Neutral Citation Number: [2020] EWHC 2755 (QB)

Claim No: E90SE056

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
ON APPEAL FROM
SHEFFIELD DISTRICT REGISTRY

Combined Court Centre
1 Oxford Row
Leeds LS1 3BG
(Remote hearing on Skype for Business)

Date: 16 October 2020

Before:

MR JUSTICE LAVENDER

- -

Between:

Darya Belsner

Claimant

- and -

Cam Legal Services Limited

Defendant

- -
- -

PJ Kirby QC and **Robin Dunne** (instructed by **Clear Legal Limited t/a checkmylegalfees.com**) for the **Claimant**
Nicholas Bacon QC (instructed by the **Defendant**) for the **Defendant**

Hearing date: 12 May 2020

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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by e-mail and release to Bailii. The date and time for hand-down is deemed to be 2:30pm on Friday 16 October 2020.

Mr Justice Lavender:

(1) Introduction

1. In this case each party appeals with permission granted by District Judge Bellamy against a different part of his order of 14 August 2019, made in the Sheffield District Registry of the High Court, on an assessment pursuant to section 70 of the Solicitors Act 1974 of the Defendant's bill of costs relating to work done by the Defendant for the Claimant in a claim for damages for personal injury arising out of a road traffic accident on 5 February 2016, which was made under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol") and which was settled following submission of the Stage 2 Settlement Pack for £1,916.98 in damages, plus fixed costs and disbursements of £1,783.19 including VAT.

2. The Claimant appeals against paragraph 1 of DJ Bellamy's order, which was in the following terms:

> "The Defendant's bill be assessed in the sum of £3,104.15 (being base profit costs of £1,392.00, success fee profit costs of £208.80, VAT on profit costs of £320.16 and disbursements of £1,783.19 inclusive of VAT)."

3. The grounds of the Claimant's appeal are as follows:

   (1) Pursuant to section 74(3) of the Solicitors Act 1974, the amount allowed on assessment should not, except where rules of court permit, exceed the amount which could have been allowed as between party and party in the proceedings.

   (2) The district judge held that the rules of court did permit the allowance of a greater amount, because CPR 46.9(2) applied, in that the Defendant and the Claimant had entered into a written agreement which expressly permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from another party to the proceedings.

   (3) There was indeed a written agreement which made express provision to that effect, but the Claimant contended that it was also a requirement that the Claimant had not merely signed that agreement, but had given informed consent to it, which required the Defendant to give the Claimant "a full and fair exposition of the factors relevant to it", which the Claimant contended that the Defendant did not do.

   (4) The district judge rejected this contention. The Claimant contends on her appeal that he was wrong to do so.

4. The Defendant appeals against paragraph 2 of DJ Bellamy's order, which was in the following terms:

> "The profit costs in the bill having been reduced by 37%, the Defendant do pay the Claimant's costs in respect of today's hearing. The court assesses the costs at £2,550 plus VAT and Court fee of £424."

5. The Defendant's grounds of appeal are as follows:

(1) The Defendant capped its claim for costs at the sum (which in the event was £2,168.89) of the amount recovered in respect of costs from the defendant to the personal injury claim (i.e. £1,783.19) and 25% of the relevant damages recovered by the Claimant (i.e. £385.50). The bill of costs set out a larger amount, which the Defendant could have claimed, but £2,168.89 is all that the Defendant had ever claimed from the Claimant.

(2) The result of the assessment was that the Defendant was still entitled to payment in full of the only sum which it had ever claimed from the Claimant.

(3) The district judge ought to have awarded costs to the Defendant and:

(i) was wrong to hold that he was constrained by section 70(9) of the Solicitors Act 1974 to award costs to the Claimant; alternatively

(ii) was wrong to conclude that there were no special circumstances under section 70(10) of that Act.

6. This is clearly a test case. In itself, this could be seen as a case about £385.50 in costs and the costs (which were assessed at £3,484 in total) of the assessment of the Defendant's bill. However, the Claimant's solicitors, Clear Legal Limited, trading as checkmylegalfees.com, have acted for the clients in other, similar cases, several of which have resulted in assessments conducted by District Judge Bellamy which are the subject of appeal. No doubt similar issues could arise in many other cases. Consequently, the parties appear to attach considerable importance to this appeal. According to their statements of costs, the Claimant and the Defendant have spent £52,575.63 and £35,139.70 respectively on this appeal. That is a total of £87,715.53, which is over 225 times the amount of £385.50 originally at issue.

(2) Background

7. The story starts with the Claimant's involvement in a road traffic accident on 5 February 2016. Her account, which was not challenged, was that she was knocked off the motorcycle on which she was a pillion passenger by a car driven by Mrs Angela Barford. There were cuts, bruises and swelling to the middle finger of her right hand, her right elbow, left knee and right ankle. She was off work for one day. Since the motorcycle was not hers, she did not have a claim for the damage to the motorcycle.

8. The Claimant contacted her insurance brokers, who contacted the Defendant, trading under the name of Scooters and Bikes Legal. On 7 March 2016 a paralegal, Julie Brown, sent a Client Care Letter to the Claimant, enclosing, amongst other things, the Defendant's Terms and Conditions of Business and a conditional fee agreement ("the CFA").

9. The Client Care Letter stated, inter alia, as follows:

"7. The Conditional Fee Agreement (no win, no fee agreement) sets out in further details how this firm's fees are calculated. Our charges are based on the time we spend dealing with the case.

8. Please read the Conditional Fee Agreement carefully and telephone me if you have any questions concerning the document.

9. If you win your case you will be liable to pay our basic charges and in addition a success fee as set out in the agreement. If your claim for pain and suffering is below the small claims limit (currently £1,000) then we will offset our charges against your general damages up to a maximum of £500 (including VAT).

10. If your claim is above the small claims limit, you can claim from your opponent part or all of our basic charges and disbursements.

11. The success fee is calculated with reference to your costs and will not apply to claims below the small claims limit, but will apply to claims above the small claims limit.

12. The success fee will be deducted from your damages at the end of your claim. The success fee cannot be more than 25% of your damages (inclusive of VAT), although there may be other costs or disbursements to be deducted from your damages such as the insurance premium.

13. The success fee is based upon your basic costs. For example if you have a claim which is settled at £4,000 damages, you will pay no more than £1,000. This means you will receive £3,000.

14. The success fee is calculated based upon the degree of risk. A success fee can be up to 100%. Taking the above example where you have settled your damages claim for £4,000 if your costs are £2,000 then the success fee would capped at £1,000 (25% of your damages).

…

18. In cases involving road traffic accidents worth less than £25,000, the amount that the Defendant is liable to pay in respect of our basic charges is fixed by the provisions of the Civil Procedure Rules.

19. We reserve the right to charge you the actual costs taking into account any recoverable costs from the Defendant.

…

23. Most Personal injury claims settle by negotiation after medical evidence and details of financial losses had been obtained. I estimate that the basic charges for the work necessary to obtain this information will be £2,500 (excluding VAT and disbursements – see paragraph 26 below). We will update this estimate of costs every six months sand inform you if it appears that any estimate may be exceeded. This could change significantly for a number of reasons, for example, if proceedings have to be issued, there are complex legal or medical issues, the Defendant defends the claim, there is a complex loss of earnings claim or if there is an allegation of fraud.

…

26. We will not usually send you a bill for our basic charges, success fee and disbursements until the Conditional Fee Agreement ends. It is important that you understand that you will be responsible for paying any bills. However, assuming you win your claim I expect to recover some of our charges and expenses from your opponent."

10. The Defendant's Terms and Conditions of Business stated, inter alia, as follows:

> "17. The charges agreed between us may exceed the costs recoverable from another party. This means that in practice there may be a proportion of your costs which you will have to bear yourself irrespective of any order for costs which may be made against the opposing party or parties.
>
> 18. As between the parties to litigation or arbitration in England and Wales, the usual position (which is subject to exceptions) is that the losing party will be ordered to pay a significant part, at least, of the winning party's legal costs (as well as the losing party's own costs). An order for payment of costs as between the parties will usually be made at the end of proceedings, but may also be made during the course of proceedings, for example following pre-trial hearings. Costs ordered to be paid during the course of proceedings may have to be paid within a specific time, typically within 14 days of the order.
>
> 19. If you obtain an order for costs in your favour against any other party or parties at any stage it does not vary or alter these Terms and Conditions. Whether a party awarded costs in fact recoups any costs will depend on the ability of the other party or parties to pay. You will be liable to us to pay our fees, disbursements and VAT (if added) in full in accordance with these Terms and Conditions irrespective of whether an order for costs is made against the other party or parties and whether or when you are able to recover any costs from your opponents. You agree that you shall not be entitled to withhold or defer payment to us pending receipt of funds from the party or parties against whom an order for costs has been made.
>
> 20. If any order for costs is made in your favour against any other party or parties, the amount of those costs will either be agreed with the party or parties against whom the order is made or will be assessed by the court or arbitrator(s). If an assessment by the court or arbitrator(s) is required, you will have to meet all our fees, disbursements and VAT incurred in conducting the assessment proceedings on your behalf. Depending upon the outcome of the assessment, the court may order the paying party or parties to meet part of the costs of the assessment. This does not affect your liability to us to meet our costs, disbursements and VAT incurred in pursuing the costs recovery in accordance with these Terms and Conditions or entitle you to withhold or defer payment to us pending receipt of funds from the party or parties against whom an order for costs has been made.
>
> …
>
> 22. We will give you the best possible information about the likely overall costs of the matter. We will tell you as soon as possible if we think our charges might be higher than any estimate or other indication of costs that has been given. An estimate is only a guide. You should not treat it as a binding quotation."

11. The CFA provided as follows:

> "If you win your claim, you pay our basic charges, our expenses and disbursements and a success fee together with the premium for any insurance you take out. You are entitled to seek recovery from your opponent of part or all of our basic charges and our expenses and disbursements, but not the success fee or any insurance premium."

12. The CFA stated that details of the Defendant's basic charges were set out in schedule 2. That schedule provided as follows:

> "How we calculate our basic charges
>
> These are calculated for each hour engaged on your matter. Routine letters and telephone calls will be charged as units of one tenth of an hour. Other letters and telephone calls will be charged on a time basis. …"

13. Hourly rates were then given for various levels of solicitor, from trainees to solicitors with at least 8 years' litigation experience.

14. The CFA provided for a success fee of 100% of the basic charge, subject to the cap (as required by section 58(4B) of the Courts and Legal Services Act 1990 and Article 5 of the Conditional Fee Agreements Order 2013) of 25% of the total amount of any general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss.

15. None of the documents, however, provided for an overall cap on the amount recoverable by the Defendant from the Claimant, save in the event that the claim for damages for pain and suffering was less than the small claims limit: see paragraph 9 of the Client Care Letter. Solicitors can, and some do, propose that the amount which they are entitled to claim from their client in a case of this nature is limited to a percentage (say 25%) of the damages ascertained or agreed. The Defendant, however, did not propose such a cap.

16. Attached to the CFA were the Law Society's Conditions, which stated, inter alia, as follows:

> "We must:
>
> …
>
> - give you the best information possible about the likely costs of your claim for damages.
>
> …
>
> Dealing with costs if you win
>
> …
>
> - Normally, you can claim part or all of our basic charges and our expenses and disbursements from your opponent. You provide us with your irrevocable agreement to pursue such a claim on your behalf. However, you cannot claim from your opponent the success fees or the premium of any insurance policy you take out.
> - If we and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court

does not cover all our basic charges and our expenses and disbursements, then you pay the difference.

- You, not your opponent, pay our success fee and any insurance premium.
- You agree that after winning, the reasons for setting the success fee at the amount stated may be disclosed to the court and any other person required by the court.
- If your opponent is receiving Community Legal Service funding, we are unlikely to get any money from him or her. So, if this happens, you have to pay us our basic charges, expenses and disbursements sand success fee.

We are allowed to keep any interest your opponent pays on the charges.

You agree to pay into a designated account any cheque received by you or by us from your opponent and made payable to you. Out of the money, you agree to let us take the balance of the basic charges, success fee, insurance premium, our remaining expenses and disbursements, and VAT."

17. The Defendant did not advise the Claimant on the likely quantum of her claim at this stage, but Helen Coe of the Defendant completed a "Matter Risk Assessment" in which she answered "No" to the question:

> "Is the claim likely to be worth less than £2k?"

18. The Defendant pursued the claim against Ms Barford's insurers ("the Insurers") in accordance with the Protocol. Liability was admitted and the Insurers paid the Stage 1 fixed costs as required by paragraph 6.18 of the Protocol in the amount provided for in CPR 45.18 (i.e. £200 plus VAT). The Defendant obtained medical reports from a GP and a clinical psychologist and sent a Stage 2 Settlement Pack to the Insurers, who accepted the Claimant's offer and paid £1,916.98 in damages, plus the Stage 2 fixed costs (i.e. £300 plus VAT) and disbursements as provided for in paragraph 7.47 of the Protocol and CPR 45.18 and 45.19. As I have already stated, the total amount paid by the Insurers in respect of fixed costs and disbursements was £1,783.19 including VAT.

19. The Defendant paid £1,531.48 (i.e. the amount of the damages, less £385.50), to the Claimant, but did not give her a bill of costs or an invoice.

20. The Claimant instructed Checkmylegalfees.com Limited (who later merged with Clear Legal Limited) and on 10 May 2018 they issued a Part 8 Claim Form in the Senior Courts Costs Office, seeking an order that the Defendant deliver its statute bill to the Claimant. On 24 May 2018 the Defendant served its final statute bill on the Claimant. The first part of the bill set out the Defendant's professional charges. These consisted of 4 items:

    (1) Basic charges of £2,171.90 plus VAT.

    (2) A success fee of 100% of the basic charges, capped at 25% of the recovered damages, i.e. £385.50 plus VAT. (There appears to have been a mistake here, since the cap was intended to apply to the success fee inclusive of VAT.)

(3) The GP report fee of £225 plus VAT.

(4) The psychology report fee of £806 plus VAT.

21. The total was stated to be £3,588.40 plus VAT of £717.67. That is £4,306.07 including VAT. Thus, the Defendant was asserting that it could have charged the Claimant £2,522.88 (i.e. £4,306.07 less £1,783.19), which would have been £605.90 (i.e. £2,522.88 less £1,916.98) more than the amount recovered by the Claimant in damages. On that basis, engaging the Defendant to represent her on the terms proposed by the Defendant would have left the Claimant with no damages and £605.90 out of pocket.

22. The payments received from the Insurers were then listed in the bill. These amounted to £1,486 plus VAT of £297.19, or £1,783.19 including VAT. The bill then concluded as follows:

> "COSTS VAT
> £2102.40 £420.48
>
> Balance of the above costs not recovered from the Defendant payable by you, but capped at 25% of damages recovered (£385.50)."

23. Mr Kirby has helpfully accepted in paragraph 13 of his skeleton argument that the effect of the bill was that the Defendant only sought to recover from the Claimant the amounts received from the Insurers in respect of costs, plus £385.50 (i.e. the success fee subject to the cap).

24. On 4 July 2018 the Claimant issued a Part 8 Claim Form in the Sheffield District Registry of the High Court seeking an assessment of the Defendant's bill, restricted to the profit costs and the success fee. No challenge was made to the amount of the disbursements.

25. On 21 August 2018 District Judge Bellamy made an order for an assessment and gave directions. The order was in the following terms:

> "There be an assessment pursuant to s.70 Solicitors Act 1974 of the Defendant's bill as follows –
>
> a. Bill no. 4025 dated 27th May 2018 in the total sum of £4306.07
>
> such assessment to be limited pursuant to s.70(6) Solicitors Act 1974 and/or the court's inherent jurisdiction to the profit costs in the sum of £2,171.90 and success fee in the sum of £385.50"

26. On 6 February 2019 District Judge Bellamy carried out a provisional assessment of the bill. In his provisional assessment, District Judge Bellamy:

(1) held in relation to basic charges that informed consent was required by CPR 46.9(2) and had not been given, and so the basic costs were limited to £500 plus VAT;

(2) in the alternative, reduced some of the items in the calculation of the basic costs; and

(3) reduced the success fee from 100% of the basic charges to 15%, following the decision of the Court of Appeal in *Herbert v HH Law Limited* [2019] 1 WLR 4253.

27. In relation to the question whether informed consent was given, the district judge said as follows:

> "Given the differences in hourly rates and the lack of detailed explanation of the various costs scenario it is hard to see how informed consent could be given."

28. The Defendant gave notice that it challenged these aspects of the provisional assessment and there was a hearing on 2 July 2019. The district judge maintained his decision in relation to the success fee, but was persuaded to change his mind in relation to the need for informed consent in relation to CPR 46.9(2). He said as follows in paragraph 6 of his judgment:

> "The next issue for the court to determine is what do the words "written agreement" mean in 46.9(2) and whether the court should import in that paragraph that there must be sufficient information given to the contracting non-legal party, in other words the potential Claimant, in order to make an informed decision. It is submitted on behalf of the solicitors, the Defendant in this case, that it is sufficient that there is a written agreement and that that written agreement is sufficiently clear giving the solicitors the right to recover more than the costs recovered from the other side, and that the words of the terms and conditions of business and CFA are sufficiently clear to allow this to happen. It is said on behalf of the Claimant that there must be more information given in terms really that the client in order to give express permission must have enough information in order to balance up and have knowledge of the likely liability, for example, between fixed costs that might be recoverable as against the estimate of costs. I think that is setting the bar too high and I think it is trying to read in to 46.9(2) something that is not there. I think the court is entitled to look at the agreement, to make sure that it contains sufficient certainty and sufficient clarity so that the Claimant entering into the agreement knows full well that there is a potential liability for further costs over and above those which are recovered by the solicitors from the other side. I was initially troubled by paragraph 19, which is page 3 of the bundle of the terms and conditions which simply reserve the right to charge actual costs, taking into account recoverable costs, and in my view if that was all there was that might have been uncertain in relation to express terms of the agreement, but I am satisfied, because I have been referred to other contractual provisions, particularly at page 28 para 19, page 19 (inaudible) of recovery that it is clear enough that entering into this agreement the solicitors will seek to recover the shortfall between their costs and the costs recovered from the other side. I think to import informed consent places the burden too high. It simply has to be an express term and an express term is a term that is clearly set out in the agreement and about which there can be no doubt and I am satisfied that this documentation meets that test."

29. Given this decision, the district judge did not revisit his provisional decision on the question whether informed consent was in fact given. Nor did the district judge amend his provisional assessment of the amount of the Defendant's bill. That assessment resulted in the figures in paragraph 1 of his order, i.e. basic costs of £1,392 plus VAT (rather than £2,171.90 plus VAT) and a success fee of £208.80 plus VAT (rather than £385.10 plus VAT).

30. The net effect of this decision was that the Defendant was entitled to charge the only sum which it had ever demanded from the Claimant, i.e. the sum of £385.50, and, indeed, would have been entitled to charge her considerably more if it had not chosen to limit its demand to that amount. The assessed figures amount to £1,920.96 including VAT. The Insurers paid £600 including VAT in respect of the Defendant's basic charges. On this basis, the Claimant would have liable for £1,320.96 of the Defendant's fees, if the Defendant had not volunteered to cap them. That would have left the Claimant with only £596.02 (i.e. £1,916.98 less £1,320.96), or 31%, of her damages.

31. The district judge allowed time for further written submissions on the issue of costs, which is why he did not make his order until 13 August 2019. He set out the reasons for his decision on costs in an email dated 7 August 2019, as follows:

> "I accept, in the modern regime of costs it may be difficult to reconcile the decisions of re Paul and Carthew with how costs are now managed by the Court under CPR. However I believe in terms of principle I am bound by those decisions, and it leaves very little room to argue that "special circumstances" can include [as might otherwise be the case under CPR] the lack of any financial recovery/benefit to the Claimant. I believe the Court of Appeal may at some stage need to re-visit this issue, albeit I accept it may not be proportionate to do so!
>
> I accept the submissions therefore on the part of the Claimant and will order the Defendant to pay the costs of the assessment [not the review where I have made no Order].
>
> …
>
> I have no hesitation in giving permission to appeal the order for costs, as it seems to me the whole issue will benefit from a higher court decision."

(3) The Claimant's Appeal: The Law

32. The present case is the first occasion, so far as counsel or I are aware, on which a court has had to decide whether a solicitor seeking to rely on CPR 46.9(2) has to show that the client gave informed consent to the payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.

33. In order to approach that question, it is appropriate to consider the fiduciary nature of the relationship between solicitor and client, the terms of section 74 of the Solicitors Act 1974 and CPR 46.9, the cases on CPR 46.9(3) and the provisions concerning

costs in low value road traffic accident cases in the Civil Procedure Rules and the Protocol.

(3)(a) The Fiduciary Nature of the Relationship

34. The relationship between solicitor and client is a fiduciary one. As a fiduciary, a solicitor may not receive a profit from his client without his client's fully informed consent. As stated in *Snell's Equity* (2020) 34th Edn. at paragraph 7-015 (omitting footnotes):

> "To provide the fiduciary with an effective defence to a claim for breach of fiduciary duty, the principal's consent to relaxation of the fiduciary's liability must be fully informed. The burden of establishing informed consent for conduct which would otherwise constitute a breach of fiduciary duty lies on the fiduciary. In order to show that the consent was fully informed there must be clear evidence that it was given after the fiduciary made "full and frank disclosure of all material facts". "The key is disclosure - 'sunlight bleaches'". The principal's consent will be "watched with infinite and the most guarded jealousy" by the court.
>
> The materiality of information to be disclosed is determined not by whether it would have been decisive (although, if it would have been decisive, then it clearly was material), but rather by whether it may have affected the principal's consent. Thus, it is no defence to a claim for breach of fiduciary duty for the fiduciary to argue that the principal would have acted in the same way even if the information had been disclosed. Further, consistent with equity's focus on substance rather than form, disclosure is treated in a functional, rather than a formalistic, way, so that the sufficiency of disclosure depends on the sophistication and intelligence of the person to whom disclosure is required to be made."

35. Whether there has been sufficient disclosure must depend on the facts of each case: see paragraph 35 of Tuckey LJ's judgment in *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351. A number of cases have considered whether the fiduciary must disclose not merely the fact that he is to receive a commission, but its amount.

36. In paragraphs 81 and 82 of his judgment in *FHR European Ventures LLP v Mankarious* [2011] EWHC 2308 (Ch) Simon J summarised the effect of certain nineteenth century authorities as follows:

> "81. Since the sufficiency of disclosure is dependent on the facts of particular cases, previous decisions will be of limited assistance. However, it is convenient at this stage to refer to a line of cases relied on by the Defendant:
>
> i) …
>
> In cases in which a conflict an interest and duty may arise,
>
> ii) Where the principal knows the agent will receive a commission and could have discovered what the commission was, but did not take the trouble to enquire, a misapprehension as to the amount of the commission will not mean that there has been no informed consent, see for example *Great Western*

Insurance Co of New York v. Cunliffe (1874) LR 9 Ch App 525 at 539 and *Baring v. Stanton* (1876) 3 Ch D 502 at 505.

iii) The Court will not regard there being a lack of consent where the principal knows that commission will be paid, but wrongly assumes that it is an annual retainer rather than the 'standard and usual brokerage', see *Hindmarsh v. Brigham & Cowan Ltd* [1943] 76 Ll.LR 141 at 152r.

82. The latter two categories illustrate a consistent approach: where the agent can show a customary usage or that the amount of the commission is standard and ascertainable on enquiry, the failure of the principal to make enquiries as to the amount of the commission is fatal to a contention that there has been insufficient disclosure. They do not assist where there is no customary usage of which the principal is deemed to have notice, or where the amount of the commission is not easily ascertainable from an available source which the principal has failed to take the trouble to discover."

37. Tuckey LJ said as follows in paragraph 36 of his judgment in *Hurstanger Ltd v Wilson*:

"36. There is some doubt as to whether the agent's duty of disclosure requires him to disclose to his principal the amount of the commission he is to receive from the other party. *Bowstead & Reynolds* says, at para 6–084:

> "where [the principal] leaves the agent to look to the other party for his remuneration or knows that he will receive something from the other party, he cannot object on the ground that he did not know the precise particulars of the amount paid. Such situations often occur in connection with usage and custom of trades and markets. Where no usage is involved, however, the principal's knowledge may require to be more specific."

The cases cited support these propositions. Here I think the requirement is more special. Borrowers like the defendants coming to the non-status lending market are likely to be vulnerable and unsophisticated. A statement of the amount which their broker is to receive from the lender is, I think, necessary to bring home to such borrowers the potential conflict of interest."

38. After referring extensively to *Hurstanger Ltd v Wilson*, Longmore LJ said as follows in paragraph 42 of his judgment in *Medsted Associates Ltd v. Canaccord Genuity Wealth (International) Ltd* [2019] 1 WLR 4481:

"It follows from all this, in my judgment, that even if the relationship of Medsted and its clients was a fiduciary one, the scope of the fiduciary duty is limited where the principal knows that his agent is being remunerated by the opposite party. As *Bowstead & Reynolds* say, if the principal knows this, he cannot object on the ground that he did not know the precise particulars of the amount paid. He can, of course, always ask and if he does not like the answer, he can take his business elsewhere. *Bowstead & Reynolds* does add that where no trade usage is involved (and no usage was alleged in the present case), the principal's knowledge may require to be "more specific". In the *Hurstanger* case the court held that it did need to be more special because "borrowers

> [such as the Wilsons] coming to the non-status leading market [were] likely to be vulnerable and unsophisticated". The contrary is the case here since, as the judge found (para 90) the clients were wealthy Greek citizens and it is likely that they were experienced investors (Mr Komninos, for example, had already dealt through MAN)."

39. These authorities are not directly relevant in the present case, but they are potentially relevant by analogy.

40. Mr Kirby also relied on a number of provisions of the SRA Code of Conduct 2011, including in particular paragraph O(1.13), which provided as follows:

> "You must achieve these outcomes:
>
> …
>
> 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;"

(3)(b) Section 74 and CPR 46.9

41. Section 74 of the Solicitors Act 1974 provides as follows:

> "**Special provisions as to contentious business done in county courts.**
>
> (1) The remuneration of a solicitor in respect of contentious business done by him in the county court shall be regulated in accordance with sections 59 to 73, and for that purpose those sections shall have effect subject to the following provisions of this section."
>
> "(3) The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim."

42. Although no claim form was issued in the present case, and although there appears to have been a dispute about this point before the district judge, it was not disputed before me that section 74(3) applies in the present case, except insofar as rules of court may otherwise provide. The relevant rule of court is CPR 46.9(2). It is appropriate to set out the whole of CPR 46.9:

> "(1) This rule applies to every assessment of a solicitor's bill to a client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1984 or the Access to Justice Act 1995 or by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
>
> (2) Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.

> (3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –
>
> > (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
> >
> > (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
> >
> > (c) to have been unreasonably incurred if –
> >
> > > (i) they are of an unusual nature or amount; and
> > >
> > > (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.
>
> (4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied."

43. Where costs are assessed on the indemnity basis, CPR 44.3(1) provides that the court will not allow costs which have been unreasonably incurred or are unreasonable in amount and CPR 44.3(3) provides that the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(3)(c) Cases on CPR 46.9(3)

44. It has been held that, for the purposes of CPR 46.9(3), an item of costs or the amount of costs has not been "expressly or impliedly approved" unless the client gave his or her informed consent. The first case to which I was referred was *MacDougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118, a case in which a firm of solicitors contended that an unusually high hourly rate was presumed to be reasonable under RSC Order 62, rule 15(2) (the predecessor of CPR 46.9(3)(b)) because their clients had agreed to it. Holland J said as follows in paragraph 7 of his judgment:

> "My further conclusion is that the quality of the approval has to be such as to raise a presumption. In the course of argument I talked of 'informed' approval and even with reflection I adhere to that concept. To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it."

45. The next case to which I was referred was the decision of the Court of Appeal in *Herbert v HH Law Ltd* [2019] 1 WLR 4253. The facts of that case were in many respects very similar to the facts of the present case, save that HH Law Limited ("HH Law") agreed to cap the overall amount which it might recover from Ms Herbert at 25% of her damages.

46. Ms Herbert retained HH Law to conduct her low value road traffic accident claim. HH Law sent her a retainer letter, a CFA and other documents, which provided that

she was to pay HH Law's basic charges, calculated at an hourly rate, and a success fee set at 100% of the basic charges, but capped at 25% of the relevant part of her damages. When the case settled, HH Law deducted from the damages the amount of the (capped) success fee and the after the event insurance premium.

47. The unusual feature of that case was that the 100% success fee did not relate to the reasonably perceived risk of Ms Herbert's litigation, but was a matter of general practice for HH Law, as part of its business model. Ms Herbert obtained an order for assessment of the success fee. The Court of Appeal held that there had been no informed consent to this unusual feature of the success fee and upheld the decisions of District Judge Bellamy and Soole J that the success fee should be reduced to 15% of the basic charges, which meant a reduction from £829.20 to £331.20 including VAT.

48. It will be noted that HH Law was paid the reduced success fee even though it could not be recovered from the other party to the claim. No argument was advanced in that case that this was precluded by section 74(3) of the Solicitors Act 1974, because no informed consent had been given to the agreement under CPR 46.9(2). Nevertheless, the Court of Appeal held that Ms Herbert did give informed consent to all aspects of the retainer except the unusual basis on which the success fee had been calculated.

49. Sir Terence Etherton MR said as follows at paragraphs 37 and 38 of his judgment:

> "37. Counsel were agreed before us that the judge was correct to hold that "approval" in CPR r 46.9(3)(a) and (b) means informed approval in the sense that the approval was given following a full and fair explanation to the client (although there was dispute between them as to the reasoning and significance of the *Macdougall* case [2001] 1 Costs LR 118 cited by the judge). We agree.
>
> 38. There was some debate before us as to whether it is the client who bears the burden of satisfying the court that express or implied approval was not given or it is the solicitor who bears the burden of satisfying the court that it was given. We consider that where, as here, the client brings proceedings under section 70(1) of the Solicitors Act 1974, it is for the client to state the point of dispute and the grounds for it. If the solicitor wishes to rebut the challenge by relying on the presumption in CPR r 46.9(3)(a) or (b), the burden lies on the solicitor to show that the precondition of the presumption, informed approval, is satisfied. Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor."

50. Later, in paragraphs 47 and 48 of his judgment, the Master of the Rolls said as follows:

> "47. … So far as I have been able to understand and confine Ms Herbert's complaint on this aspect of the appeal to what it is open to her to argue in this court (aside from the relevance of litigation risk assessment in fixing the success fee), it is no more than that she should have been told at the outset that the success fee would be 25% of the relevant damages she received since this

> would inevitably be less than 25% of HH's basic charges (save in very rare circumstances). I do not agree that this meant that the documentation provided to her by HH at the outset of the retainer was inaccurate or misleading. The CFA stated expressly that the success fee could not be more than 100% of basic charges; there was a maximum limit on the amount of the success fee which HH could recover from her; and the maximum limit was 25% of the total amount of general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss, awarded to her in the proceedings covered by the CFA. The amount of the success fee she was charged was consistent with a success fee calculated in accordance with that description. While it is true that the invoice she was sent did not set out the basic charges and then apply the cap of 25% of damages, the retainer letter stated that her contribution towards costs would always be limited to 25% or less of her relevant recovered damages. The "What You Need to Know" document said the same. There was, accordingly, nothing for her to pay by way of HH's charges other than the success fee capped at 25% of the general damages recovered from the defendant (in addition to the costs recovered from the defendant).
>
> 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 her who, within HH, would have the initial responsibility for dealing with her 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, the 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 her 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."

51. It will be noted that the agreement as to costs in that case was similar to the agreement in the present case, save that the Defendant in this case did not agree that the Claimant's costs liability should be limited to 25% of the damages which she obtained.

(3)(d) Costs in Low Value Road Traffic Accident cases

52. The Protocol, which applied to the Claimant's claim, provides for three Stages. In summary, Stage 1 is where the claim is made and liability is admitted or denied, Stage 2 is where the parties attempt to agree the amount of damages if liability is admitted; and Stage 3 is where the Court resolves any disputes as to quantum.

53. To expand slightly on that, but still omitting much of the detail:

(1) Stage 1 is when the claimant sends the Claim Notification Form ("CNF") and the defendant completes the "Insurer Response" section of the CNF ("the CNF Response"). In many cases, this will involve an admission of liability and no allegation of contributory negligence, or an allegation of contributory negligence only in relation to the claimant's admitted failure to wear a seat belt. In such cases, the defendant must pay the Stage 1 fixed recoverable costs: see paragraph 6.18 of the Protocol.

(2) Stage 2 is where the claimant submits the Stage 2 Settlement Pack, which consists of the Stage 2 Settlement Pack Form, a medical report or reports and other evidence of the value of the claim and the Defendant either accepts the offer made in the form or makes a counter-offer. No doubt many cases settle in Stage 2, whereupon the Defendant must pay the agreed damages and the Stage 2 fixed costs: see paragraph 7.47 of the Protocol. In the absence of settlement, the claimant must send the Court Proceedings Pack to the defendant, who must pay the amount of its final offer in respect of damages, plus the Stage 2 fixed costs and agreed disbursements: see paragraph 7.64 of the Protocol.

(3) Stage 3 is the stage from the issue of a claim form to trial. The Stage 3 Procedure is set out in CPR Practice Direction 8B.

54. Section III of CPR 45 applies to claims to which the Protocol applies. CPR 45.17 provides that:

> "The only costs allowed are –
>
> (a) fixed costs in rule 45.18; and
>
> (b) disbursements in accordance with rule 45.19; and
>
> (c) where applicable, fixed costs in accordance with rule 45.23A or 45.23B."

55. Table 6 in CPR 45.18 sets out the amount of fixed costs in cases under the Protocol. Amounts are specified for Stage 1 fixed costs, Stage 2 fixed costs and Stage 3. Different amounts are specified for cases where the value of the claim: (a) is not more than £10,000; or (b) is more than £10,000, but not more than £25,000. For a claim with a value of not more than £10,000, the Stage 1 fixed costs are £200 and the Stage 2 fixed cost are £300. All of these figures are net of VAT and are increased by 12.5% if the Claimant lives or works in a specified area (primarily London) and instructs a legal representative who practises in that area: see CPR 45.17. That 12.5% increase was not applicable in the present case.

56. CPR 45.19 specifies the types of disbursements which may be claimed, but does not fix the amount of those disbursements, save in soft tissue injury claims.

57. There are a number of circumstances in which the Protocol can cease to apply to a claim. These include:

In Stage 1 or 2

(1) where the claimant notifies the defendant that the claim has been revalued at more than the upper limit of £25,000: see paragraph 4.3 of the Protocol;

(2) where the defendant notifies the claimant that the defendant considers that, if proceedings were issued, the small claims track would be the normal track for the claim: see paragraphs 6.15(4)(ii) and 7.39(a);

In Stage 1

(3) where the defendant considers that inadequate mandatory information has been provided in the CNF: see paragraphs 6.8(1) and 6.15(4)(a) of the Protocol;

(4) where the defendant makes an admission of liability but alleges contributory negligence: see paragraph 6.15(1) of the Protocol;

(5) where the defendant does not complete and send the CNF Response: see paragraph 6.15(2) of the Protocol;

(6) where the defendant does not admit liability: see paragraph 6.15(3) of the Protocol;

(7) where the defendant fails to pay the Stage 1 fixed recoverable costs within the specified period and the claimant gives written notice that the claim will no longer continue under the Protocol: see paragraph 6.19 of the Protocol;

In Stage 2

(8) where the defendant does not comply with the provisions of the Protocol concerning interim payment: see paragraphs 7.28 to 7.30 of the Protocol;

(9) where the defendant withdraws the admission of causation: see paragraph 7.39(b) of the Protocol;

(10) where the defendant does not respond to the Stage 2 Settlement Pack within the initial consideration period: see paragraph 7.40 of the Protocol;

(11) where a party withdraws an offer made in the Stage 2 Settlement Pack Form after the initial consideration period or further consideration period: see paragraph 7.43 of the Protocol;

(12) where the defendant fails to make certain payments due in accordance with the Protocol: see paragraph 7.75 of the Protocol; and

(13) where the claimant gives notice that the claim is unsuitable for the Protocol, for example because there are complex issues of fact or law (although fixed costs will continue to apply in such a case if the court considers that the

claimant acted unreasonably in giving such notice): see paragraph 7.76 of the Protocol.

58. In addition, in Stage 3 the Court may determine that a claim is not suitable to continue under the Stage 3 Procedure: see paragraphs 7.2 and 9.1 of CPR Practice Direction 8B.

59. Published statistics show that, for one reason or another, the Protocol does in practice cease to apply to many claims commenced under it. It is certainly the case that a solicitor advising his client at the outset of a personal injury claim which fell within the scope of the Protocol would not be entitled to assume that the client's case would remain within the Protocol.

60. It will be recalled that the Defendant stated in paragraph 23 of the Client Care Letter that most personal injury claims settle by negotiation after medical evidence and details of financial losses had been obtained, i.e. at or after Stage 2, if the claim remains within the Protocol. I see no reason to doubt the statement made in paragraph 23 of the Client Care Letter. Indeed, achieving a large number of settlements in Stage 2 is clearly a central purpose of the Protocol.

61. Section IIIA of CPR 45 applies to claims which are started under the Protocol but no longer continue under it or under the Stage 3 Procedure. CPR 45.29B provides that, for as long as the case is not allocated to the multi-track, the only costs allowed in such a claim are the fixed costs in CPR 45.29C and disbursements in accordance with CPR 25.29L. This is subject, inter alia, to CPR 45.29J, under which the court may award a greater amount of costs if it considers that there are exceptional circumstances.

62. As to fixed costs, Table 6B in CPR 45.29C specifies the fixed costs. Different amounts are specified for cases which settle before the issue of proceedings, cases which settle after the issue of proceedings but before trial and cases which are disposed of at trial:

    (1) In respect of cases which settle before the issue of proceedings, there is a different formula for calculating the amount of the fixed costs, depending on whether the amount of the agreed damages is: at least £1,000, but not more than £5,000; more than £5,000, but not more than £10,000; or more than £10,000. For instance, the basic fee in a case which settles before the issue of proceedings for damages of at least £1,000, but not more than £5,000, is the greater of (a) £550; or (b) the total of £100 and 20% of the damages. The effect of this formula is that the fixed costs will be £550 in any case where the damages are £2,250 or less (as they were in the present case).

    (2) In respect of cases which settle after the issue of proceedings, but before trial, the fixed costs are 20% of the damages plus a fixed amount which varies depending on whether the case settles: prior to the date of allocation; after the date of allocation, but prior to the date of listing; or after the date of listing.

    (3) In respect of cases which are disposed of at trial, the fixed costs are specified as £2,655 plus 20% of the damages agreed or awarded plus the trial advocacy fee, which is fixed at one of four figures, depending on whether the damages

agreed or awarded are: not more than £3,000; more than £3,000, but not more than £10,000; more than £10,000, but not more than £15,000; or more than £15,000.

63. Like CPR 45.19, CPR 45.29I specifies the types of disbursements which may be claimed, but does not fix the amount of those disbursements, save in soft tissue injury claims.

(4) The Claimant's Appeal: Submissions

64. Counsel for each party submitted careful and thorough skeleton arguments, which were ably developed, but not radically changed, in the course of their oral submissions, so I need only summarise their submissions in this judgment.

65. For the Claimant, Mr Kirby submitted that:

(1) The relationship between the Claimant and the Defendant was a fiduciary one. The Defendant was not permitted to retain a profit derived from that relationship without the fully informed consent of the Claimant.

(2) There is an obvious disparity in knowledge between solicitor and client. That is so whether the case falls within paragraph (2) or (3) of CPR 46.9.

(3) The language of the two paragraphs is identical.

(4) CPR 46.9 has to be read as a whole. That is what Soole J said at paragraph 46 of his judgment in *Herbert v HH Law* [2018] 2 Costs LR 261 (although on appeal the Master of the Rolls confined himself to saying that it was common ground that paragraphs (3) and (4) should be read together).

(5) It would be illogical to treat paragraphs (2) and (3) differently.

(6) Informed consent is required in a case falling under paragraph (3) even if the "express approval" relied on by the solicitor took the form of "a written agreement which expressly permits" the item of costs in question. That was the case in *Herbert v HH Law*, which concerned the success fee payable under a written conditional fee agreement, the relevant terms of which are set out in paragraph 5 of the Master of the Rolls' judgment.

(7) The Defendant could have chosen to enter into a contentious business agreement pursuant to section 59 of the Solicitors Act 1974. That would have given the Claimant the right to apply for a determination whether the terms of the agreement were fair and reasonable. It appears to be the Defendant's position that the Claimant has less protection under CPR 46.9(2) than she would have had under a contentious business agreement.

66. Mr Kirby accepted that the Defendant stated in the Client Care Letter, in its Terms and Conditions of Business and in the Law Society's Conditions attached to the CFA, that the Claimant could be charged fees in excess of those recoverable from the Insurers, but he submitted that this was not sufficient to mean that her agreement to these terms constituted informed consent. That required a full and fair exposition of the relevant factors, and the factor which was not identified to the Claimant was the

amount of the costs recoverable from the Insurers. It would have been simple for the Defendant to say that if the claim settled at Stage 2, the net profit costs could be fixed at £500.

67. For the Defendant, Mr Bacon submitted that:

(1) Paragraphs (2) and (3) of CPR 46.9 are obviously and deliberately different and are dealing with different things.

(2) The language of paragraph (2) of CPR 46.9 focuses on the content of the contract between solicitor and client, whereas paragraph (3) concerns questions of reasonableness and whether a client has given "express or implied approval" to incur an item of cost.

(3) The language and purpose of paragraph (3) is notably and deliberately different from that of paragraph (2). In particular, the key word in paragraph (3) is "approval". This is the word which creates the requirement for informed consent. It is not to be found in paragraph (3).

(4) Where paragraph (2) is satisfied, the costs still have to be assessed. They will not be allowed if they are unreasonable and paragraph (3) will come into play at that stage. Indeed, the Defendant's costs have been assessed and a sum substantially greater than that actually charged was allowed, which must be on the basis that that sum was not unreasonable.

(5) Allowing the Claimant's appeal would result in a wholesale change of the basis on which solicitors advise their clients in fixed costs cases. The Law Society's Model CFA would be insufficient to meet the threshold proposed by the Claimant. The only relevant passage in that document is in the following terms:

> "If we and your opponent cannot agree the amount [of costs], the Court will decide how much you can recover. If the amount agreed or allowed by the Court does not cover all our basic charges and our expenses and disbursements, then you pay the difference."

(6) Indeed, it would mean that solicitors working in the lowest value area of personal injury litigation had a higher burden, in terms of the advice which they were required to give to their clients, than those dealing with cases of much higher value and complexity.

(7) It is not practical to expect solicitors to advise their clients on the amount of costs to the paid by the respondent to the claim, since these can vary in accordance with, inter alia, the amount of the claim and the stage at which it settles, and whether the claim remains under the Protocol.

(8) There is an expectation that a client will pay a contribution towards the costs of bringing an action. General damages in personal injury cases were increased by 10% to go some way to offset this.

(9) Sir Rupert Jackson said as follows in his Supplemental Report of 2017, in answer to the question why he did not seek to limit the amount of costs payable by a claimant to his or her solicitor in a fixed costs case:

> "Given the multifarious kinds of litigation it is not feasible to preordain how much clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs. This incentivises lawyers (who are in competition with one another) to keep the actual costs down, so that the client's shortfall in costs recovery (if it wins) is as low as possible."

(5) The Claimant's Appeal: Decision

(5)(a) Is Informed Consent Required?

68. I do not consider that this appeal can be determined by a simple comparison between the wording of CPR 46.9(2) and (3). The requirement for informed consent which applies in cases under CPR 46.9(3) does not arise because of the use of the word "approval" rather than the word "agreement". The requirement for informed consent arises because of the fiduciary nature of the relationship.

69. It goes without saying that an agreement for the purposes of CPR 46.9(2) must be a valid and enforceable agreement. It follows, for example, that an agreement procured by fraud or misrepresentation would not suffice. Nor, obviously, would an agreement whose performance would involve a breach of fiduciary duty. To that extent, therefore, CPR 46.9(2) requires informed consent.

70. A solicitor who wishes to rely on CPR 46.9(2) must not only point to a written agreement which meets the requirements of the rule, as the Defendant did, but must also show that his client gave informed consent to that agreement insofar as it permitted payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings. For this purpose, the solicitor must show that he made sufficient disclosure to the client.

71. The key question in this case is therefore whether the Defendant made sufficient disclosure to the Claimant for the purposes of section 74(3) and CPR 46.9(2). There were, broadly, three possibilities which were given canvassed in argument. At one extreme, neither party suggested that a solicitor is obliged to give a detailed and comprehensive explanation of the provisions of the Civil Procedure Rules and the Protocol concerning fixed costs. On the other hand, the Defendant's position was, in effect, that it is sufficient for a solicitor to disclose to the client that the agreement permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings, without giving any detail as to what the limits are on such recovery. In between was the position

contended for by Mr Kirby, which was that the solicitor was obliged to give some indication of what the limit on recovery might be.

(5)(b) The Disclosure made by the Defendant

72. It is appropriate at this stage to review what the Defendant told the Claimant about the potential limits on the recovery of costs from the Insurers:

(1) Paragraph 10 of the Client Care Letter told that Claimant that if her claim was above the small claims limit she could claim from her opponent "part or all" of the Defendant's basic charges and disbursements.

(2) Paragraph 25 of the Client Care Letter told the Claimant that in cases involving road traffic accidents worth less than £25,000, the amount that the opponent is liable to pay in respect of the Defendant's basic charges is fixed by the provisions of the Civil Procedure Rules.

(3) Paragraph 26 of the Client Care Letter told the Claimant that assuming she won her claim the Defendant expected to be able to recover "some" of its charges and expenses from her opponent.

(4) Paragraph 17 of the Terms and Conditions of Business told the Claimant that the charges agreed might exceed the costs recoverable from another party and that the Claimant might have to bear "a proportion" of her costs herself.

(5) Paragraph 18 of the Terms and Conditions of Business stated that the usual position is that the losing party will be ordered to pay "a significant part, at least" of the winning party's costs.

(6) Paragraph 19 of the Terms and Conditions of Business told the Claimant that she would be liable to pay the Defendant's fees irrespective of whether an order for costs was made against the other party and irrespective of whether, or when, she was able to recover any costs from her opponents.

(7) The CFA told the Claimant that, if she won her claim, she was entitled to seek recovery of "part or all" of the Defendant's basic charges and expenses and disbursements, but not the success fee.

(8) The Law Society's Conditions told the Claimant that, if she won her claim, normally she could claim "part or all" of the Defendant's basic charges, expenses and disbursements from her opponent, but that she could not claim the success fee from her opponent. She, not her opponent, would pay the success fee.

(9) The Law Society's Conditions also told the Claimant that, if the amount agreed or allowed by the court did not cover all of the Defendants' basic charges, expenses and disbursements, then the Claimant would pay the difference.

(5)(c) The Adequacy of the Disclosure made by the Defendant

73. There can be no doubt that the Defendant disclosed to the Claimant that the agreement between them permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from another party to the proceedings. In particular, the Defendant disclosed that:

    (1) if she won her claim, the Claimant would pay the success fee and could not recover it from her opponent; and

    (2) the Claimant would pay the difference between the Defendant's basic charges, expenses and disbursements and the amount agreed or allowed by the Court in respect thereof.

74. The Defendant also disclosed to the Claimant that, in cases involving road traffic accidents worth less than £25,000, the amount that the opponent is liable to pay in respect of the Defendant's basic charges is fixed by the provisions of the Civil Procedure Rules. The Defendant did not attempt to summarise those provisions, nor did it give any example or examples of what they might mean in practice.

75. Instead, the Defendant used a series of general terms to indicate what the Claimant might recover from the Insurers, i.e.:

    (1) "part or all" of the Defendant's basic charges, expenses and disbursements;

    (2) "some" of the Defendant's charges and expenses; or

    (3) such that the Claimant might have to bear "a proportion" of her costs herself.

76. One expression used by the Defendant was criticised by Mr Kirby as misleading. That is the expression "a significant part, at least" in paragraph 18 of the Terms and Conditions of Business.

77. Mr Kirby submitted that the Defendant ought to have gone further and given some indication of the level of costs which might be recoverable from the Insurers. He submitted that an example would suffice, such as:

> "For example, if your claim settles at Stage 2 for less than £10,000, then the amount which your opponent will be liable to pay in respect of our basic costs might be £500 plus VAT."

78. It seems to me that I have to consider whether this is material information, in the sense that it may have affected the Claimant's consent to the agreement between them insofar as it permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from another party to the proceedings.

79. As stated in *Snell's Equity*, it is relevant to consider the sophistication and intelligence of the Claimant. No evidence was adduced about this. She was a consumer rather than a business, but there is no reason to believe that she was particularly vulnerable or incapable of reading and gaining a layman's understanding of the documents provided to her.

80. I also bear in mind that the Defendant was under a professional obligation to give the Claimant the best possible information about the likely overall cost of her matter and

that paragraph 22 of the Terns and Conditions of Business imposed a contractual obligation on the Defendant to the same effect. I was unimpressed by Mr Bacon's submission that that obligation only applied to information about the Defendant's costs and not to information about the extent to which those costs could be recovered from the Insurers. Both of those factors contribute to the likely overall cost to the Claimant of her claim.

81. Pursuant to that obligation, the Defendant provided the estimate in paragraph 23 of the Client Care Letter. This was, in effect, an estimate of the basic charges for the work necessary to take the case to Stage 2 and the service of the Stage 2 Settlement Pack, if the claim remained within the Protocol.

82. The estimate was £2,500 plus VAT. There is a striking contrast between that figure and either:

(1) the figure of £500 plus VAT, which is the amount of the fixed costs which would have been recoverable from the Insurers if the claim had settled at Stage 2 for less than £10,000 while remaining within the Protocol; or

(2) the figure of £550 plus VAT, which is the amount of the fixed costs which would have been recoverable from the Insurers if the claim settled at that stage for £2,250 or less after leaving the Protocol.

83. If the claim had settled at that stage (and the Defendant acknowledged in paragraph 23 of the Client Care Letter that most personal injury claims do settle at or after that stage) then, on the basis of the Defendant's estimate, if the claim had remained within the Protocol (and using for these purposes the success fee as set out in the CFA, rather than as reduced on assessment), the Claimant would have owed the Defendant £2,400 (i.e. £2,500 - £500, plus VAT) plus 25% of the damages. In that event, unless the damages were at least £3,200, the effect of the agreement was that the Claimant would have had to pay all of her damages and more to the Defendant. The quantum of the Claimant's claim could not be known for certain at that stage, but it was not suggested to me that the Defendant could exclude the possibility that the Claimant's damages would be less than £3,200.

84. It is necessary to ignore for these purposes the fact that the Defendant subsequently chose not to claim everything which it was entitled to claim by way of costs. The Defendant acted as if it, like HH Law, had agreed to cap the costs which it could recover from the Claimant at 25% of the damages. Many solicitors agree to do this, but the Defendant did not.

85. If it had been pointed out to the Claimant that, while the Defendant's estimate of costs was £2,500 plus VAT, she might recover only £500 or £550 plus VAT from the Insurers, then that may have affected the Claimant's consent to the agreement between them insofar as it permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from the Insurers. It may, for instance, have led the Claimant to ask whether her liability could be capped, or to approach a different firm of solicitors, who would cap her liability. Prima facie, therefore, it ought to have been disclosed.

86. It does not seem to me that it would have been an unduly onerous burden to require the Defendant to make this disclosure. It would not involve explaining all of the detail and complexity of the provisions of the Civil Procedure Rules and the Protocol which I have set out. Nor would it have required identifying every possible outcome of the Claimant's claim. Rather, it involved taking the outcome which the Defendant had itself assumed for the purposes of its estimate of costs and stating what the recoverable costs might be in that case.

87. The general terms used by the Defendant to describe the amount of the Defendant's costs which the Claimant might recover from the Insurers are not such as to bring home to the Claimant that, if the claim settled at Stage 2 then she might recover only £500 or £550 plus VAT from the Insurers towards the Defendant's estimated costs of £2,500 plus VAT.

88. I note that the documentation provided to the Claimant in the present case was similar to that provided in *Herbert v HH Law*, which the Master of the Rolls described in paragraph 48 of his judgment as providing "a clear and comprehensive account of her exposure to the success fee and HH's fees generally." However, the agreement in that case differed from the agreement in the present case in that it included a cap of 25% of the damages on the amount which HH Law could recover from Ms Herbert. Moreover, no argument had been advanced based on CPR 46.9(2) and so the Court of Appeal did not have to address the issues which I have had to consider.

89. I have considered carefully the argument that it was sufficient for the Defendant to disclose that the amount that the Insurers would be liable to pay in respect of the Defendant's basic charges was fixed by the provisions of the Civil Procedure Rules. It was open to the Claimant either to ask for more detail or to look up the relevant provisions for herself. The nineteenth century authorities referred to by Simon J in *FHR European Ventures LLP v Mankarious* provide some support for this argument by way of analogy, but they all concerned businesses and trade usages, whereas the present cases concerns a consumer and some detailed and complex provisions of the Civil Procedure Rules and the Protocol. Those cases were applied in *Medsted Associates Ltd v. Canaccord Genuity Wealth (International) Ltd* because the clients in that case were wealthy Greek citizens who were likely to be experienced investors, but not in *Hurstanger Ltd v Wilson*, where the clients were vulnerable and unsophisticated, nor in *FHR European Ventures LLP v Mankarious*.

90. Each case has to be decided on its own facts. In this case, it is a very striking feature of the agreement being proposed to the Claimant by the Defendant that the Defendant's estimated basic charges were five times the amount which the Claimant might be entitled to recover from the Insurers if her claim settled for less than £10,000 at Stage 2 in the Protocol and that, in that event, she might have to pay the first £3,200 of her damages to the Defendant. This was so striking that it ought, in my judgment, to have been brought specifically to the Claimant's attention, if she was to give informed consent to the agreement insofar as it permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from the Insurers, that, while the Defendant's estimate of costs was £2,500 plus VAT, she might recover only £500 or £550 plus VAT from the Insurers..

91. I conclude that the Claimant did not give her informed consent to the agreement and the Defendant cannot rely on it for the purposes of CPR 49(2).

(6) The Defendant's Appeal

92. Given my conclusion on the Claimant's appeal, it is not necessary for me to decide the Defendant's appeal. It was fully argued by the parties in their written submissions, but there was no time to hear oral submissions at the hearing.

(7) Conclusion

93. For the reasons which I have given, I allow the Claimant's appeal. I make no decision on the Defendant's appeal, since that is rendered otiose by my decision on the Claimant's appeal.

94. I express my gratitude to the lawyers on both sides for the care taken in the preparation and presentation of these appeals, which was of considerable assistance to me.