Neutral Citation Number: [2018] EWHC 580 (QB)
Case No: COUNTY COURT CLAIM NO:C90 SE 097

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SHEFFIELD DISTRICT REGISTRY

The Law Courts
50 West Bar
Sheffield S3 8PH

Date: 21/03/2018

Before :

MR JUSTICE SOOLE

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Between :

MS NICKY HERBERT	**Claimant/ Respondent**
- and -	
HH LAW LIMITED	**Defendant/ Appellant**

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- -

Mr Andrew Hogan (instructed by the Defendant/Appellant solicitors)
Mr Ian Simpson (instructed by JG Solicitors Limited) for the Claimant/Respondent

Hearing dates: 8 November, 15 December 2017

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Judgment Approved

Mr Justice Soole :

1. This is an appeal by the Defendant solicitors (HH) from decisions of DJ Bellamy dated 28 April 2017 and 1 June 2017 whereby he:

   (i) on assessment of HH's bill of costs in respect of the Claimant (Ms Herbert)'s personal injury claim reduced the success fee under the conditional fee agreement (CFA) from 100% to 15%;

   (ii) approved a Cash Account in terms which treated payment of Ms Herbert's ATE insurance premium as a solicitor's disbursement;

   (iii) in ordering HH to pay the costs of the assessment, refused to inquire further into HH's contention that the retainer of Ms Herbert's new solicitors JG Solicitors Ltd (JG) was tainted by illegality and unenforceable.

2. Permission to appeal was granted by a combination of DJ Bellamy and Langstaff J.

3. Ms Herbert's claim arose from a road traffic accident (RTA) on 15 October 2015, when the car she was driving was struck from behind by a bus. On 17 March 2016 she and HH entered a CFA which provided that if successful in the claim she would pay

HH *'…our basic charges, our disbursements, success fee and ATE Premium. You are entitled to seek recovery from your opponent of part or all of our basic charges and our disbursements…'*

4. As to the success fee, the CFA set this at the statutory maximum of 100%, subject to the maximum of 25% of the total amount of general damages for pain suffering loss of amenity (PSLA) and damages for past financial loss. These maxima reflected Articles 3 and 5 of the Conditional Fee Agreements Order 2013 (the 2013 Order).

5. As to the ATE premium, HH's letter of the same date (17.3.16) had enclosed an 'Insurance Information Fact Sheet'. That document referred to the Qualified One Way Costs Shifting (QWOCS) regime and the loss of protection in the specified events. Under the heading 'After the Event Insurance' the document stated in particular :

'If you do not have suitable alternative funding as detailed above then we will take out an insurance policy with Centron Insurance…

…The insurance policy costs £349 and will be deducted from your damages at the conclusion of the claim as well as up to 25% of your damages. If you do not inform us otherwise, a policy will be taken out if you do not have suitable alternative legal funding to protect you against having to pay the other side's costs…

…We only deal with Centron Insurance for Legal Insurance Policies but we are not contractually obliged to conduct business in this way. You are free not to take out an insurance policy with Centron or choose your own insurance policy however we must advise that not having an insurance policy in place will expose you to the risk that you may have to pay costs and disbursements from your own pocket.

You are taking this insurance policy out without the firm having conducted a fair analysis of the market. We have researched legal protection insurance policies generally and found Centron policies to be reasonably priced given their high level of protection. You also do not have to pay for the policy unless your claim is successful, which we believe is a benefit for our clients. Please note that the firm does not have an interest in recommending this policy and the firm will not receive a commission from the Insurer…

…We believe that a contract of insurance with Centron Insurance is appropriate because..', then citing a list of factors including *'The premium reflects the category of risk'.*

6. The document provided for the client (Ms Herbert)'s signature after confirmation that she had read and understood the above and that *'I am aware that if I do not have the appropriate cover in place for this accident* [HH] *will proceed to take out an insurance policy at a cost of £349 to protect me. I am aware that the cost of the policy and a deduction of damages, up to a maximum of 25%, will be taken upon successful conclusion of my claim'.*

7. The claim was submitted via the RTA portal on or about the same date. An internal HH review note dated 26 April 2016 considered Ms Herbert's completed accident questionnaire and under 'prospects' concluded that the claim *'…enjoys reasonable prospects of success given it is a rear end shunt and liability has been admitted on the*

linked files. I am a little wary that the client may have slammed on rather than slowed to a stop given the earlier altercation with the Defendant driver, however I am of the opinion that she would not have done considering she had young children in the back of the vehicle'.

8. The proceedings were issued in the County Court on 23 August 2016, claiming damages for a whiplash injury and consequential loss.

9. By letter dated 3 September 2016 the defendant's insurers made a Part 36 offer of £3400, together with costs as agreed or assessed, in full and final settlement of the claim.

10. By letter to Ms Herbert dated 6 September 2016 HH advised that she should accept the offer; and that if she did so the total deductions would be £1178.21, comprising *'Contribution towards our Costs (25% of damages) £829.21'*[1] and *'ATE Insurance policy £349.00'* and stated *'To clarify, if you were to accept this offer you will receive £2,221.79 and balance of £1,178.21 will be paid towards our legal costs'*.

11. Details of the costs incurred were enclosed in an invoice (not a request for payment) dated 6 September 2016. This was in the total of £6175.84 comprising *'costs 22.10 hrs at £118 £4795.70*; VAT £959.40; and *'Disbursements (expenses incurred on your behalf by the firm)'* of £421, comprising medical report (£216) and Court fee (£205).

12. On about 19 September 2016 Ms Herbert accepted the offer. By letter dated 3 October 2016 she received the net sum of £2221.79. HH subsequently delivered two bills, namely the previous invoice (6.9.16) totalling £6175.84 and invoice no. 173761 (26.9.16) in the sum of £691 plus VAT = £829.20, i.e. representing the success fee.

13. Ms Herbert subsequently instructed her present solicitors, JG. On 10 November 2016 HH supplied JG with its file of papers. By letter to HH dated 30 November 2016 JG challenged HH's costs, in particular contending that HH had failed to conduct a risk assessment justifying the level of success fee; and that the 100% uplift was out of step with the fixed success fee of 12.5% under the previous costs regime for RTA claims which settled before trial. That regime had been replaced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) with effect from 1 April 2013.

Assessment of success fee

14. The present claim for an assessment of the two bills was issued by JG. By order dated 14 February 2017 there was to be a 'paper assessment' limited to the amount of the success fee, pursuant to s.70(6) Solicitors Act 1974.

15. The post-LASPO CPR provisions for a solicitor-client assessment are in CPR 46.9. As far as material these provide:

(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed

[1] The £829.21 was calculated as 25% of the general damages (£3316.84) forming part of the total £3400.

(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

(c) to have been unreasonably incurred if

(i) they are of an unusual nature or amount; and

(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

(4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied'.

16. In support of its position, HH submitted a witness statement from its Mr Craig Ralph dated 20 March 2017. This explained that its pre-LASPO practice in personal injury litigation was to limit the costs payable by the client to the sums recovered from the other party. It would routinely recover costs on the standard basis and a success fee on those costs. This had been its business model which covered overheads and made profit.

17. This all changed with LASPO and the loss of the ability to recover success fees from the paying party. In order to continue as a business it had become necessary to restructure the charges to clients in order to cover overheads and make a profit. In consequence :

'6. As a firm, we considered that the easiest and most transparent way was to make a solicitor own client charge, by way of a success fee which the client could pay out of damages. The success fee would be based on the basic costs that we actually recovered from the other side, thus limiting the fee.

7. We considered that clients would readily understand that method in principle, and we also thought it was fair, as the client's interests would be protected by the statutory cap on deductions from certain categories of damages of 25%. An individual client would therefore always retain 75% (at least) of his/her damages.

8. Conversely, charging the client an increased hourly rate, or requiring the client to pay hourly rates when only fixed costs were going to be recovered in many cases, seemed to us to be more cumbersome, result in the hardest fought and most difficult cases carrying the heaviest burden of irrecoverable costs and less fair.

9. I can say that the model we have adopted, is that opted for by most of our competitors. It is routine that solicitors now make a solicitor client charge in the form of a success fee: I also know that many of our competitors charge success fees in the same way that we do. Our policy on success fees and the amount therefore reflects the 'market rate' for a person who wishes to instruct a solicitor will pay. Equally of course, clients are free to 'shop around' for a better rate, or lower success fee.

10. The success fee in this case is a contractually agreed fee, with the quantified fee of 100% (with the 25% maximum limit capping her liability) specifically agreed between the Claimant and this firm. I have no doubt that the Claimant was fully aware of the charging structure and it was expressly set out in her Conditional Fee Agreement and funding documentation. The Claimant as client was free to ask questions if there was anything she did not understand. In this case, neither at the outset of the case when funding was discussed, or at any point to its conclusion did the Claimant raise a concern, or seek to suggest that the fee was unfair.'

18. Critically, Mr Ralph did not accept the proposition that the size of the success fee must be calculated according to the risk in the particular case (para.11). In return for the success fee the client obtained *"… A number of valuable benefits including (i) the writing off of fees if the case was lost (ii) the financing by this firm of the Claimant's disbursements (iii) the deferral of fees until the end of the case, whenever that might have been.'* The amount of the fee in this case represented no more nor less than the market rate usually charged post-1 April 2013 by solicitors practising in this field. The alternative would have been to charge the client with irrecoverable elements of fees calculated on an hourly rate on a solicitor/own client basis (para.15).

19. By his judgment dated 28 April 2017 the Judge agreed with HH that CPR 46.9(4) cannot be read as a 'stand alone' and that 46.9 must be read as a whole; and held that CPR 46.9 *'places the burden on the client to prove the charges are unreasonable. It also significantly restricts the scope of the court's discretion to interfere with contractually agreed amounts through the mechanism of the presumptions'* and that *'It follows that the Claimant needs to establish good reasons why she should not be bound when challenging the success fee by the presumptions in 46.9(3)'.*

20. As to those presumptions: *'12. Where I part company with the Defendant's submissions on this point is what constitutes unusual nature or amount. It is clear from the file of papers disclosed that the solicitors had little or no direct contact with the Claimant. The Claimant appears to have been referred to the solicitors (details unclear from the file) and the solicitors take instructions on the telephone. There is no face-to-face meeting subsequent to that discussion but there followed significant correspondence, terms and conditions, and documentation in relation to the CFA. There is no evidence on the file of any formal risk assessment, nor note of any discussion in relation to the success fee. Whilst accepting the retainer between solicitor and client is contractual in nature, the reality is that litigation funding of itself is complex, risk assessments and success fees add a further level of complication, as does the charging arrangement of the solicitors. This is an unsophisticated client dealing, by referral, with a claim for damages arising out of a road traffic incident, the circumstances of which appear from the file note relatively straightforward, it being a rear end collision with the claimant's stationary car. It seems to me not a difficult hurdle in those circumstances for a Claimant to overcome to rebut the presumption of reasonableness in CPR 46.9(3). There is no clear evidence the Claimant approved either expressly or impliedly, with full knowledge, the cost to be incurred, and more particularly, a success fee of 100% could easily be said to be unusual both in nature and amount given the circumstances of the claim that were known to the solicitors at the time. Further, there is no risk assessment on the file that would in any event justify as being reasonable, a success fee of 100%'.*

21. As to 46.9(4), he accepted that the proper interpretation of *'the relevant factors as they reasonably appeared to the solicitor'* imposed a *'subjective gloss'* upon the sub-rule.

22. Turning to Mr Ralph's explanation of his approach to charging the Judge stated: *'I do not accept as a starting point that a Defendant has to charge clients fees simply to ensure overheads and a reasonable level of profit are made. Furthermore, the relevance of each factor set out by Mr Ralph must surely depend on the circumstances of the case, the facts as given by the client, and the impression the client gives to the solicitors within their witness statement or initial instructions. I do accept that the most valuable benefit provided to the client in the circumstances of this type of case is the potential writing off of fees if the case were lost; the financing of disbursements as the case progressed (albeit in an RTA claim those disbursements would be modest and restricted to a fixed cost medical report and fixed court fees) and the provision of credit, in other words there was no request for interim costs to be paid. However, the latter is again subject to a balanced judgment by the solicitor as to the nature of the claim that is to be pursued and the length of time it is likely to conclude, particularly bearing in mind the existence of the RTA portal process.'*

23. He concluded : *'15. I do not accept that any of those relevant factors are sufficient in addition to the circumstances of the case, the nature of the claim, and the evidence from the Claimant to justify an uplift of 100%. It is difficult to see in the circumstances of this case known to the solicitors at the time that the CFA was to be entered into that an uplift of much more than 12.5% could ever be justified. On the circumstances described by the client the facts of the case was straightforward, the nature of the injury was minor soft tissue damage and whiplash, there was no time off work, and it was likely this case would be settled for a modest amount in a short period of time.'* In the circumstances of the particular case, and allowing for the fact that the *'modest'* disbursements were funded by the solicitors for a *'fairly short'* period, the appropriate success fee was 15%, namely £276 plus VAT = £331.20.

Appeal on success fee

24. On behalf of HH, Mr Andrew Hogan rests the challenge on a number of points of principle concerning the interpretation of CPR 46.9.

25. First, freedom of contract. That principle was given particular expression in 46.9(3)(a) and (b) which raise presumptions that costs in their nature and/or amount have been reasonably incurred if they had the express or implied approval of the client. Prima facie that approval would be (and was in this case) satisfied by the client's consent as embodied in the CFA. In the case of a success fee the 'amount' must mean the percentage, since that is the language of a success fee and its quantum will depend on the product of the percentage and the base charges.

26. Mr Hogan acknowledged that in Macdougall v. Boote Edgar Esterkin [2001] 1 Costs LR 118, a case on the similar provisions of RSC Order 62 rule 15(2), Holland J stated that approval means 'informed approval', adding *'To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it"* (para.8). However he submitted that those observations must be seen in the context of its particular facts where the explanation given by the

solicitor the client was held to be *'seriously misleading'* (para.10(a)). In the absence of anything misleading, the client's agreement to the relevant costs raised a 'strong' presumption that they were reasonably incurred and/or reasonable in amount which would be difficult to rebut; for to do so would be to interfere with the contractual terms.

27. As to 46.9(3)(c), Mr Hogan accepted that an irrecoverable success fee could be regarded as a cost of an 'unusual nature or amount', but here the retainer made it clear that this could not be recovered from the other party. Accordingly this presumption did not arise.

28. In support of these contentions he also contrasted the regime which preceded LASPO, i.e. before 1 April 2013.

29. At that time a solicitor-client assessment was governed by CPR 48.8 and PD 48. CPR 48.8(2) contained similar presumptions to the present 46.9(3). As to CFAs, 48.8(3) provided: *'Where the court is considering a percentage increase, whether on the application of the legal representative under rule 44.16 or on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.'*

30. PD 48 then provided that:

'54.6 Where the client applies to the court to reduce the percentage increase which the solicitor has charged the client under the conditional fee agreement, the client must set out in his application notice : (a) the reasons why the percentage increase should be reduced; and (b) what the percentage increase should be.

54.7 The factors relevant to assessing the percentage increase include (a) the risk that the circumstances in which the fees or expenses would be payable might not occur; (b) the disadvantages relating to the absence of payment on account; (c) whether there is a conditional fee agreement between the solicitor and counsel; (d) the solicitor's liability for any disbursements.

54.8 When the court is considering the factors to be taken into account, it will have regard to the circumstances as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into.'

31. The non-exhaustive list of relevant factors identified at PD48 para. 54.7 was not replicated in CPR 46.9(4) or any Practice Direction relating to the LASPO regime. Mr Hogan submitted that this was a deliberate and material change. Furthermore Parliament's removal of that list of 'relevant factors' mirrored the changes which LASPO had made to a inter partes assessment.

32. Under the pre-LASPO regime, the maximum percentage increase was set at 100% : Conditional Fee Agreements Order 2000 (SI 2000/823) Article 4. However this was subject to an assessment of what was reasonable in the circumstances, including the degree of risk in the particular case.

33. The Conditional Fee Agreements Regulations 2000 (SI 2000/692) in turn required that a CFA must specify the reasons for setting the success fee at the stated level (Reg.3(1)(a)); and must provide that the increase ceases to be payable, unless otherwise ordered, where it is held to be unreasonable *'in view of the facts which were or should have been known to the legal representative at the time it was set'* (Reg.3(2)). The Costs Practice Direction (PD 44) then made provision for the assessment which included : *'11.8 In deciding whether a percentage increase is reasonable relevant factors to be take into account may include (a) the risk that the circumstances in which the costs, fee or expenses would be payable might or might not occur; (b) the legal representative's liability for any disbursements; (c) what other methods of financing the costs were available to the receiving party'.*

34. By contrast, LASPO removed any liability of the losing party to pay any part of the success fee; but provided protection for the client in the form of the maximum 100% success fee (2013 Order, Article 3), subject to a 'cap', in personal injury proceedings at first instance, of 25% of general damages for PSLA and past pecuniary loss (Article 5).

35. Thus under the LASPO regime the factor of risk in the individual case necessarily formed no part of the inter partes assessment; and there was equally no basis for that factor to be taken into account on the solicitor-client assessment. The client was protected by the combination of the 100% maximum and the 25% 'cap' and there was no need for yet further protection based on an assessment of the risk in the individual case. In this important sense the LASPO reforms must be seen as a package, with the inter partes and solicitor-client assessments proceeding in step.

36. CPR 46.9(4) provided a residual discretion where a client had been actively misled or if obviously irrelevant or irrational factors had been taken into account. As an example of the latter, he cited a differential percentage based on ethnicity.

37. Turning to Mr Ralph's witness statement, this set out the relevant factors as they reasonably appeared to him. He had not taken account of any irrelevant or irrational factors and accordingly there was no basis to interfere.

38. Turning to the judgment, the District Judge had gone into error in paragraph 12 when he had twice referred to the absence of a risk assessment. This wrongly involved a presumption that there should be a risk assessment in each individual case. The Judge had rightly referred to the 'subjective gloss' in CPR 46.9(4), but then had wrongly rejected the factors which Mr Ralph had taken account in setting the success fee at 100%. In paragraph 15 he had reverted to the 'pure error' of criticism based on the absence of an individual risk assessment.

39. Mr Hogan accepted that, if he was wrong on this central point, his criticism of the decision must fall away. The Judge's assessment of the risk at 15%, in this rear end collision case, was 'in the ballpark' and not itself open to challenge.

40. For the reasons largely elaborated by Mr Simpson, I do not accept these contentions.

41. Dealing first with the presumptions in CPR 46.9(3)(a) and (b), I do not accept that the 'approval' of the client is satisfied by the mere fact of the client's consent to the relevant type or amount of cost to be incurred. The language of 'approval' evidently

requires something more. I respectfully agree with Holland J in Macdougall that approval requires an informed consent. It follows that the simple refrain of freedom of contract establishes neither the presumptions nor the reasonableness of the success fee in the particular case.

42. Secondly, I do not accept that the requirement of approval is directed only at cases where the client has been misled by the solicitor. That happened to be the circumstance in Macdougall, but there is nothing in the language of CPR 46.9 which so restricts its reach, nor is there any principled reason why it should do so.

43. Thirdly, I do not accept that the LASPO changes had the effect of removing risk assessment as a relevant factor when considering the success fee percentage increase on a solicitor-client assessment. Whilst LASPO excluded the success fee from the inter partes assessment, CPR 46.9(4) demonstrates that it did not do so for the purpose of a solicitor-client assessment. The terms of that sub-rule are the same as the former CPR 48.8(3), save for the necessary exclusion of an application by the solicitor.

44. When the costs judge is faced with the client's application under 46.9(4) for a reduction of the percentage increase, I can see no good reason for the risk in the individual case to be excluded as a relevant factor. On the contrary it is likely to be the primary factor. This reflects the fact that the assessment is concerned with the circumstances of the particular retainer. By that retainer, and the fiduciary obligations to which it gives rise, the exclusive focus of the solicitor is on the best interests of the client: see also the SRA Code of Conduct 2011, Introduction and Outcome 1.6.

45. Accordingly and in any event I do not accept that the removal of the PD 48 list of relevant factors had the effect of excluding the assessment as a relevant factor under the successor to CPR 48.8(3), namely 46.9(4); nor as a matter relevant to approval for the purpose of the presumptions under 46.9(3).

46. Like the Judge, I accept that 46.9(4) is not free-standing and that CPR 46.9 must be read as a whole. Thus if a client applies for a reduction in the success fee, he may be met by evidence that he gave his informed approval to the percentage identified in the CFA. If so, the presumption in 46.9(3)(a) and/or (b) is likely to be satisfied and will be difficult to dislodge. Alternatively, if the presumption is not established, the costs judge will proceed to the assessment and hence the reasonableness of the success fee percentage.

47. Putting the point another way, if and insofar as HH took no account of the risk in the individual case and provided for a 100% uplift (subject to the 25% cap) in all cases by reason of its particular post-LASPO business model, I consider that informed approval would require this to be clearly explained to the client before she entered the agreement.

48. In any event the suggested irrelevance of a risk assessment is at odds with HH's own documents relating to this case. Thus its 'Insurance Information Fact Sheet' stated that ATE insurance was appropriate because of a list of factors which included that *'The premium reflects the category of risk'*: see also its internal review note of 25.4.16 which assessed the prospects of success.

49. In the absence of any such informed approval by Ms Herbert I see no basis for the application of either presumption (a) or (b). I do not consider that presumption (c) arises, since Ms Herbert was advised that the uplift would not be recoverable from the other party.

50. The presumptions not arising, it was for the Judge to assess the reasonableness of the success fee in the particular case. He rightly held that the risk in the individual case was a relevant factor and rejected the arguments based on HH's business model. There being rightly no challenge to his assessment of the risk factor at 15%, this ground of appeal must be dismissed.

Appeal on ATE premium

51. The second ground of appeal relates to the ATE premium. Although the point arises by an indirect procedural route, the central question is whether, as the Judge held in his second judgment, the premium was to be classified as a 'solicitor's disbursement'. The significance of this point is that the ATE premium did not appear in HH's bills to Ms Herbert.

52. The appeal includes a challenge to the procedure which was followed by the Judge. It is therefore necessary to set out the procedural history in a little detail. CPR 46 PD para. 6.19 provides that *'After the detailed assessment hearing is concluded the court will (a) complete the court copy of the bill so as to show the amount allowed; (b) determine the result of the cash account...'*

53. In JG's submission on the success fee issue (27.3.17), it noted that the parties had provided the Court with two competing versions of the appropriate cash account. HH's version included its disbursement of £349 for the ATE premium. This item was not contained in its bill of costs. JG submitted that it should have been included in the bill as a solicitor's disbursement; and that in consequence it must be removed from the cash account.

54. HH's submissions of the same date did not deal with the point, doubtless because the preliminary issue related only to the success fee.

55. Having given judgment on that issue (27.4.17) the Judge invited written submissions on costs. JG's submissions (2.5.17) also reiterated its point on the ATE premium and the cash account. HH's submissions (4.5.17) did not respond to that point; nor did it subsequently do so.

56. Having given his judgment on costs, the Judge dealt with the ATE premium/cash account point as follows: *'Finally the Claimant* [has] *asked that I deal with the cash account as the final step in the assessment process. I agree that the ATE premium should be shown (and indeed treated as) a disbursement (see Cook on Costs 2017 paragraph 2.12), but of course I also note that there has been no challenge to that item as being unreasonable in amount nor did it form part of this assessment. Nonetheless the revised cash account exhibited to the Claimant's submissions would appear to be correct.'* The Judge's order then included an order approving the cash account in the form exhibited by JG.

Procedural challenge

57. The first ground of appeal is that it was procedurally improper for the Judge to deal with this point when it had not been previously identified as an issue in the assessment. I do not agree. The issue was squarely raised by JG's submissions of 27.3.17 and 2.5.17, to each of which there was no response from HH; the Judge was required by the Practice Direction to determine the cash account; and (as will be seen) that in turn required determination of whether or not the ATE premium was a 'solicitor's disbursement'.

58. I turn to the substantive questions of (i) whether the ATE premium is a solicitor's disbursement and (ii) in any event, whether it should have been excluded from the cash account.

Solicitor's disbursement

59. In support of HH's contention that the ATE premium was not a 'solicitor's disbursement', Mr Hogan points first to Friston on Civil Costs: Law and Practice (2nd ed) which describes these[2] as those payments which a solicitor is bound either by law or custom to make.

60. This reflects the decision in In re Remnant (1849) 11 Beav. 603 where, having taken advice from the Taxing Masters, Lord Langdale MR concluded that *'It appears to me, that it is the practice of solicitors, who may have to pay or advance money on behalf of their clients, carefully to distinguish such professional disbursements as ought to be entered in their bill of costs, from such other advances or payments, as ought to be entered only in their cash accounts, as cash payments or advances. And it seems to me a very reasonable and proper rule, that those payments only, which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs."* (p.613). The decision was approved by the Court of Appeal in In re Buckwell & Berkeley [1902] 2 Ch.596.

61. Subsequent authorities have referred to Lord Langdale's 'first rule' (payments made in pursuance of the solicitor's professional duty) and 'second rule' (payments sanctioned by custom).

Client's disbursements

62. Friston contrasts 'Client's disbursements' as *'...a sum of money paid by the client (either personally, or by some other person acting on his behalf) for services of provisions pertaining to the litigation. An example would be where the client had agreed to pay an expert directly, or where he agreed to pay a witness's travel expenses. Client's disbursements are recoverable regardless of whether there is an enforceable retainer. They may be paid through the agency of the solicitor; where this is done, they may be distinguished from an actual disbursement by virtue of the fact that the solicitor will have no duty to disburse the disbursements. If there is a dispute as to whether an item included within a bill is an actual disbursement or a client disbursement, then the burden will lie with the solicitor to prove that it is properly chargeable as an actual disbursement. Client disbursements will, where appropriate,*

[2] Also described as 'actual disbursements'

appear in the cash account, but the cash account itself does not have a bearing on whether a disbursement is an actual disbursement or a client disbursement; in particular, the fact that a client has put his solicitor in funds for a disbursement (such as counsel's fees) will not generally have a bearing on whether that disbursement is or is not an actual disbursement.'

63. Friston continues *'Thus, a payment made by a solicitor on behalf of a client will not become a disbursement merely by reason of it being paid by the solicitor rather than the client. Where the solicitor is not bound by law or custom to make it, a payment made on behalf of the client would not be a disbursement and it would not appear in the solicitor's bill; instead, it will merely appear as an entry in the client account.'*

64. In In re Blair & Girling [1906] 2 KB 131, Vaughan Williams LJ identified the distinction as whether the relevant payment *'...has been made by the solicitors in their professional character as solicitors, or whether it has been made by them as agents independently of that character, just as a banker or any other agent might make disbursements for a client.'* (p.137). He observed that it made no difference whether the money was or was not supplied in the first instance by the client to his solicitor for the purposes of him making a payment : *'We simply have to consider whether this payment is a professional disbursement or not.'* As to custom, *'...I do not think we ought to draw the inference merely because many solicitors habitually insert this particular payment into their bill of costs. If, on the other hand, a particular disbursement has appeared in bills of costs which have gone to taxation, and that disbursement has been habitually treated upon taxation as an item properly introduced into the bill of costs, then I think that that would go far to establish this custom'* (p.138).

65. Mr Hogan then cited s.29 of the Access to Justice Act 1999 which provided, before its repeal by LASPO : *'Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.'* From this provision the Court of Appeal in Hollins v. Russell [2003] 1 WLR 2487 concluded that ATE insurance premiums were recoverable as costs in any proceedings irrespective of whether or not there was a CFA between the receiving party and the legal representatives. Brooke LJ continued: *'The client's liability to pay the insurance premium arises from the contract of insurance, not from her contract with the legal representative. It arises whether or not there is a CFA and whether or not the CFA is enforceable."* : para.114.

66. Mr Hogan submitted that the ATE premium was payable pursuant to the client's contract with insurers, as distinct from the solicitor's retainer. In consequence it was not payable by the solicitor pursuant to his professional duty as solicitor. Furthermore the ATE premium had been recoverable as costs only because and for so long as s.29 so provided. This reflected the fact that it was not a solicitor's disbursement otherwise recoverable on an inter partes assessment. Solicitors such as HH were simply undertaking a form of insurance brokerage service for the client. All in all, the premium was a client disbursement, paid over to the insurer by the mere agency of the solicitor.

67. Mr Simpson's central response was that the premium was an inextricable part of the overall CFA funding package offered by solicitors to their prospective clients for such litigation. Its payment fell within both of the rules in In re Remnant. It was a sum which the solicitor was professionally bound to pay in discharge of his duty qua solicitor. As to custom, the premium had been habitually treated as a disbursement under the pre-LASPO costs regime where there were routine challenges to the amount of such premiums in inter partes assessments challenges to bills of costs : see e.g. Rogers v. Merthyr Tydfil CBC [2006] EWCA Civ 1134. This had continued post-LASPO in clinical negligence cases where ATE premiums continued to be recoverable.[3] There was no reason to conclude that the nature or status of an ATE premium had been changed by the arrival of the LASPO regime. Furthermore, if the solicitor had any agency, it was on behalf of the ATE insurer.

68. In reply, Mr Hogan acknowledged that under the pre-LASPO regime ATE premiums were commonly included as disbursements in solicitor's bills. However this was only because of s.29 which gave such premiums the status of items of costs. Even if that practice were to be regarded as a 'custom' within Lord Langdale MR's 'second rule', it came to an end with the LASPO regime and the repeal of s.29. He also disputed that the solicitor was the agent of the ATE insurer.

69. I prefer Mr Simpson's submissions. In my judgment the purchase of ATE insurance cover is an inextricable part of the package which the solicitor provides to the client in such litigation and which HH provided Ms Herbert in this case. The fact that that there was a contract between client (insured) and insurer is not decisive. The reality is that the insurance cover is offered and provided as part of one overall package presented by the solicitor to the prospective client; and then, pursuant to the terms of the retainer, the solicitor pays the premium to the insurers from the gross settlement sum received from the third party.

70. This typical arrangement is reflected in the retainer letter and CFA terms in the present case. The Insurance Information Fact Sheet provided to the client identified the proposed ATE insurance and premium and advised that it would be paid at the end of the case by deduction from damages received. The CFA, in matching terms, stated that *'If you win your claim, you pay our basic charges, our disbursements, success fee and ATE premium'*. HH's letter of 6.9.16 to Ms Herbert duly reflected that reality when it stated that, if the settlement offer from RTA insurers were accepted, it would deduct £1178.21 as the total *'paid towards our legal costs'*.

71. I do not accept that s.29 assists HH. The question of whether an item of costs is recoverable inter partes is distinct from the question of whether it constitutes a solicitor's disbursement as between solicitor and client.

72. My conclusion is that this payment of the premium falls within the first rule in In re Remnant, namely as a sum paid by HH *'... in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform'*. I do not accept that the sum was paid as mere agent for the client, independent of HH's duty as her solicitor.

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[3] See The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No.2) Regulations 2013; and the County Court decision in Martin v. Queen Victoria Hospital NHS Foundation Trust, 13.5.16.

73. I also consider that the evidence and case law demonstrate a clear and established custom to that effect, within Lord Langdale's second rule. There is no reason to conclude that there was a change in that custom (as opposed to a change in respect of its recoverability from the paying party) following the repeal of s.29.

Cash Account

74. The definition of a cash account is provided by PD 46 at paragraph 6.6(b), namely *'...a cash account showing money received by the solicitor to the credit of the client and sums paid out of that money on behalf of the client but not payments out which were made in satisfaction of the bill or of any items which are claimed in the bill.'*

75. Cook on Costs (para.2.12), to which the Judge referred, explains that the purpose of the cash account is *'...so that the court can see the whole picture between the solicitor and the client. In effect the account deals with money expended by the solicitor for anything which is not in the bill (or which ought to be there)'*. Having discussed the difference between solicitor's disbursements and client's disbursements, Cook continues : *'It is important to know what disbursements should appear in the bill itself and what should be charged in the cash account because, perhaps obviously, only those items in the bill can be recovered from the client. Many solicitors lose money on assessments of costs by regarding as cash account entries which should have been disbursements.'*

76. In the light of his conclusion that the ATE premium was a solicitor's disbursement the District Judge approved JG's version of the cash account which excluded that sum; and thus left a balance in favour of Ms Herbert in the sum of £349.

77. Mr Hogan submits that this is wrong and that classification of the item as a solicitor's disbursement does not have the consequence that the item should be removed from the cash account. A cash account is simply a matter of arithmetic and no more than a record of the solicitor's payments in and out; not a record of what it ought to show.

78. In support he points to the SRA Accounts Rules 2011 which provide under Rule 29 :

'29.3 If separate designated client accounts are used: (a) a combined cash account must be kept in order to show the total amount held in separate designated client accounts;...

29.4 All dealings with office money *relating to any* client *matter, or to any* trust *matter, must be appropriately recorded in an office cash account and on the office side of the appropriate client ledger account'.*

79. The wrongful effect of the Judge's order was that there remained a credit balance in favour of Ms Herbert in the sum of £349. Thus HH was required to pay her a sum which had been paid out on her behalf to ATE insurers.

80. Mr Hogan submitted that the client's remedy for wrongly deducted sums is a claim for fraud or professional negligence or, 'more prosaically', an application to the Court under s.68 of the Solicitors Act 1974 for the delivery of a bill of costs which includes the ATE premium; and which could then be the subject of argument as to whether it is a solicitor's or a client's disbursement.

81. Mr Simpson in response referred to In re Remnant and Cook on Costs (cited above); and to Hurst on Civil Costs (5th ed.) which states *'The cash account should not contain disbursements which belong in the delivered bill'* : para.11-010. Since the ATE premium ought to have been included in the bill as a professional disbursement amenable to solicitor-client assessment, it should not appear in the cash account.

82. I again prefer Mr Simpson's submissions. I consider the Judge's decision to be supported by the definition of a cash account in PD46 para.6.6(b), the observations in In re Remnant and the commentary in the cited text books. I do not accept that the Solicitors Accounts Rules point the other way.

83. If a payment by a solicitor is properly to be classified as a solicitor's disbursement, it should be contained in his bill of costs and thus be amenable to the s.70 process of solicitor-client assessment. The effect of allowing the solicitor to include the item in the cash account would be to deprive the client of the opportunity to challenge the item on a solicitor-client assessment.

84. Equally, it is no answer to leave the client to a remedy against the solicitor in fraud or professional negligence. Nor does the s.68 power to order delivery of a bill permit the Court to determine the particular contents of the bill to be delivered : see my decision[4] in Parvez v. Mooney Everett [2018] EWHC 62 (QB). If the solicitor fails to include that item in the delivered bill of costs, he has to bear the consequence; subject to any application for leave to withdraw the bill and deliver a fresh bill.

85. My conclusion is that the Judge was right to approve the cash account in the version which excluded the ATE premium, a solicitor's disbursement.

Costs : illegality

86. The final ground of appeal, as revised in oral submissions, is that the Judge erred in the way he dealt with HH's argument that JG's claim for the costs of the success fee issue was vitiated by illegality relating to the formation of JG's retainer from Ms Herbert. The Judge wrongly stated that any concern should be pursued with the SRA. He should at least have ordered JG and Ms Herbert to make witness statements explaining how JG came to be instructed.

87. HH's skeleton argument of 27.3.17 and its submissions on costs dated 4.5.17 pointed to Mr Ralph's witness statement in which he referred to a number of cases where former clients had retained JG to challenge its bill of costs. He expressed concern that JG had obtained a client list and had then in breach of the SRA Code 'cold called' these clients in order to obtain instructions. Mr Ralph referred to a former client (Mr Miles) where *'...I have been made aware that [he] alleges he was contacted directly, on his mobile telephone by Mr Green who asked for instructions to bring a claim'.* He asked the Court to direct Mr Green and Ms Herbert to file and serve witness statements setting out how she came to instruct JG and whether she had been cold called by telephone. Such a breach of the SRA Code would have the consequence that the retainer was tainted with illegality and unenforceable; and thus that any order for costs would offend the indemnity principle.

[4] Handed down 19.1.18, after the hearing in this case

88. Mr Green responded with submissions, signed by him and dated 2.5.17, in which he stated that it was *'simply untrue'* that he had a list of clients who were being cold called. This applied both generally and in respect of the identified client. He stated that a number of former clients of HH had sought to instruct him in the light of valid concerns about its charges. The instructions had come via a number of marketing methods all of which were compliant with the Code of Conduct. He denied that Mr Miles had been contacted directly by JG.

89. The Judge responded to this issue as follows: *'The Defendant suggests the court should investigate the conduct of the Claimant's solicitor and in particular how he came to act for the Claimant. The allegation is one of professional misconduct and in my view should be directed to the SRA. It would be disproportionate and wrong for this court to embark upon such enquiry given the powers of the Solicitors regulatory body'*.

90. In support of his argument that the Judge should have ordered witness statements, Mr Hogan cited the SRA Code at Rule 8.3 that *'you do not make unsolicited approaches in person or by telephone to members of the public in order to publicise your firm or in-house practice or another business'*; and authority that a retainer entered in breach of the Code was illegal and unenforceable: Mohamed v. Alaga & Co [2000] 1 WLR 1815; Garbutt v. Edwards [2006] 1 WLR 2907.

91. In my judgment there is no basis for criticism of the Judge's decision on this point, nor therefore of his consequent costs order. Mr Ralph's evidence of cold-calling was based on no more than cautiously phrased evidence that he 'had been made aware' of such an allegation by another former client; and Mr Green had expressly denied the particular and general allegation in a signed statement. The Judge's decision, that it would be disproportionate for him to take the matter further and that Mr Ralph should redirect his complaint to the SRA, fell squarely within the ambit of his case management discretion.

92. For all these reasons this appeal must be dismissed.