Neutral Citation Number: [2019] EWHC 2063 (QB)

Case No: QB/2018/0161

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM SENIOR COURTS COSTS OFFICE
APPLICATION NO QB/2018/0261

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before:

MR JUSTICE STEWART

- -

Between :

JASON BLYTH (1)	**Claimants/Appellants**
DANIEL BLYTH (2)	
- and -	
NELSONS SOLICITORS LIMITED	**Defendant/Respondent**

- -
- -

Mr James Howlett (instructed by **Cenpro Legal Limited**) for the **Claimants**
Mr Rupert Cohen (instructed by **Nelsons Solicitors**) for the **Defendant**

Hearing dates: 24 and 31 July 2019

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Approved Judgment

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

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MR JUSTICE STEWART

Mr Justice Stewart:

Introduction

1. On 13 June 2018 Master Whalan handed down a Judgment in the Senior Courts Costs Office. In that Judgment he determined these preliminary issues:

   (i) Did the parties conclude a contractual agreement that the costs payable by the Claimants to the Defendant would be limited to the sums set out in the costs budget? Was such an agreement concluded orally on 16 June 2014 and confirmed in writing on 5 August 2014?

   (ii) Further, or alternatively, should the Defendant be estopped from recovering from the Claimants, costs in excess of the sums set out in the costs budget?

   (iii) In terms of costs, what, if anything, was agreed between the parties at the mediation on 2 March 2015?

      (a) Did the parties conclude an oral "binding compromise", whereby the Claimants agreed to pay the Defendant's costs of £400,000, inclusive of success fee and VAT, plus disbursements?

      (b) If the Court upholds the Defendant's assertion that such an agreement was concluded, should it be set aside nonetheless on the grounds of misrepresentation and/or undue influence?

      (c) Alternatively, did the parties agree that the costs chargeable by the Defendant to the Claimants will be limited to (or "capped" at) £400,000, inclusive of success fee and VAT, plus disbursements, subject to the Claimants' right to seek a Solicitors Act detailed assessment?

      (d) Further, or alternatively, should the Defendant's right to charge the Claimants be limited by other factors, specifically a breach of the terms of the retainer and/or a failure to comply with the Solicitors' Code of Conduct.

2. In paragraph 57 of his Judgment the Master summarised his findings in this way:

> (i) no binding, enforceable contract was concluded orally on 16 June 2014, that the costs payable by the Claimants to the Defendant would be limited to the sum set out in the costs budget;
>
> (ii) the Defendant is not estopped from recovering from the Claimants costs in excess of the sum set out in the costs budget;
>
> (iii) at the mediation on 2 March 2015, the parties agreed that the costs chargeable by the Defendant to the Claimants would be limited to (or "capped" at) £400,000, inclusive of success fee and VAT, plus disbursements, subject to the Claimants' right to seek a Solicitors Act detailed assessment;

> (iv) the Defendant's right to charge the Claimants is not limited by other factors, specifically a breach of the terms of their retainer and, in turn, a failure to comply with the Solicitors' Code of Conduct.

3. The background facts are helpfully summarised in paragraph 2 of the Master's Judgment. Between June 2013 and May 2015, the Claimants retained the Defendant to represent them in a contentious probate dispute concerning the will and estate of their late father. On 29 November 2013, after a short, private instruction, the parties agreed a conditional fee agreement ('CFA') which the Claimants signed on 5 December 2013. On 16 June 2014, shortly before a Case Management Hearing listed on 7 August 2014, a meeting was held at the Defendant's offices and attended by the Claimants, Jonathan Roberts, a partner, and Simon Key, an Assistant Solicitor, at the Defendant. The Claimants' allegation is that during this meeting they agreed with the Defendant to limit or "cap" their costs liability to the sums set out in the costs budget. The litigation settled at a mediation on 2 March 2015. In December 2015, the Defendant served on the Claimants an invoice for their costs on the outstanding balance of £400,000, inclusive of success fee and VAT, plus disbursements. The Defendant said that this liability of £400,000 was agreed at the mediation.

4. A claim under the Solicitors' Act 1974 was commenced by the Claimants in a Part 8 claim issued on 16 February 2016. On 29 March 2016, Master Whalan ordered a detailed assessment to be made of the invoice. A formal Bill/Breakdown was served in April 2016. This calculated a total sum of costs of £608,780.76, comprising £289,895.60 profit costs, a success fee of 75% and VAT of £101,463.46. The Defendant accepted, however, that the Claimants' actual liability could not exceed £400,000, inclusive of success fee and VAT, plus disbursements. Points of Dispute, Replies and additional Points of Dispute were then served by the parties.

Grounds of Appeal

5. The Grounds of Appeal contained five grounds. The question of permission came before me on paper on 1 April 2019.

6. The first ground alleged that the Judgment was handed down 11 months after the conclusion of the oral evidence and that this was a serious procedural irregularity. The argument was that, in respect of the Master's findings of fact generally, their significance was diminished by the passing of time and the fading of the Master's recollection of the oral evidence. I refused permission on this ground as a separate ground of appeal, but said that submissions could be made in relation to the delay in support of grounds 2 and 3. However I noted that the submissions were not before the Costs Master until 18 December 2017, some 6 months after the evidence. In the Master's Judgment he refers to the hearing dates as being 9 May, 31 July and 18 December 2017. On this basis the Judgment was handed down just under 6 months after submissions concluded.

7. Ground 2 was that the Master's finding that there was no concluded contractual agreement that the costs payable by the Claimants to the Defendant would be limited to the sum set out in the costs budget, was wrong, unsupportable and one which no reasonable Master could reach. Ground 3 challenged the Master's ruling that the

Defendant was not estopped from recovering from the Claimants costs in excess of the costs set out in the costs budget. I granted permission on grounds 2 and 3.

8. Ground 4 was in respect of preliminary issue 3(b). My order was that permission in respect of this ground would be dealt with at the hearing of the appeal. I shall return to that ground later in this Judgment.

9. Ground 5 was a challenge to the Master's finding number (iv). I refused permission on this ground. There was no application to renew the application for permission to appeal on that ground.

The alleged Oral Agreement of 16 June 2014

10. This is dealt with by the Master in paragraphs 4-25 of his Judgment.

11. The key date was 16 June 2014. This was when the Claimants said an oral agreement was entered into.

12. The Master reviewed the Claimants' witness statements which were to the effect that Mr Roberts gave them an assurance that Nelsons' costs would not over-run the budget. Mr Jason Blyth, in his statement, said that once the costs budgets were approved by the court this would limit what they could receive, or the other side could receive from them, unless there were "special circumstances". [In fact on 7 August 2014 the court dispensed with costs budgets, but that is not relevant to the issues in the appeal]. Both Claimants gave oral evidence, the effect of which is summarised in paragraphs 6 and 8 of the Master's Judgment.

13. Mr Roberts' witness statement was that he did not recall any discussion concerning rising profit costs, only concerns about disbursements. He referred to an email of 17 June 2014 dealing with the disbursement of counsel's fees. He said [35] that he did not believe that profit costs were an issue to the Claimants as Nelsons were acting under a CFA and the only circumstances in which they would have to pay profit costs was if they were successful in the claim.

14. At [11]-[17] the Master dealt with the documentary evidence. This comprised:

    (i) A CFA dated 29 November 2013 signed by the Claimants on 5 December 2013. It gave an estimate of costs to take the matter to a contested trial in the High Court to be in the region of £150,000 plus VAT, disbursements and expenses. Under the CFA the Claimants were responsible for paying disbursements.

    (ii) The Claimants' Precedent H dated 2 May 2014 tabulated total fees incurred and forecast (i.e. estimated) costs of £175,959.90, exclusive of VAT and success fees. This sum included some £75000 incurred and some £45000 estimated profit costs.

    (iii) Mr Roberts' iPad notes of 15 June 2014 which contained various references to fees of, inter alia, counsel and the mediator, but no reference to any agreement to limit or "cap" the Claimants' costs liability. A manuscript note compiled by Mr Key also referred to

various disbursements, but made no reference to any discussion of or agreement to cap the Claimants' costs.

(iv) The email of 17 June 2014 already referred to.

(v) An email of 5 August 2014 to which I will refer later in this Judgment.

(vi) On 2 February 2015, prior to a mediation, the second Claimant sent an email to Mr Modiri of Nelsons stating "your fees will need to be looked at prior to any possible mediation (although I think your fees are capped as £150,000 plus "uplift")."

15. In paragraph 16 of the Judgment the Master also referred to some emails post mediation. I will deal with those later in this Judgment.

16. At [18]–[22] the Master made findings of fact after analysing the evidence. He noted that the Claimants' case was that the agreement was to cap fees, and that this was made orally on 16 June 2014 and confirmed in writing by email on 5 August 2014. Therefore the email was evidence of the oral agreement. His key findings are in [21]. He said:

> "My findings of fact are, therefore, as follows. During the meeting on 16th June 2014, the Claimants raised undoubtedly some concerns as to costs, but these related to the disbursements for which they were directly and immediately liable, namely the fees of counsel, the handwriting expert and the mediator. Some fees already incurred were disputed, while other concerns were expressed about their future, growing exposure particularly as the litigation proceeded to trial. Given the failure of the first meditation along with the apparent intransigence of their opponents, counsel's fees for trial were a real concern to the Claimants. To address this, the parties discussed and agreed that should the case proceed to a trial, the Claimants would not brief counsel, but would rely instead on the in-house advocacy of Jonathan Roberts. This had a very real advantage to the Claimants, as Daniel Blyth acknowledged in his evidence, that the cost of advocacy would no longer be a disbursement but instead "would be wrapped up in the CFA". The discussion, on my findings, went no further than that. When, latterly, Mr Roberts produced a copy of the Precedent H on his iPad, this was done as part of his explanation as to the procedure of the forthcoming Case Management Hearing"

17. I now turn to the email of 5 August 2014. It was a long email covering 4 pages in small font. It dealt with numerous matters, including the Claimants' main concern of their lack of confidence in the solicitor at the Defendant who had been dealing with the matter prior to the summer of 2014. Mr Roberts wrote "I want us to proceed as follows …" There were then over 20 paragraphs dealing with how the matter was to proceed. Included in that was the following:

> "I hope that the changes that I have made will work out. Although Kevin is a partner, when it comes to the final bill, his rates will be adjusted so that you are not being charged any more than you would have been charged if Nicola had

> continued to deal with the case. Insofar as any costs budget revisions are necessary due to the increase in the Trial length from 7-10 days, then obviously, we will need to pass these costs on to you, but in so far as there is any other "over-run" of charges, then I confirm that we will honour the original budget and, of course, the appropriate success fee that will apply to our final bill."

18. The Master at [10] recorded what Mr Roberts had said in cross-examination about this email. The Judgment says:

> "In his email of 5th August, the reference to "over-run" repeated the words of the Blyths themselves. He confirmed that his understanding of the words "original budget" was that they referred to the Precedent H. His intention at the time was to keep within this budget and he did not envisage that it would be exceeded."

19. The Master's finding at [22] was:

> "… Insofar as no such agreement was concluded, the best interpretation of Mr Roberts' confirmation that the Defendant "would honour the original budget", meaning the Precedent H, was that it comprised an indication that the solicitors intended to work within a budget that they expected to be adequate and which, moreover, they expected the court to approve in a Costs Management Order. Ultimately, both assumptions proved to be incorrect, but this does not, in my conclusion, convert a discussion about procedure into a binding agreement to limit the Claimants' overall liability in costs."

20. In the format of the Judgment the Master made findings of fact at [21] before he construed the email at [22]. That is why he began his discussion of the email with "insofar as no such agreement was concluded ...". However, he had set out in some detail all the relevant evidence, including the email and what was said about it in the preceding paragraphs. His conclusions at [21]-[22] are precisely that: conclusions after reviewing all the material evidence. His findings of fact, based on the written and oral evidence were that the discussions at the meeting on 16 June 2014 went no further than the fact that, should the case proceed to trial, the Claimants would not brief counsel but would rely instead on inhouse advocacy of Mr Roberts.

21. The Claimants make a number of points. However, the key complaint is that the words used by Mr Roberts in the 5 August 2014 email are not capable of any proper interpretation other than that which the Claimants alleged.

The approach of the appeal court to findings of fact

22. This court has to bear in mind some important principles when considering an appeal against findings of fact.

23. An appeal court should be "very slow" to reverse a trial judge's evaluation of facts arising by oral testimony (BVM Management Limited v Roger Yeomans t/a the Great Hall at Mains [2011] EWCA Civ 1254 at [23]).

24. In Re B (A Child) [2013] UKSC 33 Lord Neuberger said:

> "52….. The Court of Appeal, as a first appeal tribunal, will only rarely even contemplate reversing a trial judge's findings of primary fact.
>
> 53 As Baroness Hale JSC and Lord Kerr of Tonaghmore JSC explain in paras 200 and 108 respectively, this is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on fact can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

25. In Manzi v King's College Hospital NHS Foundation Trust [2018] EWCA Civ 1882 Ryder LJ said:

> "15. It is helpful to focus on the test this court must apply. That was most recently described in Re B (A Child) [2013] UKSC 33 per Lord Neuberger PSC at [53]:
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> > "…where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where the conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."
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> 16. Having regard to the focus that the claimant wishes to give to the appeal in this case, the words of Arden LJ in Langsam v Beachcroft LLP [2012] EWCA Civ 1230 at [72] are apposite and helpful:
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> > "…where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

26. The court's powers to interfere are therefore confined, against the background of these various citations from authority, to allow an appeal only where: "it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

The approach to construction of the email of 5 August 2014

27. Ground 2(a) of the Grounds of Appeal criticises the Master for failing to consider the objective meaning of the email of 5 August 2014 and by making his finding taking into account the subjective intentions of the parties as described by them in evidence.

28. The Claimants rely upon principles of contractual interpretation, as summarised, for example, by Popplewell J in **Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd ("The Ocean Neptune")** [2018] EWHC 163 (Comm), particularly at [8]. I shall cite a brief extract:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. …."

29. It must be noted however that the email of 5 August 2014 was not part of the contract. It was merely evidence of the contract which was said to have been made orally. Therefore, the principles of construction or interpretation of the terms of a contract are not applicable.

30. In **Thorner v Major [2009] 1 WLR 776; [2009] UKHL 18,** Lord Neuberger said at [82]

"…(a) the interpretation of a purely written contract is a matter of law, and depends on a relatively objective contextual assessment, which almost always excludes evidence of the parties' subjective understanding of what they were agreeing, but (b) the interpretation of an oral contract is a matter of fact (I suggest inference from primary fact), rather than one of law, on which the parties' subjective understanding of what they were agreeing is admissible."

31. The email was clearly relevant evidence as to whether there was an oral agreement and, if so, its terms. As Smith LJ said in **Maggs v Marsh [2006] EWCA Civ 1058:**

"26. In my judgment it is clear that the principle set out in Miller's case, does not apply to an oral contract. Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the

contract. It is simply helping him to decide whose recollection is right. It is not surprising to me that the editor of Lewison should observe that there is nothing in the authorities to prevent the court from looking at post contract actions of the parties. As a matter of principle, I can see every reason why such evidence should be received"

32. In **BVM Management Limited v Roger Yeomans t/a the Great Hall at Mains [2011] EWCA Civ 1254,** Aikens LJ, dealt with evidence in partly oral and partly written contracts, and the reluctance which an appeal court should exercise in interfering with a first instance decision in this regard. He said:

"23. When the terms of a contract have to be ascertained from oral exchanges and conduct that is a question of fact: see Carmichael v National Power plc [1999] 1 WLR 2042 at 2049C per Lord Hoffmann; Thorner v Majors [2009] 1 WLR 776 at [82] per Lord Neuberger of Abbotsbury . Moreover, in the case of a contract which is entirely oral or partly oral, evidence of things said and done after the contract was concluded are admissible to help decide what the parties had actually agreed: Maggs v March [2006] BLR 395 at 400 per Smith LJ; Crema v Cenkos Services plc [2011] 1 WLR 2066 at [34] per Aikens LJ . Many cases have emphasised that an appellate court should not readily hold, particularly in a case where the finding is dependent upon oral evidence, unless the judge's finding is obviously wrong, is an unreasonable finding on the evidence or the finding produces a result unsustainable in law. All this means that we must be very slow to reverse the judge's evaluation of the facts."

33. In my judgment, the Master was entitled, indeed obliged, to admit evidence of the subjective intention of Mr Roberts when he wrote the email. In respect of the email, being relevant evidence of an alleged wholly oral agreement, the Master's task was to weigh it in the balance of the other evidence about the alleged agreement. He then had to decide, having regard to its wording, and Mr Roberts' evidence as to his subjective intention in writing the words, along with the other evidence, what, if any, agreement had been reached.

34. I shall return to the email later in this judgment.

Other criticisms of the Master's judgment on the agreement

35. Ground 2(b) alleges that the Master failed to have regard to the contra proferentem rule of construction of contracts and to Regulation 7 of the Unfair Terms in Consumer Contracts Regulations 1999. Neither of these points was raised in the court below. In any event: (i) the contra proferentem principle applies to contracts. According to **Chitty on Contracts 23rd Edition at 13-095** the principle is that "a deed or other instrument shall be construed more strongly against the grantor or maker thereof". The Roman law maxim is: "verba cartarum fortius accipiuntur contra proferentem", which means that the words of documents are to be taken strongly against the one who puts them forward. The 5 August 2014 email was evidence, not a contract, and the alleged contract was oral. The maxim has no application; (ii) The 1999 Regulations are applicable to terms in contracts. They have no application in construing the words of the email of 5 August 2014.

36. Nevertheless, it is a point of some significance that when solicitors write an email, one would expect the recipient – especially a client reading a formal communication - to be able to understand the natural meaning of the words in the context in which they are used.

37. Ground 2(c) alleges that the Master incorrectly inferred, from the Claimants' evidence that they were uncertain whether the agreed sum was that contained in the CFA, that there was no agreement limiting the costs to those contained in the costs budget. It is said that he failed to take into account a relevant matter, namely that it was common ground (i) that the conversation on 16 June 2014 had concerned the costs budget and not the CFA agreement and (ii) that the Claimants had not at any stage been provided with a copy of the costs budget.

38. The relevant passage in the judgment on this point is:

> *"*20…….The Claimants, whose evidence I found to be more hesitant and uncertain, kept no written records or notes. When attempting subsequently to articulate their version of events, both exhibited continuously a fundamental confusion as to the terms of the alleged agreement. They were unable, thus, to explain accurately or consistently the meaning of "original budget", stating variously that it referred to either the estimate cited in the CFA of November 2013, or the sums set out in the Precedent H of May 2014."

39. The Defendant refers to the evidence on which this finding was based. The First Claimant's evidence, in relation to the cap and the alleged oral agreement was, as recorded by the Master at [6]:

> "…He stated that he could not be exact about the agreed figure as neither he nor his brother were given a copy of the budget. It became clear to me from further, detailed questioning that the first Claimants' figure of £150,000 had come from the costs estimate in the CFA, and that it was his understanding that the parties had agreed a cap at that level. Ultimately, therefore, the impression he gave in oral evidence was that he was unclear genuinely as to whether the alleged agreement was to cap the Claimants' costs at the CFA estimate or the figure in the Precedent H"

40. The Second Claimant, at [8]: "agreed that the repeated reference by both he and his brother to a cap at £150,000 was "an error on our part", and that he "may well have been in a state of confusion about this"". [The Master recorded that the repeated references to "£150000" included subsequent emails, particularly an email of 2 May 2015; this appears to be a typographical error for 2 February 2015, or perhaps 29 May 2015 – though that email came from the First Claimant].

41. It was common ground that the email of 5 August 2014 referred to the Precedent H costs budget and that the Precedent H costs budget was discussed in the meeting of 16 June 2014. The Claimants were shown it on Mr Roberts' iPad. The Claimants were not provided with a copy of the Precedent H costs budget at any time until July 2015. The Claimants' case was that the costs were capped at the figure recorded in the document on the iPad. This was the Precedent H of May 2014.

42. Nevertheless, the Master's finding was that in the meeting the Precedent H was shown on the iPad "as part of the explanation as to the procedure at the forthcoming Case Management Hearing", and that there was no discussion as to profit costs. It was not, as the Claimants allege, common ground that the conversation on 16 June 2014 had concerned the costs budget in the context of any discussion about capping or agreeing fees. Mr Cohen took me in some detail through the relevant communications. It would be impermissible for me to hold that the Master was not entitled to reach the conclusions he reached in [20]. This Ground must fail.

43. Ground 2(e) says that the Master failed to consider the uncontested evidence that the Defendant had by email of 7 August 2014 sent to the Claimants and the court a copy of their written submissions dated 31 July 2014 for the CMC listed on 7 August 2014. This set out a total Precedent H figure of "approximately £175000" for a 7 day trial, the cost budget in that sum being filed for use at the CMC. The revised budget in Precedent H was submitted on 2 May 2014.

44. The Claimants say this is fundamental because the Defendant were seeking the Court's approval of the costs budget, thereby potentially limiting the recovery against the other party following a trial to the potential detriment of their clients. They say this makes no sense whatsoever unless the costs as between solicitor and client had already been capped in the sum no higher than that set out in the costs budget. I do not accept this since it is also consistent with the possibility that solicitors intended to work within a budget they expected to be adequate, as the Master found at [22].

45. In addition the Claimants contend that the Master wrongly attached significance to an email sent by the previous fee earner on 31 July 2014, attaching costs ledgers. It is correct that the Master recorded this at [17] as providing the Claimants with an updated figure for work done in a total of £144,410.40 plus VAT. However, this does not feature anywhere in his reasoning in coming to his decision on whether there was an oral agreement in June 2014. {When he referred to it at [53] as updating "the figure set out in the Precedent H compiled in early May", that was in the wholly different context of the extent to which the figure of £400,000 costs agreed in March 2015 exceeded previous figures given to the Claimants. This was the subject of a challenge in Ground 5, upon which permission to appeal has been refused – see below}.

The construction of the 5 August 2014 email

46. Ground 2(d) assumes, as I have decided, that the subjective intention of Mr Roberts when writing the email was admissible evidence. On that basis it makes 3 points. These are:

    i) The purposes of the relevant part of the email of 5th August 2014 was to give the applicants an "assurance" or a "reassurance" that the costs going forward would not exceed the costs budget;

    (ii) The word "honour" in the email meant "stick to";

    (iii) His purpose in writing the email was to articulate to the Appellants that the Respondent's costs would not exceed those set out in the Costs Budget.

47. The question arises as to whether on any reasonable construction of the words used in the email the Master's "best interpretation" was a permissible one.

48. The words "assurance", "reassurance" and "stick to" in Ground 2(d) come from a note of Mr Roberts' evidence when he was questioned about the email.

49. I remind myself that the material words in the email were:

> "Insofar as any costs budget revisions are necessary due to the increase in the Trial length from 7-10 days, then obviously, we will need to pass these costs on to you, but in so far as there is any other "over-run" of charges, then I confirm that we will honour the original budget"

50. The first point is that the Master found, and was entitled to find after a full review of the surrounding evidence, that both Claimants "exhibited a fundamental confusion" about the "original budget" which was to be honoured. I have already addressed this and decided that this finding of the Master cannot be overturned. This of itself undermines any possible finding of a binding agreement.

51. As to the word "honour" this is capable of bearing the meaning that the original budget would not be exceeded by fulfilling a previous agreement. It is, however, also capable of the meaning that, apart from the revisions necessary because of the possible increase in trial length, the Precedent H would be respected in the sense that, as the Master said: "the solicitors intended to work within a budget they expected to be adequate…" Although, absent context and the evidence as a whole, which the Master took into account, and the findings he made, the former might at first blush seem the preferable construction, the latter is a permissible construction and the Master was entitled to make it.

52. I should add some further contextual matters:

> (i) As the Master noted [20], Mr Roberts and Mr Key kept a written note of the meeting of 16 June 2014. Though not comprehensive, neither record makes reference to any discussion or agreement to cap or limit the costs. I have seen the two records. They follow a similar pattern and are consistent, the one with the other, Mr Key's being more comprehensive than Mr Roberts'. Further, there was a long email dated 17 June 2014 – see judgment at [14] from Mr Roberts to the Claimants in which he says he will "endeavour to deal with the concerns that you raised with me relating to the handling of your case". The email essentially follows the format of the contemporaneous notes and, as the Master said, "there is no reference to any agreement to limit or cap the Claimants' costs."
>
> (ii) The background to the potential increase in trial length from 7 to 10 days referred to in the 5 August 2014 email is briefly this. The Precedent H was drafted in May 2014, budgeting costs on the basis of a 7-day trial. There is nothing to suggest that a possible increase to 10 days was discussed at the 16 June 2014 meeting. In the Defendant's skeleton submission dated 31 July 2014 for the 7 August 2014 CMC, it was recorded that the parties had previously agreed 7 days but, because of various factors, might require 10 days. If there had been an agreement to fix fees at the 16 June 12014 meeting, then the stated "need to pass on these costs to you", referring to 3 days extra trial costs, would have been something outwith the agreement, perhaps a

unilateral variation. It would be surprising (a) if the Defendant believed that it had already entered into an agreement, that it should refer to such a change in such a way; (b) if the Claimants believed they had already entered into an agreement, that they should not raise any questions or objections arising from that comment. This is notwithstanding the fact that the First Claimant's evidence was that the limit would apply unless there were special circumstances.

53. In Ground 2(f) complaint is made that the Master failed to consider uncontested written evidence. The Master recorded that on 2 February 2015 the second Claimant sent an email to Mr Modiri stating "I think your fees are capped at £150,000 plus uplift". He did not record that Mr Modiri emailed Mr Roberts asking: "Does the fee cap mean anything to you" and Mr Roberts replied "Vaguely. Anika please look at the correspondence from when the CFA was entered into." Mr Roberts' dealt with this in his statement. He said: "…..I probably had in mind the £150,000 estimate that I had given them at the initial meeting, as it was, of course, the same figure."

54. The fact that Mr Roberts wrote "Vaguely" in an email in the context in which he did is by no means conclusive. It would have been better if the Master had dealt expressly with this point, but it is not sufficient, if the Master's judgment is otherwise not susceptible to appeal, to overturn the judgment. First instance judges do not have to deal with every piece of evidence, so long as they deal with the central maters, which the Master did.

The Master's alternative finding based on accepting the Claimants' evidence

55. The Defendant submitted that even if there was a meeting of minds, there was no enforceable agreement because (a) there was no valid offer and acceptance; and (b) any agreement would be too uncertain to be enforceable. They rely on the Master's judgment at [25] that:

> "…..even if my findings were demonstrated to be wrong, the evidence would still not support the existence of a binding enforceable agreement. First, the Claimants' evidence about the meeting, even when taken at its highest, does not establish the existence of a valid offer or acceptance. Jonathan Roberts' purported "assurance that costs would not overrun" falls well short, in my view, of an offer (or agreement) to limit or cap the Claimants' overall costs liability. Second, any terms were of insufficient certainty to be enforceable. Even if Mr Roberts' email of 5 August 2014 was somehow incorporated into the contract – which is not the Claimants' case – I cannot see how a promise to "honour the original budget" could be viewed as being sufficiently certain and complete to be enforceable. Although Mr Roberts used the word "original", it is clear that he was referring to the budget in the Precedent H. The Claimants, meanwhile, were (and remained) confused between the estimate in the CFA and the budget in the Precedent H…"

56. The Defendant says there is no appeal against this alternative finding. However, Ground 2 commences with the words: "the Master's finding that there was no concluded contractual agreement that the costs payable by the Applicants to the Defendant would be limited to the sums set out in the Costs Budget was wrong, unsupportable and is one which no reasonable Master could reach…" The Grounds then deal with the subparagraphs to Ground 2 which I have covered in some detail above.

57. This extra point does not now arise for decision given that I have upheld the Master's finding that there was no agreement.

Ground 3 – Estoppel

58. At [26]-[29] the Master dealt with, and rejected, the Claimants' alternative case based on estoppel. This case was that the Defendant should be estopped from charging fees that exceed the costs budget by reason of estoppel by convention and/or promissory estoppel.

59. The Master's decision was that it followed from his findings of fact – or indeed any interpretation of the evidence – that the Claimants had not established an estoppel. He continued [29]:

> "In no way….could any representations alleged to have been made by Jonathan Roberts on 16 June 2014 (or, indeed, 5 August 2014) be stated as being clear, unequivocal, precise or unambiguous. There was, even on the Claimants' case, no common assumption of the parties. The Claimants' evidence was confused fundamentally. Even according to their best interpretation, namely that in referring to the 'original costs budget', Mr Roberts was purporting to limit costs to the estimate in the CFA, this was never the (express or implied) intention of the Defendant. There was, in turn, no clarity in the Claimants' purported reliance. Quite apart from the consequences of my findings of fact, therefore, the evidence does not, on any reasonable interpretation, establish the existence of an estoppel by convention and/or a promissory estoppel."

60. Ground 3(a) is that the Master made a finding that was wrong, namely that the email of 5 August 2014 was not clear, unequivocal, precise or unambiguous. I have dealt with this above. It did not satisfy those criteria.

61. Grounds 3(b)-(d) allege that the Master combined the test for the two types of estoppel and therefore failed to consider promissory estoppel. The Claimants also challenge his finding that there was "no clarity in the Claimants' purported reliance", saying that the Master did not give reasons for rejecting the Claimants' evidence that they did rely on the representation that costs payable would be limited to the sums set out in the costs budget.

62. The Master had set out [27]-[28] the passages in Chitty on Contracts (32nd Edition at 4-108 and 4-094/5) setting out the tests in relation to the two types of estoppel. As regards estoppel by convention, he found that the requirement for a 'common assumption' was not met. A main difference between estoppel by convention and promissory estoppel is, according to Chitty, that the former: "does not depend on any representation or promise", while the latter does. In the passage cited above, the Master clearly addressed the question of representation or promise. There is no basis for saying that he did not properly consider the elements of the two types of estoppel.

63. As to the alleged failure to give reasons for rejecting reliance by the Claimants, he gave perfectly adequate reasons, having said that the Claimants' evidence was "confused fundamentally" and then briefly explaining why. He had previously gone through this in some detail earlier in his judgment. This detail I have already considered in relation to Ground 2 of the appeal.

64. Therefore, the challenges in Ground 3 of the appeal must fail.

65. In any event:

(i) It was not the Claimants' case that the 5 August email was a free standing representation in the absence of agreement;

(ii) It was not the Defendant's case that, had there been agreement on 16 June 2014, there was no consideration.

In those circumstances the estoppel point adds nothing to Ground 2.

Ground 4

66. The Master found [44] that an agreement was concluded on 2 March 2015. I shall call this "the 2015 agreement". He said that the issue between the parties was whether the agreement comprised a fixed compromise of the Claimants' costs liability, as the Defendant submitted, or simply an agreement to limit or cap the Claimants' liability, subject to any Solicitors' Act rights, "which the Claimants would accept, given my rejection of their case as to a pre-existing, binding agreement from June 2014".

67. The Master's decision was that the 2015 agreement "should be construed as a limit or maximum claim and not a binding compromise for a fixed sum". Later he considered the Solicitors' Act rights and, although the Defendant accepted that it had failed to keep the Claimants updated on costs after 5 August 2014, despite costs having substantially increased from the budget, he found, following the authorities, that the sum of £400,000 was a sum which was in all the circumstances "reasonable for the client to be expected to pay". This latter finding was the subject of Ground 5 in the appeal. Permission to appeal has been refused on Ground 5.

68. At [47] the Master said: "In the light of this conclusion, it is not necessary for me to consider the Claimants' arguments on misrepresentation and/or undue influence."

69. Returning to Ground 4, this is in two parts:

(a) the Master's decision on the 2015 agreement was premised on his erroneous conclusion on the 2014 agreement/estoppel. It is correct that his decision was premised on his conclusion as to what happened in June 2014.

(b) The Master should have in any event considered the Claimants' argument that the 2015 agreement was entered into following misrepresentation, abuse of confidence and undue influence on the part of the Defendant. There was a breach of the terms of the retainer and the Code of Conduct in not updating the Claimants as to costs. Therefore, the intimation of costs of £600,000 at the mediation on 2 March 2015, which formed the backdrop to the agreement to limit costs to £400,000, is said to have been massively in excess of any figure provided to the Claimants, and, consequently, the Master should have made findings as to whether that agreement was entered into as a result of abuse of confidence or undue influence.

70. My decision on permission was:

"**Ground 4**

Permission to be dealt with at the hearing of the appeal.

If there was a binding agreement in 2014, on the Costs Master's finding [44] the agreement in 2015 was merely to cap the Respondent's costs at £400,000 [subject to any Solicitor's Act rights] and not to substitute an agreed recovery figure for costs. The Costs Master's finding at [47] was that it was not necessary to consider misrepresentation/undue influence because he had found in favour of the Claimants in relation to the 2015 Agreement, not because he had found against them in relation to the 2014 agreement. The Appellant's case was put on the basis that if the 2015 Agreement was no more than a cap, then that did not affect the earlier agreement [see e.g. Appeal Bundle pages 588-596 and elsewhere]

It is not clear from the Judgment whether, if the Costs Master had accepted the Appellant's case that there was an agreement in 2014, he would have found that it was inconsistent with or superseded by the 2015 Agreement. If, therefore, the Respondent will seek to argue at the Appeal that the 2015 Agreement superseded any agreement in 2014 [if accepted on appeal, based on success under Ground 2 or Ground 3], and/or files a Respondent's Notice or Cross – Appeal seeking to challenge the Costs Master's finding that the 2015 agreement was no more than a cap, then the Judge hearing the appeal will have the power to grant permission on this Ground also."

71. The Claimants' case is that, even if there was no concluded agreement in June 2014, it was a term of the CFA that the Defendant's responsibilities included giving the Claimants "… the best information possible about the likely costs of your claim." This had not been done. Even in the absence of an agreement in 2014, they were therefore faced at the mediation in March 2015 with a choice between not settling the main action and facing a costs exposure which the Defendant said had already reached £600,000, or settling it with costs capped at £400,000. The Claimants say that in theses circumstance the Master ought to have determined the issues of abuse of confidence and undue influence.

72. The Master was expressly informed by counsel for the Claimants that he did not need to address these issues. The transcript shows the following exchange between counsel for the Claimants and the Master:

"Mr Lyons: ……. only if you think it's a fixed fee agreement can you then, you may want to come back to me….

Master Whalan: These arguments are only relevant in the context of a conclusion that what was agreed in March 2015 constituted a binding agreement to fix---

Mr Lyons: Yes..

Master Whalan: And not just to cap the fees?

Mr Lyons: Yeah….."

73. Mr Howlett was not aware of this exchange when he drafted the Grounds of appeal and skeleton argument. In the light of it, he accepted, correctly, Ground 4 cannot be proceeded with. In any event it is difficult to see how the Claimants, in the absence of an agreement in June 2014, could be prejudiced by their consent to a costs cap.

74. Permission to appeal on Ground 4 is therefore refused.

Summary

75. It follows that the appeal will be dismissed. Counsel for the Defendant told me that, once additional liabilities etc. are taken into account, the difference between the £175,959.90 in the Precedent H and the £400,000 agreed as a cap in the March 2015 meeting is only some £30,000. If that is correct, it is very unfortunate that so much by way of extra costs has been incurred subsequently.