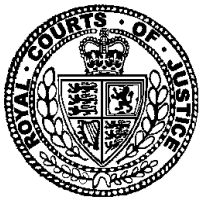

Neutral Citation Number: [2025] EWHC 68 (SCCO)
Case No: SC-2023-BTP-000468

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 17/01/2025

Before:

COSTS JUDGE ROWLEY

- -

Between:

MR RYAN PERRETT	**Claimant**
- and -	
WOLFERSTANS LLP	**Defendant**

- -
- -

Mark Carlisle (instructed by **JG Solicitors**) for the **Claimant**
Robert Marven KC (instructed by **Kain Knight (North & Midlands) Ltd**) for the **Defendant**

Hearing dates: 10 and 11 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. This is my reserved judgment in respect of preliminary issues 2, 3, 4 and 5 of the claimant's points of dispute following a hearing on the 10th and 11th of July 2024 at which the claimant and Ms Tracey Barton of the defendant gave evidence and detailed submissions were made by Mr Carlisle for the Claimant and Robert Marven KC for the Defendant.

2. Points of dispute 2, 3 and 4 concern wide ranging challenges to the nature of the retainer between the claimant and defendant, the construction of it and the applicable primary and secondary legislation. The fifth point of dispute concerns the method of assessment of the non-contentious costs contained within the defendant's bill. As I have described them, the last point of dispute is a self-contained point which I deal with at the end of this judgment. The other three points are interrelated, both in terms of evidence and submissions, and consequently I have not sought to separate them during the course of this judgment. Under the heading of "The Evidence" I have dealt with the main factual disputes. I have separately referred to other elements of the witnesses' evidence in parts where that appeared more convenient.

3. I have generally referred to "the claimant" when describing the background to his case and the submissions made by Mr Carlisle. In setting out and discussing the key evidence, I have generally referred to "Mr Perrett" on the basis it made matters clearer but it has no other significance.

The Evidence

4. The claimant instructed the defendant to act on his behalf in respect of an accident which occurred on 1 December 2018. On that evening, the claimant was at work when he suffered an accident through slipping on a spillage which had not been properly cleaned up. As a result of the accident, he sustained injuries to his wrist, neck and shoulder.

5. The claimant knew that the defendant's offices were in his local area and, having telephoned the receptionist to ascertain whether they acted on a "no-win, no fee" basis, he discussed his claim at the telephone with someone who he recollects as being Tracey Barton. According to his witness statement, the claimant asked Ms Barton if she would take his case on under a no win, no fee agreement and "she said that she would make this decision when I had completed the accident details form."

The Two Disputed Conversations

6. The claimant completed an enquiry form and was assisted by his partner in completing it because of his wrist injury. He delivered the form by hand to the defendant's offices a few days later. One of the central pieces of evidence relied upon by the claimant was his conversation with the receptionist at the time of handing in his form. He describes, at paragraph 15 of his witness statement, the conversation as follows:

> "I specifically remember having a conversation about the legal fees with the lady who was sat on the reception desk when I

> handed my completed accident form in. I told that lady that I had never had a personal injury claim before and didn't know how it worked with paying fees. I recall specifically that the lady I spoke to advised me that if the Solicitors were going to work for me on a no win no fee basis all my legal fees would be paid by the other side if my claim was successful. If the claim wasn't successful, I wouldn't have to pay anybody anything."

7. In the witness box, Mr Perrett described how he had felt the need to get out of his house and so had received a lift from a friend to the solicitors in order to drop the form in. He had no appointment but was able to hand the form to a smartly dressed woman sitting at the reception desk. Under cross examination, the extent of the conversation with the receptionist altered from the description in the witness statement so that the description of the mechanics of a no-win, no fee agreement was given by Mr Perrett rather than the receptionist. Her role reduced to responding by saying "that's right". Mr Perrett said in the witness box that he had used words to the effect of:

> "Am I correct in saying, if I lose, I don't pay, if I win are all my costs covered by the other side/my employers?"

8. Mr Perrett distinguished between the merits of his case, which he would only expect to discuss with the person actually running his case and the business practice of using no-win, no fee agreements, which he thought anyone working at the solicitors would know about.

9. In her witness statement, Ms Barton disagreed with paragraph 15 of Mr Perrett's witness statement. At paragraph 10 of her statement she said the following:

> "I have no knowledge as to whether the Claimant hand-delivered the form or not as it would have just been scanned with my post; however our reception staff would not comment as to the funding of the claim as it is not part of their job to do so and they are not informed of how claims are funded so would not have the necessary knowledge to answer. If such a question had been raised it would be usual for a member of reception staff to ask for the fee earner or a member of the PI department to attend to discuss with the client."

10. In the witness box, Ms Barton accepted that she had no first-hand knowledge of the claimant's conversation with the receptionist. She reiterated that although the receptionist would be aware of the fact that the firm used no-win, no fee agreements, at least in some areas of the practice, they did not know the mechanics of them. Ms Barton relied upon the document subsequently signed by the claimant which contradicted his description of how he said the CFA worked.

11. Ms Barton's comments echoed the cross examination of the claimant regarding the wording of the conditional fee agreement ("CFA"), which he subsequently signed on 10 January 2019, insofar as it related to paying the defendant where the case was successful. Under the heading "Paying us if you win" Mr Marven asked Mr Perrett to read out the following passage:

> "You are entitled to seek recovery from your opponent of part or all of our basic charges, disbursements, your Barrister's fees and VAT, but not our success fee or the Barrister's success fee (if the Barrister is instructed under the terms of a Conditional Fee Agreement with us). If you do not recover all of our basic charges, disbursements and your Barrister's fee (if instructed) from your opponent or any other third party liable to pay them then you will be liable to pay them and we reserve the right to deduct them from your damages."

12. Mr Perrett said that he understood this passage to mean that if the other side did not pay the costs for some reason, then he might be liable for the costs but since the other side were covering everything, he would not pay any costs. This was sufficiently clear to him that he did not feel the need to check his interpretation (having already spoken to someone (i.e. the receptionist) at the defendant company.)

13. When taken to the letter which contained the CFA and the terms and conditions, Mr Perrett said that the paragraph in bold seemed to be more important than other things in the letter and, as such, he was drawn to it. He described it as the "crucial passage" in the CFA covering letter. The emboldened paragraph can be found under the heading "What do I pay if I Win?" and says:

> "It is the policy of this firm to aim to ensure that the overall amount we will charge you for our basic charges, success fee, expenses and disbursements, any Barrister's fees (and success fee, if the Barrister is instructed under the terms of a Conditional Fee Agreement with us) (inclusive of VAT), after any contribution to your costs has been paid by your opponent, is limited to a maximum of 25% of the total damages you receive."

14. The notion of a contribution to Mr Perrett's legal fees set out in both this quotation and the quotation above from the CFA itself, did not sit easily with Mr Perrett's evidence that he expected all of his fees (with the possible exception of the After The Event ("ATE") insurance policy) to be paid by his opponent.

15. This apparent contradiction was highlighted when Mr Perrett was taken by Mr. Marven to the correspondence between Mr Perrett and his former solicitors when considering making offers to settle his claim and considering offers made by his opponent's insurers. For example, in a letter dated 21 October 2021, following advice to make a settlement offer of £7,334.63, the pre-penultimate paragraph of that letter stated:

> "I would remind you that on settlement of your claim there will be a deduction in respect of the insurance premium with ARAG Insurance in the sum of £319.20 and this firm's costs. Any contribution in respect of this firm's costs will be limited to 25% of your damages."

16. Mr Perrett signed a mandate regarding the making of the offer two days later and which specifically recorded the sum to be offered of £7,334.63.

17. Upon receipt of the claimant's offer, the opponent made a counter offer of £7,102.61 which Tracey Barton had no hesitation in recommending to Mr Perrett should be accepted. The letter is dated 17 November 2021 and set out a list of two deductions that would be made from the damages. The first was the ATE insurance premium. The second was:

> "This firm's success fee – £1,500. We are entitled to make a deduction of up to 25% of damages. The proposed reduction represents 21% of your damages.
>
> You will therefore receive £5,283.41"

18. When asked how the claimant reconciled his stated understanding that all of his fees would be paid by the opponent with his agreement to accept a 20%+ reduction when settlement offers occurred, Mr Perrett initially suggested that he simply wished the case to come to a conclusion and that it needed to be finished. It was only "at that point" that he "realised what was happening."

19. When pressed by Mr Marven as to why he did not challenge this apparent modification of the arrangement, Mr Perrett then suggested that he had in fact asked a question and had had a "slight conversation" regarding the letter. He said that he could not remember who it was – although it was a woman – and it might have been either Tracey Barton or her assistant, Rachel Green. He said that he had been told that the arrangement was how it had always been and he said "let's just do it."

20. Mr Perrett accepted that he had not mentioned this conversation in his statement and, in answer to Mr Marven's suggestion that his evidence amounted to him being unable to remember who he spoke to or what was said, he accepted this to be the case. This was at the end of his cross examination and I accept that Mr Perrett's response may have been dealing with the point broadly, but it is certainly the case that the probative value of his evidence regarding the conversation alleged to have taken place after 17 November 2021 has to be extremely modest. There is no specific date or person mentioned with which the defendant could have made enquiries, even if it had been put on notice of its existence. Nor is there any indication of what was said which might jog a person's memory. It seemed clear that the person spoken to was in fact neither of the fee earners who dealt with this case and therefore Mr Perrett's evidence about the people who had confirmed the workings of the CFA at the beginning and end of the retainer was, at best, that it was from other members of staff.

21. Partway through the cross examination, Mr Perrett said to Mr Marven that the latter was now making the terms of the agreement clear to him but that was not how he had read the agreement and that he had genuinely read it as being that the opponent was going to cover all of the costs.

22. I accept that Mr Perrett was a witness genuinely trying to assist the court with his recollections. Furthermore, as Mr Carlisle pointed out, the only evidence before the court regarding the conversation between Mr Perrett and the receptionist was Mr Perrett's own evidence. Ms Barton's evidence was entirely a commentary on what would usually be the case.

23. But Mr Perrett's evidence has to have some cogency, even if uncontested by other evidence. That cogency was challenged by Mr Marven's cross examination. At the time of the conversation with the receptionist, Mr Perrett had had a telephone conversation with members of the defendant, including Ms Barton, and at which time, Mr Perrett was keen to establish that the defendant used "no win, no fee" agreements. Ms Barton declined to confirm whether or not a CFA would be offered until she had further information. There is no disagreement between the parties that, prior to the accident form being handed in, this was the situation. Having heard Mr Perrett describe the conversation with the receptionist in very different terms under cross examination from the contents of his witness statement, I am not persuaded that a conversation in terms remotely close to the one set out in his witness statement took place.

24. On Mr Perrett's own evidence, he simply decided to leave the house so that he could drop in the form rather than delivering it in some other fashion. That does not suggest that he went to the defendant's offices with the intention of clarifying the terms of the retainer. He had been asked to provide more information so that a decision could be taken on whether the defendant would even be prepared to take on the claim. In my judgment, any conversation whilst dropping off the form was more likely to be closer to the evidence given in the witness box.

25. The receptionist's response of "that's right" seems to me to be more likely to have related to a comment about whether the defendant used "no win, no fee" agreements generally than anything specific about their mechanics. As I have recorded at paragraph 7 above, Mr Perrett is now able to describe the outcomes of both winning and losing (if using a CFA Lite). At the time he was seeking to instruct solicitors for his personal injury claim, the phrase "no win, no fee" is all that either side say he used. That phrase, on its own, does not highlight what happens if there is a win and that seems to be a general reflection that would-be clients are particularly interested in covering off the potential downside of a loss. Given Mr Perrett's own description that he was looking for a "no win, no fee" agreement when he first contacted the defendant, I am not persuaded that the concise description of a CFA Lite which he gave in the witness box was one which was likely to have been used when dropping off the accident form before he even became a client. In my view, the understanding over time that some CFAs may be CFA Lites, has blended into his recollection of the conversation with the receptionist which, I find, was more likely to have been no more than an offhand comment on the use of CFAs by the defendant.

26. Similarly, I do not accept that there was any meaningful conversation with anyone regarding the settlement proposal. The very existence of that conversation did not come to light until Mr Perrett entered the witness box and it was not his first explanation of why he accepted that a deduction would be made from his damages. To the extent that there was any such later conversation, it seems to me that Mr Perrett's evidence that he was told that the agreement had always been that a deduction would be made is by far the most likely to be accurate.

27. In my judgment, Mr Perrett appreciated the evidential hole he was in whilst in the witness box and his sudden, vague recollection of a later conversation which confirmed the understanding that he had throughout the case was a reconstruction of events rather than any true recollection.

The Advice Form

28. I am quite prepared to accept that Mr Perrett's faulty understanding of the written terms of his agreement was not assisted by the rather peculiar method of the defendant in providing advice to a would-be client when sending out the CFA documentation. From Mr Carlisle's cross-examination of Ms Barton, it was entirely apparent that the "confirmation of advice given" in the form signed by Mr Perrett was no such thing. No advice was given in the way the costs were calculated, how qualified one-way costs shifting worked, or the court procedure for challenging the defendant's bill amongst the 10 statements for which boxes were provided so that they could be ticked.

29. Whilst the boxes were ticked, Ms Barton had to accept that there was no separate conversation regarding the terms of the CFA and that the client was left to understand how it worked from the wording of the CFA itself. On that basis, it seems to me that the confirmation of advice given document was pointless since the client either understood the CFA from its own terms or, as appears the case, he did not and in either event would be none the wiser by reading the confirmation document and seeking to complete it.

30. One statement in the confirmation of advice given which Mr Carlisle particularly quizzed Ms Barton about, concerned the bald statement that "My Solicitor considers that a Conditional Fee Agreement is the most appropriate form of funding for my case."

31. Mr Carlisle queried what other forms of funding were considered. He was met with the answer that the defendant did (and does) not offer any other funding options besides a CFA or a private paying arrangement. Ms Barton accepted therefore that the stated advice that a CFA was the most appropriate form of funding did not cover other potential forms of funding besides the two offered. She did, however, consider that the firm complied with the Solicitors' Code of Conduct.

Characterising the Agreement

32. The defendant says that the parties entered into a CFA. The claimant says that the true nature of the agreement entered into was a Damages-Based Agreement ("DBA"). In fact, the claimant runs a number of arguments regarding the nature of the contract of retainer and some of them, it seems to me, are mutually exclusive. It is therefore necessary to take the arguments, step-by-step.

33. The agreement signed by the parties described itself as a CFA. The claimant says that the way the "success fee" is calculated fits the DBA regime more accurately than the CFA regime. The claimant also says that a DBA would have been better for the claimant than a CFA because, in modest claims for personal injuries, a DBA is invariably the better model. The claimant also criticises the defendant for only offering to act under a CFA which, on the face of it, appears to run counter to the claimant's argument that it is in fact a DBA.

34. A CFA, to be enforceable, needs to comply with s58 and s58A of the Courts and Legal Services Act 1990 ("CLSA"), as amended. I do not understand the claimant to be saying that, if I conclude that the agreement is a CFA, that it fails to comply with the legislative requirements and as such could not be enforced against him, in principle.

35. In order for the agreement to be a DBA, it would need to comply with section 58AA CLSA, an extract of which is as follows:

> **"58AA Damages-based agreements**
>
> (1) A damages-based agreement which satisfies the conditions in subsection (4) is not unenforceable by reason only of its being a damages-based agreement.
>
> (2) But (subject to subsection (9)) a damages-based agreement which does not satisfy those conditions is unenforceable.
>
> …
>
> (9) Where section 57 of the Solicitors Act 1974 (non-contentious business agreements between solicitor and client) applies to a damages-based agreement other than one relating to an employment matter, subsections (1) and (2) of this section do not make it unenforceable."

36. In the case of Bolt Burdon Solicitors v Tariq and Ors [2016] EW HC 811 (QB) Spencer J confirmed, at paragraph 150 of his judgment, that section 58AA had no direct bearing on the non-contentious business agreement which he was considering. As I have indicated at the outset of this judgment, the discrete fifth point of dispute in this case seeks a particular method of quantification of the solicitors' costs as a result of the work being non-contentious and therefore being governed by the Solicitors (Non-Contentious Business) Remuneration Order 2009 ("S(NCB)RO").

37. It would seem, therefore, that the claimant is in some difficulty in arguing about any issue regarding compliance with the DBA Regulations 2013 because they do not apply any more than the primary legislation. In particular, the challenge in the fourth point of dispute that the solicitors share of the monies exceeded the 25% cap for personal injury in the regulations cannot be sustained.

38. Any agreement involving non-contentious work can be described as a non-contentious business agreement. Whether it is an agreement which restricts the client's right to challenge it under s57 Solicitors Act 1974 (a Non-Contentious Business Agreement ("NCBA") which I have capitalised to distinguish it) is a different matter. If it is a valid agreement under that section, then the client can only have the costs claimed under it assessed if they can establish that it is not "fair and reasonable." If the agreement is invalid under that section – or the solicitors do not seek to rely upon that formality – then it is still a business agreement involving non-contentious work. By virtue of s58AA(9) such an agreement is not caught by the legislative requirements of either s58AA or the DBA Regulations 2013. Indeed, it is common in transactional work, which is inevitably non-contentious, for solicitors and their clients to agree fees which are based on contingencies concerning successful or unsuccessful outcomes in the transaction without any attempt to create a DBA or other form of formal contingency arrangement.

39. Moreover, it seemed to me that Mr Carlisle's submissions supported this line of reasoning. He relied upon the decision of Mann J in Wilson v Spector Partnership [2007] EWHC 133 (Ch) regarding the creation of a business agreement, whether or not the parties to it appreciated what they were doing. (The case of Wilson actually related

to a Contentious Business Agreement ("CBA") rather than its non-contentious counterpart (NCBA), but the reasoning applies equally.)

40. In Wilson, Mann J rejected the first instance judge's reasoning that since the parties did not describe it as such, the agreement could not be a CBA. What mattered was form, not substance. Mann J reiterated the need for certainty that was inherent in a CBA so that the parties, and in particular, the client knew "what he was letting himself in for", including being prevented from seeking an assessment under s70 Solicitors Act 1974. Mann J decided in Wilson that there was insufficient certainty because the hourly rates could be varied to an unspecified amount in some circumstances.

41. In this case, Schedule 2 of the agreement allowed for periodic increases, albeit that those increases had to be agreed beforehand with the client. This might have amounted to sufficient certainty, but the first paragraph on the final page of Schedule 2 allowed the defendant to take into account a number of factors which might or might not be sufficiently recompensed by the hourly rate charged. As such, the rates might have been increased if the matter became more complex than expected. Based upon the dicta in Wilson, I cannot see that this wording would entitle the defendant to seek to circumscribe the claimant's rights to a s70 assessment by maintaining that the parties had entered into a valid NCBA.

42. Nevertheless, for the reasons I have given, it seems to me that the agreement is, at the very least, an invalid NCBA and as such is outside the scope of the DBA provisions. Accordingly, to the extent that there is any problem with the calculation of the success fee in this case, it has to be viewed as deriving from a non-compliance with the CFA provisions rather than that it should be seen as emanating from it being seen as a DBA.

43. For the sake of completeness, I should also address the argument that comments made by the Supreme Court in the case of R(PACCAR) v Competition Appeal Tribunal [2023] UKSC 28 assist the claimant in defining the agreement as a DBA. The claimant's argument is that a number of statements by their Lordships as to the regime under the Compensation Act 2006 were intended to protect the consumer from activities covered by the regime no matter who was undertaking such activities. According to the second point of dispute, litigation funding agreements where the client paid a fixed percentage of compensation in the event of a win were DBAs "notwithstanding they were not so described and that the parties to the agreements have not understood them to be such."

44. In my judgment there is a clear distinction between this case and the situation faced by their Lordships in PACCAR. In the latter case, the agreements into which the litigation funders had entered were assumed not to be caught by any of the legislation and were therefore simply contracts at common law. The Supreme Court however concluded that the legislation was sufficiently wide for one of the contingency fee options to encompass those litigation funding agreements.

45. In this case, the agreement comes within the sections of the CLSA which deal with CFAs. As such, there is a regulatory environment in which this agreement undoubtedly sits. The claimant seeks to argue that it is also caught by a separate section of the CLSA, albeit that it does not comply fully with the requirements of that section and its secondary legislation. It seems to me that this situation is plainly distinguishable from PACCAR.

46. The claimant's final argument involving a DBA is the challenge that the claimant ought to have been offered such an agreement as an alternative to a CFA. In failing to do so, the defendant prevented the claimant from receiving the best possible information under the Solicitors Regulation Authority ("SRA") Code of Conduct in circumstances where a DBA would invariably be the better option.

47. At the time when the claimant became the defendant's client, version 20 of the SRA Handbook applied. Version 21 was published on 6 December 2018 and that was replaced by the SRA Standards and Regulations on 25 November 2019 and which is currently in place.

48. Principle 4 espoused in the SRA Handbook is to "act in the best interests of each client" and in relation to the issue of costs, the most obviously relevant outcomes are:

> "O(1.6) you only enter into fee agreements with your clients that are legal, and which you consider suitable for the client's needs and take account of the client's best interests;
>
> O(1.13) clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of their matter;"

49. In order to consider whether the outcomes have been achieved, reference can be had to the "indicative behaviours" which, in respect of fee arrangements, include the following:

> "IB(1.14) clearly explaining your fees and if and when they are likely to change;
>
> IB(1.15) warning about any other payments for which the client may be responsible;
>
> IB(1.16) discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;
>
> IB(1.17) where you are acting for a client under a fee arrangement governed by statute, such as a conditional fee agreement, giving the client all relevant information relating to that arrangement;"

50. Mr Carlisle made numerous submissions in relation to the compliance or otherwise with the Code of Conduct by the defendant. For the purposes of the immediate argument, Mr Carlisle submitted that the defendant had breached Outcome 1.6 by failing to take account of the client's best interests. His argument involved a series of propositions as to the desirability of different forms of agreement and which expanded upon the argument in the second point of dispute that a DBA was more advantageous for clients than a CFA and that the reverse was therefore true for the solicitors.

51. In his oral submissions, Mr Carlisle categorised a CFA without any form of cap as being the worst of all worlds. A CFA with a cap was only marginally better since the extent of that cap was only known at the end the case. A CFA Lite - traditionally a CFA where the solicitor recovered costs from the opponent and sought nothing further from the client – was better than a CFA. Mr Carlisle said that a private funding arrangement was a better option for someone who had a good claim since there would be no success fee to be taken from the damages. The best option of all was a DBA. If unsuccessful, the position was the same as for a CFA in that no fees would be charged against the client and Qualified One way Costs Shifting ("QOCS") would apply to protect the claimant to some extent against adverse costs orders.

52. The benefit of a DBA was apparent where the claim was successful. For example, the 25% cap on damages was inclusive of VAT unlike a CFA. There were no base fees in addition to the percentage fee payable, therefore where costs were recovered, they would be set against the 25% cap, unlike a CFA, thereby reducing the sum payable by the client. In failing to advise the client that a DBA would be a better option for him, it was Mr Carlisle's submission that the defendant here had breached Outcome 1.6.

53. In response, Mr Marven relied upon the evidence of Ms Barton on this point. The defendant did not offer a DBA to any client and there was no obligation to advise a client about an alternative that the defendant did not offer. Whilst it can be seen from Indicative Behaviour 1.16 that there is an obligation to discuss some other forms of funding with the client, it seems to me that Mr Marven's argument is correct as between a CFA and a DBA. There is nothing in any of the outcomes or indicative behaviours that requires a solicitor to advise upon different forms of contingency agreement governed by statute. Indicative behaviour 1.17 simply requires any agreement which is so governed to be explained with all of the relevant information relating to that agreement.

54. There are many firms of solicitors who do not seek to act under a DBA. The difficulty with seeking any form of payment at all where the client is unsuccessful has, it appears, put off many solicitors who can achieve that outcome via a CFA – so that a "no win, no fee" agreement becomes a "no win, lower fee" agreement. Case reports of solicitors who use DBAs finding themselves entirely unremunerated in various situations presumably adds to the concern of those who have not sought to act under a DBA.

55. If Mr Carlisle's argument were right, then such solicitors would be obliged to offer a DBA or to turn away clients who might be able to obtain such an agreement from another firm. If that, rather surprising, situation occurred, in my judgment there would have to be extremely clear wording in the Code of Conduct to this effect. In fact, in Chapter 1 of the Code of Conduct dealing with client care, the statement is made to solicitors that "you are generally free to decide whether or not to accept instructions in any matter, provided you do not discriminate unlawfully." It seems to me that this clearly entitles solicitors to limit the methods by which they are to be remunerated.

56. It is, in principle, no different from a client who instructs a solicitor using a CFA, being told part way through the case, that the prospects of success have become sufficiently dim that the solicitor would only be prepared to continue with the case if the funding changed to a privately paying arrangement. That would be a less good form of funding according to Mr Carlisle's submissions, since payment would be made where the case looked likely to lose, but there has never been any suggestion, as far as I am aware,

since CFAs became widespread that to do so was somehow contrary to the SRA Code of Conduct.

57. In my judgment, when the claimant rang to establish whether the defendant could provide representation under a "no-win, no fee" agreement, the defendant was perfectly entitled to confirm that a CFA might be available once certain checks had been made, without having to explain that other no-win, no fee agreements might be available elsewhere.

58. A solicitor is required to "take account" of "the client's best interests". Mr Carlisle's submissions elevated that phrase to something approaching an absolute which does not fit with the Code of Conduct – e.g. Outcome 1.2 requires a solicitor to protect the interests of their client in the matter, "subject to the proper administration of justice" - and is a counsel of perfection. I do not consider that Mr Carlisle's reliance on the case of McDaniel & Co v Clarke [2014] EWHC 3826 (QB) adds anything to this argument. In McDaniel, the costs were disallowed because the solicitor had failed to provide the advice described in Indicative Behaviour 1.17, and therefore the claimant was unable to take advantage of the free legal advice provided by her union. In this case, the defendant did not breach that Indicative Behaviour and provided the client with the option of one of at least two agreements governed by statute which could be described as a no win, no fee agreement.

Consumer Rights Act 2015

59. In the second point of dispute, the claimant's argument in relation to Consumer Rights Act 2015 ("CRA") is described as something of a fallback position depending upon the defendant's argument. In essence, the point of dispute states that the agreement was in reality a DBA drafted in unenforceable terms. It goes on to say that if the defendant seeks to argue that the terms of the agreement remove it from the DBA regime, the court would be asked to consider the fairness of such terms under the CRA.

60. I have already dealt with why I do not accept the claimant's argument regarding the DBA and therefore, I need to consider the claimant's CRA argument as a result.

61. In the second point of dispute reference is made to section 62 which, in bullet point form records that:

- an unfair term consumer contract is not binding on the consumer
- the term is unfair to the detriment of the consumer as a result of some absence of good faith causing a significant imbalance in the parties' respective rights and obligations
- whether a term is to be determined as fair takes into account the nature of the subject matter of the contract by reference to all the circumstances existing when the term was agreed.

62. This argument was taken by the claimant in Belsner v Cam Legal Services [2022] EWCA Civ 1387. The claimant there submitted that seeking recovery of costs over and above the recoverable fixed costs created a significant imbalance as to costs to the claimant's detriment. However the argument that the fixed costs were the maximum

sum for the client to pay was reliant upon the operation of s74(3) Solicitors Act 1974 and which did not apply in that case. As such, the argument under the CRA added nothing to the claimant's case. Section 74(3) only applies to contentious business and so it does not apply to this case either. As such, there is no need to consider this particular provision any further.

63. In his oral submissions, Mr Carlisle referred to s50 CRA which says:

> "(1) Every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if –
>
> (a) it is taken into account by the consumer when deciding to enter into the contract, or
>
> (b) it is taken into account by the consumer when making any decision about the service after entering into the contract.
>
> (2) Anything taken into account by the consumer as mentioned in subsection (1)(a) or (b) is subject to –
>
> (a) anything that qualified it and was said or written to the consumer by the trader on the same occasion, and
>
> (b) any change to it that has been expressly agreed between the consumer and the trader (before entering into the contract or later)."

64. The conversation between Mr Perrett and the receptionist was relied upon by Mr Carlisle as being taken into account by Mr Perrett when entering into the CFA. On the claimant's case, that conversation altered the wording of the contract so that the claimant was to benefit from all of his costs being paid by the defendant. Therefore, by implication, if there was any shortfall in the recovery, that would be no concern of the claimant.

65. Mr Carlisle relied upon the decision of Constable J in St James v Wilkin Chapman [2024] EWHC (KB) in this context. In that case, the Judge decided that the wording in the client care letter overrode the standard wording in the CFA so that the effect was that a CFA Lite was created and the client was not liable for any shortfall in the recovery of costs. The discussion alleged by the claimant in this case as to the mechanics of the CFA are said to have the same effect as the wording of the client care letter in St James.

66. Whilst there is a superficial similarity between this case (as the claimant puts his case) and St James, there are some obvious differences. In St James, the conflicting documents were provided at the same time and the argument was largely about which of those documents had primacy. Here the conversation on which the claimant relies took place before the claimant was offered CFA terms and was sent the documentation. The wording of the documentation is not in doubt, it is simply whether the receptionist said anything to Mr Perrett about the service he would receive as a client which he took into account when deciding to enter into the contract.

67. Mr Perrett's evidence was that he was looking for a no win, no fee agreement and that was what he was ultimately offered by the terms of the CFA. It is not the case that the term "no win, no fee" generally connotes a CFA Lite arrangement where the solicitors will only charge whatever can be recovered from the opponent. To the extent that the service offered was simply described as a no win, no fee agreement, whether by the receptionist or indeed Ms Barton, such representations are not in my view ones which change the terms of the documentation signed by Mr Perrett.

68. For this argument to have any weight, the claimant needs to establish that it was the receptionist who described the service in the manner set out in Mr Perrett's witness statement. For the reasons I have already given, I do not accept that the receptionist said anything more than "that's right" and that this was an answer to a general comment regarding no win, no fee agreements. On this basis, there is no term of the contract to be taken into account in the first place.

69. But if I am wrong about the conversation between Mr Perrett and the receptionist, it seems to me that s 50(2)(b) provides a different obstacle for him to surmount. When the offers were being discussed in writing and, in Mr Perrett's evidence in a telephone call with an unknown person, the deduction from the damages was expressly considered. The agreement to the deduction followed the terms of the contractual documentation signed by Mr Perrett. Therefore, if the written agreement was amended at the time of entering into it by the preceding conversation with the receptionist, Mr Perrett subsequently expressly agreed with the change to a deduction when providing written instructions regarding the offers made / accepted and on any clarificatory telephone call.

Failing to comply with the SRA Code of Conduct

70. The second strand to Mr Carlisle's criticisms of the defendant's conduct in relation to the SRA Code of Conduct concerned the information provided by it in relation to the potential costs recovery in this case.

71. The third point of dispute refers to the Court of Appeal's decision in Belsner v Cam Legal Services Ltd [2022] EWCA Civ 1387 and, in particular, paragraphs 84 to 86. Immediately before those paragraphs, there is a discussion of the current SRA Standards and Regulations (i.e. not the version applicable in this case). Although those provisions are worded differently, they still involve giving clients information in a way they can understand and should amount to the best possible information about pricing and the likely overall costs of the matter. Paragraph 84 then says:

> "In this case, the Client was given most of the information she needed to make those decisions, with the exception of one vital matter, namely the fixed recoverable costs that the defendant's insurers would pay within the RTA portal. It would have been straightforward for the Solicitors to inform the Client of the level of the fixed recoverable costs that could be recovered at stages 1 and 2. The Client was told that the Solicitors estimated their base costs at £2,500 (net of VAT and disbursements), and that many such claims will settle within the RTA portal after production of medical evidence and financial losses. She was also given an estimate of £2,000 for her damages. Had she also been told of

> the level of the fixed recoverable costs, she would have been able to compare the likely recoverable costs with the amount she was being asked to agree to pay the Solicitors. As the Client submitted to us, she would then have known that she was assuming a liability to pay the Solicitors five times the cost she would be getting back from the defendant. I do not think that the Solicitors can be said to have complied with [the relevant provisions] of the Code without providing that information.
>
> 85. For these reasons, the Solicitors neither ensured that the Client received the best possible information about the likely overall cost of the case, nor did they ensure that she was in a position to make an informed decision about whether she needed the service they were offering on the terms they were suggesting.
>
> 86. In my judgment, it is wholly unsatisfactory for solicitors generally, and these Solicitors in particular, routinely to suggest that their clients agree to a costs regime that allows them to charge significantly more than the claim is known in advance to be likely to be worth. Solicitors do not resolve this unsatisfactory state of affairs by allowing a discretionary reduction of their charges after the case is settled."

72. The point of dispute goes on to say that a breach of the code is a serious matter and refers to the case of McDaniel & Co v Clarke (also referred to at paragraph 58 above).

73. Mr Carlisle's submissions described the evidence given in respect of the information provided to the claimant as there being "no explanation of anything." This had resulted in the claimant losing his rights through a lack of understanding and being told the necessary information.

74. This was a trenchant description of the evidence given by Ms Barton and the documents provided to the claimant but there is a good deal of force in that criticism. The only evidence in Ms Barton's witness statement concerns a reference to the CFA and accompanying documentation which, as described above, indicate that part or all of the costs will be recovered from the defendant but does not give any indication of the extent of any shortfall.

75. When giving oral evidence, Ms Barton was asked about an estimate of £2,000 contained within the letter of 9 January 2019 which included the CFA. The estimate related to initial investigations of the injury and suggested that if the matter went all the way to trial, the likely cost would be in the region of "£15,000 or more". In July 2019, Ms Barton estimated that the overall costs of the claim would be around £5,000. That estimate was not altered in January 2020, July 2020 or February 2021. Those letters were described as being for information purposes only and Ms Barton indicated that the specific statement that no payment was being requested at that point was included as experience had shown that otherwise she would receive phone calls requiring reassurance. She accepted that the figure of £5,000 for base costs, disbursements and VAT was not out of the norm for a case of this type.

76. Mr Carlisle questioned Ms Barton at some length regarding the figures put forward, especially in terms of the fixed recoverable costs that were likely to be obtained in a portal case. Whilst she accepted that she would not normally be able to recover all of the estimated £5,000 on a portal case which concluded at Stage 2, she did not accept that the figure was "abnormal" since it had happened to her on more than one occasion. Ms Barton did not accept either that the wording of the CFA was too general to provide the claimant with specific information about his case. She accepted that the agreement was used in all cases but considered that each client would view the wording based upon the circumstances of their own case. She agreed that a partial recovery of costs was the most likely outcome and that the client was not told this save for in the CFA itself. The client was not told at any point that he was moving from potentially recovering all the costs to one where he could not expect to do so.

77. As with Mr Perrett, I accept entirely that Ms Barton was seeking to assist the court and that she gave her evidence honestly. It was clear that she considered any shortcomings that there may have been in providing the client with information was more than catered for by the overriding cap in the CFA which limited the costs recoverable from the client to 25% of the relevant damages.

78. Mr Marven adopted the same argument in his submissions. He said that what mattered to the claimant was the bottom line and that the communications about the deductions were clear. It was the defendant's primary case that the entire deduction of £1,500 claimed from Mr Perrett was justified by the success fee reflecting the risks of the case. Only if the court decided that the success fee was set at too high a percentage, would there be any need at all to justify the deduction from damages by reference to any shortfall in the profit costs. Therefore, unless the success fee was significantly reduced, the entire challenge regarding the supposed shortfall in costs was irrelevant.

79. In support of this approach, Mr Marven referred to the Court of Appeal decision in Herbert v HH Law Limited [2019] EWCA Civ 527 and in particular paragraph 48:

> "It is important to bear in mind that the complaint of Ms Herbert on this issue is not that she should have been sent a more detailed invoice or further invoices but that she did not give her informed consent to the charging of the success fee and its amount. There is no merit in that complaint (subject to the risk point addressed below) because all the information relating to its imposition and calculation and to her exposure to HH's fees generally, in the circumstances which occurred, was clearly set out in the documentation with which she was provided before agreeing HH's retainer. The retainer letter said that any contribution by her towards HH's costs under the CFA would be limited to 25% or less of her recovered damages. It told who, within HH, would have the initial responsibility for dealing with the claim and the person having overall supervision for the claim. The CFA said that, if she won the claim, she would pay HH's basic charges, their disbursements, success fee and the ATE premium. It said that HH would use their best endeavours to recover maximum costs from the defendant and their insurers. It set out the way the success fee would be calculated, and specified that there would be a cap of 25% of the elements of damages described. The

> "What you Need to Know" document also stated that, if HH won her claim, she would be liable to pay HH's basic charges, their disbursements, the ATE insurance premium and a success fee, and that a contribution towards her costs liability would be limited to up to 25% of the damages she obtained. That document also set out how the basic charges were calculated, and the hourly rate to be charged, and the imposition of VAT. Subject to the point on litigation risk and the success fee, the totality of that information provided a clear and comprehensive account of her exposure to the success fee and HH's fees generally."

80. Mr Marven relied upon this passage as being authority for the extent of the description of the claimant's liability generally for solicitors' costs and not simply the success fee, albeit that in Herbert the level of the success fee was the central question. Mr Marven equated the information provided in this case with that provided by the solicitors in Herbert.

81. I think there is little doubt that the defendant's provision of information to the client falls below the "best information possible" approach of the Code of Conduct. A complete absence of any indication of the costs that were likely to be recovered is sufficient to draw that conclusion. The question then is what effect does any such breach have? In Belsner the Court of Appeal upheld the solicitors' charges even though it found the Code of Conduct had been breached. The wording of the agreement here compares well with the wording found by the Court in Herbert to be a clear exposition of the arrangements. There is no open ended arrangement because the charges to the client are limited to 25% of the relevant damages. Therefore, even though it seems likely that there would almost always be a shortfall given the limited recoverable costs in portal cases, the arrangement here cannot be criticised in the same terms as the agreement in Belsner.

82. The matters raised by the claimant are not ones which are directly causative of any loss. Instead, they are context for the submissions regarding the agreement being a DBA in reality (which I have dismissed) and /or that the agreement is not fair and reasonable when assessed as non-contentious business (see below).

Approach to assessment

83. At paragraph 41 I concluded that the agreement between the parties was not an NCBA. The effect of this conclusion is that the work done under the agreement falls to be assessed under s70 Solicitors Act 1974 rather than s57. Since the work involved concerns non-contentious business, this means an assessment by reference to the S(NCB)RO rather than CPR 46.9.

84. It is usually the case, in my experience, and according to the authorities, that it will be the solicitors who seek to argue that an agreement is an NCBA so that the client's scope for challenge is reduced to challenging whether it is fair and reasonable or not. Only if the agreement is unfair and / or unreasonable will the client be able to seek to reduce the costs. Arguments regarding, for example, the reasonableness of particular items of work done will not fall for assessment. It is for this reason that courts have been slow to exclude clients from challenging fees under such agreements unless satisfied that the

terms were sufficiently certain for the client to know what they were letting themselves in for (as described by Spencer J in Tariq above).

85. However, that approach was turned on its head by Mr Carlisle in this case. It is not unusual for solicitors to take the view that they are content to defend their work on a s70 assessment – as the defendant does here – rather than seek to persuade the court that a valid NCBA exists. But it is unique, as far as I am concerned, for the client to argue that an NCBA exists, or at least that the fair and reasonable test is the one that should be applied. Mr Carlisle's arguments sought to show that the costs claimed were unfair and unreasonable. Mr Carlisle's argument, as described above, was that a CBA had been created in accordance with Wilson but it seemed to me that his argument was really aimed at an NCBA. It matters not because I have concluded that no formal NCBA is in existence.

86. This then leads to Mr Carlisle's fallback position that the costs still need to be fair and reasonable in accordance with the S(NCB)RO. Article 3 of that Order says:

> "3. A solicitor's costs must be fair and reasonable having regard to all the circumstances of the case in particular to –
>
> (a) the complexity of the matter or the difficulty or novelty of the questions raised:
>
> (b) the skill, labour, specialised knowledge and responsibility involved;
>
> (c) the time spent on the business;
>
> (d) the number and importance of the documents prepared or considered, without regard to length;
>
> (e) the place where and the circumstances in which the business or any part of the business is transacted;
>
> (f) the amount or value of any money or property involved;
>
> (g) whether any land involved is registered land within the meaning of the Land Registration Act 2002;
>
> (h) the importance of the matter to the client; and
>
> (i) the approval (express or implied) of the entitled person or the express approval of the testator to –
>
> (i) the solicitor undertaking all or any part of the work giving rise to the costs; or
>
> (ii) the amount of the costs."

87. The method of assessment forms the substance of point of dispute 5. However, as canvassed in argument, relevant considerations can also potentially be found in the

detailed points of dispute. The decision, at this stage, can only be a high level one concerning the method of assessment itself.

88. The claimant's argument is that the court should at least contemplate making an overall assessment of a fair and reasonable sum rather than descending into the detail. Such an approach would bear in mind the factors set out in Article 3 but, in order to consider all the circumstances, the court should look at other elements as well. It is on this line of reasoning that Mr Carlisle sought to bring in various points such as the failure to comply with the SRA Code of Conduct. The absence of any information to the client about the inevitability of (a) a shortfall in the recovery of profit costs and (b) the imposition of a 25% deduction should weigh heavily in the scales. In respect of this second point, Mr Carlisle referred to the hourly rates in the CFA and the 60% success fee sought. Even if the success fee percentage was reduced on assessment, the 25% deduction would be justified, at least arithmetically, by the time claimed at the hourly rates and which would not be recovered from the opponent.

89. Furthermore, the difference between the incurred costs and those that could be recovered by the fixed recoverable costs allowed, should be considered as unreasonable or unusual in line with comments made by Constable J in St James. The reference to those comments actually related to costs above the budgeted costs allowed in a costs management order but Mr Carlisle drew an analogy with a level of recovery which is essentially fixed. He also referred to paragraph 70 of the judgment which criticised the solicitors' reliance upon any shortfall being within the 25% cap as absolving them of a responsibility for keeping the client informed so as to look after his interests.

90. In order to reflect these various factors, Mr Carlisle relied upon the words of Longmore LJ in Jemma Trust v Liptrot [2003] EWCA Civ 1476 when considering the assessment of non-contentious costs with the assistance of two decisions from Donaldson J (as he then was) in the 1970's (Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment [1975] 1 WLR 1504 and Treasury Solicitor v Regester [1978] 1 WLR 446.)

91. The headnote to the report of one of the Donaldson J cases refers to it being one of the few reported cases on the quantification of non-contentious costs. Half a century later, that remains the case. As such, I have no criticism of Mr Carlisle for relying upon such authorities but it seems to me that they involve cases which are fundamentally different from this one.

92. All three cases support Mr Carlisle's argument in principle that the court should refrain from simply considering the amount of work done but should look at the other factors set out in what is now the S(NCB)RO. As a quotation from the Treasury Solicitor decision describes,

> "The magnetic attraction of [the time spent] as a foundation for assessment of fair and reasonable remuneration is that, in the absence of an approved scale applied to value, it is the only figure which is readily calculable. It is an attraction which must be sternly resisted in cases of this sort where one or more of the other factors is such as to dwarf it into insignificance."

93. In two of the three cited cases, the value of the property was the key issue. The Property and Reversionary case involved the conveyance of a property worth £2.25million and in Jemma Trott, the estate was worth almost £10 million. In the Treasury Solicitor case, the key issue was described as the "adrenalin factor" where urgency and precision were key. (The value was said to be £2 million.)

94. In all three cases, the courts were at pains to say that these other factors made simply looking at the time spent the wrong approach to take to reflect the appropriate figure to allow for the solicitors' fees. There was no suggestion, as I understood Mr Carlisle, that any of the specified factors in the S(NCB)RO ought to "dwarf" the time spent in the manner suggested by Donaldson J. Instead, Mr Carlisle's submission was that I should take factors which are not specified in the S(NCB)RO so as to take all the circumstances into account. The court's reference to an adrenalin factor in Treasury Solicitor supports that approach since it too does not really come within in any of the matters specified by the Order. But, it seems to me that simply to treat those factors as a non-exhaustive list for which other matters should be equally important is a path that I should be hesitant to follow. The previous incarnations of the S(NCB)RO in 1972 and 1994 are differently worded. They cover the same ground but there has obviously been consideration given to the precise terms of those factors and it seems to me that they should be given the greater weight, in the same way as the relevant parts of the CPR are considered when assessing contentious work.

95. Accordingly, where, as here, there are no other specific factors said to dwarf the time spent, I consider that I should assess the costs by reference to that time spent and then to consider the sum allowed to see whether other matters cause me to adjust that figure in order to determine a sum that is fair and reasonable. As Donaldson J concluded in Treasury Solicitor, the court's role is to make a value judgment based on discretion and experience to establish:

> "*a* right figure: one which is reasonable in all the circumstances and which is fair both to the client and to the solicitor."

An NCBA at the end of the retainer?

96. At paragraph 34 of his skeleton argument, Mr Marven put forward an argument under the heading of method of assessment, i.e. point of dispute 5, that there is no need to consider this point. Either the claimant's agreement to accept the opponent's offer as described in the mandate he signed on 18 November 2021 binds him or alternatively it is itself an NCBA which is neither unfair nor unreasonable and so cannot be re-opened.

97. This argument is not in the Replies and arises from the dicta of Eyre J in Holcroft v Thorneycroft Solicitors Ltd [2024] EWHC 1473 (KB). The Court of Appeal has given permission to appeal that decision and it seems to me to be better in all the circumstances to put that argument to one side pending the Court of Appeal's conclusions. If, in due course, it is to be raised, I consider it would be of assistance if the parties had the opportunity to set out their respective cases.