Neutral Citation Number: [2016] EWHC 811 (QB)

Case No: HQ15X00701

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 13th April 2016

Before :

Mr Justice Spencer

Between :

Bolt Burdon Solicitors	**Claimant**
- and -	
(1)Aijaz Tariq	**Defendants**
(2) Azeem Tariq	
(3) Amees Tariq	

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Roger Mallalieu (instructed by **Bolt Burdon**) for the **Claimant**
Simon Edwards (instructed by **Lopian Wagner**) for the **Defendants**

Hearing dates: 26th , 27th, 28th January

Judgment
As Approved by the Court

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.

MR JUSTICE SPENCER

Mr Justice Spencer :

1. This is a claim by solicitors for professional fees under a Contingency Fee Agreement entered into with their clients, the defendants, in respect of non-contentious business in recovering compensation from Allied Irish Bank Plc ("AIB") under the Financial Conduct Authority Redress Scheme. The complaint was that AIB had mis-sold the defendants an "interest rate swap". The Contingency Fee Agreement which was negotiated entitled the solicitors to 50% of any compensation recovered, plus disbursements. AIB eventually offered compensation of £821,045.06 (gross of tax). Accordingly the sum claimed by the solicitors in this action, including disbursements and VAT, is £498,083.52.

2. The defendants dispute the solicitors' entitlement to so large a fee. They do so as a matter of construction of the agreement. They also assert that the solicitors wrongly led them to believe that the claim was all but hopeless. Although there is no suggestion of bad faith, it is said that there were misrepresentations as to whether the limitation period had expired and as to the scope and finality of the review process under the Redress Scheme. The defendants further assert that in all the circumstances the agreement was unfair and unreasonable, such that the court should exercise its discretion under section 57 of the Solicitors Act 1974 to set it aside or reduce the fees payable.

3. I heard oral evidence and submissions in a three day trial. The case raises interesting and unusual issues. The essential facts are, however, largely undisputed.

Factual background

4. The first defendant, Mr Aijaz Tariq is a very experienced, capable and successful businessman. He has been involved in owning and managing hotels for 30 years. The second and third defendants, Mr Azeem Tariq and Mr Amees Tariq, are his sons. They both work in the family hotel business as hotel proprietors. For practical purposes, however, it is and was Mr Aijaz Tariq who made all the important decisions. I shall refer to him hereafter as "Mr Tariq".

5. By 2006 Mr Tariq owned and ran three hotels in London. Towards the end of 2007 he approached AIB for finance to acquire a fourth hotel. The total facility advanced to AIB was £6.2million. As a term of the advance, AIB required the defendants to use an interest rate hedging product ("IRHP") in respect of the interest on £3million of the total loan. It was still expected at that time that interest rates would rise. The purpose of this interest rate "swap" was to provide a hedge against inflation. It tied the defendants into fixed rates of interest.

6. At the beginning of 2008 the defendants sold one of the hotels, enabling them to repay AIB £2million of the outstanding loan. But interest rates had fallen dramatically and the defendants were under severe financial pressure. The interest rate swap worked against the defendants. They were required to make large interest payments to AIB. In January 2009 Mr Tariq complained to the Financial Ombudsman Service about the increase in interest payments on his AIB loan facility. That complaint was rejected on 6th May 2009, and was not pursued further.

7. By 2011 the financial position of the business had improved to the extent that the defendants were able to purchase a further hotel. However, Mr Tariq transferred their borrowing from AIB to Lloyds, which involved paying "breakage" costs of £200,000 to AIB under the terms of the IRHP.

8. On 20th August 2012, out of the blue, AIB wrote to inform the defendants that the Financial Services Authority had instigated an industry-wide review of the sale of IHRPs, and that AIB had agreed voluntarily to take part in the review. An independent third party, approved by the Financial Services Authority, would be appointed to provide oversight of the review. The letter emphasised that there had not been any finding of mis-selling.

9. On the recommendation of his finance broker, Mr Tariq instructed a specialist hedging product adviser, Mr Abishek Sachdev of Vedanta Hedging Limited, to seek compensation from AIB. Vedanta's fee for providing a summary opinion was £1,500 plus VAT. Written submissions were prepared by Vedanta and approved by Mr Tariq. The sum the defendants were seeking to recover was £490,000 plus interest paid under the swap, plus the breakage fee of £200,000. There was also mention of consequential losses. Mr Tariq and Mr Sachdev met with AIB's independent reviewer on 28th November 2012 to discuss the complaint. It is significant that in negotiating Mr Sachdev's terms of business Mr Tariq was, in effect, inviting him to act on a "no win no fee" basis, and specifically mentioned the possibility of instructing a lawyer on a no win no fee basis should a lawyer become necessary.

10. Eleven months passed before AIB communicated their decision on the review. By letter dated 15th October 2013 AIB informed the defendants that the review had found that the IRHP was sold in a "non-compliant way", but that no compensation was being offered. The letter stated:

> "Based on a review of information available, the Review has found that no redress is due to the Business. In reaching this conclusion the Review has considered, given that hedging was a condition of lending, what alternative IRHP the Business would have purchased at the time of the original sale, if all Regulatory Requirements had been met. The Review has concluded that the Business would have purchased the same IRHP product and that the failure to meet certain Regulatory Requirements did not impact upon the choice of IRHP purchased by the Business. "

An appendix to the letter set out a detailed explanation of the review. Of the ten complaints, five had in fact been upheld. The letter set out the "next steps" available and explained that if the findings of the review were accepted no further action was required. The letter stated, however:

> "If you would like to discuss the Review in further detail, or provide any additional information you believe should be considered, then please complete and return Section B of the attached Customer Reply Form (Appendix 2), and upon receipt the Bank will contact you to discuss this matter."

11. The form in Appendix 2 invited the customer to set out in writing the issues which the customer wished to discuss further. The letter made it clear that in the absence of a response within 42 days the Bank would write confirming the review was closed. It is important to note, therefore, that the Review provided for no formal appeal procedure.

12. Mr Tariq was told by Mr Sachdev that he could "appeal" the decision but that he could not assist him further. He would need to find a solicitor specialising in disputes over mis-sold

IRHPs. Mr Tariq's own solicitor (whom he had been instructing for 30 years) could not recommend a specialist solicitor so Mr Tariq undertook a Google search on the internet. It was the claimant solicitors, Bolt Burdon, who came out top in the search results. Their website described their expertise in claims for interest rate swap mis-selling. It referred prominently to "no win no fee". It also mentioned contingency fee agreements, describing what they entailed and emphasising that they were not available once court proceedings had been issued:

> "This agreement provides that we take a percentage of whatever you win. These agreements are often suitable for debt collection and financial mis-selling cases during the redress process."

13. Mr Tariq made a number of calls to other solicitors, whose names he cannot now remember. He first made contact with Bolt Burdon on 28th October 2013. The person he spoke to was Mr Simon Bishop, then a trainee solicitor. Mr Bishop joined Bolt Burdon in July 2013 and qualified as a solicitor later that year, prior to the formal execution of the Contingency Fee Agreement in this case. Before training as a solicitor Mr Bishop had gained extensive valuable experience in the financial services sector, including interest rate swaps. During his training contract with Bolt Burdon he had worked on several cases of this kind. He impressed me in the witness box as a diligent and careful solicitor. His supervisor during his training contract was Mr Matthew Miller.

14. In the initial telephone call on 28th October Mr Tariq made it plain that he was only willing to proceed on a no win no fee basis. Mr Bishop invited Mr Tariq to email him the key documents which he would review to asses the merits of the case. Normally Bolt Burdon would charge for a formal file review, although it seems there was no mention of this on the website.

15. On 30th October Mr Tariq emailed Mr Bishop thanking him for showing interest in the case, stressing:

> "… The only basis for the case I can give to you is no win no fee. If you are interested please let me know criteria and terms and conditions."

16. The relevant documents were duly sent by Mr Tariq and reviewed by Mr Bishop and by a very experienced consultant in the firm, Mr Gary Walker. It was noted that the "trade date" for the interest rate swap was 10th August 2007, more than 6 years earlier, which meant that any claim in contract or tort was statute barred. That was certainly their firmly held opinion. There appeared to be a good argument, however, that what Mr Tariq should have been sold was an interest rate cap rather than an interest rate swap. The difficulty was how to pursue the claim when the review process provided for no appeal, and when any claim in court was statute barred.

17. On 7th November 2013 Mr Bishop spoke to Mr Tariq by telephone (by arrangement) to discuss the prospects of his case and how it might be funded. There is no attendance note of this conversation, but its content can be inferred to an extent from a lengthy email sent by Mr Bishop to the managing partner in the firm, Lynne Burdon, only an hour and half later, setting out the background of the case and inviting her approval of the basis on which Bolt Burdon would act for Mr Tariq. Some of the detail of the conversation is in dispute but it is

common ground that Mr Bishop informed Mr Tariq of the limitation problem and the absence of any formal appeal procedure to challenge the review decision. Mr Bishop said that the prospects of achieving a successful outcome were significantly less than 50%. Mr Tariq agrees this was said but maintains that Mr Bishop went further, describing the prospects as very poor.

18. Mr Bishop recalls explaining to Mr Tariq in this conversation that Bolt Burdon would not be able to act on a no win no fee basis, and that in response Mr Tariq made the suggestion that Bolt Burdon could act on a no win no fee basis in return for 50% of any compensation Mr Tariq might obtain. Mr Tariq denies this suggestion came from him. He maintains that it was Mr Bishop who made the suggestion, and that Mr Bishop said that generally when Bolt Burdon took on cases such as this it was on a 50% fee basis, and that was the only basis on which they were prepared to act for Mr Tariq.

19. On this factual dispute I prefer the evidence of Mr Bishop. He had no authority to offer to act on a 50% contingency fee basis. Bolt Burdon had not acted on such a basis for any client before, on the evidence as it emerged. I am satisfied Mr Bishop did not say this, and would not have said this. On the other hand, during the course of a telephone conversation with Mr Bishop much later on when the parties were trying to reach a compromise (1st September 2014) I am satisfied that Mr Tariq accepted that it was he who had made the suggestion of 50%. He also said that he had made enquiries of other firms of solicitors who work in this specialist area and that mostly they charge in the region of 50%. The exchanges in that phone call on 1st September were recorded by Mr Bishop in an attendance note.

20. In cross-examination Mr Bishop said that the offer of 50% came as a surprise. He had a strong recollection that it was Mr Tariq who mentioned it and he discussed it with his colleague and supervisor Mr Marc Thurlow immediately thereafter. This again is borne out by the same email to the managing partner, soon after this conversation, in which there is reference to Mr Tariq being "willing to run a 50% contingency fee agreement", which Mr Bishop and Mr Thurlow thought would reflect the substantial risk involved. The inference is that they must have discussed this soon after Mr Bishop's telephone conversation with Mr Tariq.

21. In that same email Mr Bishop summarised the background to the proposed claim and identified the two major problems:

> "1. The claim has already run through the scheme and whilst there is an invitation to reply to AIB/ the Independent Reviewer with any issues regarding the decision, there is no formal appeal process and there is no structured forum to hear the appeal once the decision has been made. If we advance the arguments above there is nothing to stop AIB saying "I see your points, but my decision remains"; and
>
> 2. The Claim is time barred, so the scheme is all we have (we are instructing counsel on this issue currently as to whether or not alternative arguments for limitation are available-this may change the state of play for Mr Tariq).
>
> To combat these issues we would suggest a wider campaign approach including FCA involvement and media pressure to try

> and force the issue through the Scheme. I feel that both would be sensitive to the case because the absence of an appeal process is a key gripe for all claimants; that seems to be justified in the light of this decision. The FCA would be particularly wary of the limitation issue - they initially told claimants it was unnecessary to seek legal advice.
>
> However, this obviously puts a considerable dent in the prospects of success, which I would say are under 50%."

22. In cross-examination Mr Bishop said that in fact he assessed the prospects of success at nearer 20 % than 40%. The email continued:

> "I explained all of this to the client. He has no money to pay up front. However, he said that he needs help and would be willing to run a 50% contingency fee agreement. Marc [Thurlow] and I share the view that this would reflect the risk involved, but obviously it is a substantial risk. Assuming that the expert (Nick Stoop) would also enter some form of contingent agreement, what would your thoughts be on us progressing the case on this basis?"

23. The response from the managing partner, Lynne Burdon, was that it "may be worth it just from a marketing prospective – BB are the firm willing to fight a cause?…".

24. The matter was discussed by Bolt Burdon at a meeting with the partners on 8th November 2013. It was agreed that Bolt Burdon would take on the case on that basis. This was communicated to Mr Tariq in an email on 8th November, inviting him to a meeting the following week, on 13th November, to discuss the terms of the agreement and the action plan for his case. In his email Mr Bishop suggested that Mr Tariq might also want his sons to attend, saying "please invite them if they would like to come."

25. Within the hour Mr Tariq responded on 8th November by email, confirming his availability for the meeting next week. He wrote:

> "I agree to have the agreement on 50% no win no fee basis on the total of net amount."

26. In advance of the meeting on 13th November Mr Bishop prepared a number of documents. One was the firm's standard form "Authority to Litigate", setting out a risk assessment to enable authority to be given by the managing partner. The risk assessment followed very closely the wording of the internal email of 7th November. It confirmed the assessment of "less than 50%" as the view on the prospects of success. The assessment of quantum was around £400,000 for direct loss, and £500,000 for indirect loss, although the latter would not form part of the initial claim. The likely fees were said to be £20,000 plus VAT, with a disbursement of £5,000 for an expert's report.

27. Mr Bishop also prepared a draft non-contentious business contingency fee agreement. This was not sent to Mr Tariq in advance of the meeting but was presented to him and explained at the meeting on 13th November.

28. In addition to Mr Bishop and Mr Tariq, Mr Thurlow was present at the meeting. Mr Tariq is adamant that his two sons were also present, Azeem and Amees (whom Mr Tariq described as sleeping partners in the business). Regrettably there is no attendance note of this meeting, which would settle that issue and others. Mr Bishop and Mr Thurlow are unsure whether the sons were present but doubt that they were. Little turns on this issue save that both the sons gave evidence, in very brief and formal terms, confirming Mr Tariq's account of what took place at the meeting.

29. The documentary evidence, in the form of subsequent letters and emails, tends strongly to suggest that the two sons were *not* present at this meeting on 13th November. For example, in his email to Mr Tariq following the meeting Mr Bishop wrote only to Mr Tariq, saying it was a pleasure to meet "you" today, whereas one might have expected mention to be made of the sons as well if they had also been present. Furthermore, in subsequent correspondence there are references to Mr Bishop wishing to meet Mr Tariq's sons (e.g. emails dated 19th November 2013, 18th December 2013 and 28th January 2014). Mr Bishop undoubtedly did meet the sons when they came into the office on Friday 7th February 2014, because Mr Bishop specifically referred to this in his email dated 12th February: "I was glad to meet Amees and Azeem".

30. Both sons were adamant in cross-examination that they had attended the solicitors' office on two separate occasions, on 13th November and 7th February. If this is correct it very strange that Mr Bishop should not have mentioned their presence at the 13th November meeting in his subsequent email correspondence. It all reads as if 7th February was the first time he had met them. The evidence is that the records of visitors to the office (such as they are) do not refer to Mr Tariq being accompanied by anyone else that day. I note that on 4th April 2014 Mr Bishop emailed Mr Tariq following a meeting the previous Wednesday (2nd April) in terms which may suggest that the sons had attended on that occasion. If so, this may explain why the sons believe they attended twice.

31. On the evidence as a whole I find that the sons were not in fact present at the meeting on 13th November.

32. Mr Tariq maintains that at the meeting on 13th November he was left in no doubt that the prospects of success were poor, if not hopeless. Mr Bishop disputes this. He recalls explaining how the argument in relation to the interest rate cap would be formulated and that an expert report would be required for this purpose. He recalls explaining the difficulties over the limitation period and the absence of any appeal process for the Review. He recalls that Mr Tariq had spent a number of years and a significant amount of money advancing his claim with nothing to show for it and he was unable to commit any further resources to the claim. Mr Tariq accepts that he said he thought the claim was worth around £1million. There was concern raised about the funding of disbursements.

33. Mr Bishop recalls explaining the agreement and going through its terms. He recalls that they discussed the possibility of acting on the basis of hourly rates but that was discounted because Mr Tariq was unable or unwilling to proceed on that basis.

34. The day after the meeting, 14th November, Mr Tariq emailed Mr Bishop to say that his understanding of no win no fee was that disbursements would be paid "only if you will be successful to achieve the compensation", in which event disbursements would be deducted. He said: "If you are agreeing on… those terms then I am ready to sign the amended contract."

35. Because the issue of disbursements was the sticking point, Mr Bishop needed to discuss the matter with the partners to see whether some alternative compromise could be found. The upshot was that Mr Bishop put an alternative suggestion to Mr Tariq, in a telephone call on 16th November, that the contingency fee could be reduced from 50% to 48% if Mr Tariq paid up front for the principal disbursement (i.e. the cost of the necessary expert's report). Mr Tariq rejected this suggestion.

36. The terms of engagement had now been agreed in principle. On 19th November Mr Bishop emailed to Mr Tariq a client engagement letter, together with Bolt Burdon's Terms of Business and a revised version of the Contingency Fee Agreement, amended in the light of the discussions about disbursements. In the covering letter Mr Bishop summarised the position. Under the heading "Your Case" he wrote:

> "We have discussed your case in detail. Having reviewed the document from Allied Irish Bank dated 15 October 2013 we are, frankly, shocked at their decision, and consider it to be deeply regrettable that you find yourself in this situation. However, there are significant risks involved for our firm in taking on your case on a no win no fee basis. Most importantly, these are:
> 1. Your complaint has already run its course through the Scheme, and with no proper avenue for appeal there is nothing to stop Allied Irish Bank deciding that their original decision is correct; and
> 2. Your 6 year statutory time period has expired, meaning that if we are unable to achieve the satisfactory result under the Scheme, AIB would be able to defend any claim through the courts using a limitation defence.
> These risks are reflected in the 50% fee plus VAT that we have agreed in principle (subject to our discussions regarding disbursements). They also have a bearing on the way in which we will approach your case. Our intention is to appeal AIB's decision by producing comprehensive written submissions, and also to use a campaign involving the media and contact with the FCA directly in order to exert as much pressure on AIB and the FCA as possible. Further detail of the work that we will carry out is contained in the Client Engagement Letter attached."

The letter went on to deal at length with the question of disbursements.

37. The client care letter dated 19th November, emailed with the covering letter, set out the usual details of who would be conducting the matter on the client's behalf, and included the following passages:

> "Following our discussions we have agreed that we will begin work on your file immediately. The initial stage of our work will involve writing to Allied Irish Bank in response to their Redress offer dated 15 October 2013, indicating that we will be challenging their decision and requesting documentation from them by way of the provisions of the Data Protection Act 1998 and further time to properly formulate your claim.
> Once this is received we will review your file thoroughly and will draft written submissions to the bank addressing the mis-sale of the swap and the loss that you have suffered as a result. We will also

> instruct a derivatives expert to review your case and produce a report to be used within the written submissions."

The letter referred to the absence of a formal avenue of appeal, and the expiry of the six year statutory time limit to bring proceedings and continued:

> "In view of these difficulties we will also correspond directly with the Financial Conduct Authority, and will attempt to expose your case to the media, both of which, we hope, will add pressure on Allied Irish Bank to consider your case again in light of the written submissions that we will prepare."

The letter set out the funding arrangements, summarising them in these terms:

> "Broadly, the important elements of the agreement are as follows:
>
> - If we obtain compensation for you, our fee for the work that we carry out on your behalf will be 50% of the compensation that you are awarded plus VAT; and
>
> - If you cancel the agreement in certain circumstances prior to the conclusion of the claim then you will be liable to pay us a fee as set out in the Agreement.
>
> Please read the Agreement carefully, following which we will discuss it with you to ensure that you are comfortable with the way it works. If you have any immediate questions please do not hesitate to ask."

The letter indicated that Mr Bishop expected the matter to take approximately six months to complete. It concluded:

> "The information in this letter, along with the Terms of Business and the Agreement enclosed will form the basis of the contract between us. Once we have discussed the Agreement with you, we will require a signed copy to be returned to us as soon as possible."

38. Having received no reply, Mr Bishop emailed Mr Tariq on 21st November again offering to address any queries he might have. Mr Bishop also attached a draft letter for Mr Tariq to send to AIB without delay, putting them on notice that he intended to appeal the decision. The material part of the letter read as follows:

> "I write to inform you that I fundamentally object to the decision and will be formally appealing it. I am currently seeking legal advice and therefore require 21 days [to] respond more substantively. Please acknowledge receipt of this letter without delay."

39. Mr Tariq duly signed that letter and sent it to AIB on 22nd November 2013. Mr Tariq did not sign the Contingency Fee Agreement for several more weeks. The precise arrangements over disbursements seem, again, to have been troubling him. There was a meeting between Mr Bishop and Mr Tariq on 10th December, following which Mr Bishop made further amendments to the draft Agreement. Mr Tariq remained concerned that his liability for the principal disbursement, the report of the expert like Mr Stoop, was too open ended. By email dated 8th January 2014 he informed Mr Bishop, "I would like to limit the disbursement cost and add an additional term that you will require to inform me and my approval (sic) for any cost regarding the disbursement or any other associated expenses".

40. In fact, as Mr Bishop pointed out by email the following day, that protection was essentially provided in the agreement already. There were further exchanges over the single outstanding issue of the principal disbursement and eventually agreement was reached.

41. On 21st January 2014 Mr Bishop emailed Mr Tariq the final version of the Agreement. Mr Tariq and his sons signed the agreement that day and it was emailed back to Mr Bishop. Mr Tariq had plainly considered its terms very carefully because he endorsed in manuscript an additional clause, at the bottom of page seven which he required to be part of the agreement. The endorsement read:

> "We have signed this agreement on the understanding of 'no win no fee basis' and in case if we are not successful to win then we are not responsible for any disbursement fee, barrister opinion fee and all miscellaneous expenses."

42. Mr Bishop concluded, after discussing the matter with his senior colleague Mr Thurlow, that this term did not affect the operation of the agreement and he emailed Mr Tariq on 23rd January agreeing to the inclusion of the clause.

The Terms of the Contingency Fee Agreement

43. It is necessary to set out some of the principal terms of the Contingency Fee Agreement, in its final signed form dated 21 January 2014, in order to explain the issues which arise.

44. Clause 1 of the Agreement contains the definitions. Clause 1.3 defined the "Claim" as follows:

> "Your claim against the Bank in respect of the mis-selling of the Derivative Transaction, whether that claim is prosecuted under the Financial Conduct Authority (or any successor) Redress Scheme and/or through mediation and/or through other non-contentious avenues and regardless of the head(s) of claim under which it is prosecuted."

45. The crucial provision of the Agreement is the definition of "Compensation" in clause1.4:

> "The total financial value of any sums or concessions or other benefits offered by or on behalf of the Bank and accepted by You in relation to the Claim including but not limited to:
> 1.4.1 payments of cash;
> 1.4.2 gestures of goodwill and ex gratia payments…
> 1.4.8 payments to compensate You for your consequential and other direct losses…
> 1.4.10 interest awarded in respect of any constituents of Compensation detailed at clauses 1.4.1 to 1.4.9…"

46. The other crucial definition, in clause 1.5, was of "Fee":

> "Our Fee is 50% of your Compensation plus VAT."

47. Clause 1.10 defined "Charges" as follows:

> "our total charges that will be invoiced to You including any Fee, Cancellation Fee or other fee however calculated, Disbursements and Expenses all plus VAT at the prevailing rate."

48. Clauses 2 and 3 provided:

> "2. What this agreement covers
> Work we do for You to pursue your Claim for Compensation from the Bank
> 3. What this agreement does not cover
> Any court proceedings against the Bank in relation to your Claim."

49. Clause 4 headed "Our duties under this agreement" provided:

> "We will:
> 4.1 subject to our professional rules and regulations and our professional obligations to third parties, act in your best interests in pursuit of your Claim and use our reasonable endeavours to obtain Compensation for You (this is likely to include our instructing experts on your behalf);
> 4.2 explain to You the risks and benefits of the actions we are taking in connection with your Claim;
> 4.3 give You our best advice about whether to make or accept any offer of settlement in connection with your Claim;
> 4.4 fund the Principal Disbursement;
> 4.5 not incur any other Disbursement without your prior written consent, such consent not to be unreasonably withheld…"

50. Clause 5 set out "Your duties under this agreement", and included:

> "5.2 You agree to instruct the Bank to pay any Compensation to Us and You authorise Us to deduct our Charges from the Compensation before accounting to You. You will at our request sign an authority to the Bank that any money due to You be paid to Us;
> 5.3 You will notify Us immediately if You receive any offer of Compensation or receive any Compensation from the Bank;
> 5.4 You will pay our Charges within 7 days of receiving our invoice by email or otherwise unless we have already deducted them from any Compensation received by Us."

51. Clause 6 of the Agreement contained the all important provision triggering payment of the solicitors' Fee, under the heading "If You Agree Compensation". It provided:

> "If You agree Compensation our Fee becomes payable.
> If the Compensation is agreed or otherwise arises in parts then our Fee will be paid in parts also as the amount of each part of the Compensation is ascertained."

52. Clause 7 provided for early termination of the Agreement by the defendants in which event:

> "…You will pay to Us a fee being the greater of:
> 7.1.1 The Cancellation Fee; or
> 7.1.2 where You have received any offer of Compensation, whether or not You choose to accept it, our Fee is calculated on the basis that the offer were accepted."

53. Clause 8 of the Agreement entitled the solicitors to terminate the Agreement at any time by notice in writing and provided:

> "If we terminate this Agreement: …
> 8.3 because we advise the likely Compensation does not make the Claim commercially viable to pursue, then You do not have to pay us any Fee or Cancellation Fee;
> 8.4 for any other reason then You do not have to pay Us any Fee or Cancellation Fee."

54. Clause 10 headed "Bolt Burdon Terms of Business" provided:

> "This Agreement incorporates our standard Terms of Business a copy of which has been supplied to You. If there is any conflict between this Agreement and the Terms of Business then the terms of this Agreement shall prevail."

55. Clause 12 contained supplementary provisions for the calculation of the "Fee":

> "The Fee shall be calculated by reference to the financial value of the Compensation as determined by Us in our reasonable discretion following the making of the relevant offer by the Bank. If you do not agree with out determination you may give us notice of that fact within 7 days and then the following procedure will apply to ascertain the Fee."

There were then lengthy provisions for appointing an independent expert to determine the financial value of the Compensation or the disputed part of it, as an expert and not as an arbitrator.

Events after the Agreement had been signed

56. Now that the terms of the Agreement had finally been settled, Mr Bishop set to work. By letter dated 28th January 2014 he informed AIB that Bolt Burdon were instructed on behalf of Mr Tariq and his sons in relation to their claim against the Bank arising from the sale of the IRHP. He referred to the letter (22nd November 2013) sent to the Bank by Mr Tariq confirming the intention to appeal their review and/or redress outcome:

> "Please note that we are currently taking instructions from our Client and we will be contacting you again in due course with further particulars of that appeal."

57. The letter then went on to make a detailed formal Data Subject Access Request. Mr Bishop explained in his evidence that from his experience of the financial sector he was aware that each bank had internal processing and security requirements which it was obliged to follow when an IRHP was sold in such circumstances. These would include the bank taking a view as to the reasonably foreseeable potential financial loss the customer would be exposed to by the swap, requiring approval of an internal line of credit, referred to as a "Credit Exposure Equivalent". Mr Bishop had noted that the submissions previously made on Mr Tariq's behalf by Vedanta had not addressed these points. He regarded this as an area of distinct vulnerability for the bank, and this was part of the target for the Data Subject Access Request. Receipt of the email was acknowledged by AIB the following day, with confirmation that the matter was being fully investigated and the Bank would reply within four weeks.

58. On Tuesday 4th February 2014 there was a fuller reply to Mr Bishop's letter of 28th January, this time from a solicitor in the legal services department of AIB, Mr Rutu Rajanai. The letter included the following:

> "Since issuing the Initial Redress Outcome Letter and receipt of your Client's response dated 22 November 2013, the Bank is currently reconsidering the application of the Review methodology in your Client's case and, therefore, the conclusion it reached in its Initial Redress Outcome Letter. In light of that, perhaps your Client would be minded to delay issuing its substantive response to the Initial Redress Outcome Letter and withdraw its Subject Access Request at this stage until it has received the updated outcome letter from the Bank. The Bank expects to be able to issue the updated outcome letter by 28 February 2014 at the latest."

59. Mr Bishop replied to the letter the following day, acknowledging the development that an updated outcome letter was to be issued, but declining to withdraw the Data Subject Access Request, reminding the Bank that it had until 10th March 2014 to comply. Mr Bishop took this stance in order to keep up the pressure on AIB.

60. On 28th February 2014 Mr Bishop was emailed by AIB's Regulatory Compliance Department and informed that the process of collating all relevant information under the request had nearly been completed. However, there had been no further communication from AIB in relation to the promised updated outcome letter, which AIB's solicitor had indicated would be issued by 28th February at the latest. On 3rd March 2014 Mr Bishop reminded AIB's solicitor of this. On 7th March AIB's solicitor confirmed that the outcome letter had been issued that day, attaching a copy.

61. This letter from AIB's independent review team, dated 7th March 2014 contained unexpected good news. AIB were now for the first time offering a redress outcome sum. The figure was £386, 510.75. Mr Bishop immediately informed Mr Tariq of this "very positive development", which they would need to discuss. The review outcome letter confirmed that the IRHP had been sold in a non-compliant way and that redress was due. The Review had considered, given that hedging was a condition of lending, what alternative IRHP the customer would have purchased at the time of the original sale if all regulatory requirements had been met. The conclusion was that the customer would have purchased a £3m three year Interest Rate Swap at a rate of 6.24%. This justified compensation consisting of a Cash Flow Replacement Sum of £331,499.97 plus compensation interest of £68,763.47. However tax of

£13,752.69 was deductible owing to a recent change in the tax rules so that sum would be withheld and AIB would pay it to HMRC on behalf of the customer.

62. The review outcome letter set out the options open to Mr Tariq. The first was that he could accept the offer in full and final settlement. The second was that if he was satisfied with the Review Outcome but considered that he had suffered additional losses beyond the value of the sum offered, for which he wished to seek redress from the Bank, he was required to provide the Bank with relevant particulars within 42 days. The Bank would consider the claim for additional losses. This would, however, preclude any court proceedings against the Bank. The third option was to reject the Bank's offer altogether within 42 days, following which the Bank would consider the customer's reasons for rejection and would write with its final response in due course.

63. Mr Bishop's assessment was that AIB's offer was insufficient and that there were still powerful arguments that the correct alternative product was not an interest rate swap but an interest rate cap. He discussed the offer with Mr Tariq, who accepted Mr Bishop's advice that this outcome should be challenged. Mr Bishop endeavoured to persuade AIB to pay the sum offered (£331,499.97) on account. AIB declined to do so.

64. Mr Bishop commissioned an expert's report from Mr Stoop, which cogently supported the proposition that an interest cap rather than an interest swap should have been sold. In a well constructed letter to AIB dated 27th May 2014 Mr Bishop set out the arguments relied upon, enclosing a copy of Mr Stoop's report.

65. There is no dispute that this part of the work done by Bolt Burdon was instrumental in persuading AIB to make a much increased offer, in a letter dated 20th August 2014. In this second offer letter The Bank acknowledged that the customer could have purchased a £3million 3 year Interest Rate Cap at a rate of 6.5%. The Redress Outcome Sum now offered was £783,050.08, comprising a Cash Flow Replacement sum of £631,070.14 and a Compensation Interest Sum of £189, 974.92. Tax on the compensation interest was deducted, as before, in calculating the Redress Outcome Sum Mr Tariq would receive.

66. Mr Bishop informed Mr Tariq of this good news and there was a meeting the following day, 21st August, at Bolt Burdon's office to discuss the offer and the potential claim for consequential losses. It was at this meeting that the matter of Bolt Burdon's fee was discussed for the first time. There had been no mention of that issue when the initial offer had been made in March. Mr Tariq said in his oral evidence that he deliberately chose not to voice any objection at that stage to paying 50% of the compensation offered. At the meeting on 21st August Mr Tariq asserted that Bolt Burdon's involvement had only produced the increase on the March offer. According to Mr Bishop's attendance note of the meeting (at which Mr Tariq's nephew was also present) Mr Tariq was pressed as to whether he was challenging the agreement or merely asking Bolt Burdon to exercise discretion in not enforcing the agreement fully. He confirmed that he was asking for the exercise of discretion. He acknowledged that he had previously tried numerous routes to recover compensation, all without success, and had been fighting the case for 4 years. He requested that Bolt Burdon should not charge in respect of the first offer but only the increase. He wished Bolt Burdon to continue to act for him in the claim for consequential losses. Mr Bishop agreed to discuss the matter with the partners.

67. Next day, 22nd August, Mr Tariq emailed Mr Bishop and the partners in Bolt Burdon, articulating his argument that their entitlement was only to 50% of the increase on AIB's

initial March offer. Mr Tariq argued that the first offer was the result of the work done by his previous adviser, Mr Sachdev of Vedanta, and nothing to do with Bolt Burdon.

68. There were further discussions between the parties over the next few weeks, with various compromises suggested, but no agreement could be reached. Mr Tariq declined the invitation to refer the question of the amount of the fee to an independent expert, pursuant to the terms of clause 12 of the Agreement.

69. On 5th September 2014 Mr Tariq terminated the Agreement pursuant to clause 7. That termination triggered payment of the "Fee" as if the offer of compensation had been accepted.

70. The increased offer from AIB was duly accepted by Mr Tariq and his sons on 15th September 2014. Mr Tariq elected to exercise option B which entitled him to pursue his claim for consequential losses as well.

71. On 19th September 2014 Bolt Burdon submitted their invoice for the full sum now claimed, £498,083.52.

72. To complete the chronology, Mr Tariq confirmed in his oral evidence that he pursued the consequential losses claim through other solicitors and recovered some £48,000. The solicitors' remuneration was £15,000 plus 10% on the first £100,000 of the sum recovered (£10,000). So in total the fee paid to the other solicitors to recover consequential losses of £48,000 amounted to some £28,000.

73. The work done by Bolt Burdon on Mr Tariq's behalf under the Agreement is costed in a document headed "Transaction Listing of WIP postings", dated 12th January 2016, broken down as between the fee earners. The total time shown is 191 hours, costed at £50,439.49. This cannot be regarded as a definitive figure for the work done up to termination of the agreement, but it gives some idea of the cost had the basis of charging been hourly rates.

The issues

74. The issues I am required to decide, as they emerged in the pleadings and during the hearing, are as follows:

> (1) As a matter of construction of the Agreement, are Bolt Burdon entitled to 50% of the final sum recovered as compensation, irrespective of whether the first offer in the letter of 7th March 2014 resulted from their efforts, or must it be demonstrated that Bolt Burdon were an effective cause of the first offer?
>
> (2) If the latter, were Bolt Burdon an effective cause of the March offer?
>
> (3) Is the 50% fee to be calculated by reference to the gross sum recovered as compensation, or only the net sum after deduction of 20% tax on the interest element?
>
> (4) Is Mr Tariq obliged to pay the "disbursements", as a matter of construction of the Agreement?

(5) Was Mr Tariq induced to enter into the Agreement by an actionable misrepresentation as to the strength of his claim against AIB, in relation to advice that:

(a) the limitation period for any claim had expired; and/or

(b) the the initial review decision was for practical purposes final?

(6) Were the terms of the Agreement unfair or unreasonable, such that the court should exercise its power under section 57 of the Solicitors Act 1974 to set the Agreement aside or reduce the fees payable?

Construction of the Agreement

75. On behalf of the claimant Mr Mallalieu submits that as a matter of plain construction of the Agreement it is clear that Bolt Burdon's fee was to be calculated by reference to whatever sum of compensation was offered by AIB during the currency of the agreement. He points to the width of the definition of "compensation" which includes even sums offered by the bank as "gestures of goodwill and ex gratia payments" (see clause 1.4.2). He submits that there is no basis for the introduction of an implied term that the fee is only payable on compensation which has "resulted from the claimant's efforts", as contended for in paragraph 23 of the defence. Such a term would give rise to impossible evidential issues of causation, particularly where an offer by AIB might be prompted by a combination of factors some or most of which could be extrinsic to "efforts" of the claimant.

76. On behalf of the defendant, Mr Edwards submits that, put simply, in order to be entitled to its fee the claimant must earn it. Otherwise it would mean that if a short while after the defendants had signed the agreement, and before Bolt Burdon had done anything at all, the Bank had made an offer of compensation which the defendants accepted Bolt Burdon would be entitled to 50% of that sum; that would be a startling proposition. Mr Edwards submits that either as a matter of construction or by the implication of a necessary term to give the agreement business efficacy, no fee is payable in respect of compensation which the claimant played no part in obtaining.

77. The starting point for any analysis must be the terms of the agreement itself and the plain meaning of the words used. By clause 1.5, the claimant's fee is "50% of your Compensation plus VAT". By clause 1.4, compensation means "the total financial value of any sums or concessions or other benefits offered by or behalf of the bank and accepted by you in relation to the claim…" By clause 6, the fee becomes payable "if You agree compensation". Alternatively, by clause 7.1.2, on early termination by the defendants the fee payable is calculated on the basis that any offer of compensation had been accepted.

78. These provisions make it very clear that the contingency upon which the claimant's fee becomes payable is the objective fact of an offer of compensation during the currency of the agreement, however that offer comes about. That is the plain meaning of the words. Mr Edwards urges upon me the principles of construction summarised by Lord Hoffmann in the well known passage of his speech in *ICS Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at page 912H to 913F.

> " (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of facts" but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respect unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax…
>
> (5) The "rule" that words should be give their natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.… "

79. Mr Edwards also relies strongly upon the terms of the client care letter dated 19th November 2013 which included the explanation:

> "The important elements of the Agreement are as follows: if we obtain compensation for you, our fee for the work we carry out

> on your behalf will be 50% of the compensation you will be awarded plus VAT"

Mr Edwards submits that this confirms that the fee was payable only in respect of compensation "we obtain for you". He submits that as an exception to the embargo on considering extrinsic material which pre-dates a written contract, it is permissible to take into account "explanatory notes" in interpreting the contract. *Investors Compensation* was just such a case, where the contract was in the claim form but reliance on the explanatory note was permitted. However, the circumstances of that case were exceptional, as Lord Hoffmann explained (at page 913G-H):

> "…. the claim form was obviously intended to be read by lawyers and the explanatory note by laymen. It is the terms of the claim form which govern the legal relationship between the parties. In construing the form, I think that one should start with the assumption that a layman who read the explanatory note and did not venture into the claim form itself was being given an accurate account of the effect of the transaction…"

As Mr Mallalieu rightly points out, in the present case Mr Tariq undoubtedly studied the Agreement itself with great care, even adding a manuscript clause of his own.

80. Mr Mallalieu relies upon the (arguably) somewhat stricter approach to interpretation explained by Lord Neuberger in *Arnold v Britton* [2015] A.C. 1619. The interpretation of a contractual provision involves identifying what the parties had meant through the eyes of a reasonable reader. Save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision. Commercial common sense was relevant only to the extent of how matters could or would have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract was made.

81. Despite the superficial attraction of Mr Edwards' arguments, I am not persuaded in the end, either as a matter of construction or by implication of a necessary term, that the true meaning of this agreement was that the claimant's fee was to be based only upon compensation which was obtained through Bolt Burdon's efforts. The agreement naturally provided that the solicitors would use their reasonable endeavours to obtain compensation for Mr Tariq (clause 4.1). The hope and expectation was that their efforts would bear fruit in obtaining compensation, hence the explanation in the client care letter. But the all important background - the "factual matrix"- was that Mr Tariq came to Bolt Burdon with no prospect whatever of obtaining compensation otherwise than through whatever they could achieve on his behalf. All other efforts to date had been unsuccessful. The Bank had rejected the claim for compensation after very prolonged consideration. There was absolutely no expectation that the Bank would change its mind without the intervention of the claimant. Any compensation offered after Bolt Burdon had been retained, upon the signing of the Agreement was, by definition, a bonus. The very simple and critical term of the Agreement was that Mr Tariq agreed to pay 50% of any such compensation offered during the currency of the Agreement.

82. Furthermore, the implication of a term requiring that the compensation must be obtained through the claimant's efforts would pose insurmountable difficulties of interpretation and proof. Analogies with estate agency contracts, for example, are unhelpful.

Mr Edwards accepted that, adopting the language of estate agency contracts, the obligation put at its highest would be that the claimant was "*an* effective cause" rather than "*the* effective cause" of compensation being offered. But several obvious practical questions arise. How would proof of effective cause be established? Would the claimant be required to obtain evidence from AIB? What if AIB offered compensation for a range of reasons, including the fact that solicitors had been instructed, pressure from the Financial Conduct Authority, pressure from shareholders, and political pressure? How would the respective weight and effectiveness of any of the individual reasons be assessed?

83. In the course of argument I invited counsel to indicate what words would need to be read into the Agreement, and in what clause, in order to achieve the objective for which Mr Edwards contended. It seemed to be common ground that clause 1.4 , defining "compensation", would have to read:

> " the total financial value of any sums or concessions or other benefits offered by or on behalf of the Bank *obtained by Us* and accepted by You in relation to the Claim…"

That at least would be consistent with the wording in the client care letter on which Mr Edwards places such emphasis. However, the word "obtained" would, unless it was given a specific extended definition in the Agreement, give rise to just these difficulties of interpretation. More fundamentally, there would be a conflict between the concept of a requirement of "obtaining" compensation and the very clear words "gestures of goodwill and ex gratia payments", as envisaged by clause 1.4.2. By contrast, the focus of the definition of compensation in clause 1.4 as drafted is rightly on the *fact* of the offer, rather than the motivation behind the offer.

84. For all these reasons I have reached the clear conclusion that the Agreement, properly construed, did not require that any offer of compensation by the Bank need be obtained through the claimant's efforts, whether this requirement is expressed as the claimant's being an effective cause of such an offer or otherwise. I have also reached the clear conclusion that there is no basis for implying a term into the Agreement to that effect in order to give the Agreement business efficacy and/or to reflect what is said to be the true intention of the parties.

The first offer, 7th March 2014

85. For the reasons I have already given, my conclusion is that for the purpose of calculating the claimant's fee under the Agreement there is no distinction to be drawn between the Bank's first offer in the letter of 7th March 2014 and the Bank's final offer in the letter of 20th August 2014. My conclusion is that there is no requirement for the claimant to demonstrate that the Bolt Burdon were an effective cause of the Bank's first offer.

86. However, for completeness and out of deference to counsel's arguments, I shall consider briefly the alternative scenario. If my conclusion is wrong, and the Agreement required Bolt Burdon to be an effective cause of the first offer, is that requirement satisfied?

87. There are, in my judgment two fundamental fallacies in seeking to draw a distinction between the March offer by the Bank and the final August offer. First, tempting as it is to regard them as separate and discrete offers, in reality they were not. The March offer letter required Mr Tariq to elect for one of three options, each of which had to be pursued with 42

days of the date of the letter. Option 1 was to accept the Redress Outcome Sum in full and final settlement. Option 2, the "Additional Losses Option" applied "if you are satisfied with the Review Outcome but consider that the Customer has suffered additional losses beyond the value of the Redress Outcome Sum for which it wishes to seek redress from the bank…". This, in effect, was the option which Mr Tariq ultimately pursued. Option 3 was to reject the Redress Outcome Sum in its entirety.

88. Mr Bishop succeeded in persuading AIB to extend the time for electing which option to pursue until there had been a satisfactory response to the Data Protection Subject Access Request. The Bank agreed in the end that the 42 day period should run from 28th March 2014. Mr Bishop was, however, unable to persuade AIB immediately to pay out the Redress Outcome Sum in the March letter (£331,499.97). It follows that it is by no means clear that the March offer could be regarded as a separate and distinct offer from the final August offer.

89. The second fallacy in seeking to treat the offers as separate and discrete arises from the all important provision under which the claim is brought, namely clause 7.1.2. It is common ground that the provisions concerning early termination in clause 7 apply. It is admitted in the pleadings that the defendants terminated the Agreement on 5th September 2014 pursuant to their rights under clause 7 which provided:

> " You may terminate this Agreement at any time by notifying Us in writing. If You terminate this Agreement then You will pay to Us a fee being the greater of:
>
> 7.1.1 the cancellation fee; or
>
> 7.1.2 where You have received any offer of Compensation whether or not you choose to accept it, Our Fee calculated on the basis that the offer Fee were accepted."

90. On the plain wording of this clause, the second and final August offer constitutes "any offer of Compensation" upon which the Fee was to be calculated. It follows that, as a matter of construction of the Agreement, it is the August offer alone that is relevant for the purpose of triggering the calculation and payment of the claimant's fee.

91. Had it been necessary to decide the issue, I am in any event satisfied that the work done by the claimant after the date of the written agreement (21st January 2014) was an effective cause of the first offer letter dated 7th March 2014, for the reasons set out below.

92. Mr Edwards placed great emphasis on the fact that the only work done by Bolt Burdon after 21st January consisted of the letter sent to AIB by Mr Bishop dated 28th January 2014 containing the formal Data Subject Access Request. Receipt of that letter was formally acknowledged by AIB the following day, 29th January, when it was confirmed that the matter was being fully investigated and the assurance was given that Mr Tariq would be contacted within 4 weeks. Mr Edwards points out that the more considered response from AIB was the letter dated 4th February 2014 from the solicitor Mr Rajani. This was only one week after Mr Bishop's letter of 28th January. The letter noted the intention to "appeal" the Redress Outcome but stated:

> "Since issuing the Initial Redress Outcome Letter and receipt of your Client's response dated 22nd November 2013, the Bank is

> currently reconsidering the application of the Review methodology in your Client's case and, therefore, the conclusion it reached in its Initial Redress Outcome Letter. In light of that, perhaps your Client would be minded to delay issuing its substantive response to the Initial Redress Outcome Letter and withdraw its Subject Access Request at this stage until it has received the updated outcome letter from the Bank. The Bank expects to be able to issue the updated outcome letter by 28 February 2014 at the latest."

93. Mr Edwards submits that it is inconceivable that Bolt Burdon's letter of 28th January (the only work they had done after the Agreement was executed) induced the March offer, because it is clear that Bank was already reconsidering the application of the review methodology. Mr Mallalieu submits, however, that whatever review process was already underway, Bolt Burdon's letter of 28th January undoubtedly kept up the pressure on AIB. Mr Edwards points out that the information Mr Bishop had sought and obtained under the Data Subject Request did not feature as one of the arguments in Mr Stoop's report.

94. I note that although correspondence with AIB in relation to the subject access request was dealt with principally by officers concerned solely with regulatory compliance, they were undoubtedly in contact with AIB's solicitor as well, who was responding directly to Mr Bishop's letters. It is also important to note that the offer letter itself was not sent by AIB until 7th March 2014, nearly 6 weeks after Bolt Burdon's letter of 28th January.

95. In my judgment it is properly to be inferred that knowledge on the part of the Bank, following the letter of 28th January, that an "appeal" was being pursued on Mr Tariq's behalf by experienced specialist solicitors must have had some impact in producing the offer in the March letter, not least by keeping up the pressure on the Bank. Putting it another way, there is no reason to assume (as the defendants maintain I should) that Bolt Burdon's letter of 28th January played no part at all in producing the March offer.

96. In this analysis I have deliberately made no reference so far to the letter dated 22nd November 2013 drafted by Bolt Burdon for Mr Tariq to send to AIB. That letter was sent before the Agreement was made. It cannot therefore be regarded as work done pursuant to the Agreement. It undoubtedly played some part in producing the March offer because AIB's solicitor specifically mentioned it in his letter of 4th February, in terms which suggest that it was that letter which had triggered reconsideration of the review methodology and reconsideration of the previous negative outcome.

97. In closing submissions Mr Mallalieu contended that the 22nd November draft letter should be regarded as part of the work done by Bold Burdon under the Agreement. He drew attention to Bolt Burdon's "Terms of Business", which are expressly incorporated into the Agreement: see clause 10. Paragraph 22 of the Terms of Business provides as follows, under the heading "The legal contract between us":

> "Delivery of these Terms of Business to you, at any time during the period we are instructed by you, forms part of the contract between us from time to time. Subject to any prior agreement between us these Terms will apply to work undertaken both before and after these Terms had been delivered to you…"

98. At first sight this might appear to suggest that the letter of 22nd November, drafted by Bolt Burdon, constituted part of the work undertaken pursuant to the Agreement. But in my view paragraph 22 cannot bear that construction. It simply provides that "these Terms" will apply to work undertaken before and after delivery. There is, however, nothing in the Terms of Business ("these Terms") which is capable of giving the Agreement itself retrospective operation.

99. There was discussion in the course of closing submissions of the situation which sometimes arises in relation to conditional fee agreements. Whilst it is quite wrong and improper to back date such an agreement to give it retrospective effect, there is no reason why such an agreement cannot be drafted so as to be retrospective: *Birmingham City Council v Forde* [2009] EWHC 12 (QB). This principle does not advance the present case, however, because the Agreement itself contains no such provision for retrospective application.

100. I conclude, therefore, that in itself the drafting by Bolt Burdon of the letter of 22nd November could not amount to work done under the Agreement which was an effective cause of the March offer. This may be tested by asking what the situation would be had the March offer been made instead in January, before the Agreement was actually signed. Plainly Bolt Burdon would not have been entitled to a Fee by reference to the Agreement, because there was no Agreement. Nor would they be entitled in any other way to remuneration for drafting the letter.

101. I therefore disregard the work done by Bolt Burdon in the letter of 22nd November in assessing whether they were an effective cause of the March offer. That is not to say, however, that the draft letter has no relevance at all to the issues I have to decide, because it remains one of the circumstances to which the court is entitled to have regard in relation to the issue of the fairness and reasonableness of the Agreement under section 57 of the Solicitors Act 1974.

Compensation net of tax or gross?

102. Both the March offer letter and the August final letter from AIB made a deduction of tax in calculating the Redress Outcome Sum. Each of the offer letters contained the following, under the heading "important notes":

> " A recent change in tax rules requires the Bank to make a tax deduction of 20% on the compensatory interest payment included within the Customer's redress payment. Therefore, tax will be withheld and the Bank will pay this to HMRC on behalf of the Customer. "

103. Thus, in the final August offer letter the compensation interest sum was £189,974.92, from which tax at 20% was deducted amounting to £37,994.498.

104. The claimant's case is that, as a matter of construction of the Agreement, the "compensation" on which the fee is calculated includes the *gross* interest sum. Mr Tariq's case is that this is wrong and unfair. The claimant's fee should be calculated by reference only to the *net* sum he received from the Bank.

105. The background to the change in the tax rules is set out in an advice note from HM Revenue and Customs, the date of which is thought to be July 2014. There was no discussion

between Bolt Burdon and Mr Tariq of the potential impact of tax treatment when the Agreement was being negotiated in the period November 2013 to January 2014.

106. In my judgment the issue here is simply one of construction of the Agreement. The definition of "compensation" in clause 1.4 is "the total financial value of any sums or concessions or other benefits offered by or on behalf of the Bank…". The definition goes on to give a list of items that would fall within this definition, the most obvious being "payments of cash". But clause 1.4.10 specifically includes, in the list, "interest awarded in respect of any of the constituents of Compensation detailed at clauses 1.4.1 to 1.4.9 inclusive".

107. In other words, the Agreement specifically contemplated that the claimant's fee would be 50% of any sum of interest Mr Tariq might be awarded as part of the offer by the Bank.

108. In my judgment it is plain that it is the gross sum of interest which forms the basis of calculation, not the net sum after deduction of tax. That process of deduction at source was merely a means of collecting the tax due. Whether the tax was deducted at source or not did not affect the status of the gross sum of interest as the true value of the interest received. In that sense it was the gross sum which represented "the total financial value" of the relevant sums, for the purpose of clause 1.4. I can see no realistic contrary argument.

109. Mr Edwards points out that in almost his first email, dated 8th November 2013, Mr Tariq said:

> "I agree to have the agreement on 50% no win no fee basis on the total of net amount."

Precisely what Mr Tariq meant by "net" in this context is unclear. There is no suggestion that he had in mind any deduction of tax at source. Mr Edwards submits, in effect, that had the parties applied their minds to the issue they would have been bound to agree that for the purpose of calculating the fee it was only the sum which Mr Tariq eventually received in his hand which should count. That is how Mr Tariq put it in his oral evidence.

110. I am unable to accept that any such expectation on Mr Tariq's part can affect the proper construction Agreement, or gives rise to an implied term which would be wholly contrary to the plain words of the Agreement. The fact that tax had to be paid on the interest element does not affect that proposition that Mr Tariq received the full benefit of the gross amount. It is not pure windfall for the claimant. Bolt Burdon, in turn, will have to account for tax on that element of their fee as part of the general charge to tax on their profits.

Obligation to pay disbursements

111. In the pleadings Mr Edwards took what he accepts was a wholly technical point in relation to the liability to pay disbursements. In the course of his oral evidence Mr Tariq accepted that he was liable to pay disbursements, which makes the point even less attractive. It is, in any event, misconceived.

112. The submission in Mr Edwards' skeleton argument, much more faintly pursued in closing submissions, was that there is no obligation spelt out in the Agreement to pay disbursements. The Fee is defined in clause 1.5 as 50% of compensation plus VAT. This does not include disbursements. The definition of "charges", in clause 1.10 does include disbursements, but there is no obligation in the Agreement to pay "charges".

113. That submission overlooks the provisions of clause 5, headed "your duties under this agreement". Clause 5.2 and clause 5.4, the text of which has already been set out in full, required Mr Tariq to pay the claimant's "charges"- including disbursements - on receipt of an invoice unless they had already been deducted from any compensation received directly into the claimant's bank account. The obligation to pay disbursements and expenses (such as photocopying) as part of the "charges" could not be more clearly set out.

114. It follows that, subject to any arguments based on misrepresentation and/or section 57 of the Solicitors Act 1974, the claimant is entitled to recover 50% of the gross amount of the sum offered by AIB in their August letter, plus disbursements and expenses.

Misrepresentation

115. The defendants' pleaded case is that they entered into the Agreement in reliance on two separate misrepresentations:

> (a) that the six year limitation period within which legal proceedings in respect of the complaint had to have been issued had expired on 7th August 2013; and
>
> (b) that the Initial Outcome set out in the Bank's letter dated 15th October 2013 was purportedly the bank's final response in relation to the complaint of mis-selling.

116. The claim is pleaded at common law and under the Misrepresentation Act 1967. It is common ground that the following are the constituent elements and relevant principles of a claim for misrepresentation, applied to this case:

> (i) there must be a pre- contractual statement of fact;
>
> (ii) that statement must have induced the defendants to enter into the Agreement;
>
> (iii) the party making the statement must have intended the other party to be induced by the misrepresentation;
>
> (iv) the misrepresentation must be shown to have been untrue;
>
> (v) unless it said to have been made fraudulently, damages will not be available for misrepresentation if the person making the statement had reasonable grounds to believe the statement and did believe it: s.2 (1) Misrepresentation Act 1967;
>
> (vi) if misrepresentation is established (other than fraudulent misrepresentation) and a right to rescission is made out, the court has a discretion to decline rescission and to award damages in lieu: s.2 (2) Misrepresentation Act 1967.

117. For present purposes Mr Edwards conceded that no claim for misrepresentation can succeed if the alleged misrepresentation was a statement of *opinion* genuinely held rather than a statement of *fact*. Mr Edwards further concedes, very properly, that if either representation here was a statement only of opinion, not fact, it was an opinion genuinely

held. I emphasise that there is no suggestion of bad faith. Against this background I shall consider each alleged misrepresentation in turn.

Limitation period

118. The limitation problem was discussed between Mr Bishop and Mr Tariq at the meeting on 13th November 2013, and was explained further in Mr Bishop's letter to Mr Tariq dated 19th November 2013. In setting out the significant risks Bolt Burdon faced in taking on the case on a no win no fee basis the letter stated:

> "Your 6 year statutory time period has expired, meaning that if we are unable to achieve a satisfactory result under the Scheme, AIB would be able to defend any claim through the courts using a limitation defence."

119. In his oral evidence Mr Tariq admitted that what he was told by Mr Bishop in the initial telephone call on 7th November and at the meeting on 13th November was that the 6 years had expired and it was going to be very difficult to take them (i.e. the Bank) back to court.

120. I find that in giving this advice about the limitation problem Mr Bishop was expressing an opinion which was honestly and reasonably held. I accept his evidence, and that of his experienced colleague Mr Gary Walker, that the generally held view was that in a claim against a bank for the mis-selling of an interest swap, time starts to run from the trade date of the relevant contract, because that is the date which the customer begins to suffer loss. As Mr Walker explains in his witness statement, this is because the bank prices its margin into the transaction at the outset. Consequently, if the transaction were to be terminated immediately after it is entered into, the customer would be "out of the money" i.e. would owe an amount to the bank. In the case of Mr Tariq this immediate "out of the money" amount was calculated by the expert, Nick Stoop, to be £29,711 (see paragraphs 4 and 17 of his report).

121. This analysis is consistent with well established authority that loss may be suffered when property becomes encumbered with a legal charge and subjected to a liability which might materialise into financial loss: see *Forster v Outred & Co* [1982] 1 WLR 86. The principle was reaffirmed in *Shore v Sedgwick Financial Services Ltd* [2008] EWCA Civ 863; [2009] Bus LR 42, where the claim was for negligent advice in relation to withdrawal from a pension scheme. The Court of Appeal acknowledged that there was a clear distinction in law between transactions which gave rise to a pure contingent liability where no damage was suffered unless and until the contingency occurred, and transactions which resulted in an immediate loss or diminution of funds. Referring to the "transaction cases" Dyson LJ said, at paragraph 42:

> "But the essence of the reasoning in those cases is that the fact that the risk to which the claimant was exposed by the defendant's negligence might not eventuate did not mean that the claimant did not suffer loss as a result of being exposed to that risk… It is the possibility of actual financial harm that constitutes the loss. That possibility is present even if there is also the possibility that the claimant would be better off as a result of being exposed to the risk."

122. There had been a decision of the Court of Appeal in October 2013, only weeks before Mr Bishop gave his advice to Mr Tariq, which had raised the issue of the limitation period in respect of a claim against a bank for mis-selling an interest rate swap: *Green v Royal Bank of Scotland Plc* [2013] EWCA Civ 1197. At paragraph 15 of the judgment Tomlinson LJ declined to express a view one way or the other on the question of whether the bank's breach of duty continued until the execution of the transaction, rather than crystallising at an earlier date when advice was given. Leading counsel for the claimant asserted on appeal that the concession by his junior at trial that the claim under s.150 of the Financial Services and Markets Act 2000 was statute barred was "likely" to be wrong. The implication of leading counsel's assertion was, it seems, that time would certainly start to run at the latest from the date of execution of the transaction. The decision in *Green* therefore did nothing to undermine the accepted view that time would start to run from the trade date. Equally it did not directly confirm it.

123. Counsel stressed in their closing submissions that I was not being invited to rule definitively whether the limitation period in this case had or had not expired 6 years after the trade date. What is clear, however, is that this was likely, on the evidence, to be the correct analysis.

124. It is also important to emphasise that in his advice to Mr Tariq Mr Bishop did not rule out entirely the possibility of a claim being taken to court. In the same letter dated 19th November 2013, under the heading "litigation" it was stated:

> " Whilst we consider it to be unlikely, as the case develops, taking the claim to court may become possible. In these circumstances the rules prevent us from acting for you under a contingency fee agreement and we will therefore have to transfer our work to a different kind of funding arrangement. This is provided for at clause 9 of the Contingency Fee agreement…"

125. It may be that in adding this qualification Mr Bishop had in mind (as appears from his internal email dated 7th November 2013 to the managing partner, already quoted) that counsel was being instructed to advise on the issue of whether alternative arguments for limitation were available in such a case, which "may change the state of play for Mr Tariq". It is also important to note, as already mentioned, that Mr Tariq accepts that he was advised that it would be difficult to take the case to court but not necessarily impossible.

126. No claim for misrepresentation could succeed unless there was a false representation of fact rather than opinion. Traditionally a representation as to law could not be classified as a representation of fact and so could not give rise to a claim for misrepresentation. The present position is summarised in Clerk & Lindsell on Torts, 21st edition, at paragraph 18-15 as follows:

> "… the distinction between factual and legal statements was difficult to draw at the best of times, and has now been discredited elsewhere in the law. It is therefore submitted that in the law of deceit misstatements of law now fall to be treated on a similar footing to misstatements of fact, though given the uncertainty inherent in case law development and statutory

> interpretation, proof that a defendant knowingly misrepresented the law is likely in practice to be hard to come by."

127. One of the authorities cited in support of this proposition is *Pankhania v London Borough of Hackney* [2002] EWHC 2441(Ch). In that case Mr Rex Tedd QC, sitting as a judge of the High Court, held that where an auction catalogue stated that a property was subject to a contractual licence whereas in fact the true legal character of the third party's interest was a business tenancy under the Landlord and Tenant Act 1954, this was an actionable misrepresentation.

128. In the end each case turns on its facts. Sometimes the alleged misrepresentation may properly be categorised as a statement of fact even though it would formerly have been regarded as a statement as to the law. In other cases the alleged misrepresentation, on proper analysis, would be categorised as a statement of opinion. In my judgment the present case falls squarely into this second category. The representations made to Mr Tariq were statements of Mr Bishop's opinion as to the legal difficulties presented by the likely expiry of the limitation period. It was an opinion honestly and reasonably held. For the reasons I have already explained, I am not persuaded that the opinion was wrong. It was probably correct. But even if it was wrong, it was a statement of opinion only and cannot give rise to an actionable misrepresentation, as Mr Edwards acknowledged.

129. For the sake of completeness I add that in any event Mr Tariq would have faced insurmountable difficulties in establishing that he relied upon that statement in entering into the Agreement and insurmountable difficulties in establishing what loss he suffered in consequence. I also observe that had the statement in relation to the limitation difficulty been expressed with the modest qualification "*almost certainly* your 6 year statutory time period has expired", that would on any view have been wholly unobjectionable. In effect, with the qualification in the letter of 19th November to the effect that litigation was not entirely ruled out, this was in fact the overall effect of the advice.

130. It follows that I reject any claim that there was an actionable misrepresentation in relation to the limitation period.

Finality of the initial outcome

131. The pleaded allegation is that the Initial Outcome was purportedly the Bank's final response in relation to the complaint: see paragraph 41 of the amended defence and counterclaim. This adopts the admission in paragraphs 13 and 14 of the particulars of claim that this was one of the matters explained to Mr Tariq in the initial telephone call on 7th November 2013. Although this was how the matter was pleaded, the evidence was rather different.

132. In his witness statement (paragraphs 23 and 24) Mr Bishop set out the matters which he thought it was likely he and Mr Tariq had discussed in that phone call. He said:

> "With regards to further dialogue with AIB, I would have explained that whilst it was always open for the Defendants to continue writing to AIB in pursuit of their complaint in the context of the Review, and that the Initial Review Outcome invited the Defendants to provide further information if necessary, the Review did not provide any formal avenue by

> which the Defendants could raise and articulate an appeal. On this basis I would have explained that there was no known obligation on AIB to overturn their decision, and this, combined with Defendants limitation position, meant that it was likely that the Initial Review Outcome would not be overturned and would be AIB's final response…
>
> I can recall in general terms (without being able to recall the precise exchanges) explaining to [Mr Tariq], during this call, that on the basis of our conclusions the only forum within which to pursue the matter further was the Review, and that because there was no formal appeal mechanism in the Review (and litigation was very unlikely to be available as leverage), the prospects of obtaining a successful result were significantly less than 50%..."

133. Mr Tariq, in his witness statement at paragraph 27, recalled that in this conversation on 7th November:

> "…He also said that there was no formal appeal procedure and that the redress letter appeared to be AIB's final response…"

In his oral evidence Mr Tariq agreed that Mr Bishop had said they could go back and make further submissions but there was no formal appeal process and the Bank might say they had made their decision and that was it.

134. In his letter to Mr Tariq dated the 19th November 2013, sent with the draft Agreement, Mr Bishop explained that one of the significant risks for Bolt Burdon in taking on his case on a no win no fee basis was:

> "Your complaint has already run its course through the Scheme, and with no proper avenue for appeal there is nothing to stop Allied Irish Bank deciding that their original decision is correct…"

135. The two fundamental issues which arise in relation to this alleged misrepresentation are, first, whether there was in fact anything false in what Mr Bishop said and, secondly, whether in any event it was a statement of opinion honestly and reasonably held, rather than a statement of fact (or law).

136. On the first issue, in my judgment there was nothing false or inaccurate in the statement Mr Bishop made. It was quite correct that there was no formal appeal procedure. Mr Tariq was well aware that it was open to him to pursue his complaint further with AIB, in accordance with the terms of the initial outcome letter dated 15th October 2013 rejecting the claim. The "next steps" set out in that letter stated:

> "If you would like to discuss the Review in further detail, or provide any additional information you believe should be considered, then please complete and return Section B of the attached Customer Reply Form (appendix A2), and upon receipt, we will contact you to discuss this matter."

Mr Tariq had already been told by his previous adviser, Mr Sachdev, that he should "appeal" the decision in the initial outcome letter and it was precisely for that reason that Mr Tariq had approached Bolt Burdon in the first place.

137. In the pleadings it was suggested on behalf of Mr Tariq that there was an agreement between the Banks and the Financial Conduct Authority which made it clear that there was a two stage process involving a provisional redress determination, followed by an opportunity for customers to make representations, and a final redress determination. This assertion was not pursued with any vigour at trial because the unchallenged evidence of Mr Bishop, and more particularly his senior colleague Mr Walker, was that the documents on which the Financial Conduct Authority's Redress Scheme was based (referred to in the defendants' pleadings) were not released for public consumption until January 2015, despite regular lobbying and requests from Bolt Burdon and other firms practising in this field.

138. Mr Walker's unchallenged evidence was that in his experience of dealing with claims of this nature, it was extremely rare for banks to reverse final decisions made under the FCA Redress Scheme prior to this date, and even after this date it remained difficult to achieve positive outcomes if the original decision from the relevant bank was negative. Mr Bishop explained in his witness statement that it was only following interrogation of the chairman and chief executive officer of the FCA by the Treasury Select Committee on 10th February 2015 that template (unsigned) versions of the relevant documents were released to the public. Despite the FCA's specific power to set up redress schemes pursuant to section 404 of the Financial Services and Markets Act 2000, the FCA chose to establish the Review on the basis of private and "voluntary" contracts with each of the banks known to have mis-sold interest rates hedging products.

139. I therefore find that there was no false or misleading statement capable of amounting to an actionable misrepresentation.

140. In any event, had there been any such falsity, Mr Bishop was merely expressing an opinion honestly and reasonably held as to the framework within which any further representations could be presented and considered by the Bank. Strictly speaking it was a representation of opinion, on the basis of what was known at the time, rather than a statement of fact.

141. Finally, and again for completeness, had there been any misrepresentation of fact in relation to the alleged finality of the Bank's response in the initial outcome letter Mr Tariq would face the same insurmountable difficulty in establishing that he relied upon any such representation in entering into the agreement. There would also be an insurmountable difficulty in showing that he sustained any loss in consequence.

142. Accordingly I find there was no actionable misrepresentation in relation to the status or scope of the initial outcome in the Bank' letter, and that aspect of the counterclaim is likewise rejected.

Section 57 Solicitors Act 1974

143. The Agreement in this case was a non-contentious business agreement to which the provisions of Section 57 of the Solicitors Act 1974 apply. Section 57 provides as follows:

"(1) Whether or not any order is in force under section 56, a solicitor and his client may, before or after or in the course of the transaction of any non-contentious business by the solicitor, make an agreement as to his remuneration in respect of that business.

(2) The agreement may provide for the remuneration of the solicitor by a gross sum or by reference to an hourly rate, or by a commission or percentage, or by a salary, or otherwise, and it may be made on the terms that the amount of the remuneration stipulated for shall or shall not include all or any disbursements made by the solicitor in respect of searches, plans, travelling, taxes, fees or other matters.

(3) The agreement shall be in writing and signed by the person to be bound by it or his agent in that behalf.

(4) Subject to subsections (5) and (7), the agreement may be sued and recovered on or set aside in the like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor.

(5) If on any assessment of costs the agreement is relied on by the solicitor and objected to by the client as unfair or unreasonable, the costs officer may enquire into the facts and certify them to the court, and if from that certificate it appears just to the court that the agreement should be set aside, or the amount payable under it reduced, the court may so order and may give such consequential directions as it thinks fit.

(6) Subsection (7) applies where the agreement provides for the remuneration of the solicitor by reference to an hourly rate.

(7) If, on the assessment of any costs, the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into-

a) the number of hours worked by the solicitor ; and

b) whether the number of hours worked by him was excessive."

144. It follows that:

(1) a contingency fee agreement of the kind in this case, where the fee is based on a "percentage", is perfectly lawful;

(ii) on an assessment of costs the client is entitled to object to the agreement as unfair or unreasonable;

(iii) in that event the costs officer may enquire into the facts and certify them to the court;

> (iv) the court may set aside the agreement or order that the amount payable under the agreement is reduced, if it appears "just" to do so.

145. In the pleadings and in the skeleton arguments served before trial there was debate as to the procedure which should be followed in this case pursuant to section 57(5), bearing in mind that the court was in any event be seized of all relevant matters which that subsection envisages the costs officer would enquire into. There were also technical arguments open to the parties in the light of the decision in *Walton v Egan* [1982] 3 All ER 849, which it is unnecessary to recite.

146. Very sensibly counsel for both parties agreed that the proper course in the circumstances of this case was for the court itself to undertake the enquiry into the facts and consider the issue of whether the agreement is unfair or unreasonable and whether it is just to set the agreement aside or reduce the amount payable under the agreement. I indicated that I was content to proceed on this basis. It was plainly in full accord with the overriding objective that the issue be dealt with in this way.

147. There is very little authority on the approach to be adopted under section 57(5) of the 1974 Act. The provision has a long legislative history. Hence some assistance is to be gained from the decision of the Court of Appeal in *In Re Stuart, ex parte Cathcart* [1893] 2 QB 201. The case turned on sections 8 and 9 of the Attorneys' and Solicitors' Act 1870 which gave the court power to declare an agreement for remuneration void "if the terms of such agreement shall not be deemed by the Court or judge to be fair or reasonable". The agreement in that case related to the employment of a solicitor to attend the taxation of costs in lunacy proceedings, the agreement being that the solicitor should be paid 5% of the amount taxed off the bill of costs. The bill contained items for daily refreshers for counsel far exceeding the maximum daily amount allowed by the rules, and of the whole bill of £5,000 nearly £2,000 was taxed off, the principal part of which consisted of refreshers. The sum claimed on a percentage basis was nearly £100, whereas the taxing master had certified to the court below that proper remuneration would have been £20.

148. The outcome of the case provides no particular assistance, but in the course of his judgment Lord Esher M.R. gave the following guidance on the proper approach under those statutory provisions:

> " By s.9 the Court may enforce an agreement if it appears that it is in all respects fair and reasonable. With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression "fair" cannot be re-introduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the Court that the terms of that agreement are reasonable. If in the opinion of the Court they are not

> reasonable having regard to the kind of work the solicitor has to do under the agreement, the Court are bound to say that the solicitor, and an officer of the Court, has no right to an unreasonable payment for the work he has done and ought not to have made an agreement for remuneration in such a manner. On this question it is quite clear to me that we cannot arrive at any other conclusion than that arrived at by the Divisional Court. It is impossible to say that work which according to information given by the taxing master to the Divisional Court would be properly remunerated by a sum of £20 can be reasonably charged at £100. The decision of the Court below must be affirmed, and the appeal dismissed."

149. I find the analysis in that case helpful to the extent of identifying that the issues of fairness and reasonableness must be considered separately. Fairness relates principally to the manner in which the agreement came to be made. Reasonableness relates principally to the terms of the agreement.

150. One other statutory provision, very recent, was also referred to in the course of argument and should be mentioned for completeness. The Damages-Based Agreements Regulations 2013 permit what are, in effect, contingency fee agreements in relation to certain contentious proceedings. Regulation 4(3) limits payment under such an agreement to an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client. I stress that these Regulations have no direct application in the present case because here we are concerned with a non-contentious business agreement. Mr Mallalieu drew attention to the provisions in order to demonstrate that the level of 50% provided for in the Agreement in the present case is within the limit of what Parliament has permitted in Damages-Based Agreements. It was also asserted in the pleadings (at paragraph 27(e) of the amended reply) that in enacting these provisions Parliament expressly rejected any recommendation that specific advice of a prescribed nature had to be provided before such an agreement could be enforced.

The parties submissions on "unfair or unreasonable"

151. On behalf of the defendants, Mr Edwards submits that the Agreement was unfair and unreasonable having regard to the circumstances in which it came to be made and the extortionate level of remuneration it produced for the work involved. He relies upon the Solicitors Regulations Authority Code of Conduct and various mandatory outcomes that must be achieved:

> "O (1.1) you treat your clients fairly;
>
> O (1.6) you only enter fee agreements with your clients that are legal, and which you consider are suitable for the client's needs and take account of the client's best interests;
>
> O (1.12) clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them;

> O (1.13) Clients receive the best possible information, both at the time of engagement and when appropriate as their matter progresses, about the overall costs of their matter."

152. Mr Edwards also submits that there was, in reality, a conflict of interest for Bolt Burdon in advising Mr Tariq to enter into a fee agreement which was so strongly to their own advantage. He submits that Mr Tariq should have been advised to seek separate legal advice. He submits that Mr Bishop should have gone through the other options available.

153. Mr Edwards submits that throughout the initial discussions, by telephone or at the meetings, Mr Tariq was given an unduly pessimistic assessment of the prospects of success. He was led to believe that the case was hopeless. He was given no indication of Mr Bishop's own estimate of the likely costs of pursuing the case, £20,000 plus disbursements, which would have highlighted the excessive remuneration based on 50% of compensation received. He was not warned that the 50% fee would be payable even if compensation was received without any input from Bolt Burdon.

154. Mr Edwards submits that, using round figures, the fee claimed of £400,000, when set against the actual costs incurred of around £50,000, represents a "success fee" of £350,000, or 700%. He submits that this equates to an assessment of the prospects of success at around 12½ %, not 20%-40% which was Mr Bishop's estimate in the witness box. He submits that this cannot be reasonable. He draws the comparison between such a large uplift and the maximum permitted uplift of 100% for a conditional fee agreement.

155. On behalf of the claimant, Mr Mallieu submits that the agreement is neither unfair nor unreasonable. He submits that Mr Tariq knew and understood exactly what he was agreeing to. Mr Tariq made the suggestion himself of 50%, knowing that he was seeking compensation of at least £700,000 and up to £1million. He was looking for an agreement under which he was required to make no payment up front and which exposed him to no financial risk, and that is what he got. He submits that Mr Bishop's assessment of the prospects of success was well within the margin of appreciation, or band of reasonableness, as between solicitors. It is submitted that Mr Bishop did not paint an over-pessimistic picture of the prospect of success. He did not describe the claim as hopeless. The limitation problem and the lack of any formal appeal procedure did, however, make it a very difficult claim, as Mr Walker's evidence confirmed.

156. Mr Mallalieu submitted strongly that the questions of fairness and reasonableness were not to be tested by the outcome, but by reference to the reasonable perception at the time the agreement was entered into. He submits that any analogy or comparison with a conditional fee agreement is wholly inappropriate. By way of illustration, assume a conditional fee agreement with an uplift of 100%. Solicitors incur costs of £200,000, which with the mark up of 100%, entitles them to £400,000. If the sum recovered in the proceedings is £1million, this may be a satisfactory outcome for the client. But if instead, after the same amount of work, the recovery in the proceedings is only £50,000, there would still be the same liability to pay costs of £400,000. This is because in a conditional fee agreement costs are always tied to the work done, whereas in a contingency fee agreement costs are always proportionate to recovery. Mr Mallalieu submits that to grant the relief sought in this case would be to destroy the commerciality of contingency fee agreements of this kind.

Analysis of "unreasonable or unfair"

157. I find that the following circumstances are of particular relevance on the question of whether the agreement was unfair or unreasonable:

> (1) Mr Tariq was and is a very experienced capable and shrewd businessman who was well able to look after his own interests. He had available to him, had he chosen to seek it, independent advice from the solicitor who had acted for him over the last 30 years.
>
> (2) When Mr Tariq first approached Bolt Burdon the prospects of any recovery at all from AIB were extremely bleak, as Mr Tariq himself recognised. For that reason he was unwilling to make any payment up front for legal advice in pursuing the claim, and was prepared only to proceed on the basis of "no win, no fee". He conveyed the impression to Mr Bishop that he was neither able nor willing to spend any more money in pursuing the case.
>
> (3) As I have already found, and for the reasons already given, I am satisfied that it was Mr Tariq who volunteered the suggestion of a fee which would involve sharing any compensation 50/50. As he said more than once in his oral evidence, this was to give Bolt Burdon an "appetite" for the case.
>
> (4) I find on the evidence that Mr Bishop did not describe the case as "hopeless" in the phone call on 7th November or the meeting on 13th November, or at any stage in discussions with Mr Tariq. He spelt out the difficulties with the claim arising from the limitation problem and the lack of any formal appeal procedure, and did so accurately and fairly. Mr Tariq accepted that the prospects had been described to him as "significantly less than 50%". That was an accurate assessment. I accept in particular the evidence of Mr Walker, at paragraph 8 and 9 of his witness statement, as to his own experience of the unlikelihood of the Bank changing its mind following the initial outcome decision.
>
> (5) I find that Mr Tariq was well aware of the potential size of the fee for which he would become liable, should he receive compensation at the level hoped for. In his previous assessment of the claim he had valued it at £490,000 plus £200,000 breakage fee, and in his oral evidence he accepted that he had in mind and mentioned to Bolt Burdon the figure of £1million.
>
> (6) I am satisfied that in his dealings with Mr Tariq Mr Bishop did not present the prospects of success (or lack of them) in any more pessimistic terms than he presented them to the partners of Bolt Burdon in seeking and obtaining authority to proceed on the basis of a contingency fee agreement at 50%.

(7) Furthermore, although Mr Bishop did not spell this out in any document at the time, I accept his evidence that he regarded the prospects of success as nearer 20% than 40%. That was, in my judgment, a reasonable assessment.

(8) I find that at the meeting on 13th November 2013 at which Mr Marc Thurlow was present as well as Mr Bishop, Mr Tariq was handed a copy of the agreement and was taken through the main provisions, including the definition of compensation. Mr Tariq says there was no real discussion of the terms of the agreement. I prefer the evidence of Mr Bishop and Mr Thurlow to the contrary. There may not have been detailed discussion of the terms, but I am satisfied that the main provisions would have been outlined. Mr Tariq accepted in his oral evidence that he was given the opportunity to raise any queries or concerns.

(9) On 19th November 2013 Mr Tariq was sent the draft Agreement, amended to reflect the subsequent conversation on 16th November about disbursements, together with Bolt Burdon's Terms of Business and their client care letter. The covering letter emphasised that he should raise any queries and should read the Agreement carefully. Mr Tariq plainly did read the Agreement very carefully and had every opportunity to do so over the next two months and to raise any further queries.

(10) The care with which Mr Tariq went through the Agreement is demonstrated by the additional clause he drafted at the end, to underline that no disbursements would be payable unless the claim succeeded. This was his only concern.

(11) The letter to AIB dated 22nd November 2013 drafted for Mr Tariq by Bolt Burdon was an essential step in keeping alive the possibility of pursuing the claim. Had that letter not been sent, I find that it is very unlikely the March offer would have been made by AIB.

(12) When Mr Tariq (and his sons) signed the Agreement on 31st January 2014 they did so in the full knowledge and expectation that they would be liable to pay Bolt Burdon's fee calculated on the basis of 50% of any compensation which was offered by AIB and accepted.

(13) I find that during the course of the telephone conversation between Mr Bishop and Mr Tariq on 1st September 2014 Mr Tariq accepted that it was he who had first suggested a fee of 50% of any compensation. I also find that in that telephone conversation Mr Tariq told Mr Bishop he had made enquiries of other firms of solicitors in this area of work and that mostly they charge in the region of 50%. I am satisfied that Mr Bishop's attendance note of that conversation is accurate.

(14) Although it is necessarily an approximate figure, I accept that the costs incurred by Bolt Burdon in relation to pursuing Mr Tariq's claim, based on the document (at E792) headed "Transaction listing of W1P postings", amounted to some £50,000.

(15) I accept Mr Tariq's oral evidence that following termination of the Agreement with Bolt Burdon, he instructed other solicitors to pursue his claim for consequential losses, and that some £48,000 was recovered. The solicitors were remunerated on the basis of a payment of £15,000 plus 10% on the first £100,000, resulting in a total outlay of some £20,000 in fees for a recovery of some £48,000.

"Unfair?"

158. In the light of these findings and all the evidence in the case, I am satisfied that the Agreement was not "unfair". Mr Tariq knew exactly what he was agreeing to. He was a very experienced businessman. He was determined that he should pay nothing for Bolt Burdon's services unless and until compensation was received from AIB. He was given an accurate assessment of the prospects of success. Had Mr Bishop told him that the prospects were nearer 20%, rather than "significantly less than 50%", that could only have strengthened Mr Tariq's determination that this was the right Agreement for him.

159. As to the suggestion of non-compliance with the SRA's Code of Conduct, I am satisfied that Bolt Burdon fulfilled their duties having regard to the particular circumstances of the case. Realistically there was no funding option, acceptable to both parties, other than a Contingency Fee Agreement. The possibility of an offer being made by AIB before Bolt Burdon had done any work at all pursuant to the Agreement was something which no-one could have foreseen. Nor, on my earlier findings in this judgment, was it in fact the case because Bolt Burdon were, I have found, an effective cause of the making of the March offer. I also observe that it was open to Mr Tariq to follow the course of referring the calculation of the Fee to an independent expert for determination, pursuant to clause 12 of the Agreement, but he chose not to do so.

160. In any event, looking at the circumstances as a whole, even though the letter of 22nd November pre-dated the signing of the Agreement and was not therefore part of the work done pursuant to the Agreement, the reality is that by the time the Agreement was signed on 21st January Bolt Burdon had preserved the opportunity of pursuing the claim. That is part of the relevant circumstances to which the court is entitled to have regard, as Mr Edwards properly conceded at the end of his reply in closing submissions.

161. As to the suggestion of a conflict of interest, it could be said of any contingency fee agreement, where the solicitors' remuneration is proportionate to the amount of recovery, that there is a conflict between the solicitors' wanting to obtain as their fee the largest possible percentage of the compensation recovered and the client's interest in achieving exactly the reverse. There was no obligation on Bolt Burdon to suggest that Mr Tariq should obtain independent legal advice in relation to the terms of the Agreement. He did not need to be told this. There was no reason why he could not have sought advice from the solicitor who had acted for him for 30 years in his business affairs. He was put under no pressure of time to

sign the Agreement. Quite the reverse, he took two months to sign it and did so only when he was satisfied that his precise requirements in relation to disbursements had been met.

162. Whilst the fact that it was Mr Tariq who suggested 50% does not necessarily mean the Agreement was fair (or reasonable) it is an important factor. Mr Tariq was deliberately seeking to give Bolt Burdon an appetite for the case, as he acknowledged in his oral evidence.

"Unreasonable?"

163. I accept Mr Mallalieu's submission that the court must be careful not to attach undue weight to the actual outcome in this case, rather than judging the reasonableness of the Agreement by reference to the circumstances as they existed and were perceived to be when the Agreement was signed. Mr Edwards also very properly accepted the need to avoid judging the issue by hindsight.

164. There is on the face of it an obvious disquiet in permitting solicitors to recover fees of some £400,000 for work which might otherwise have been billed, on the basis of hourly rates, at only some £50,000. However, on proper analysis this ignores the commercial realties which faced the parties when the Agreement was made. In truth the Agreement represented a speculative joint business venture in which the solicitors were taking all the risk and the client was exposed to no risk at all.

165. It is particularly important, in my judgment, to distinguish the potential consequences of this Contingency Fee Agreement from those of a conditional fee agreement. As the example given by Mr Mallalieu in closing submissions demonstrates, the client may well find himself worse off overall with a conditional fee agreement unless sufficient recovery of compensation is achieved.

166. Taking the figures in the present case by way of example (assuming profit costs of £50,000 on an hourly rate basis), had this been a conditional fee agreement with an uplift of, say, 300% (consistent with 25% risk) then a successful outcome of the claim would produce a fee of £200,000. That would be acceptable to the client if there were full recovery of £800,000, because the fee would be only half what it would be under a contingency fee agreement based on 50%. However, if the compensation recovered had been only £200,000, there would be the same liability to pay the £200,000 costs under a conditional fee agreement, whereas under the contingency fee agreement the fee would still be only 50% of the compensation, £100,000.

167. I have not overlooked the fact that the estimate of profit costs in the risk assessment for the authority to litigate, when the Agreement was proposed, was only £20,000. But the example I have just given illustrates the danger of concentrating on the outcome rather than the prospects and possibilities at the time of the agreement was signed. Recovery, if there was any at all, could have been far less than in fact it was. As it turned out, Bolt Burdon were very fortunate. But so was Mr Tariq. There is no reason, in my judgment why they should not share equally in that good fortune, as the Agreement always envisaged in reflecting their shared intention.

168. It is important to bear in mind that Bolt Burdon could equally well have incurred £50,000 in costs with no fee to show for it at all. It is true that if it became obvious that it was no longer commercially viable to pursue the claim Bolt Burdon had the right under clause 8 of the Agreement to terminate it. But if they did so, they were entitled to no fee at all.

169. Finally, I observe that in respect of the claim for consequential losses subsequently pursued on his behalf by other solicitors, Mr Tariq's outlay, by a combination of fixed fee and percentage based on success, was in round figures £20,000 for a recovery of £48,000, with the result that the solicitors' fees represented not far short of 50% of the further compensation Mr Tariq recovered.

170. In the light of the findings I have set out, and all the evidence in the case, I have reached the clear and firm conclusion that this Agreement Mr Tariq entered into with Bolt Burdon was not "unreasonable".

171. Accordingly I refuse the relief sought under section 57 of the Solicitors Act 1974. The Agreement was neither unfair nor unreasonable, and it would not therefore be "just" to set it aside or to direct payment of a lesser amount.

Conclusions

172. It follows that the claimant is entitled to judgment for the full sum claimed, and the defendants' counterclaim is dismissed.

173. Having seen this judgment in draft, counsel have agreed the terms of the Order, save for one issue: the date by which the sums due are to be paid in paragraphs 1,2 and 5, including the payment on account of costs. The claimant contends for 14 days; the defendants ask for 35 days. In my view the appropriate period is 21 days from the date of the Order, 13th April 2016. The sums are therefore to be paid by 4pm on 4th May 2016.

174. I record my gratitude to counsel for the high quality of their well researched and well presented submissions.