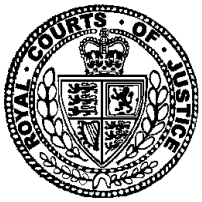

Neutral Citation Number [2023] EWHC 36 (SCCO)
Case No: C69YM407 & 10BS066C
SCCO Reference: SC-2022-BTP-000278

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 12/01/2023

Before :

COSTS JUDGE LEONARD

- -

Between :

Julian Reed	**Claimant**
- and -	
(1) Woodward Property Developments Ltd	
(2) Anthony Woodward	**Defendants**

- -
- -

The Claimant in Person
Nicholas Lee (instructed by **DAS Law**) for the **Defendant**

Hearing dates: 11 and 12 October 2022

- -

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.

.....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. I am undertaking the detailed assessment of the costs of the Second Defendant, payable by the Claimant under orders dated 24 July 2020 and 22 March 2021.

2. The purpose of this judgment is to address the following issues. The first is the Claimant's challenge to the validity of the retainer between the Second Defendant and DAS Law ("DAS"), the solicitors representing him. The second is the Claimant's contention that the Second Defendant seeks to recover from the Claimant costs which were not incurred by him, but by the First Defendant, which has no right to recover costs from the Claimant. The third is whether the Second Defendant is entitled, for the purposes of assessment, to rely upon a costs budget approved on 12 April 2019 or whether, as the Claimant contends, there is good reason under CPR 3.18(b) to depart from the budgeted costs so as to allow, on assessment, a substantially lower figure.

The Underlying Litigation

3. The Claimant is a barrister. On about 30 August 2016 he issued proceedings against the First Defendant, a building company of which the Second Defendant was a director, and against the Second Defendant himself.

4. As against the First Defendant, the Claimant claimed the sum of £73,506.97 representing the cost of rectifying allegedly defective building works, with damages as an alternative remedy. As against the Second Defendant he claimed the sum of £33,530, representing the cost of rectifying the unlawful dumping of building materials and waste upon the Claimant's land. He also claimed damages against the Second Defendant based (broadly speaking) upon the proposition that the Second Defendant had accepted personal responsibility for the performance of the building works undertaken by the First Defendant.

5. His case in this respect was that the Second Defendant had agreed to assume the role of project manager and had, in that capacity, negligently failed to ensure that the work performed by the First Defendant was undertaken in a competent and efficient manner, extending to the provision of the appropriate guarantees and certificates on the completion of the work; and also upon allegations of negligent misrepresentation as to the standard of performance to be expected from the First Defendant. The total claim was put at no more than £108,000.

6. On 11 July 2017, DJ Watkins, in the County Court at Bristol, approved a budget of the combined costs of the first and Second Defendants totalling (exclusive of budgeting costs) £83,534.04, but observed that "the incurred costs for statements of case do not immediately appear to be reasonable."

7. On 2 May 2017 the Second Defendant applied to strike out the claim against him and on 17 November 2018 District Judge Watkins struck that claim out. The Claimant appealed, and on 19 September 2018 His Honour Judge Hughes KC allowed the appeal, restoring the claim against the Second Defendant.

8. In the meantime, expert evidence was exchanged on 7 November 2017. Replies to questions were provided by the experts by mid-December.

9. On 26 February 2018 the First Defendant went into voluntary liquidation. I understand that this was a Creditors' Voluntary Liquidation and that the First Defendant had neither assets nor indemnity insurance to meet the Claimant's claim. According to the papers filed by DAS, it was not informed of the liquidation until 5 June 2018, following which DAS spent some months attempting to obtain instructions from the liquidators before applying, on 28 November 2018, to be removed from the record for the First Defendant. An order to that effect was made on 10 December 2018.

10. On 12 April 2019 DJ Watkins approved additional sums for what was described in the court's order as "the Second Defendant's updated costs budget" which brought the approved budget (again, excluding budgeting costs) to a total of £93,885.64. The updated budget document itself comes to £131,146.84 and is headed "Costs Budget of the First (to 10/12/18 only) and the Second Defendant dated 14/3/19".

11. A note prepared by DAS to support the updated budget confirms this, and also shows that the additional budget sums approved by DJ Watkins 12 April 2019 represented the costs of the Second Defendant. A number of reasons were given, including the additional cost attendant on necessary liaison with the solicitors appointed by the liquidators of the First Defendant.

12. The Second Defendant sought to increase the budget for the Statements of Case, CMC, Disclosure, Witness Statement, Expert Report, Pre-Trial Review, Trial Preparation, Trial, and ADR/settlement phases, with contingent phases for Mediation and an application for non-compliance with directions. DJ Watkins recorded in his order that the court did not have jurisdiction to consider any previously incurred costs and limited the increases to witness evidence, trial preparation and ADR/settlement, with a contingent phase for.

13. The hearing on 12 April 2019 was attended by Mr Maddocks, one of the liquidators of the First Defendant. DJ Watkins' order of that date records that the liquidators' stated position was that they only became aware of the proceedings in October 2018; that they had taken no active steps nor authorised anyone else to do so on behalf of the First Defendant; and that they were still investigating whether or not to do so. Subsequently the First Defendant took no active part in the proceedings.

14. DJ Watkins' order of that date also incorporated certain rulings and further directions, including one for a joint statement of experts.

15. Witness evidence was exchanged on 3 October 2019. On filing a pre-trial checklist on 18 November, the Second Defendant applied for a trial of limited issues. On 8 January 2020 the court made an order in agreed terms to the effect that the trial would be limited to the factual evidence to be given by lay witnesses and would not determine any dispute that would require consideration of expert evidence.

16. At the beginning of the trial, on 5 February 2020, the parties identified the factual issues to be addressed, which were first whether the Second Defendant had assumed personal responsibility for project management; and second whether the Second Defendant was personally responsible for the dumping of waste on the Claimant's land.

17. The trial was heard over 3 days. Giving judgment on 1 June 2020, HHJ Ambrose dismissed the claim against the Second Defendant.

18. HHJ Ambrose found that the Second Defendant had acted only in his capacity as a director of the First Defendant and not as a project manager. He found that contaminated builders' waste had been brought on the Claimant's land without his authority, but that the Second Defendant (not having acted as project manager but only as a director of the First Defendant) had no personal responsibility for that.

19. The findings of HHJ Ambrose were recorded in an order dated 1 July 2020, which incorporated judgment for the Claimant against the First Defendant based on his findings in respect of the fitting of a wrong roof and the dumping of waste.

20. After receiving written costs submissions, HHJ Ambrose on 24 July 2020 gave a separate judgment on costs, awarding to the Second Defendant 75% of his costs on the standard basis. The reduction reflects conduct issues raised by the Claimant, including a failure on the Second Defendant's part to mediate or to respond to pre-action correspondence.

21. On 4 November 2020, Mr Justice Garnham gave the Claimant permission to appeal, imposing a stay pending appeal. Handing down judgment on 22 March 2021, Mr Justice Bourne dismissed the appeal, ended the stay and reaffirmed the costs order of HHJ Ambrose. He awarded to the Second Defendant 85% of the cost of the appeal, a percentage I understand to have been agreed by the parties.

The Second Defendant's Retainer with DAS

22. The history of the Second Defendant's dealings with DAS is addressed by two witness statements provided on behalf of the Second Defendant. The first is a statement from the Second Defendant himself, dated 14 September 2022. The second is a statement from Francesca Rogers, a solicitor who conducted the claim at DAS under the supervision of Christopher Brewin. It is dated 21 September 2022.

23. The Second Defendant's account is as follows. DAS were initially instructed to act for the First Defendant. When draft particulars of claim were received from the Claimant, they included a claim against him personally. DAS, accordingly, made enquiries with DAS Legal Expenses Insurance Company Ltd, the First Defendant's provider of legal expenses insurance ("LEI") to see whether the policy cover would extend to his own defence. That was confirmed and following some initial confusion about the ability of DAS to act, during which time the Second Defendant instructed Hugh James, solicitors, to represent him DAS went on to represent both Defendants. The Second Defendant was responsible for and personally paid the fees of Hugh James.

24. Because the Second Defendant had health problems, which were exacerbated by the stress of the case, DAS gave advice to and received instructions from the Second Defendant via his wife, Mrs Lisa Woodward. His understanding was that he was personally liable for DAS's costs, but that the cost would be covered by the LEI as long as he adhered to the terms of the policy.

25. The Second Defendant was aware of the hourly rates charged by DAS, which were set out in an initial letter of advice, and of how the LEI cover worked.

26. In June 2018, as a consequence of the liquidation of the First Defendant, LEI cover was withdrawn. The Second Defendant from that point understood that he was liable to pay

the costs of DAS without any insurance indemnity. He was reminded of his exposure to costs from that point to trial, and DAS discussed with him alternative funding arrangements. DAS agreed to cap its costs in relation to the Claimant's appeal against the striking out of the claim against him at £4,000, and when that appeal succeeded he recognised that he could not afford to pay both DAS's costs to the trial and any costs awarded to the Claimant.

27. Work undertaken by DAS up to the trial before HHJ Ambrose was covered by a Conditional Fee Agreement ("CFA") effective from 1 October 2018, and work incurred in relation to the Claimant's unsuccessful appeal by a second CFA effective from 1 August 2020.

28. This is the account of Ms Rogers. DAS law received instructions from the LEI on 1 August 2016 to act for the First Defendant under the terms of its legal expense policy. A client care letter was sent on 3 August 2016.

29. On 8 August 2016 DAS received a copy of the draft particulars of claim and discovered that the Claimant was claiming against both Defendants. On 15 August 2016 the LEI confirmed there was cover for both Defendants.

30. Legal advice was provided to both Defendants on 16 August 2016 with an estimate of costs, hourly rates and overview of funding. The claim was served on 4 September 2016 and Counsel was instructed to prepare a Defence for each Defendant. Counsel raised a potential conflict in acting for both Defendants, which resulted in the Second Defendant briefly reinstructing his previous solicitors, Hugh James, to assist in the preparation of his Defence. In the event, there was no conflict and the DAS was re-instructed on behalf of the Second Defendant.

31. DAS, accordingly, represented the Second Defendant from 15 August 2016 to 26 September 2016 on a private client basis with the benefit of an LEI Policy. Hugh James was instructed to represent the Second Defendant from around 26 September 2016 until the Second Defendant disengaged them on or around 3 October 2016. DAS Law represented the Second Defendant again from 30 September 2016 on a private client basis with the benefit of an LEI policy, until LEI was withdrawn for both Defendants on 20 June 2018.

32. At this point, the case was on hold pending the outcome of the Claimant's Appeal to reinstate the claims against the Second Defendant. The Second Defendant instructed DAS to continue representing him on a private client basis and a fresh client care letter was sent to him on 10 July 2018.

33. After the Claimant's appeal succeeded in September 2018, DAS discussed alternative funding arrangements with the Second Defendant. From 1 October 2018, DAS acted for the Second Defendant pursuant to a CFA dated 20 February 2019 with express retrospective effect to cover work from 1 October 2018.

34. For the Claimant's appeal from the judgment of HHJ Ambrose, DAS entered into a second CFA with the Second Defendant. This was dated 15 December 2020 but was also retrospective, expressly covering all work on the appeal from 1 August 2020.

The Claimant's Challenges to the DAS Retainer

35. It has not been particularly easy to isolate from the Claimant's Points of Dispute every point that he is making in relation to the retainer. That is because the points of dispute do not comply with Practice Direction 47, paragraph 8.2 in that, rather than being short and to the point, they tend (meaning no disrespect to the Claimant) to prolixity and repetition, and the issues addressed by different Points of Dispute tend to overlap. This however is my understanding of what has been said, both in the Points of Disputes and on the hearing of this issue.

36. With regard to the pre-CFA period, the Claimant says that what the Second Defendant says about his retainer with DAS does not add up.

37. In a letter dated 18 August 2018 DAS confirmed that it was instructed by the First Defendant and in an email dated 28 September 2016, confirmed that it was not acting for the Second Defendant.

38. The bill's synopsis indicates that DAS took over the claim on 18 August 2016, which is inconsistent with the proposition that advice was given to both Defendants on 16 August 2016. DAS, he asserts, was not instructed by the Second Defendant at that time, nor at the time they instructed counsel on 2 September 2016, nor at the time they received counsel's advice dated 15 September 2016. The bill's synopsis in this respect is, he says, misleading. The Claimant requests that DAS provide a certified copy of its signed letter of retainer from the Second Defendant and proof of who discharged counsel's fees.

39. With regard to the two CFAs under which DAS is said to have acted for the Second Defendant, the Claimant says that at the trial in February 2020 HHJ Ambrose was, on making enquiries as to how the Second Defendant was funding the litigation, told by counsel for the Second Defendant that the Second Defendant was a privately paying client, funding the litigation himself, LEI cover having been withdrawn. The Second Defendant's bill of costs for the proceedings before HHJ Ambrose says, on the contrary, that DAS was acting under a CFA dated 1 October 2018.

40. That was shortly after the Claimant's successful appeal reinstating his claim against the Second Defendant, in respect of which the Second Defendant was ordered to pay £14,282.15 costs. The Claimant says that he suspects that the litigation was thereafter conducted without charge, due to erroneous advice resulting in the Second Defendant failing to successfully defend the appeal. For that reason, the Claimant seeks sight of the client retainer correspondence, because without a retainer the whole principle of costs is in dispute) both CFA agreements, and the metadata in relation to all of those documents.

41. The Claimant also refers to an email sent by Mr Brewin of DAS on 19 March 2021, indicated DAS had not received any monies. Receiving monies, he says, would be inconsistent with a CFA, especially given that work was allegedly undertaken prior to the first CFA being entered. The Claimant's suspicion is that the idea of CFAs "have come to light after the event" and disputes the validity of any CFA.

42. At another part of his Points of Dispute, the Claimant refers to a telephone call from Ms Rogers of DAS to his solicitors on 30 October 2018, when DAS was still on record

as representing D1 and D2. Ms Rogers, he says, made an offer to settle at £25,000, which included the appeal costs of £14,282.15, and stated that the Second Defendant had no other assets or money. He disputes the accuracy of that statement, but in relation to the retainer his point is that Ms Rogers indicated that if the offer were not accepted then the Second Defendant would use the remaining money he had to defend the litigation. That, he says, is inconsistent with the proposition that DAS was acting under a CFA from 1 October 2018, as well as what was said to HHJ Ambrose at the trial.

43. The Claimant has sought disclosure of a copy of DAS's client account ledger showing costs paid by the Second Defendant to DAS during the course of the litigation up to the point that it "purportedly entered the CFA".

44. The Claimant, before me, referred to the fact that the Second Defendant's Replies to his Points of Dispute state that the date of the second CFA is 17 March 2019, rather than 15 December 2020. He also argued, relying upon *Radford v Frade* [2018] EWCA Civ 119 and *Pentecost v John* [2015] EWHC 1970 (QB), that a CFA cannot have retrospective effect unless the solicitor has already been acting for the client under a valid contract of retainer.

Conclusions on the DAS Retainer

45. Before explaining my conclusions in relation to the retainer challenge, I should refer to some established principles. The first, which is not in dispute, is the indemnity principle, which provides that the Claimant, under the orders for costs made in the Second Defendant's favour, has to indemnify the Second Defendant only for costs liabilities that he has actually incurred. The Claimant argues that because there is no valid retainer between the Second Defendant and DAS, there is nothing for him to indemnify.

46. The second principle is that where, as here, a Receiving Party's bill of costs bears the certificate of a solicitor to the effect that the indemnity principle has not been breached, the Court can (and should unless there is evidence to the contrary) assume that his signature to the bill of costs shows that the indemnity principle has not been offended: *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570. In practice this means that there must be some real reason to doubt the accuracy of the certificate in the bill. Speculative challenges should not be entertained.

47. The third principle, recently articulated in the judgment of Lang DBE J in *Fladgate LLP v Harrison* [2012] EWHC 67 (QB) (at paragraph 39) is that (with the exception of certain types of agreement governed by statute, such as CFAs) it is not necessary for a contract of retainer between a solicitor and a client to be in writing. It may be oral, or implied by the conduct of the parties.

48. The fourth principle (referred to again in *Bailey v IBC Vehicles Ltd*) is that the fact that litigation costs are funded by an insurer (or another third party such as a trade union or litigation funder) has no bearing on that party's right to recover costs except in the event that there is a specific agreement to the effect that the funded party has no personal liability for the costs. Such arrangements must, by definition, be rare; I myself have never come across one.

49. In the course of the hearing we discussed the procedure under Practice Direction 47 paragraph 13.13, which provides that the court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence. The receiving party will not be put to an election if the exercise would be disproportionate (as, for example, in those cases where a litigant in person demands sight of an opposing solicitor's entire file).

50. In effect the Second Defendant has already elected to rely upon the witness evidence of the Second Defendant and Ms Rogers. That evidence is wholly unremarkable. DAS has been conducting the Second Defendant's defence for several years, undertaking for example the preparation of his defence and his witness evidence. It is innately highly unlikely that DAS could have done so without his knowledge and authority and his witness evidence confirms, as one would expect, that there was such knowledge and authority. For the period before any CFA was entered into, that is all that is really needed to establish the existence of a contract of retainer.

51. It is not at all clear to me that, at least until the withdrawal of LEI cover, a separate written retainer was ever addressed directly to the Second Defendant for the pre-CFA period, but to my mind that is of little or no significance. At the very least, as a director of the First Defendant the Second Defendant would be expected to have been on notice of the terms upon which DAS were prepared to act, and he says plainly that he was.

52. Turning to the points raised by the Claimant, I shall start with the pre-CFA period. The evidence of Ms Rogers is that DAS started to act for the Second Defendant on 15 August 2016, and that there was a 4-day period between 26 August and 30 August 2016 that it ceased to act because of concerns about a potential conflict of interest. Hugh James was, accordingly, briefly instructed by the Second Defendant between 26 September and 3 October, when he disinstructed them, having returned to DAS. I should say that (although the Second Defendant has not relied upon them) this is entirely supported by the papers filed in support of the Second Defendant's Bill of Costs.

53. The synopsis in the Second Defendant's bill of costs does not, as the Claimant asserts, state that DAS took over the case on 18 August 2016. It says only that they sent their first letter to the Claimant's solicitors on that date. The letter itself, as the Claimant says, did not mention the Second Defendant (perhaps because the information sought in that letter related to the claim against the First Defendant) although judging from the fact that within about two weeks of that date, DAS was asked to and did confirm that it had instructions to accept service on behalf of both defendants, the Claimant's solicitor seems to have understood the true position. It is in any event perfectly clear on the evidence that DAS was acting for the Second Defendant at that time.

54. DAS's email of 28 September 2016 was sent during the brief period over which it was thought that the Defendants would have to be separately represented, and DAS indicated at that point that Hugh James would be serving the Second Defendant's defence. That however was resolved by 30 September, when DAS established to its own satisfaction that there was no conflict of interest and on the same date prepared, filed and served upon the Claimant's solicitor the Second Defendant's defence. If the

Claimant's solicitor was confused by that, it cannot have been for very long: he served the Claimant's reply to the defence of the Second Defendant upon DAS on 17 October.

55. As for the period after LEI was withdrawn and the Claimant's claim against the Second Defendant restored, the evidence of Ms Rogers is that it took some time for the Second Defendant and DAS to resolve the basis upon which DAS could continue to represent him, and they finally settled upon a conditional fee arrangement. It seems to have taken them some time to work their arrangements out, but there is no good reason to doubt what she says.

56. In short, there is no good reason for querying the certification of the bill in relation to the pre-CFA period, nor any good reason to doubt the evidence relied upon by the Second Defendant in that respect.

57. I turn to the Claimant's challenges to the validity of the Second Defendant's CFAs. Some of them are based upon the misapprehension that the synopsis in the Second Defendant's bill of costs states in its synopsis that the first CFA entered into between the Second Defendant and DAS was dated 1 October 2018. In fact (again) the synopsis does not say that: it says only that the first CFA covers costs incurred from that date, which is consistent with the evidence offered by Ms Rogers.

58. This leaves the allegedly misleading statement made to HHJ Ambrose about the funding of the Second Defendant's defence; Mr Brewin's email of 19 March 2021; and the incorrect date of 17 March 2019 given in the Second Defendant's Replies to the Points Dispute for the second CFA.

59. Before addressing those points I should mention an assertion made by the Claimant in the course of the hearing to the effect that the Second Defendant is the joint owner of a valuable property (he also made reference to expensive cars driven by the Second Defendant, but that is entirely unsupported by evidence and would mean very little even if it was). This was advanced by way of a challenge to the Second Defendant's evidence that, following withdrawal of insurance cover and the restoration of the claim against him, he was concerned that he could not meet the continuing costs of the litigation and was actually contemplating bankruptcy: the CFA was the solution to this problem.

60. Judging from the correspondence between the parties filed for the hearing, the property referred to seems to have been the Second Defendant's home, jointly owned with his wife. I have seen no evidence of the actual extent of his share in the property, but given that it was his home and assuming he had an interest in it of real value, the only ways of using it to fund litigation would appear to have been to borrow against it (if affordable) or sell it.

61. I can see that bankruptcy might well, for the Second Defendant, have seemed a viable alternative to selling his and his wife's home to fund his continuing defence, or for that matter to requiring his wife (as would have been necessary) to make her share in the property subject to a loan offered for that purpose. The Second Defendant's evidence in relation to his ability to fund the continuing litigation seems to me to be perfectly credible.

62. Turning to the proceedings before HHJ Ambrose, as I have not seen a transcript I do not know exactly what was said. Assuming that the position was indeed put to HHJ

Ambrose in the way that the Claimant says, then clearly that was inaccurate. That however is really as much as one can say, and I have seen nothing to suggest that the point was of any material importance.

63. Mr Brewin's email of 19 March 2021 appears to have been sent to the Second Defendant's Counsel and copied to the Second Defendant's solicitor. It appears to have been sent in the course of negotiations concerning the percentage that might be conceded by the Second Defendant in recovering his costs of the Claimant's unsuccessful appeal (ultimately agreed at 15%). The pertinent wording is, I believe, "I'm not averse to agreeing a percentage, with the final amount to be assessed on the standard basis, especially if that makes it more likely we will get some costs sooner."

64. I am afraid that I find it quite impossible to understand why this phrase should be considered to be inconsistent with the existence of a CFA. Mr Brewin seems to be hoping, in quite general terms, for the early recovery of costs from the Claimant, which is consistent not only with his duty to the Second Defendant but with the likelihood, under the CFA, that DAS would be dependent for payment of all or part of its fees upon recovery of costs from the Claimant.

65. The date given for the second CFA in the Second Defendant's Replies is evidently an error, either typographical or editorial. I have seen many of those and I will, I am sure, see many more. It seems to me to be of no significance whatsoever.

66. In summary, on the strength of (i) what was allegedly said to HHJ Ambrose QC; (ii) a misreading of the synopsis in the Second Defendant's bill of costs; (iii) Mr Brewin's broad reference In March 2021 to the desirability of recovering costs from the Claimant sooner rather than later; (iv) an error in the Second Defendant's Replies; (v) the wholly speculative and frankly unlikely proposition that DAS and the Second Defendant might, after the claim against him was restored, have entered into an agreement that DAS would continue to represent the Second Defendant without charge; and (vi) the Claimant's dubious interpretation of very limited evidence concerning the Second Defendant's means, I am invited not just to query the certification of the Second Defendant's bills of costs, but to entertain the suspicion that the CFAs between the Second Defendant and DAS are forgeries, concocted after the event in order to recover costs unlawfully, and that Ms Rogers has, inadvertently or otherwise, given false evidence.

67. There is nothing in the evidence that comes close to justifying any of that. I appreciate that there may be reasons to treat the evidence of the Second Defendant with some caution, given the findings of HHJ Ambrose, but as I have already observed his evidence is precisely what one would expect. I have seen nothing to cast doubt on the accuracy of Ms Rogers' evidence.

68. Although it is not strictly necessary, I should address the proposition that the CFAs between the Second Defendant and DAS cannot have had retrospective effect unless there was already in place a valid contract of retainer. In my view, neither *Radford v Frade* nor *Pentecost v John* furnish authority for such a proposition. In my view, the position, as explained in the judgment of Mr Justice Turner in *Pentecost v John*, seems to me to be precisely the opposite.

69. *Forde v Birmingham City Council* [2009] 1 WLR 2732 established that there is no prohibition on retrospective CFAs. As for the proposition that there must be a valid contract of retainer in place for a CFA to have retrospective effect, the position is summarised in the passages from *Northern and Shell Plc v John Laing Construction Ltd* [2002] EWHC 2258 (TCC) quoted by Turner J:

> "The parties' intention that a contract or deed is to have retrospective effect is more readily to be seen where the parties had a prior contractual relationship preceding the contract… in question but it is still possible for such retrospective effect to occur where no such prior contractual relationship was in existence where such is provided for by the clear words of the contract or deed".

70. For all the above reasons, my conclusion is that there is no good reason to look behind the certification of the bill of costs, no good reason to query the evidence proffered on behalf of the Second Defendant as to the nature, from time to time, of his retainer arrangements with DAS, and no good reason to query the validity of those arrangements.

Division of Costs

71. Again, before explaining my conclusions, I should refer to established principles. Perhaps the most helpful authority to which I have been referred is the judgment of Mr Justice Jay in *Haynes v Department for Business Innovation and Skills* [2014] EWHC 643 (QB), which drew upon the judgment of Mr Justice Patten (as he then was) in *Dyson Technology Ltd v Strutt* [2007] EWHC 1756 (Ch).

72. *Haynes* concerned a claim by the widow of a Mr Haynes, who had died of lung cancer occasioned by exposure to asbestos. Mr Haynes had been employed by ten employers, and proceedings were issued against all of them. The claimant subsequently accepted a Part 36 offer from one of the Defendants and abandoned the claim against the other nine.

73. On the assessment of the claimant's costs, a Costs Judge assessed the amount due to the claimant as a fraction of her total costs against all ten defendants. Jay J found that this was wrong in principle.

74. The common or generic costs of the case, he found, effectively fell into two categories. First, there were non-specific costs such as court fees, medical reports and travel expenses which would have been incurred in any event, regardless of the number of other defendants. Those were recoverable in full against the DBIS.

75. Secondly, there were specific common costs which were, in principle, capable of identification and division: for example, a conference with Counsel concerning the liability of all ten defendants. Specific common costs fell to be divided. In undertaking that division the general rule is that evidence-based decisions are required, rather than an approach which simply identifies the number of defendants. This general rule must however yield in circumstances where it would be disproportionate to conduct a more punctilious exercise. In the circumstances of that particular case (the claimant having failed to file any papers in support of her bill) a more broad-brush approach was justified.

76. *Dyson* concerned proceedings for injunctive relief, based upon two clauses in a contract of employment between the claimant and the defendant. The claimant relied upon two provisions in the contract, referred to as clauses 18 and 19.1, but abandoned the clause 18 claim during the trial.

77. The Defendant was ordered to pay the Claimant's costs of the proceedings, with three exceptions. These were the cost of expert evidence, as to which no order for costs was made; of the costs of the clause 18 claim; and the costs of an application to amend the Claimant's particulars of claim. In respect of those last two categories, the Claimant was to pay the Defendant's costs.

78. Applying the same principles as did Jay J in *Haynes,* Patton J found that "non-specific costs such as travelling expenses which are general to the action in the sense that they do not relate to the handling of any particular issue and would have been incurred whatever issues were involved" should be recovered in full and "specific common costs… which relate to work done on more than one issue in the case, but which are not separated for the purposes of charging out time or as disbursements" fell to be divided. Notably he found that "the identification of the fees or charges for time spent in relation to work on the cl. 18 claim excludes work that would have had to be done anyway because it also relates to the cl. 19.1 claim." I understand that the Second Defendant relies in particular upon *Dyson v Strutt*.

79. The Second Defendant's bill has been prepared on the basis that all costs solely attributable to the First Defendant's case (with one erroneous exception, which has been conceded) must be excluded, but that there is no proper ground for dividing non-specific common costs during the period that DAS was acting for both Defendants. That is because the Claimant's case was that the Second Defendant was personally responsible for all the acts and omissions of the First Defendant it follows, says the Second Defendant, the case against the First Defendant was also the case against the Second Defendant.

80. In support of this argument I have been referred to the pleadings; to the parties' written submissions for the trial before HHJ Ambrose; to the evidence given by the Claimant's solicitor resisting the application for a trial of limited issues, emphasising as it did the importance of the allegations against the First Defendant in helping to establish the Claimant's case against the Second Defendant as to credibility and alleged dishonesty; and to correspondence between the parties in which the Claimant's solicitor indicated that he intended to rely upon every part of this evidence, for much the same reason.

81. I do not think that the Second Defendant's approach can be right, and I do not regard it as supported either by *Dyson v Strutt* or by *Haynes,* for these reasons.

82. The Claimant's case against the First Defendant was that the building works undertaken by the First Defendant were defective. The Claimant's case against the Second Defendant was first that he had taken on personal responsibility for the quality of work performed by the First Defendant, and had negligently failed to ensure that it was carried out to the required standard; second that he had negligently misrepresented the quality of the work to be expected from the First Defendant; and third that he was personally responsible for the unauthorised dumping of waste on the Claimant's property.

83. I appreciate that those were closely linked cases, not least because the Claimant alleged that the Second Defendant offered to undertake personal responsibility for the standard of works precisely so that he could avoid the appointment of an independent project manager and so enable the First Defendant to cut corners and perform substandard work.

84. They are, nonetheless, two quite distinct cases against two quite distinct defendants. It is quite right that the Claimant's case against the Second Defendant depended heavily upon his case against the First Defendant, if only because he could not have been liable for any failure adequately to supervise building works that were in fact adequately performed, but that cannot merge two separate cases against two separate defendants into one case against both.

85. To put the matter in perspective one only has to consider the position if, as seemed possible between 26 and 30 September 2016, the First Defendant and the Second Defendant had been separately represented throughout these proceedings. Whatever the outcome of the proceedings, there would have been no question of the Second Defendant recovering from the Claimant any part of the costs incurred by the First Defendant. He would only have been entitled to recover costs connected with the case against the First Defendant to the extent that it was reasonable for him, in preparing his own case, to incur such costs. The position can be no different simply because there was a period when the two defendants were not separately represented.

86. The reality of the position is, to my mind, illustrated by the documents that have been filed by the Second Defendant in support of his bill of costs. In the Second Defendant's defence, allegations against the First Defendant are neither admitted nor denied; they are matters for the First Defendant. His witness evidence , similarly, leaves the question of the standard of building works to the experts.

87. A witness statement of Ms Rogers dated 18 November 2019 and filed in support of the application for a trial of limited issues, states without qualification (paragraph 5) that:

> "The expert evidence and a large proportion of the witness evidence relates to the claim against the First Defendant, which will only be relevant against the Second Defendant if he is found to have personally owed the Claimant a duty of care in Tort".

88. She goes on to explain (paragraph 12) that:

> "The First Defendant is in liquidation and the liquidators have not actively participated in the litigation. The Second Defendant has an interest in the First Defendant succeeding in its defence, which is why the Second Defendant instructed the Defendants' expert to prepare a joint statement of issues with the Claimant's expert."

89. All this to my mind is perfectly clear and sensible, but it is quite inconsistent with the approach taken to the preparation of the Second Defendant's bill. Examples are as follows.

90. Mr Graeme Sampson of counsel gave written advice on the merits of the case against both defendants on 15 September 2016 (this is the advice erroneously described by the

Claimant as having been given at a time when DAS was not acting for the Second Defendant). 75% of his full fee is included in the Second Defendant's bill of costs. That is not a sustainable claim. Even a brief review of the advice demonstrates that this item of costs is plainly a divisible one. Separate consideration is given, as one would expect, to the merits of the case against each of the defendants, and it is this advice in which the possibility of a conflict of interest is first raised.

91. The same applies to the brief fee of Mr Whitehouse for representing both Defendants at the CCMC on 11 July 2017, which is claimed (after separating out the cost of an application) at 75% of the total. This item falls to be divided between the two defendants.

92. Similarly, all three of the fees rendered by Mr North, a chartered building surveyor, on 24 October 2017, 4 December 2017 and 27 June 2019 have been claimed by the Second Defendant at 75% of the total, notwithstanding that, as Ms Rogers put it in her witness statement of 18 November 2019, they clearly related to the claim against the First Defendant.

93. Although I can accept that his third fee was incurred by the Second Defendant alone, on the basis that it would strengthen his case, I struggle to see any basis upon which the Second Defendant can properly claim any of the cost of Mr North's first two reports.

94. There are other examples: in addition to those mentioned above the Claimant has put a good deal of emphasis upon disclosure, for which (according to my spreadsheet bill) some 16.7 hours have been claimed, notwithstanding that the case against the Second Defendant rested entirely upon alleged verbal representations and agreements.

95. In summary, it is not open to the Second Defendant, for the period when DAS were acting for both defendants, to treat as indivisible all costs not exclusively incurred on behalf of the First Defendant. The majority of those costs will be divisible, and it will be necessary to consider how the items of work performed by DAS up to 15 June 2018, when DAS was advised of the fact that the First Defendant had gone into liquidation, should be divided. Whilst the detail has yet to be addressed, it seems likely that there will be substantial reductions to that part of the bill.

96. After that point, it will still be open to the Claimant to argue that costs were incurred unreasonably because they really pertained to the claim against the First Defendant, but as DAS (even before its removal from the record) received no further instructions from the First Defendant, it seems to me that there can be no question of division.

Budgeting

97. I have heard extensive submissions about the budget approved on 11 July 2017 and approved as updated on 12 April 2019, including reference to the authorities on departing from budget. For the reasons I shall give, I have concluded that much of what has been said is irrelevant, but I will attempt briefly to summarise.

98. The Second Defendant argues that his costs for each of the phases that fall within the 12 April 2019 approved budget's estimated (as opposed to incurred) costs should be allowed as drawn. A relatively modest claim for costs in excess of budget for some phases has been withdrawn.

99. The Claimant favours a "broad brush" approach, exemplified by figures set out in his written submissions based on the proposition that up to 90% of the costs of the action are attributable to the claim against the First Defendant. One can start, he suggests, by identifying that percentage, and then deduct from that percentage a figure reasonably attributable to the cost of work provided for in the budget but not actually undertaken.

100. I am quite sure that neither party's approach is right.

101. The "broad-brush" approach advocated by the Claimant is, to my mind, wrong in principle. One cannot achieve a fair result by starting from the broad assumption that any particular percentage of the costs of the action is attributable to the First Defendant. There is no proper evidential basis for such an assumption, which would be directly contrary to the authorities on division to which I have referred.

102. Obviously it would be open to the parties, in the interests of proportionality and saving costs, to agree something of the kind, but for me to impose it would be entirely arbitrary.

103. Nor would it be appropriate for me to treat the budgeted figures (or a given percentage of them) as a "cap" from which one can then work down by going into the detail of the work actually done. That is directly contrary to the principles established by *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792.

104. It seems to me that there is, equally, a fatal obstacle to the Second Defendant's attempt to rely upon the revised cost budget of 12 April 2019. It is that the estimated figures approved by the judge on both occasions incorporate the First Defendant's costs as well as those of the Second Defendant. At no point did either budget distinguish between the costs of the first and Second Defendants except to the extent that DJ Watkins, on 12 April 2019, approved "additional sums" for the Second Defendant alone.

105. The difficulty is that this begs the question: additional to what? Because neither of the costs budgets distinguish between the costs of the first and Second Defendant, it is impossible to identify a total figure allowed in the budget for the Second Defendant's costs alone.

106. For that reason, my conclusions are these. First, the fact that the Claimant succeeded as against the First Defendant but not the Second Defendant gives good reason to depart from a budget which incorporate the costs of both Defendants without distinguishing between them. Second, the budget, for the same reason, is so unhelpful as to have become irrelevant, except in one respect.

107. The budget is relevant only to this extent. It must be right that the Second Defendant has abandoned any claim for costs in excess of the budgeted figures, because it is highly unlikely that one defendant could justify the recovery of costs in excess of an approved budget designed for two defendants.

108. For the above reasons, I have concluded that it is going to be necessary to assess the Second Defendant's costs, on the usual principles, without further reference to the budget.

Summary of My Conclusions

109. There is no sound basis for the Claimant's challenges to the retainer arrangements reached between the Second Defendant and DAS, and in fact no real reason to go behind the indemnity principle certification on the Second Defendant's bill of costs.

110. The argument that the Second Defendant is entitled, up to 5 June 2018, to recover all of DAS's costs not incurred exclusively on behalf of the First Defendant, is not sustainable. There is clearly much scope for division of the specific common costs up to that date, and it seems likely that the Second Defendant's bill will be reduced substantially as a result.

111. After the point when DAS undertook work on behalf of the Second Defendant only, it may still be open to the Claimant to challenge work undertaken on the basis that it really had to do with the First Defendant's case, but that would be an argument as to whether the costs were reasonably incurred, not one based upon principles of division.

112. Because the approved costs budget of 12 April 2019 incorporated both defendants' costs without distinguishing between them, it is impossible to identify an approved budget figure for the Second Defendant alone. It follows that, where only the Second Defendant has any right to recover costs from the Claimant, there is good reason to depart from that budget.

113. As to the extent of that departure, the budget is of no value for the purposes of assessing the costs recoverable by the Second Defendant other than that it is unlikely that the Second Defendant alone could justify the recovery of costs in excess of a budget incorporating the costs of two defendants. Any claim for costs in excess of the approved budget has already, rightly, been abandoned. What is left will have to be assessed in the usual way without reference to the budgeted figures.

The Further Conduct of this Detailed Assessment

114. The underlying litigation that led to this detailed assessment was characterised by strong antipathy between the Claimant and the Second Defendant, each of whom attacked the other's credibility. As so often happens that antipathy, at least on the Claimant's part, seems to have extended to the detailed assessment.

115. The Claimant's Points of Dispute are littered with allegations of dishonesty. Claims for costs which the Claimant argues are irrecoverable, excessive or disproportionate are not just opposed: they are, repeatedly, characterised as dishonest. In fact the words "dishonest" or "dishonestly", largely aimed at the Second Defendant's legal representatives but also at the Second Defendant himself and his expert, appear in the Points of Dispute twelve times.

116. I can illustrate the tone of the Claimant's Points of Dispute by reference to their opening sentence:

> "The Bill of Costs ("Bill") is an attempt to mislead, profiteer and falsely claim costs, to which neither DAS nor the Second Defendant ("D2') are entitled. As a result the recoverable costs should be nil. If found that the Bill includes costs that are not recoverable, then the

> indemnity principle has been breached, the Bill incorrectly certified and should be assessed at nil."

117. I do not pre-judge any of the points that remain to be made by the Claimant when I observe first that parties routinely claim costs which the court finds to be irrecoverable, which is why we have assessments; second that, for that reason, the last sentence of the passage quoted above does not represent established practice; and third that, whilst detailed assessments can, metaphorically speaking, escalate into open war, even metaphorical wars are notoriously expensive.

118. At the conclusion of the second day's proceedings the Claimant expressed some horror at the prospect (now, I fear, almost inevitable) of these detailed assessment proceedings becoming longer than the trial itself. Having spent most of the first day of what was intended to be a two-day assessment entertaining speculative retainer challenges, extending to entirely hypothetical suggestions of criminal conduct on the part of the second Defendant's legal representatives, I share his concern, if not for precisely the same reasons.

119. As for the second day, all that was established in my view is that the second Defendant's bill (as quite rightly submitted by the Claimant) should have been prepared quite differently, and that the budget is of no use for assessment purposes.

120. The only real achievement in the detailed assessment proceedings so far has been the determination of hourly rates and recoverable interest, and we only achieved that because neither of those issues took much time.

121. What is now in prospect is a continuing detailed assessment, likely I fear to be conducted against the background of hostility, which will of necessity address issues of division of costs to 5 June 2018 before moving on to the assessment of costs after that date without regard to any budget. In the course of that exercise I shall have to address the Second Defendant's challenges to the validity of some of the Claimant's Points of Dispute, in particular by reference to *Ainsworth v Stewarts Law LLP* [2020] EWCA Civ 178. When all that has been done, I will then be hearing submissions on proportionality and the Claimant's intended application for a penalty under CPR 44.11.

122. It is perhaps not entirely fair to compare the length of a trial with the length a detailed assessment hearing, because the detailed assessment concerns the entirety of the proceedings, and so much depends what the parties choose to put into issue. In fact, most detailed assessment hearings are avoided or curtailed by negotiation. That however requires an element of goodwill which seems, to date, to have been wholly lacking in this case.

123. It is not difficult to see that in addressing all the remaining issues I have mentioned (not least when so many allegations of dishonesty are made) a disproportionate amount of time and cost is likely to incurred in relation to costs claimed at a total (even before division) of less than £120,000.

124. I would suggest that the next step is to consider how this detailed assessment can be concluded in the most proportionate and cost-effective way possible. I will arrange a directions hearing with a view to determining that, and pending that hearing I would

encourage the parties to discuss and if possible agree how it might be achieved. To that end, even a temporary cessation of hostilities might assist.