Case No: 1901346

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

Thomas More Building
Royal Courts of Justice, Strand,
London WC2A 2LL

Date: 29 January 2021

**Before** :

**MASTER HAWORTH**

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**Between :**

| | |
|---|---|
| **(1) James Murray**<br>**(2) Storm Loans Ltd** | **Claimants** |
| **- and -** | |
| **Richard Slade and Company Ltd** | **Defendant** |

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**Robin Dunne** (instructed by **Checkmylegalfees.com**) for the **Claimants**
**Thomas West** for the **Defendant**

Hearing dates: 24-25 November 2020

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# Approved Judgment

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

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MASTER HAWORTH

**Master Haworth, Costs Judge:**

## BACKGROUND

1. This matter relates to a claim by the First Claimant for the assessment of three invoices delivered by the Defendant, his former solicitor, pursuant to Section 70 of the Solicitors Act 1974. The relevant invoices are:

    IN803534 dated 31 May 2018 totalling £20,000.03 inclusive of VAT (Counsel's fee bill);

    IN803734-FF dated 25 January 2019 in the sum of £16,200.00 (Hodder's claim bill);

    IN803735-FF dated 25 January 2019 in the sum of £6,000.00 (Costs of Assessment bill).

2. It was agreed at the hearing that the Costs of Assessment bill be adjourned to await the hand-down of this judgment. Consequently, this judgment relates solely to the Counsel's fee bill and the Hodder's bill.

## FACTS

3. The First Claimant instructed the Defendant to defend a claim from his parents, Mr and Mrs James Victor Murray who sought declarations that they were beneficial owners of properties held in the First Claimant's name. The First Claimant entered into a private retainer with the Defendant in relation to that matter on 22 February 2016.

4. The Hodder's claim bill arose out of a proposed claim by the First Claimant against his former solicitors, Hodders Law Ltd. That matter was the subject of a Conditional Fee Agreement entered into between the First Claimant and Defendant in 2016. The First Claimant's Points of Dispute in relation to the Counsel's fee bill state:

    "**Counsel's Fee - £15,000 plus VAT of £3,000**

    It was agreed between the parties at a meeting on or around [date] that all work from 1 December 2017 to the end of the case would be subject to a fixed fee of £50,000 inclusive of VAT and all disbursements.

    This was to include the fees for Counsel of the Defendant's choice for interim hearings and the trial, and was subject to the exception that if the Claimants wanted a more senior barrister, they would have to pay extra.

    There was an exception in respect of other disbursements, but only to the extent that if the Claimants wanted an expert, that too would be an additional cost.

    The Claimants object to the claim for Counsel's fee in its entirety, which it will be seen is a claim for Counsel's fee to the

extent that it exceeds £10,000 plus VAT, on the following grounds –

1. Francis Moraes was Counsel chosen by the Defendant and his fees ought to be subsumed by the fixed fee agreement.

2. No evidence has been adduced to show that the Claimants wanted a more senior barrister, or that, if they did, they agreed to pay an additional £15,000 plus VAT for the privilege.

3. No evidence has been adduced to show that the element of Counsel's fees for which allowance had been made within the £50k fixed fee was £10,000.

4. No evidence has been adduced to show that (if £10k was the element that had been included in the fixed fee), the Claimants were advised that incurring 2.5 x that figure might be deemed "unusual" for the purpose of CPR 46.9(3)(c) and as a consequence potentially irrecoverable from the opponent.

5. No evidence has been produced to show the process of agreement of the fee with Counsel's clerks.

6. No evidence has been produced to show that the fee, once agreed in principle with Counsel's clerks, was agreed with the Claimants.

7. No evidence has been produced to show that a fee of £25,000 plus VAT has in fact been paid to Mr Moraes.

For the avoidance of doubt the Claimants' position is that a fee of £10,000 plus VAT for Counsel is reasonable, but that that has already been provided for in the fixed fee agreement.

**Defendant's Reply**

The Defendant reached the fixed fee agreement in a meeting following oral discussion between Richard Slade and the First Claimant and the matters discussed are vividly recalled by Mr Slade who will give evidence in that regard. The meeting took place because the First Claimant, who is a serial complainer, had complained about the previous solicitor/client bills in this matter and in relation to progress of the claim which he wished to bring about Hodders. The meeting led to the agreement for the fixed sum (with add-ons) but the agreement was not as presented by the Claimants above. The agreement provided that the fixed fee would be £50,000 inclusive of VAT (the Claimants having refused a suggested

fixed fee of £50,000 plus VAT). However, there were exceptions which would be payable in addition if incurred.

It is plain from the second paragraph in this point of dispute above that the fixed fee made provision only for a Junior Counsel, as the Claimants acknowledge that the agreement would not cover the cost of a more senior barrister or an expert or disbursements. Despite what is said on their behalf in the second paragraph of this point of dispute above, the Claimants have continued to present a case as if the extra fees of the more senior Counsel instructed for the trial should not be paid by them. In relation to the expert evidence, at the time when the agreement was reached it was not clear that expert evidence would be required and thus no expert had been identified, thus it would not have been possible to include the expert's fees in the fixed fee. Subsequently the Claimants paid the fee for expert evidence although they thereafter attempted to reclaim it from AMEX as the payment had been made on the First Claimant's card with that company.

In relation to the other disbursements, these are provided for as being paid separately in addition to the solicitors, time in the various retainers …"

5. In relation to the Hodders claim, the Claimants' Points of Dispute state:

"**No Entitlement to Costs**

These costs were incurred pursuant to a Conditional Fee Agreement dated in or around 23 August 2016 which covered a "claim against the opponent for professional negligence against a former solicitor", the full terms of which will be referred to on assessment.

It is asserted by the Defendant that the retainer was terminated by requesting the return of his papers, however no evidence has been adduced to show that such request was made or that, if it was, it was made in such a way that it amounted to a termination.

Whilst the First Claimant accepts that a request for the papers may have been made – possibly verbally – such request was not made with a view to terminating the retainer, but borne out of frustration about lack of progress. It is denied that the Claimants, or either of them, terminated the retainer in June 2018 or at any point thereafter.

In fact the Claimants have subsequently urged the Defendant to continue with the case, but the Defendant has refused to do so, and has thereby terminated in the retainer in such a way that it is not entitled to any payment.

The First Claimant's frustration at the lack of progress was understandable. In particular –

- Work on preparing the letter of claim was not commenced until around May 2017.
- It was duly sent on 27/10/17.
- The response on 02/02/18 was that the letter of claim contained insufficient information on causation to enable a proper response.
- Whilst there was a subsequent discussion with Counsel, nothing more of substance happened until June 2018
- The delays were, no doubt, caused or contributed to by the high turn-over of fee earners dealing with the matter.
- All of this was against a background of the Defendant confirming that, in respect of at least one aspect of the claim [increased costs due to loss of the file], the case was good.
- In respect of the other aspect [the tax claim] instructions were provided when sought to deal with the causation issues.

**Defendant's Reply**

It is denied that the Claimants did not terminate the retainer but in any event their conduct gave the Defendant grounds to terminate the retainer in their own right.

The Defendant invites the Court to note that only the First Claimant was the client in relation to this matter.

In relation to the First Claimant's termination of the retainer, the Defendant relies upon the First Claimant's complaint by email dated 04/07/18 which is already in the First Claimant's possession. The references in that email to the "Alf" matter relate to the claim which the First Claimant wished to bring against Hodders, his former solicitors, for professional negligence. It should be noted that in that complaint the First Claimant indicates that the second limb of it relates to *"release of file(s) regarding the Alf case and your assurances regarding future progress should we choose to seek another firm of solicitors to take up the case"*."

**EVIDENCE**

6. I was provided with the following witness statements:

James Murray (the First Claimant) -14 August 2020;

Jann Preen (the First Claimant's accountant and business partner) -14 August 2020;

Mark Carlisle (the Claimants' costs lawyer) – 14 August 2020;

Richard Slade (a Partner in the Defendant) – 13 June 2020.

7. I heard oral evidence from Mr Murray and Mr Slade on 24 November 2020.

8. The First Claimant suffers from severe dyslexia with associated impairments to his cognitive ability which was supported by a report from an expert instructed in unrelated proceedings, but which accompanied the Defendant's files of papers in connection with this assessment.

**Counsel's Fee Bill**

9. The Defendants had acted and were acting for the First Claimant in a number of matters. At paragraph 6.1 of the First Claimant's witness statement the First Claimant had complained to the Defendant of poor service and overcharging. As a result, Mr Slade of the Defendants had agreed a substantial reduction of £7,000 in fees including VAT. Against this background, a meeting took place between the First Claimant and Mr Slade on 21 December 2017 at a restaurant in London. The First Claimant's case for the meeting was to discuss fees and on the Defendant's case solely to have lunch.

10. In relation to the question of fees, the First Claimant in his witness statement, states:

> "6.2.2 In terms of the Defendant's own fees, it was agreed that there would be a fixed fee for the rest of the case. This fee would be payable regardless of what time was actually spent. This was to avoid problems of the sort that had been resolved just ten days earlier by the Defendant agreeing to a total credit of £7,000 including VAT and to provide certainty."

11. The witness statement goes on to say:

> "6.2.4 In terms of Counsel's fees, the agreement was that so long as Counsel was chosen by Mr Slade, the fixed fee would include Counsel's fees."

12. Mr Slade in his witness statement recalls the meeting in the following way:

> "11. Mr Murray raised the matter of his previous request for a fixed fee to the end of the case. I did not really want to discuss that over lunch – but, again, he persisted. I had in fact checked the position with Mr Davern beforehand. I sent him an email on 17 December 2017. He replied on 18 December 2017 and sent me the costs budget. I replied, asking how much of the budget had already been spent. Mr Davern replied on 19 December 2017, telling me that there was £27,000-odd left for fees and £21,450 for disbursements. Both figures were

exclusive of VAT and I knew, from the budget, that Mr Hunter's fee for the 5-day trial was £16,000, being £10,000 on the brief and four refreshers of £1,500 each.

12. Based on that information, I was prepared to fix the fee for the rest of the case at £50,000 + VAT, which would, at least, have the benefit of avoiding any dispute with Mr Murray about how much he was charged. Essentially, I was prepared to conduct the case for the balance of the budget.

13. I explained this to Mr Murray over lunch. However, I stipulated certain conditions – nothing unusual and all matters which sprang from the budget.

15. The second condition was the barrister's fees. Mr Hunter had been instructed in the case for some time and his fees were in the budget and so were included in my figure of £50,000. But having been to the FDR and seen Mr Murray's interaction with Mr Hunter, I could see that he would be more comfortable with a much more senior member of the Bar. Because of the potential value of the case (more than £700,000), I could see that this could potentially be justified and so I explained to Mr Murray, over lunch, that if, between us, we decided to instruct a more senior barrister and that cost more (as it would), Mr Murray would pay the extra cost. I illustrated this to Mr Murray by pointing out that at a restaurant like Otto's it was sometimes possible to have the fixed price menu but then if you wanted the lobster, you could have it but there supplement to pay. The arrangement I was proposing was the same. I did not regard this as anything unusual – it was no more than saying that the agreed figure was premised on the status quo but if that changed, there would be an extra cost. Mr Murray said that he accepted this.

17. Having gone through that, Mr Murray said that he would agree but that it would have to be £50,000 including VAT. That was, apparently, his way of negotiating a 20% discount. He left it until the end of the conversation. Rather than have a further debate with him, I agreed. Then, rather than stick to his original proposal, which was to pay the whole fee at once, he said that he would pay by instalments. He was re-negotiating again but I was prepared to go along with it and agreed."

13. On 21 December 2017 the Defendant rendered an invoice number IN803304-FF to the First Claimant, which states:

"**Start Date 01/12/2017 – End Date 31/05/2018**

Professional Fees

> On account of professional fees and disbursements incurred and to be incurred in connection with proceedings involving Shirley Murray, per conversation today between James Murray and Richard Slade - £50,000.00 (inc. VAT)."

14. On 10 May 2018 a pre-trial review took place in relation to the litigation between the First Claimant and his parents before His Honour Judge Gerald. A meeting followed at the offices of the Defendant between the First Claimant and Mr Slade. In his witness statement the First Claimant states:

> "6.2.5.1 I fully accept that I was disappointed with the outcome of the hearing on 10 May 2018. The Defendant had said that we would need an expert's report, and the Judge did not allow it. I felt that Counsel had performed badly, and – despite previous promises – Mr Slade had not been in attendance at the hearing himself. After the hearing I went back to the Defendant's office and complained. I said that he needed to get this sorted. I did not specify how it should be sorted, or that I wanted a more experienced barrister or was prepared to pay more, and the Defendant's response was to say "leave it in my hands".
>
> 6.2.5.2 Mr Moraes was not my choice of Counsel. He was chosen by Mr Slade. That was clear from the email of 16 May 2018 which is at page 32 of this exhibit. This email, which is just five days before the final hearing, does not mention any additional fee. It does not even mention Counsel's name. I did not even meet or speak to Mr Moraes.
>
> 6.2.5.3 Had I been told that there was any additional fee, but particularly one of the magnitude now sought, I would have queried it. If I had appreciated, as I now understand to be the case, that any additional fee that I had agreed would have been irrecoverable from the opponents in the event of a win because it exceeded what had been included in the costs budget, I would not have agreed to incur it."

15. In his witness statement Mr Slade for the Defendant relates:

> "<u>10 May 2018</u>
>
> 22. Mr Murray and Mr Davern returned from the PTR and I met them both in the office. Things had not gone well in Mr Murray's view and he blamed the barrister, Mr Hunter, who he said was "weak".
>
> 23. In fact, as I uncovered what had happened, nothing had gone badly but the Judge, HHJ Gerald, an extremely experienced county court judge who heard the PTR, had refused to allow Mr Murray's expert albeit that he had made provision for a Scott Schedule on the basis that the relevant

allegations (which had to do with Mrs Murray taking money from the accounts of Storm Loans, which were under her management) were more a matter of fact for the parties than expertise. It was a situation where it had taken an expert to isolate the relevant information but, once he had done that, there was no need for him to give evidence because the parties could do so for themselves. However, the Judge had dismissed my clients' application and made an order for costs in Mrs Murray's favour in the sum of £1,500. It seemed to be this, rather than anything else, which had annoyed Mr Murray.

24. In any event, he told me that he did not want Mr Hunter for the trial and that I should arrange a more experienced barrister. I reminded Mr Murray of our agreement, pointed out that it would cost him more, and, when he agreed, said that I would make the necessary arrangements.

25. I spoke to Mr Hunter's clerk and explained the nature of the problem. He put forward Mr Francis Moraes, who sits as a Deputy Master and is a highly experienced member of the Bar. I agreed that Mr Moraes should start work on the case immediately and, as a favour to me, it was also agreed that Mr Hunter would continue work so as to provide a draft skeleton and an effective hand-over.

<u>16 May 2018</u>

26. I spoke with the clerk and agreed the fee at £25,000 + VAT. It was less than the clerk had in mind and, as a favour to me, he agreed to dispense with refreshers and so, while the fee was, in fact, the fee for the brief, it became, by agreement, a single rolled-up fee for the entire hearing.

27. I sent an email to Mr Murray. He was mainly concerned, at this stage, with settlement negotiations, which were opening, and I said that I would call him about that in the afternoon. I mentioned that the new barrister was already working on the case.

<u>17 May 2018</u>

28. I spoke to Mr Murray, with whom I had not spoken the previous day, and explained that it would cost him a further £15,000 + VAT. He was not concerned. He was focussed on getting what he wanted, which was a settlement on his terms. He gave me authority to negotiate a settlement up to £30,000."

16. On 18 May 2018 the case between the First Claimant and his parents settled in the sum of £30,000.

## Hodders Claim Bill

17. The First Claimant first instructed the Defendants in connection with this claim in or about 2016. The conditional fee agreement was not entered into until August 2016. On the basis that no progress had been made in relation to the claim, Mr Preen on behalf of the First Claimant, made a complaint to the Defendant by letter on 14 June 2017, and in December 2017, after further complaints by the First Claimant, this resulted in the £7,000 reduction in fees referred to paragraph 9. The First Claimant at paragraphs 7.13-7.15 of his witness statement makes further complaints as to the way in which the Defendants were handling the Hodders claim.

18. The First Claimant in his witness statement states:

> "7.19 By this stage in June 2018 the Defendant had had the response to the letter of claim for more than four months and no further progress had been made at all. It is notable that in this email Mr Slade says that the case, insofar as it related to Hodders' failure to deal with restrictions in property, was a good one and that he expected to win it. It was only at that stage that Mr Slade asked for an explanation of how I assessed the level of loss on the tax aspect of the claim. This information had already been provided by Mr Preen however, not least by provision of the file of papers in July 2017.
>
> 7.20 Dissatisfied with the situation, Mr Preen and I met with Mr Slade on 3 July 2018. Mr Slade's sole focus at the meeting was on getting in payment of the disbursements that he said were outstanding, including Counsel's fee. He seemed to have very little interest in our complaints about lack of progress in the Hodders case and its history of delays and having documents overlooked. He wanted payment of what he said were his outstanding charges and everything else was conditional upon that.
>
> 7.21 He said that if the outstanding amounts were paid, then I had two options for progressing the Hodders case, which were –
>
> 7.21.1 For him to continue with the case, which he would deal with personally, and which he was confident that he and he alone could win, or
>
> 7.21.2 For the papers to be released without charge if I wanted to go elsewhere, but on the basis that if the case was ultimately won, he would be entitled to his fees under the terms of the Conditional Fee Agreement.
>
> 7.22 The firm implication was that, if the disbursements were not agreed and paid, no further work would be undertaken on the Hodders case. This was the way in which Mr Slade had dealt with me previously in December 2017, when I was told

> that if there was an unresolved dispute he could not continue to act. I felt pressurised into making payments that I did not, at that point, believe to be due."

19. At paragraph 7.25 he goes on to say:

> "It was not a termination of the retainer, I wanted, and still want the Hodders case to be progressed. But I was not prepared to accept the delays that had already taken place or tolerate being held over a barrel in respect of the Hodders case because there were fees allegedly due under an entirely different charging arrangement that I disputed."

20. Mr Slade concludes at paragraph 49 of his witness statement:

> "Mr Murray maintains that the firm's CFA in the claim against Hodders was terminated by the firm in circumstances whereby in his letter dated 4 July 2018 he demanded the return of his papers. I took that letter as termination of the CFA but refused to release the papers until the bills had been paid."

21. On 16 May 2018 Mr Slade emailed Mr Murray in the following terms:

> "I'll call this afternoon. I have been tied up in meetings. I have lined up a different barrister - my age and someone I've known for years and who knows HHJ Gerald very well – who is already working on a hand-over from … "

22. On 17 May 2018 the First Claimant emailed Mr Slade at 13.30 as follows:

> "I'll give you full permission to negotiate with their barrister up to £30K. We both know she won't accept that, should hold us in better stead with the Judge. I would like to know what the new barrister thinks of the whole case."

23. On 4 July 2018 the First Claimant emailed Mr Slade following the meeting at the Defendant's offices the previous day. The email recalls poor progress and lacklustre enthusiasm in the "Alf" case (which is a reference to the Hodders case) and records the following:

> "I wholly and completely dispute the disbursement charges mentioned above and ask that in order to avoid this matter being made formal, you release the "Alf" file without caveat and remove the two disbursement charges and confirm this within five working days of this letter."

24. In response to correspondence from the First Claimant's costs lawyers, on 16 October 2018 Mr Slade dealt with the Hodders matter in the following way:

> "In relation to the Hodders matter, we take it that our retainer has indeed been terminated because Mr Murray has asked for the return of the papers. Please confirm. Those papers are

> subject to our lien because, of course, bills have been rendered and are outstanding in relation to the claim by Mrs Murray in respect of while they were directed to the company, Mr Murray is personally, jointly and severely liable and has signed a personal guarantee."

25. In the papers provided to me for assessment by the Defendant there is an email dated 26 October 2018 headed "Without Prejudice" which contains the following:

> "4. James either pays the draft bill in the Hodders matter and I transfer the files to the firm of his choosing, or (if he wishes) continues to instruct my firm to deal with the matter on the terms of the CFA. If the latter (which I do not encourage but will go along with if that's what he wants) some agreement will have to be made with Jann Preen who has, to date, sought to disrupt the course of my work to James's disadvantage."

26. The relevant provisions of the Conditional Fee Agreement relating to termination are as follows:

> "14.3 Richard Slade & Company can end this agreement if the client does not meet its responsibilities. If this happens, the client will have to pay Richard Slade & Company fees at the normal rates for the work done to the termination date and disbursements.
>
> 14.4 Richard Slade & Company can end this agreement if it believes the client no longer has a reasonable prospect of success. If this happens, the client will only have to pay Richard Slade & Company fees at the discounted rates and disbursements.
>
> 14.5 The clients' death before the claim is resolved will bring this agreement to an end. Richard Slade & Company will be entitled to recover its fees at the discounted rates and the disbursements up to the date of the client's death from the client's estate."

## SUBMISSIONS

### For the First Claimant

27. Mr Dunne submitted that the fees of Mr Moraes, who was instructed by the Defendant to attend trial on behalf of the First Claimant in place of Mr Hunter, at a fee of £25,000 + VAT for the brief and refresher, were not payable because Counsels fees were included in the fixed fee agreed between the First Claimant and Mr Slade at the meeting on 21 December 2017. His second submission was that in any event these fees are an unusual item of cost which should be presumed to be unreasonable by virtue of Rule 46.9(3)(c) CPR. It was accepted that the First Claimant was unhappy with the outcome of the hearing on 10 May 2017, however, the First Claimant neither suggested nor demanded that more senior Counsel be instructed. Neither did he say

that he did not want Mr Hunter to conduct the trial or that Mr Slade informed him that the instruction of alternative Counsel would lead to increased costs.

28. He submitted that the only evidence in support of the claim by the Defendant for additional fees over and above the fixed fee was the email sent by Mr Slade on 16 May 2018 which indicated "I have lined up a different barrister".

29. In relation to his submission that, Mr Moraes' fee was unusual, the fee allowed in the cost budget was £16,000 to include refreshers of £2,000 per day. In the light of the settlement achieved by the parties, no refreshers were payable. By contrast Mr Moraes' brief fee to include refreshers was £25,000, some two and a half times the original brief fee. Mr Dunne argued that there was no evidence to support that the First Claimant was ever advised the additional costs might not be recovered from the opponent.

### The Hodders Bill

30. Mr Dunne submitted that it was the Defendant who terminated the retainer unlawfully and, as a result, there was no entitlement to costs. Mr Slade, in his response to the First Claimant's complaints in July 2018, was conflating two issues: Counsel's fees and the Hodders claim. The Defendant could not terminate the CFA as a result of bills not being paid because no bills in the Hodders claim had ever been delivered. In relation to the email of 4 July 2018 claiming that the retainer was not terminated, this was both a complaint and an offer to have the files released on the basis that the disbursement in relation to the Counsel's fees was dropped. The First Claimant's case was that the CFA was still in existence at that point. He argued that the subsequent correspondence from the Defendants had demonstrated that the retainer still existed between the parties.

### For the Defendant

### Counsel's Fees Claim

31. Mr West submitted that the questions for the Court were whether the instruction of Mr Moraes was based on the First Claimant's instructions and if so, whether he should pay for it. It was submitted this was a matter of fact based on the evidence. On the basis of the oral evidence, that of Mr Slade, should be preferred. In relation to the argument that the disbursement was unusual, he submitted that this was a matter to be dealt with in the quantum assessment and was not a matter of principle.

### The Hodders Claim

32. It was submitted that the First Claimant had clearly terminated the retainer by demanding his papers in July 2018. That action was clearly inconsistent with the continuation of the retainer by the solicitor where all trust between the parties had broken down.

## DISCUSSION

33. In my judgment, I am required to determine two preliminary issues in this assessment. Firstly, in the Counsel fee bill, whether Mr Moraes was instructed by the First

Claimant or on the Defendant's own initiative, and, secondly, in the Hodders matter, whether the CFA that was terminated by the First Claimant's email to the Defendant of 4 July 2018. I make my findings having heard the cross-examination at length of two witnesses, the First Claimant and Mr Slade on behalf of the Defendant. I was made aware prior to the hearing of the First Claimant's dyslexia and the impact that may have upon him in the way that he gave his oral evidence. During the course of that evidence, Mrs Preen sat with the First Claimant to assist him. So far as I could see, Mrs Preen was simply there to assist the First Claimant, largely handing him the documents to which he was referred by the Advocates. She took no part in formulating his replies or assisting him so far as I could see in any other way. Looking at matters in the round, the First Claimant gave his evidence forcefully. He had the clear impression that the "deal" reached by himself and Mr Slade at the meeting in December 2017 was a barter and that he was pleased to have negotiated the Defendant down to a fixed fee of £50,000 including VAT, from the £77,000 where they started. His recollection was that it was an all-in fee. By contrast, Mr Slade gave his evidence by his own admission as a litigator of the old school. I accept that he was trying to help the Court but during the course of his cross-examination, I found his answers to questions long-winded, repetitious and with a view to pre-empting the next question or the point he wished to make.

34. The Counsel's fee dispute relates to an oral contract. The agreement reached by the First Claimant and the Defendant at the meeting on 21 December 2017 was not recorded in writing. "Cook on Costs" Chapter 1, para 1.3 deals with this point as follows:

> "Where there is a dispute between a solicitor and his client about the terms of an oral retainer, the word of the client is to be preferred to the word of the solicitor, or, at least, more weight is to be given to it. The reason is plain. It is because the client is ignorant and the solicitor, or should be, learned in the law. If the solicitor does not take the precaution of getting a written retainer, he has only himself to blame for being at variance with his client over it and must take the consequences. The onus on the solicitor to establish the terms of the retainer in the absence of persuasive evidence, the Court should prefer the client's version. It is up to the client to take the appropriate steps to clarify precisely the extent of his retainer (*Gray v Buss Merton (a firm)* [1999] PNOR 882 & 892)."

35. In *Gestmin SGPS S.A. v Credit Suisse (UK) Ltd (1) Credit Suisse Securities (Europe) Ltd (2)* [2013] EWHC 3560 (Comm), Leggatt J at paragraph 22 said:

> "In the light of these considerations the best approach for a Judge to adopt in the trial of a commercial case is, in my view, to place little, if any, reliance at all on witnesses' recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence on known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords

> to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalled a particular conversation and event. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

36. The evidence of the First Claimant in cross-examination was at variance with his pleaded case in the Points of Dispute. Point 1 of his Points of Dispute makes clear that the agreement reached at the meeting in December 2017 was that all work from 1 December 2017 to the end of the case would be subject to a fixed fee of £50,000 plus VAT including all disbursements. This was to include the fees for Counsel of the Defendant's choice for interim hearings and the trial, and was subject to the exception that if the First Claimant wanted a more senior barrister he would have to pay extra. In cross-examination the First Claimant was at pains to make the point that so far as he was concerned the agreement reached in December 2017 was an all-in fee. This was based on the history of his dealing with the Defendant, his previous complaints and the need to achieve a bargain. In reality there is little between the parties in relation to the First Claimant's pleaded case in the Points of Dispute and Mr Slade's version of the meeting in December 2017.

37. The nub of the issue appears to be what transpired in relation to the instruction of Mr Moraes in May 2018. What is clear from the evidence of both First Claimant and Mr Slade is that the First Claimant was unhappy with the outcome of the pre-trial review, and in particular the performance of his barrister Mr Hunter. Under cross-examination his evidence was that he told Mr Slade "you had better get this sorted out, you had better get this sorted".

38. The trial of the Murray claim was imminent and on 10 May 2018 Mr Slade confirmed in cross-examination that he telephoned Counsel's clerk and instructed a different barrister, Mr Moraes. The Defendant's computerised time records show that from 10 May 2018 there were a series of telephone calls between the Defendant firm, Finian Davern and Counsel with regard to the Murray claim. It was not until 16 May 2018 that Mr Slade emailed the First Claimant to tell him that he had lined up a different barrister and was already working on a hand-over from Mr Hunter, his previous Counsel. Mr Slade's evidence is that the following day he telephoned Mr Murray with whom he had not spoken the previous day, explaining to him that Mr Moraes' services would cost him a further £15,000 plus VAT. The computerised time records for the Defendant record a telephone call on 17 May 2018 by Mr Slade to the First Claimant of 2 units. In cross-examination the First Claimant denied having a telephone call with Mr Slade that day. Further he denies in oral cross-examination and in his witness statement agreeing to pay the additional Counsel's fee sought by the Defendant. The First Claimant neither met, spoke or even knew the name of Mr Moraes prior to his instruction. To my mind alarm bells would have been ringing in the head of an experienced solicitor at that meeting when it was clear that the First Claimant was unhappy with the services of Mr Hunter. The evidence points to Mr Slade instructing Mr Moraes on 10 May 2018 of his own volition without authority

from the client which he did not seek until 17 May 2018, some seven days later, shortly before the trial.

39. I am satisfied that a telephone call did take place between the First Claimant and Mr Slade on 17 May, but I am not satisfied that the record of that telephone call is the one set out in Mr Slade's witness statement. As an experienced litigator I would have expected there to have been an attendance note in relation to this telephone call which was of the utmost importance, varying as it purported to do, the terms of the fixed fee agreement. In cross-examination Mr Slade stated that he made a note in his day book but that day book was not before the Court and not referred to in his witness statement. Furthermore, there was no letter or email to the First Claimant confirming the terms upon which Mr Moreas had been instructed which I would have expected to see, bearing in mind the previous difficulties in the relationship between the First Claimant and Defendant in these and other proceedings.

40. The fee negotiated by Mr Slade with the clerk to Mr Moreas was, in my judgment unusual, in that it was a brief fee of £25,000 plus VAT which included refreshers. The previous brief fee agreed with Mr Hunter was £10,000 plus £2,000 per day by way of refresher, together with VAT. The fees set out within the costs budget were £16,000 which included refreshers of £2,000 per day. It would have been obvious to Mr Slade that were the First Claimant to agree to the instruction of Mr Moraes at a substantially increased brief fee, the difference may be irrecoverable in the Murray claim were the First Claimant to obtain a costs order in his favour. Furthermore, by agreeing a fee of £25,000 plus VAT to include refreshers the First Claimant was liable for this sum even were the matter to settle the following day. In my judgment Mr Slade was the author of his own misfortune (1) by failing to record his attendance on the First Claimant on 17 May 2018 and (2) failing to confirm his instructions from the First Claimant to obtain different Counsel at an increased fee of £25,000 plus VAT, together with the consequential effect this would have on the fixed fee agreement. There is simply no documentary evidence to support Mr Slade's contention that the First Claimant was made aware of the change of Counsel, his name or the additional fee that was being incurred on his behalf.

41. This is an assessment taking place pursuant to the Solicitors Act 1974. Consequently, the provisions of Rule 46.9(3) of CPR apply, namely:

> "(3) Subject to paragraph (2) costs are to be assessed on the indemnity basis but are presumed
>
> (a) to have been reasonably incurred … or implied approval of the client.
>
> (b) to be reasonable in amount … by the client.
>
> (c) to be unreasonably incurred if
>
> (i) they are of an unusual nature or amount; and
>
> (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party."

42. In cross examination Mr Slade accepted that he did not advise the First Claimant that as a result of instructing Mr Moraes at an increased brief fee of £25,000 plus VAT, the additional costs over and above those previously agreed may not be recovered from his opponent, were the First Claimant successful in obtaining an order for costs.

43. In *McDougal & others v Boote Edgar Esterkin* [2001] Costs LR 118, Mr Justice Holland considered sub-paragraphs (b) and (c) of Order 62, Rule 15.2, which has now been largely reproduced in Rule 46.9(3). The Judge carefully analysed the primary findings of fact made by the Costs Judge and held that for consent to be implied under the Rule sufficiently to displace any indemnity taxation of an item on a subsequent solicitor/client assessment, the approval has to be "*informed*". At paragraph 122 he said:

> "To rely on the applicant's approval, the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the applicants, lay persons as they are, can be reasonably bound by it."

44. Whilst this authority was not one which the advocates for both First Claimant and Defendant referred me to, to my mind although the decision pre-dates the Civil Procedure Rules, it remains good law. I am fortified in that conclusion by Dr Friston who, at paragraph 37.11 of Friston on Costs, states "*Thus there can be no doubt that Holland J's analysis has survived the coming into force of the CPR*" On the facts of this case there is no evidence whatsoever, either in the witness statement of Mr Slade or in correspondence passing between the First Claimant and Defendant that any consent by the First Claimant to the instruction of Mr Moraes and the additional costs to be incurred had the *informed* consent of the First Claimant. Furthermore, the instruction of Mr Moraes at an additional fee of £25,000 plus VAT was an increase of £15,000 over and above the fixed fee agreed with the First Claimant and is in my judgment a disbursement which is both of an unusual nature and amount. Consequently, Mr Slade has not complied with the provisions of Rule 46.9(3) CPR and in that respect the additional Counsel's fee is irrecoverable from the First Claimant. Consequently, any additional costs incurred in relation to the instruction of Counsel over and above to the fixed fee agreement reached between the First Claimant and Defendant on 21 December 2017 are disallowed.

## Termination of the Retainer

45. On 3 July 2018 the First Claimant and Mr Preen met with Mr Slade. The evidence, which I accept, is that Mr Slade was solely focussed on dealing with the outstanding disbursements in the Counsel's fee bill rather than addressing the issues raised by the First Claimant in respect of the Hodders claim. He offered two scenarios to resolve the First Claimant's complaint:

    i) If the disbursements were paid, he would continue with the case personally, or

    ii) The files would be released without charge, if the First Claimant wished to instruction other solicitors on the understanding that if the claim was won, the Defendant would be paid pursuant to the terms of the CFA.

46. The 4 July email, in my view, dealt with both the Counsel's fee claim and also the lack of progress in the Hodders claim. In my judgment the retainer was not terminated by this email. The email was a complaint whereby the First Claimant offered to have the files released on the basis that the outstanding disbursements were dropped.

47. The response from the Defendant is the email of 8 August 2018. That email did not state the retainer had been terminated, nor advise the First Claimant of the potential consequences that would arise from a termination of the retainer. To my mind most of that email relates to the unpaid Counsel's fee and goes on to state:

> "This brings me to the present. There is a bill to pay in the sum of £20,000. If that bill is paid and the payments by American Express are left undisturbed, that will be the end of the matter. The retainer can be concluded in an orderly way and the files made available for collection or transfer to a different firm."

48. In my judgment, the email presumes the retainer still exists and refers to how the retainer might end, not that it has ended.

49. Matters continued and on 3 October 2018 the First Claimant's costs lawyers wrote to the Defendant confirming their instructions and explicitly stating that their instructions did not amount to a termination of the retainer. The first time there is any mention of a termination was in the reply of the Defendant in October 2018 when Mr Slade stated:

> "In relation to the claim against Hodders, your client terminated the retainer by demanding the return of the files."

50. This correspondence continued and on 16 October 2018 the Defendant, in a letter to the First Claimant's costs lawyers, stated:

> "In relation to the Hodders matter we take it that our retainer has indeed been terminated because Mr Murray asked for the return of papers. Please confirm."

51. In response the First Claimant's costs lawyers replied on 25 October:

> "Once again, your retainer has not been terminated."

52. On 26 October in a without prejudice email from Mr Slade to the First Claimant's costs lawyers which was provided to me in the bundle for assessment, the letter records:

> "James either pays the draft bill in the Hodders matter and I transfer the files to the firm of his choosing or (if he wishes) continues to instruct my firm to deal with the matter on the terms of the CFA. If the latter (which I do not encourage but will go along with if that's what he wants) some agreement will have to be made with Jann Preen who has to date sought to

> disrupt the course of my work for James to James's disadvantage."

53. On 6 November 2018 in correspondence with the First Claimant's costs lawyers Mr Slade stated:

> "If Mr Murray wishes us to lift the suspension of our service, he will have to make the payment requested."

54. On 12 December 2018, Mr Slade in a letter to the First Claimant's costs lawyers goes on to say:

> "We therefore accept your client's repudiatory breach of our retainer as bringing that retainer to an end. We shall transfer the sum of £10,000 held on our client's account as part payment of our outstanding bill and draw up and send in final bills."

55. The provisions of termination in the CFA are set out in paragraph 14 of the agreement. The First Claimant could end the CFA at any time. If he did not continue the claim, he was liable to the Defendant for any work done at normal rates. If he continued with the case and wins, he would also have to pay the success fee for the work already completed.

56. The Defendant could end this agreement if the First Claimant did not meet its responsibilities. If that happened the First Claimant would have to pay the Defendant's fees at normal rate for work done to the termination date and disbursements.

57. In my judgment the Defendants were conflating two issues. First, the alleged outstanding disbursements in the Counsel's fees claim which had been raised as interim statute bills and secondly the complaints in relation to the Hodders case. In my judgment there was no basis whatsoever for the Defendant to terminate the CFA on the ground of any failure to pay costs. Any sums owed could only relate to the Counsel's fee claim and could not relate to the Hodders case. The Defendant had not given the First Claimant notice of any breach of his responsibilities under the provisions of paragraph 14.3 of the CFA in any event.

58. I am satisfied that the First Claimant did not terminate the retainer by seeking the return of his files. I accept the First Claimant's evidence that the First Claimant and Defendant at that time were negotiating a complaint which was caused by the Defendant's poor service. At no time did the Defendant advise the First Claimant that the request he made in his email of 6 July 2018 would cause the retainer to be terminated or advise him of the consequences of termination. Furthermore, the Defendants accepted in the October 2018 correspondence that the retainer continued. They then terminated the retainer at some unknown date for an alleged repudiatory breach without setting out the terms of that breach or providing the First Claimant with notice.

59. In the Points of Reply the Defendant puts his case in the alternative, namely, that if the retainer had not been terminated by the demand for the return of papers, the

Defendant was entitled to terminate on the basis of the First Claimant's conduct namely the letter of 4 July 2018. In my judgment this argument takes the Defendant nowhere, for the reason that the Defendant was asking the client to confirm whether the CFA had been terminated in the October correspondence and was told that it had not been terminated. To my mind, that alone does not support the contention that the 4 July email permitted the Defendant to invoke the provisions of paragraph 14.3 of the CFA to terminate the retainer. Furthermore, there appears to be no evidence, either in Mr Slade's witness statement or the documents, as to the actual date that the Defendants state they terminated the retainer.

60. What is clear from the evidence is that the First Claimant, either by himself or through Mr Preen, had made a number of complaints to the Defendants, none of which had led to termination. Furthermore, there is no evidence, whether documentary or in the witness statement of the Defendants that the First Claimant was at any time advised that his complaints might lead to a termination of the CFA.

61. For those reasons I disallow the Hodders claim for costs on the basis that the Conditional Fee Agreement was terminated by the Defendants without good cause or on reasonable notice.

## Further Orders

62. I order that the Defendants pay the Claimants' costs of the provisional issues hearing and order an on-account payment in respect of those costs in the agreed sum of £21,000.

63. The remaining issues in this assessment are adjourned pending further directions of the court consequent upon the handing down of this judgment. Permission for either party to apply for any consequential orders arising.