figure of over £770,000 as indicating the value of the dispute. But this figure is the total claimed cost of the remedial work and does not appear to recognise that that the claim against the Respondent was only for a proportion of this amount; the balance being other claims against the other leaseholders, including, at least substantially, companies controlled by the Claimant herself. [……..]

81. Bearing in mind all circumstances an hourly rate for a lead fee earner of £325 per hour does not appear unreasonable. However, a fee of £250,000, on my calculations, equates to just under 770 hours of continuous and uninterrupted work at this rate. And if a solid working week were to be about 35/40 hours of work (and, broadly speaking, that would be my understanding) the sum claimed would equate to some 20.5 working weeks.

82. Ordinarily, the reasonableness of a lead fee earner with an hourly rate of some £325 per hour would be considered in the context of the involvement of a lower grade fee earner who would be expected to be do much of the more routine work such as bundling, liaising with experts and the court/tribunal, and preparing the first draft of witness statements. It would ordinarily be expected that such lower grade fee earners would be charged to the client at substantially less than £325 per hour. My concerns however arise even if it were reasonable on a solicitor-client basis for all the work to be undertaken by the lead earner.

83. I accept also that there was some significant work to be done by solicitors in respect of the preparation of experts' reports for the FTT hearing, albeit that the substantial burden of the work lay, of course, with the experts. Detailed witness statements had been taken but these were from witnesses of a professional or commercial background (a feature which could be expected to impact on the time required to draft the witness statements). There were settlement discussions and the hearing bundle for the FTT hearing had to be prepared (much of which would ordinarily be delegated). There was also perhaps be some attendance at the hearing before the FTT - albeit is it not clear to me whether it would have been reasonable Mr Lawrence to attend, or he be expected to, to attend the hearing for its full duration or whether he in fact did so (albeit for current purposes I proceed on the basis that there was reasonable attendance by him for its full duration).

84. As indicated above, I was not provided with the Grounds of Appeal until the hearing. It is not necessary for me to set out the Grounds in detail, albeit I have considered them closely in reaching my decision. They include the contentions that the FTT (1) failed to discount the claim on the grounds that the Respondent had obstructed the works (and failed to properly to mitigate his loss), (2) erred in preferring the evidence of the Respondent's valuer in respect of (a) to the notional rental value of the flat, (b) the diminution in value of the notional rental value; (3) erred in its approach to assessing the condition of the building in the period in question and (4) that the overall allowances the FTT had made (albeit not calculated) was excessive alongside the actual loss of amenity (reference being made to the decision *Moorjani v Durban Estates* [2015] EWCA Civ 1252).

85. As I indicated above, I was not provided with the decision refusing permission to appeal (or the terms of any refusal) albeit I was shown a response served on behalf of the Respondent urging the UT to refuse permission and, in the alternative, to consider any appeal by way of review only. I note however that the fixed fee agreement envisaged that the work would cover the claim made by the Respondent as a set off only and not any work which would be done if a claim (beyond a set off) might be pursued by the Respondent in the County Court.

86. It appears to have been envisaged that counsel would be instructed on the appeal. Counsel would not, of course, conduct the litigation but counsel alone might attend the hearing of a permission to appeal (conventionally, such hearings being short). Substantive responsibility for matters such as the skeleton argument would fall on counsel. It may be that an additional bundle would be prepared for the appeal (much of which work might be administrative - not normally fee-earning - in nature). There would or might be settlement negotiations. It is possible, I am prepared to assume, there would have been a re-hearing and the need for experts to attend (and give evidence concurrently as the valuers had done in the FTT but it is difficult to see that a hearing would last longer (or substantially so) than a single day. If the matter were remitted for re-hearing there might be further work preparing witness statements or experts' evidence. I might add that it is not however clear to me how any work on remitted hearing could be included within the terms of the Agreement, as the fixed fee agreement only applied to work "*up to and including the appeal hearing*".

87. I bear in mind the work described in the bills, which included work on witness statements. It is not possible to cover every possible course the proposed appeal might have taken or indeed all the work associated or ancillary to the litigation, but having considered this in some detail (notwithstanding the limited nature of the submissions to me on this) it seems to me that the figure £250,000 is very substantially in excess of what I would expect to see charged for the work done (even allowing for some interest on the bills) and the work to be done pursuant to the Agreement. Having considered the matters generally, and noting the response of the Respondent to the application for permission to appeal, it is not all clear to me that if permission to appeal had been granted that it was likely that the UT would deal with the appeal by way of rehearing. A consideration of the likely course of the appeal suggests that the fees claimed are grossly excessive: solicitors' fees associated with an appeal giving rise to a one day hearing might reasonably be expected (had the solicitor attended the appeal hearing) to have been no more than £10-£15,000 or at least something in this region. In any event the fixed fee is not, to my mind, justified by any reasonable pre-estimate of costs associated with the appeal.

88. I do not think it can be assumed, and I am not satisfied, that the Claimant knew (notwithstanding her litigation experience) that it would be possible for solicitors to instruct counsel to carry out much of the work associated with the appeal. The Defendant could be expected to consider carefully any skeleton argument and Grounds of Appeal (and potentially have input in respect of these documents) but may, otherwise, have had relatively modest involvement in the appeal; counsel could not conduct the litigation, but short of formally serving documents, there was not much else that counsel could not have been involved with; counsel might, for instance, have been involved to a substantial extent in any settlement discussions and drafting witness statements (if any had been permitted or required). The Agreement thus exposed the Claimant to the possibility that there may be substantial costs in respect of counsel on top of the fixed solicitors' fee in circumstances where solicitor's input was modest.

89. Further and independently of the above, it is asserted by the Claimant that the fee proposal created a strange incentive for the Defendant in that it would benefit significantly if permission were refused. This problem is, perhaps, intrinsic to a fixed fee agreement, and such agreements are not per se unreasonable, but the difficulties are particularly acute where, as here, permission to appeal was required for the litigation to continue. As the Claimant says, when entering into this agreement, she was reliant to a great extent on a positive assessment of the merits, and the likely costs that would be incurred going forward had fees been charged on a time basis. [……..] Plainly, if permission to appeal were refused it would, under the terms of the Agreement lead to a very large gain for the Defendant who would have had to do very little work on the appeal. Thus the reasonableness of the Agreement might depend to an extent on the reasonableness of the advice as to the prosects. I was not, as I say above, provided with the decision refusing permission: and the refusal of permission gives me cause to question whether the prospects of success in particular reducing the amount of the set off had been adequately considered. In any event there was no substantial attempt to justify the advice on appeal in the light of the refusal.

90. Mr. Lawrence stressed the potential for delay in resolution of the appeal; this was particularly so, he said, given that the UT could be presumed to have wanted to know the actual financial implications of the FFT's Decision. But it is not apparent to me that some approximate value of the Respondent's claim by way of set off could not be ascertained quite readily (as appeared to be case), at least as looked at the time when the Agreement was entered into. Given the material findings were in respect of a set off only, it is perhaps unclear why any damages award going beyond a set off would be material to the UT's decision.

91. As to concerns about security for costs, asserted at least in part as a justification for the fee, it is plain to me that there was no such concern at the time. In an email to the expert valuer on 7 January 2020 Mr. Lawrence said this:

> "*Unfortunately, I don't yet have a date by which we will both be paid but the reason for the delay relates to a refinancing and property sale that she is currently carrying out of two of her London properties which, upon completion, will lead to a release of funds to pay off our bills. Given that the properties are worth many millions, there is no question that our fees will be paid, it is simply a matter of waiting for completion of the transactions. I appreciate this is not a satisfactory state of affairs and I assume, in the circumstances, that you will wish to charge interest on your unpaid bills*."

92. Moreover had this been a concern I would have expected security to have been requested at the time.

93. The Defendant contended that the threat to cease acting was justified by the Claimant's failure to pay outstanding fees and the other matters referred to above, including repeated failures to meet promises to pay. It was, as I understand it, submitted that it was not unfair, or unreasonable, for the Defendant to require the Claimant's agreement to the proposal on 11 February 2020 in the way that the Defendant did in the circumstances of this case if the Claimant wished the Defendant to continue to act. Any pressure of time for considering the proposal was, it was said, entirely the responsibility of the Claimant. There was also, it was said, real value to the Claimant in not having to pay the Defendant's fees immediately. If there were no agreement on 11 February 2020 the Defendant could legitimately have ceased acting.

94. The decision in *ex parte Cathcart* requires the court to consider whether the terms of an agreement are reasonable *"having regard to the kind of work which the solicitor has to do under the agreement"*; if the terms are not reasonable applying this test, the Court was *"bound to say that the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner".* As I raised with Mr. Marven in the course of the hearing, it seemed to me that the matters he was asking me to consider as part of the test concerning reasonableness might be said to go beyond those matters relevant to the test as set out in that case. In the event I am not satisfied that the decision in *Bolt Burdon* indicates that the approach in *ex parte Cathcart* has been superseded by a different approach. In *Bolt Burdon* the learned judge was plainly entitled to have regard to considerations of risk in determining

issues of reasonableness given that the agreement in that case was a non-contentious agreement - where broader considerations may apply. In any case, I was not persuaded that it was appropriate for me to depart from what seems to me to be the clear *ratio* of the Court of Appeal decision in *ex parte Cathcart*.

95. I am strengthened in my approach by consideration of other terms of the 1974 Act. Section 65 (2) of the 1974 Act provides that any request for an interim on account payment by a solicitor should be for *"a reasonable sum on account of the costs incurred or to be incurred in the conduct of that business"* and only if *"the client refuses or fails within a reasonable time to make that payment, the refusal or failure shall be deemed to be a good cause whereby the solicitor may, upon giving reasonable notice to the client, withdraw from the retainer."* These provisions, together with others in the same section dealing with security for costs are plainly intended to protect a solicitor's firm's exposure to costs, including by the incurring of disbursements. I am satisfied that they would have adequately protected the Defendant in this case. The provisions of Section 65(2) are intended to strike a balance between solicitors and clients, and to my mind provide some support for the conclusion that I should read the provisions of section 61 strictly in accordance with the decision in *ex parte Cathcart*.

96. Further, it seems to that to extend the consideration of reasonableness in the way contended for would, to my mind, risk undermining the nature of the protection, referred to in *Clare*, that underlies section 61. Moreover, if as I think was the case, the Defendant solicitors were adequately protected by the provisions of Section 65 (2), I have difficulty seeing how demands for payment, whether in the form of interim statute bills or demands for an on account payment, can justify what would otherwise be an agreement on highly unreasonable terms. This is particularly so if demands are made without any adequate information having been provided about anticipated costs before entry into a retainer, or in any event substantially in advance of the demand.

97. I should add perhaps that there are clear difficulties for a client in challenging her own solicitors' interim statute bills in the course of proceedings[3] albeit that the service of such bills would, in principle, give the solicitors the right to sue upon them.

98. By way of further justification, I would add that my concerns about the level of costs claimed by the solicitors extend to the disbursements in this case. I am not satisfied that the dramatic increase in the estimate of experts' fees from 25 September 2019 to 7 October 2019 was justified on the information provided. As I understand it experts' fees amounted to close to some £70,000 (inclusive of VAT) by the end of the hearing in the FTT (some £8,000 for the lift surveyor, some £20,500 building surveyors' fees, and just over £39,000 for the valuer[4]- all VAT inclusive). That is an increase of some 450%. This level of fees (particularly of the building surveyor and valuer) appears to me highly excessive for work which included, but did not, it appears, go much beyond the preparation of a report, the production of joint statement and the giving of evidence (as I understand the evidence of the

[3] See also the observations of Senior Costs Judge Gordon-Saker in *Iwuanyawu v Ratcliffes Solicitors* [2020] EWHC B25 at [26].
[4] The valuer was to charge a further £6,000 including VAT for work on the calculations.

valuer lasted a day). I have similar concerns as to junior counsel's fees including brief and refresher for a hearing of four or five days (£10,000 inclusive of VAT for work on the Statement of Case and initial advice; £30,000 inclusive of VAT for trial) but more particularly as to representations made by Mr. Lawrence that all counsel would demand an up front payment of brief and refreshers, substantially in advance of the trial, which would not accord with my experience. In order to justify costs of the level demanded I would expect to see attendance notes showing attempts to instruct experts, including a valuer, at a more reasonable cost and attempts generally to negotiate fees.

99. The solicitors were acting for the Claimant and were expected to take reasonable steps to minimise their client's liability for disbursements. It is notable in this context that it appears that it was on Mr Lawrence's initiative that the valuer asked for his claim for fees to be accepted as a fixed fee and an agreed debt (rather that than subject to assessment), for which he appears to have been able to bill the Claimant directly. And the Claimant appears to have been persuaded by Mr. Lawrence to accept that the fees claimed would be accepted as a debt; and it was on this basis that the statutory demand was served directly on the Claimant by the valuer in April 2020. Indeed, the exchanges set out above appear to suggest that Mr. Lawrence assumed responsibility for agreeing fees of the experts without involving the Claimant substantially (see in particular [41] above).

100. I might add that in correspondence Mr. Lawrence appears to seek to lay the blame for these heavy fees in respect of disbursements on the Claimant. But I am not satisfied that this is appropriate. The instruction and costs of experts and an advocate are matters solicitors are reasonably expected to address at an early stage in the ligation, or at least at a stage when it was clear that experts and an advocate were reasonably anticipated (the directions hearing in the UT took place, it seems, on 10 January 2019). Mr. Marven argued that I should not have regard to any professional obligations in this regard as this matter had not been specifically raised by the Claimant. Nevertheless the reasonableness of the demands for the fees and disbursements of experts and counsel are plainly matters which arise for consideration in this case given that the apparent lateness of their instruction is suggested as a possible justification for the level of fees. It seems to me in any event that discussions about these matters should have taken place at an earlier stage, and information about the anticipated costs provided, substantially in advance of the final hearing and not in the weeks before the hearing.

101. In any event (and whether I am correct in my findings in the preceding two paragraphs or not) I am not satisfied on the information available that the payment of £70,000 on account was obviously unreasonably low; nor does it seems to me that it was reasonable to demand more on the information available, particularly under the time scales the Defendant set. This is especially so when it was open to the Defendant to request security if needed.

102. Further, I am not satisfied that the failures to pay were "wilful" in the sense that Mr. Marven urged upon me, that the Claimant was deliberately making promises that she knew could not fulfil. In dealing with the application for a debarring order I rejected the Claimant's case that she had given adequate disclosure of her assets and that she could not have paid at least something towards the orders made. I accept however that at the material time for

current purposes she had difficulties with cash flow which affected her ability make large payments of the sort demanded under the time scales which the Defendant set; such difficulties appear to have been accepted by the Defendant at least on 10 October 2019 (see email at [39] above); further in an email dated 8 January 2019 to Mr Kay, the valuer, Mr. Lawrence appeared to blame the problem "*mainly*" to "*disorganisation*" on the part of the Claimant. If these matters had been addressed at an early stage, the Claimant would have had more opportunity to consider the reasonableness of the demands made by the Defendant. As it was, if she were to continue with her claim, she had little or no realistic option but to accept the demands made.

103. Further, it was contended on behalf of the Defendant that the Agreement had been freely and independently entered into by Mr. Kan on behalf of the Claimant and that it was open to him and the Claimant to suggest a lower figure if they were not happy with the terms of Agreement. The difficulty with this, it seems to me, is that section 61 proceeds on the basis that there has been an agreement and that the court is concerned with the reasonableness of that agreement not with whether a better one might have been negotiated by the client. So, I am not satisfied that this can be relevant, still less a substantial factor in determining the reasonableness of the Agreement. I would add that I am not satisfied in any event that the Claimant had sufficient understanding of what a reasonable fixed fee might be. And, even if she had had such an understanding, I am satisfied that the Claimant's ability to negotiate was substantially restricted in the circumstances to which she has referred.

104. Mr. Marven argued that the Claimant could have abandoned the appeal - she did not have to proceed. But I am not satisfied, applying the decision *in ex parte Cathcart* that the Defendant could reasonably demand an unreasonable fee agreement as the price for continuing to act in accordance with the retainer; this is so even if the Defendant were entitled to terminate the agreement. It was also argued that the Claimant could have sought alternative advice on appeal on receipt of the draft decision, but she appears not to have received the final decision before 21 January 2020 and it seems to me unrealistic to expect her to do so. In particular, I note that the impression was given that Mr. Lawrence might assist with the appeal, as indicated by an invitation to a meeting apparently to discuss an appeal, after receipt of the draft decision of the FTT.

Conclusions of fairness and reasonableness as to whether the Agreement should be set aside

105. In my judgment for the reasons set out above, and applying the test in *ex parte Cathcart*, overall the terms of the Agreement were unreasonable having regard to the kind and amount of work done. This is so even if the Claimant were to have been reasonably advised that there were strong or good prospects of obtaining permission to appeal and succeeding on the appeal. In reaching this conclusion I take into account that there was some potential advantage to the Claimant in the deferment of the date of payment of the fees.

106. The Agreement is made, to my mind and for the reason set out above, on plainly disadvantageous terms. And I am not satisfied, for the reasons set out above, that the further matters raised by the Defendant could be said to make its terms reasonable. However, even if

I were wrong as to the approach to the determination of the reasonableness of the terms of Agreement and it were appropriate to have regard to the matters relied upon by the Defendant, such as unsatisfied demands for payment of fees, I would not accept, for the reasons given above, that the terms were reasonable. To my mind overall the level of demands for interim and upfront payments of fees and disbursements were unreasonable.

107. The issues of fairness did not arise for consideration in *ex Parte Cathcart* because the Court was satisfied that the fees claimed were unreasonable and on the basis of its findings the relevant agreement had to be set aside. I consider that I should reach the same conclusion by the same route in this case.

108. Even if I were wrong in my conclusion as to reasonableness of the terms of the Agreement I would conclude that it was unfair having regard to the manner in which it came to be made for the following reasons whether viewed on their own (and hence, alternatively) or cumulatively.

109. It seems to me that the Claimant was not provided with sufficient information to be able to consider the reasonableness of the terms and was not otherwise in a position to consider the same. I think that more is required than advice as to the effect of entering into fixed fee agreement. Significantly in this context, there was, I consider, no adequate or realistic opportunity to take independent advice. To my mind this this could not realistically be obtained when the Agreement was entered into and when the Claimant's efforts were fully or substantially engaged in the demands of the litigation (nor indeed when the first two fixed fee agreements were entered into).

110. In ***Surrey v Barnet*** *and Chase Farm Hospitals NHS Trust and other* [2018] EWCA Civ 451 the claimants were pursuing clinical negligence claims with the benefit of legal aid. After liability had been admitted, the solicitors acting for the claimants arranged for the legal aid certificate to be discharged and for funding thereafter to be by a conditional fee agreement supplemented by an after the event insurance policy. The Court of Appeal allowed an appeal from a decision that the costs of additional liabilities had been reasonably incurred. In respect of the advice given by the solicitors in respect of the change in the funding arrangements, the court referred at [61] to the "*fundamental principle of equity that where a person stands in a fiduciary relationship to another, the fiduciary is not permitted to retain a profit derived from that fiduciary relationship without the fully informed consent of the other*." I am not satisfied that fully or adequately informed consent of the sort required was obtained in this case.

111. Further and independent of the above, to my mind the Claimant was not in a position to properly negotiate its terms (as the solicitors would have appreciated). The imminence of the hearing before the FTT was used as a lever in negotiating the first and second fixed fee agreements, so too was the imminent expiry of the time limit for lodging a Notice of Appeal. The latter time limit acted, as Mr. Lawrence was likely to have appreciated, as a lever applying pressure on the Claimant to accept the fee terms proposed in January 2020. I note that the pressure applied might, in respect of the Agreement, have been relieved by the lodging of the Notice of Appeal, a matter which I would assume would involve a very modest

amount of chargeable work under the existing retainer (indeed I would expect it to involve significantly less work than that which was involved in formulating the Agreement and then discussing it with the Claimant).

112. Further and, again, independent of the above, there appears to have been no advice as to the effect of the fixed agreement on the recovery of costs, in particular in the event that the appeal had been successful (whether at a hearing or by way of compromise). This is a further matter of concern to me. The net effect of the Agreement was that a sum was payable by way of costs which, it appears, would be likely to dwarf the claim (as determined by FTT). My concerns about this are not integral to my decision as to the outcome in this case given my other findings. However the Agreement, it seems, would expose the Claimant to a shortfall in costs even if she were to have the benefit of a costs order in the appeal. The shortfall itself would potentially exceed the value of the sums recovered in respect of the claim for service charges. It seems to me that acting in the Claimant's best interests some advice as to the effect of the Agreement on any potential recovery of costs was reasonably to be expected.

113. There were apologies for non-payment by the Claimant and Mr. Kan and further, an apparent acceptance of the fees and disbursements claimed in the face of the demands made. But it seems this might be explained by a desire on their part not to fall out with the solicitors in the course of litigation and trust by them in their solicitor, that an unreasonable demand for costs would not be made.

114. In the light of my findings is not easy to see what other options are available in this case aside from setting aside the Agreement. Section 61 however provides the Court with a discretion in this regard even if I were to find the Agreement unreasonable or unfair and it is open to me reduce the sums due under the Agreement. Where an hourly rate or a success fee uplift is unreasonable in a conditional fee agreement, it might readily be seen how it could be appropriate to reduce the sums due by reducing the hourly rate payable or the success fee uplift. However there is, to my mind, no means of reducing the liabilities, ie adjusting the amount payable under it under the Agreement, in a way which would have rendered it reasonable (short of an assessment of those costs); and none was clearly advanced before me. It seems to me in any event, in the light of all the findings including those relating to fairness, that the only proper course is to set aside the Agreement.

Postscript

115. Following the sending out my judgment in draft form by email on 23 June 2021 Mr. Marven QC indicated that he wished me to reconsider one element my decision. If I understood him correctly he was concerned that I had, in effect, misunderstood his submissions, and invited me to consider further submissions on the point. I indicated that it appeared appropriate for him to have the opportunity to make further submissions on this point but as a result of his limited availability and limited court time it was not possible to arrange for a hearing for such submissions until 20 July 2021. Subsequently, and by order made on 29 June 2021, I lifted the debarring order on the grounds *inter alia* that its continuation appeared disproportionate and could give rise to substantial injustice given the matters likely to arise on consideration of the consequential orders and other issues arising.

Sometime thereafter and prior to the formal handing down of this judgment the parties settled these costs proceedings.