Case No: SC-2020-APP-000377

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 25/6/2021

Before :

COSTS JUDGE LEONARD

- -

Between :

ACUPAY SYSTEM LLC	**Claimant**
- and -	
STEPHENSON HARWOOD LLP	**Defendant**

- -
- -

Robert Marven QC for the **Claimant**
Jamie Carpenter QC for the **Defendant**

Hearing date: 23 March 2021

- -

Approved Judgment

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

....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. These proceedings started as an application under Part 8 of the Civil Procedure Rules (CPR) for the detailed assessment of five bills rendered by the Defendant to the Claimant between 29 January 2020 and about 27 May 2020. The January 2020 invoice was part paid: the rest are wholly unpaid. The total unpaid balance of the bills is £339,613.75.

2. I should mention that the Claimant describes itself on its Part 8 application as "Acupay System LLC (UK Branch)". That name has been repeated in court orders and other documents produced in the course of these proceedings. In fact, on the evidence I have, the Claimant is Acupay System LLC, a limited liability USA company which is registered in the state of New York. It has an office in London, registered at Companies House as the UK establishment of the US entity. That is consistent with the fact that an overseas company must be registered when it has some degree of physical presence in the UK.

3. It does not follow that the Claimant's UK Branch is a distinct legal entity. It is nothing more than a branch of the US corporation. It cannot contract with the Defendant or conduct litigation in its own right. It is not appropriate for the UK branch to be described as the Claimant in these proceedings. I have headed this judgment, and will expect all further court orders and other documents produced for the purposes of the litigation, to be headed accordingly.

4. The Claimant's application was accompanied by a document headed "CPR Part 23 Statement of Case". This document referred to a Conditional Fee Agreement ("the CFA") entered into by the parties on 12 August 2019 and amended by agreement on 13 August 2019. The Statement of Case asserts that the CFA is a Contentious Business Agreement ("CBA"), that it is void for lack of consideration, and, on a number of grounds, that its terms were unfair and unreasonable.

5. To summarise the stated grounds in broad terms, they are that the definition of "success" in the CFA included payment by the Claimant of a sum that it could not afford to pay; that the Claimant gained no benefit from the CFA whereas the Defendant stood to gain a pecuniary advantage; and that the Defendant was under an obligation to advise the Claimant to seek independent legal advice before entering into the CFA, which the Defendant had not done.

6. The Statement of Case asks for these remedies: a declaration that the CFA is a CBA; a declaration that it is unfair, unreasonable and must be set aside ab initio, with no fees enforceable or recoverable by the Defendant; alternatively, a declaration that the CFA, "lacking the essential ingredients of a contract by way of an absence of consideration," is void ab initio.

7. The Claimant produced "Amended Particulars of Claim" on 12 August 2020. Again, the Claimant's stated case was that the CFA is a CBA which, being unfair and unreasonable, must be set aside as void ab initio, with "no fees enforceable or recoverable" by the Defendant.

8. The Claimant's case as presented in the Amended Particulars of Claim rests on three propositions, summarised at paragraph 8 of that document. The first is that the CFA is invalid for want of consideration, all benefits accruing to the Defendant: the Defendant's fees went up rather than down, in the case of the two "highest fee earners" by over 11%.

9. The second is that the definition of "success" in the CFA extended to payment by the Claimant of a sum of up to £3,950,000, more than three times the net worth of the Claimant, so that a success fee would be payable to the Defendant even where a judgment debt put the Claimant into liquidation.

10. The third is that the Defendant, obtaining through the CFA a financial advantage over the Claimant, with an attendant conflict of interest or possible conflict of interest, was under an obligation to advise the Claimant to seek independent advice, and that such references to independent advice as were made by the Defendant fell short of that obligation.

11. The Defendant, on 31 July 2020, filed an acknowledgement of service agreeing to an order for the assessment of its bills on condition that a payment be made against the outstanding balance.

12. On 14 August 2020 the court approved a consent order filed by the parties which incorporated these recitals and provisions:

> "**UPON** the application of the Claimant for assessment pursuant to section 70 Solicitors Act 1974 of certain invoices rendered to it by the Defendant ("the Invoices")
>
> **AND UPON** the parties agreeing that the Senior Courts Cost Office has jurisdiction to assess the costs of the Invoices, pursuant to Part III Solicitors Act 1974, and under CPR Part 67.3(2(a)
>
> **AND UPON** the parties having agreed the directions set out below,
>
> **IT IS ORDERED BY CONSENT THAT:**
>
> 1. The Claimant be permitted to advance an argument that the conditional fee agreement between it and the Defendant dated 12 August 2019 ("the CFA") is a contentious business agreement within the meaning of section 59(1) Solicitors Act 1974 ("a CBA") and that if the CFA was a CBA, it was unfair and/or unreasonable on the grounds set out in paragraph 8 of the Amended Particulars of Claim attached.
>
> 2. The following issues shall be determined as preliminary issues ("the Preliminary Issues"):
>
>   a. Whether the CFA is a CBA;
>   b. If so, whether the CFA is fair and reasonable;
>   c. The consequences of the Court's findings on the previous issues for the Claimant's liability for the fees and disbursements in the Invoices…"

13. The remaining provisions of the consent order set a timetable for the determination of the Preliminary Issues, including the service of evidence first by the Claimant, and then by the Defendant. The hearing took place on 23 March 2021.

14. On the hearing of the preliminary issues, I heard submissions from both parties about the fact that the evidence served by the Claimant extends beyond the issues raised in the Amended Particulars of Claim and so permitted by the consent order, for example in introducing an entirely new argument to the effect that, at the time of the signing of the CFA, the Claimant had not been provided with sufficient costs information.

15. Mr Marven, for the Claimant, argued that in Part 8 proceedings, which do not normally have pleadings, it would be unfair to restrict what the Claimant can put in evidence simply because the Claimant did, in this particular case, produce a form of pleading. If one were to treat this as a pleaded case, then it would be right for the Claimant to rely upon the fact that no defence has been filed traversing the Particulars of Claim. In any case, the consent order does not strictly define the preliminary issues; it simply records what the Claimant is permitted to advance.

16. Mr Carpenter, for the Defendant, did not accept this line of argument, and nor do I. That is first because the consent order appears to have been negotiated as a pragmatic and sensible solution to the fact that the Claimant's case was unclear, in parts misconceived (as in the application for a declaration that nothing is payable under the CFA) and, at least arguably, procedurally defective.

17. The Part 8 claim form seeks only the assessment of wholly or partly unpaid bills, a fairly routine application covered by section 70 of the Solicitors Act 1974. An application to set aside a contentious business agreement is a different (and less commonly invoked) remedy under section 61 of the 1974 Act.

18. The Part 8 claim form does not seek that remedy. If it had been sought then the Claimant would have been under an obligation to file and serve its evidence with the Claim Form, in the absence of which the Claimant would have had no right to be heard without the court's permission (the exception to this rule at Practice Direction 67 Paragraph 4 extends only to applications for detailed assessment).

19. The Defendant could have insisted that the Claimant amend its claim form, or raised arguments about relief from sanction. Instead, as I have said, a pragmatic solution was agreed, and part of that agreed solution was that the Claimant be permitted to advance its CBA case on the defined and reasonably clear grounds set out at paragraph 8 of the Amended Particulars of Claim. That agreement, embodied in a consent order, is binding upon the Claimant.

20. There are also practical and procedural considerations weighing against allowing the Claimant to ignore the terms of the consent order. As Mr Marven rightly says, Part 8 proceedings do not provide for pleadings, perhaps because the procedure is primarily designed for cases in which there is unlikely to be any substantial dispute of fact (CPR 8.1(2) refers). CPR 67.3(2) requires, however, that applications under Part III of the 1974 Act (other than in existing proceedings) must be made by Part 8 claim form, and it is common, on such applications, for the facts to be fiercely and extensively contested.

21. For that reason, because any defendant to any claim (Part 8 or otherwise) is entitled to understand and be ready to respond to the case they have to meet, and because a clear definition of the issues may be essential to setting a workable timetable for determining them, it may well be necessary to provide in an order that a claimant's case be clearly defined and adequately set out, and to hold the claimant to that defined case. If the parties had not themselves addressed that in the consent order, then I would have made such an order myself in a directions hearing (such a hearing was listed, but vacated precisely because the consent order had been approved).

22. In fact I have taken a fairly broad view of what falls within the ambit of the consent order, so that for example I will accept that the "independent advice" argument can extend to submissions about misleading information and informed consent. The exception is the Claimant's new case on costs estimates. That is something that must turn on evidence, and in my view the Defendant was right to regard the Claimant's evidence as irrelevant to the agreed defined issues and to confine its own evidence to those issues. It follows that I do not accept, as Mr Marven argued, that the Defendant did so at its own risk. It would be wrong, in the circumstances, to make a finding against the Defendant based on one-sided evidence. In fact, for reasons I shall give, I do not believe that the estimates argument has any substance in any case.

The Parties' Dealings

23. The Claimant is in the business of providing electronic data processing services. It offers, I understand, particular expertise in automated processes used for the transmission of large quantities of data in the settlement and custody of securities. It is one of (depending upon what I read) between 90 and 99 defendants to what Mr Carpenter accurately describes as "an extremely large piece of litigation" being pursued through four consolidated claims in the High Court by the Danish Customs and Tax Administration, Skatterforvaltningen ("SKAT"). SKAT alleges that it has been defrauded of approximately £1.5 billion in refunds of withholding tax which were never due. At the time the CFA was signed, there would appear to have been 95 active defendants.

24. The Claimant is not alleged by SKAT to have acted fraudulently. The defendants to the SKAT litigation can be divided into two groups, described as "the alleged fraud defendants" and the "non-fraud defendants". The Claimant is one of the non-fraud defendants.

25. SKAT alleges that the Claimant, in the course of submitting repayment claims on behalf of its clients, made negligent misrepresentations. The amount claimed by SKAT against the Claimant on this basis is approximately £430 million. SKAT makes an alternative claim in unjust enrichment in respect of the fees which the Claimant earned by filing the allegedly fraudulent claims. The value of these fees has on the evidence been put by the Claimant, in the course of the proceedings, at €4,569,737.03.

26. On 23 July 2018 Mr Stef Lambersy, Co-President (and now President) of the Claimant, sent an email to Ms Rosamund Prince, a partner in the Defendant firm. The email was copied to Ms Miriam Haniffa, at the time the other Co-President of the Claimant.

27. Mr Lambersy explained that he and a colleague (presumably Ms Haniffa) needed a civil lawyer and that Mr Anand Doobay, a solicitor who I understand offers expertise in

large, complex criminal and regulatory matters and with whom Mr Lambersy and Ms Haniffa had been working, had recommended that he get in touch with Ms Prince. Mr Lambersy asked whether Ms Prince could join a telephone discussion that day.

28. Ms Prince has given evidence for the Defendant (and Mr Lambersy for the Claimant). Her recollection is that Mr Lambersy asked her whether the Defendant would be willing to act on a fee structure, and specifically on a fixed fee basis. Ms Prince says that she would never offer a fixed fee for anything other than advisory work, where the scope of work can be clearly defined and is not dependent on other parties' conduct. Nor would she normally offer a new client such as the Claimant anything more than a modest (say 15%) discount on the Defendant's standard hourly rates, unless there was also an upside for the Defendant in the form of a CFA.

29. In an email of 26 July 2018 to Mr Lambersy and Ms Haniffa Ms Prince set out the basis upon which the Defendant would be prepared to act for the Claimant in the SKAT litigation:

> "English lawyers normally charge by an hourly rate. My standard hourly rate is £675 (plus VAT) and our associates' hourly rates vary depending on their seniority, from £435 to £645 (in each case plus VAT) per hour. We issue bills on a monthly basis…
>
> On this kind of claim, it is not possible to predict likely costs at this stage because we know very little about the claim and it is not possible to predict how the other parties will behave. The other parties' behaviour has a significant impact on costs. Taking two extreme examples, it is possible that the vast majority of the defendants do not participate actively in the proceedings which means limited costs have to be incurred on things like correspondence between solicitors. On the other hand, it is possible that many different defendants instruct lots of different lawyers and participate actively, in which case far more time will have to be spent dealing with correspondence.
>
> It is therefore not possible on this kind of claim to offer 'fixed fee' structures. However, I am in principle willing to offer a flexible fee structure whereby part of our fees would be conditional on achieving success. This would mean we would charge you a discounted rate, but if we achieved success we would charge full rates, and if we achieve early success we charge an additional uplift.
>
> In practice, how this would work is that we would enter into a conditional fee agreement with you (a "CFA"). The CFA would define what success is and define how the fees are to be structured (for all the figures below, VAT needs to be added). For example, it might say that:
>
> • We would charge a discounted rate for my fees of £472 per hour (i.e. we would discount the standard rate by 30%).
>
> • The CFA would define 'success' and how this applies to rates. For example, it might define success as (a) defeating the claim at trial, (b)

settlement at or below a certain sum (e.g. settlement on terms that you pay less than a certain figure), and/or (c) striking out the claim.

• In the event of success, a retrospective increase would be applied to our discounted fees, so as to bring them to full rates. In other words, our fees would retrospectively be £675 per hour (rather than the discounted rate).

• The CFA would also define 'early success' and how this applies to rates. For example, it might define early success as (a) striking the claim out within a fixed period (e.g. in the first 6 months) or (b) reaching early settlement below a certain sum (e.g. settling the claim within the first six months). In the event of early success, a retrospective increase would be applied to our discounted fees, so as to bring them to full rates plus a 30% uplift (i.e. £877 per hour)

The same discount and uplift percentages would apply to the hourly rates of other lawyers working on the case. VAT is chargeable on top of all hourly rates.

In summary what this means is that if you do not achieve the outcome you want (i.e. if you lose at trial or have to pay a high settlement figure), you only pay the discounted rate of £472 per hour. If we achieve a good outcome for you, you pay our standard rates. If we achieve good outcome for you at a very early stage (thereby saving you the costs of litigation over a long period), you pay our standard rates plus an uplift…

At this stage, it is very difficult to say how success should be defined: we would realistically need to see the Particulars of Claim, to understand exactly what they are claiming against you (and more importantly, what the value of their claim as against you is). If you wish to instruct us, I would therefore be happy to enter into an engagement saying that the discounted fees will apply for the first three months in any event (without any uplift), following which fees will revert to standard rates. However, the engagement letter would expressly say that we hope to enter into a partial CFA with you after receiving the particulars of claim.

I hope the above is useful – it is always quite difficult to explain clearly how CFAs work and I would be very happy to have another call once you have had a chance to think about the points above".

30. Shortly afterwards, Ms Prince recalls, Ms Haniffa called Ms Prince and informed her that the Claimant would be instructing Mishcon de Reya LLP rather than the Defendant. However on 7 August, Ms Haniffa contacted Ms Prince again by email. They spoke on the telephone on 8 August 2018 and Ms Haniffa explained that an issue had arisen in relation to Mishcon de Reya LLP and asked the Defendant to act.

31. Ms Prince, accordingly, sent Acupay an engagement letter dated 8 August 2018, enclosing standard terms of business. The engagement letter reflected Ms Prince's email of 26 July 2018:

"I have pleasure in enclosing our Standard Terms of Business (Edition 8 - May 2018) which, together with this letter, set out the basis on which we will undertake work for you as a client of Stephenson Harwood LLP.

Stephenson Harwood LLP's objective is to provide all clients with an efficient and effective service and, in order to assist us to do this, I should be grateful if you would read carefully the Standard Terms of Business, which include important information relating to the basis on which we act for clients. I set out in this letter certain specific matters governing our relationship with you and the particular work on which we have been instructed. In the event of any conflict between the terms of this letter and the Standard Terms of Business, the terms of this letter shall prevail…As you will see from section 3 of the Standard Terms of Business, we appoint a Relationship Partner for each client. We propose that I should be your Relationship Partner.

I will also be the assigned partner for this matter… I will have the responsibility of day to day conduct of the matter and I will keep you informed about progress….

In this matter, we will be charging you at hourly rates depending on the experience and expertise of the professional staff involved as it is not possible at this stage to fix, or give a realistic estimate or forecast of, the overall costs. The hourly rates (exclusive of VAT) applicable (as described below) are: -

Hugo Jenney - Partner Standard Rate: £800; Discounted Rate: £560

Ros Prince - Partner Standard Rate: £675; Discounted Rate: £472

Associate (depending on seniority) Standard Rates: £435 - £645

Discounted Rates: £305 - £484

Trainee/Paralegal - Standard Rate: £220; Discounted Rate: £154

During the first three months of our engagement, we will charge you the Discounted Rates. Following that, our rates will revert to the Standard Rates. However, as previously explained we are in principle willing to consider entering into a Conditional Fee Agreement ("CFA") once we have had sight of the Particulars of Claim (as set out in our email from Ms Prince of 26 July 2018). We will discuss this with you once we have received the Particulars of Claim, and we hope to enter into a CFA prior to the rates reverting to Standard Rates.

These rates will then apply until 1 May 2019, following which we reserve the right to review and amend the rates, upon notice to you. Before that date there may be some limited interim increases to reflect the increase in experience of individual lawyers..."

32. The engagement letter provided for bills to be rendered monthly. The accompanying terms of business included this provision:

> "Unless otherwise stated by us, our fees are based primarily on the time spent on the matter and will reflect the experience and expertise of the lawyers involved but may also reflect other discretionary factors, such as the value of a transaction, its complexity, the degree of responsibility involved and time constraints. All time spent on a matter is recorded and we will advise you, as applicable, of the status and charging rates of all lawyers who work on your matters. We will advise you of increases in our charging rates and the date when they will take effect."

33. The engagement letter was signed on behalf of the Claimant on 9 August 2018.

34. In fact, the Defendant continued to charge the discounted rates set out in the engagement letter until the CFA was signed on 12 August 2019. Ms Prince describes this as an ex gratia gesture by the Defendant. I have no evidence of any express understanding to that effect. The impression is rather that the Defendant simply allowed the Claimant to continue paying discounted rates, anticipating perhaps that a CFA would, in due course, be signed, and that the Claimant (understandably) felt no pressing need to remind the Defendant that the Claimant had in fact agreed to pay more.

35. This impression is reinforced by Ms Prince's evidence to the effect that she did not increase the Defendant's hourly rates from 1 May 2019, as provided for by the engagement letter, because she anticipated that the parties would shortly enter into a CFA.

36. It is also reinforced to some extent by an email dated 5 July 2019, from Ms Prince to Mr Lambersy, attaching a draft of a proposed CFA and a summary of its terms. The email described the parties' charging arrangements to date in terms rather more generous to the Claimant than had actually been the case (suggesting that Ms Prince had not really applied her mind to the question of hourly rates since the engagement letter was signed):

> "You may recall that we agreed that we would offer you discounted rates for the initial stage (until service of the defence), and that we would then consider offering a conditional fee agreement ("CFA").
>
> I attach a letter and CFA. The effect of the CFA is that you continue for now to pay the rates that you have been paying, but you would pay an uplift in fees in the event of a successful outcome (as defined in the agreement).
>
> I would suggest that you run this past Anand to check that he has no issue with this from a criminal perspective. Whilst he is a criminal lawyer and would not normally offer advice on contract matters, he may also be able to provide you with independent advice on the agreement if you need it (we cannot advise you on a contract with us)."

37. "Anand" is Mr Doobay, the solicitor who recommended the Defendant in July 2018.

38. Ms Prince's email of 5 July 2019 has been the subject of much criticism by the Claimant, in particular because the draft CFA attached to it (like the final version signed five weeks later) did not, as the email seems to suggest, provide for the Claimant to pay the hourly rates that had been paid to that date. In fact they were to be significantly higher, on both a full and a discounted basis.

39. A letter attached to Ms Prince's email offered a summary of the CFA's terms of which no criticism has been made:

> I am writing with reference to your engagement letter dated 8 August 2018 and our discussion regarding fees when you initially instructed us. You may recall I agreed that we would work for you at discounted hourly rates on this case for the first phase up to and including filing Acupay's Defence. I explained that after that point, I would be prepared to consider entering into a Conditional Fee Agreement whereby our firm shares with Acupay part of the risk in the outcome.
>
> Acupay's Defence and Counterclaim was filed on 1 April 2019. I have therefore prepared a Conditional Fee Agreement ("CFA") which is enclosed.
>
> In summary, the CFA provides for 3 different levels of costs that may be payable by Acupay for the fees of Stephenson Harwood LLP on this case. The different levels of fees are dependent on different outcomes of the litigation. These outcomes are outlined below and the mechanics are described in full in the CFA.
>
> 1 Successful outcome
>
> If Acupay achieves a "successful outcome", it must pay to us: (i) the Standard Costs; and (ii) any unpaid Disbursements (including Counsel fees and other third party fees). Standard Costs are our standard hourly rates (as set out in the schedule to the CFA).
>
> A Successful Outcome for Acupay occurs on any of the following events:
>
> 1.1 If the Claim against Acupay is dismissed by the court;
>
> 1.2 If SKAT discontinues the Claim against Acupay;
>
> 1.3 If the court grants a judgment against Acupay requiring you to pay not more than £3,954,124 (i.e. the sterling equivalent of EUR 4,408,517 as at the date of the agreement) (excluding costs and interest); or
>
> 1.4 If a settlement is entered into, resulting in a payment by Acupay of not more than £3,954,124 (i.e. the sterling equivalent of EUR 4,408,517 as at the date of the agreement) to SKAT (including costs and interest).
>
> 2 Early Success
>
> If Acupay achieves "Early Success", it must pay to us: (i) the Enhanced Costs; and (ii) any unpaid Disbursements. Enhanced Costs are our standard hourly rates plus 20% (as set out in the schedule to the CFA).

> Early Success occurs on any of the following events:
>
> 2.1 A Successful Outcome is achieved on or before 1 April 2020; or
>
> 2.2 A Successful Outcome is achieved at any time, and as a result of it, no payment becomes due (whether by order of the court or otherwise) from Acupay to SKAT, including in respect of costs.
>
> 3 Unsuccessful action
>
> If SKAT wins its Claim against Acupay, then Acupay must pay to us: (i) the Basic Costs; and (ii) any unpaid Disbursements. Basic Costs are our standard hourly rates less 30% (as set out in the schedule to the CFA).
>
> The action is Unsuccessful when:
>
> 3.1 The court has awarded Damages payable by Acupay of more than £3,954,124 (i.e. the sterling equivalent of EUR 4,408,517 as at the date of the agreement) excluding costs and interest.
>
> It is important that you read the CFA in full and it is of course up to you if you want to seek independent legal advice on the terms of the CFA. I would be happy to discuss this with you..."

40. The draft CFA, at clause 5, set out a three-tier fee structure along the lines described by Ms Prince in her covering letter. The schedule appended to the CFA and referred to by her was in tabular form, showing over four columns a standard, 30% discounted and 20% enhanced hourly rate for each "level of lawyer", the only named person being Ms Prince herself at a standard hourly rate of £755, followed by associates at hourly rates of between £390 and £665 depending upon seniority, and trainee solicitors and paralegals at a standard hourly rate of £230.

41. Ms Prince confirms that the hourly rates in the schedule to the draft CFA were based on the Defendant's current hourly rates at the time, which had increased on 1 May 2019 but which she had not (as I have mentioned) applied pending signature of the CFA.

42. At the foot of the table of hourly rates was this provision:

> "These rates are fixed until 30 April 2020. They will then increase on 1 May 2020 by 3% for any work done after that date and then by the same percentage on 1 May on every subsequent year, again in respect of work done after that date".

43. I will pause my narrative here to make these observations. Ms Prince says that in indicating, in her email of 5 July 2019, that the Claimant would continue to pay the rates that it had been paying, she meant only to say that the Claimant would continue to pay discounted rates, as opposed to the full rates upon which the Defendant, and absent a CFA, was (on the Defendant's case) entitled to insist. She certainly did not intend to mislead Mr Lambersy.

44. That is not difficult to accept, and I do accept it. That is because any intention on her part to mislead would have been entirely inconsistent with the fact that in her letter of

the same date, Ms Prince asked Mr Lambersy to read the CFA in full and drew his attention to its key provisions, including the schedule in which every applicable hourly rate was clearly set out. Even a brief perusal of that schedule would have dispelled any misunderstanding on Mr Lambersy's part as to the hourly rates that the Defendant proposed to charge under the CFA.

45. Ms Prince's email was, with regard to the hourly rates to be charged, loosely worded. If read in isolation, it could have been misleading. It was not however, intended to be read other than in conjunction with the attachments which made the proposed CFA charging regime entirely clear. In order to be misled by it, Mr Lambersy would have had to ignore both Ms Prince's request that he read it in full and her emphasis upon the importance of doing so.

46. The draft CFA sent to Mr Lambersy on 5 July 2019 also contained the following provisions. If the Claimant were to terminate the CFA, then it would be liable to pay the Defendant's standard costs (clause 6.1). The Claimant accepted that the fee arrangement set out at clause 5 had been explained to it (clause 11.2). The Agreement stated that it was "not a contentious business agreement within the meaning of section 59 of the Solicitors Act 1974" (clause 20.4).

47. Other than to correct a miscalculated discounted rate for one level of associate in the schedule, there were no material changes to these provisions in the finalised CFA.

48. On 2 August 2019 Ms Prince sent to Mr Lambersy an email attaching the Defendant's bill for 1 to 25 July 2019, along with this message:

> "Please do not hesitate me or Nicola should you have any queries. Please could you revert to me on the CFA as soon as you have a moment? I'm coming under pressure internally to raise the rates as these were only agreed for the initial period, although of course we agreed we would consider offering a CFA as we've now done. I am very happy to discuss what Acupay would prefer on a commercial level, if that would be helpful?"

49. Mr Lambersy replied on 7 August 2019 to this effect:

> "Overall I think the terms of the CFA make sense and are in line with what we have discussed. I have some questions and a small mark-up, which you will find in the attached PDF. Happy to discuss as soon as possible so we can finalize".

50. Mr Lambersy appears, as requested, to have read the CFA quite carefully, line by line. Against clause 5.3, providing that the Defendant's costs would not be capped, he queried whether the Defendant would be prepared to do so, and he asked for explanations of two other provisions.

51. Some amendments, immaterial for present purposes, were agreed and on 9 August 2019 Mr Lambersy sent to the Defendant a signed clean draft. On 12 August Ms Lewis of the Defendant firm asked Mr Lambersy whether she could return a signed and dated copy to him. Mr Lambersy gave that confirmation, and a signed and dated copy was sent to him by Ms Lewis on the same day by email with the following message:

> "The hourly rates that you are currently paying are 70% of standard rates for 2018. From today, these rates will increase to 70% of standard rates for 2019 which are identified as the "Basic Costs" in the Schedule to the CFA. The Standard Costs / Enhanced Costs will apply as provided for in the CFA."

52. The following day, Ms Lewis contacted Mr Lambersy again by email:

> "I have noticed an error in one of the charge-out rates in the Schedule to the CFA. It was incorrectly stated as a higher amount. We propose to amend it as per the manuscript amend in the attached, assuming you agree?"

53. Mr Lambersy agreed, and the error was corrected and initialled by both parties.

54. Monthly billing continued, at the discounted rates provided for in the CFA. Ms Prince confirms that the Claimant paid bills delivered by the Defendant on 29 August, 8 October, 29 October, 2 December and 16 December 2019 and 10 January 2020, generally within 56 days of receipt. On 10 March 2020, however, it was necessary for her to email Mr Lambersy about an unpaid invoice delivered on 29 January 2020 (the first, part-paid bill of the series of five otherwise unpaid bills listed in the Claimant's Part 8 application for assessment). It is worth recording both the tone and the content of the exchange of emails that followed over the course of the day:

> "Hi Stef
>
> I am sorry to chase, but my credit control team tell me the attached invoice for our work in January has not been paid – please could you check if this has got stuck in your systems somewhere?
>
> Kind regards.
>
> Ros"
>
> "Hi Ros,
>
> You are probably aware that 90% of our income comes from Italy. There has been a gradual slow down in the payments of our invoices by clients. This started several weeks before the current quarantine as people moved to remote working, and there were instances of breaks in communication between departments.
>
> So we have been delaying payments to vendors and the delay you have seen is not an oversight. I know you and your colleagues put in a lot of excellent work in January so your invoice will be prioritized. We should be able to pay the week of March 30.
>
> I apologize for only bringing this up now and for any inconvenience.
>
> Stef"
>
> "Hi Stef
>
> Understood, the international situation is all rather difficult!

> I am concerned that we have a CMC coming up that will require counsel to attend. We are liable for counsel's fees whether we get paid or not, and therefore our credit control keep a tight eye on invoices outstanding (as they don't want us to incur costs of counsel if we already have invoices outstanding). Let me speak internally and see what I can do.
>
> Kind regards.
>
> Ros"
>
> "I spoke to Amy just now. What we could do is pay all the disbursements + 20% VAT and then pay the balance in 2 weeks.
>
> Stef"

55. This arrangement was accepted by the Defendant, but evidently the payment promised by Mr Lambersy, to clear the entire balance of the 29 January bill, was never made.

56. I do not know, and have not tried to extract from the bundle, the full sequence of events that followed, although I note that on 12 May 2020 the Claimant wrote to the Defendant complaining that promised budgeting information for 2020 had not been forthcoming and proposing a change to a "value-based" charging system, along with other steps designed as part of a package of measures to address the detrimental effects upon the Claimant's business of the global pandemic.

57. In any event, I understand that the CFA was ultimately terminated by the Claimant. The terms of the CFA provided in that event for the Claimant to be liable to pay the Defendant for all work done under the CFA at its standard, non-discounted hourly rates, but the Defendant has not sought to recover its full standard rates. At the hearing before me, Mr Carpenter confirmed that the Defendant will not be seeking to do that, and so will not be rendering any further bills to the Claimant.

The Claimant's Case

58. The Solicitors Act 1974, at section 59(1), provides that:

> "...a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated."

59. Sections 60 and 61 of the 1974 Act make general provision for the effect and enforcement of contentious business agreements. Section 60(1) provides that the costs of a solicitor in any case where a CBA has been made shall not be subject to assessment.

60. This is subject to the provisions of other sections of the 1974 Act, including section 61. The pertinent provisions of section 61, for present purposes, give the court, if of the opinion that the CBA is in all respects fair and reasonable, the power to enforce it; or if

the court is of the opinion that the CBA is in any respect unfair or unreasonable, the power to set it aside and order the costs covered by it to be assessed as if it had never been made.

61. I should mention (as it has some bearing on the issues I have to consider) that section 61 also provides that where the agreement provides for remuneration by reference to an hourly rate, and the client is not alleging that it is unfair or unreasonable, the court may enquire into the number of hours worked by the solicitor and make a finding as to whether those hours are excessive.

62. The Claimant argues that (lack of consideration aside) the CFA fits squarely within the statutory definition of a CBA. This is not a case, as in *Chamberlain v Boodle & King* [1982] 1 WLR 1443 (which was decided before contentious business agreements by reference to hourly rates were permitted) of the CFA failing to show, as required if it is to be a CBA, all the terms of the bargain.

63. Direct authority for the proposition that (at least generally) a CFA is a contentious business agreement can be found in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 1 WLR 2487, at paragraph 93.

64. The Defendant relies upon clause 20.4 of the CFA, which provides that it is not a contentious business agreement, but, says the Claimant, such reliance is misplaced. If an agreement fulfils the requirements for a contentious business agreement set out in section 59 of the Act (as the CFA does), then the effect of s 59 is that it is a contentious business agreement.

65. Solicitors cannot contract out of the 1974 Act, or thereby seek to deprive clients of the protection that the Act provides: *Martin Boston & Co v Levy* [1982] 1 WLR 1434, at (in particular) 1440 F.

66. In oral submissions Mr Marven referred me to two important authorities. The first is *Street v Mountford* [1985] A.C. 809 and the famous dictum of Lord Templeman concerning the distinction between a lease and a licence:

> "Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

67. The second is *Wilson v The Specter Partnership* [2007] EWHC (Ch), [2007] 6 Costs LR 802. In *Wilson* Mr Justice Mann considered whether an agreement between solicitor and client was a CBA. He concluded it was not, but only after rejecting the approach of a district judge who had decided that it was not, because it did not describe itself as such. He also made some observations that demonstrate just how wide is the ambit of section 59(1) of the 1974 Act:

> "I turn therefore to the question of the district judge's decision as to whether the relevant agreement was indeed a CBA… His main reason is that it was not referred to anywhere as being a CBA. With respect, I do not think that that is necessarily relevant, and it is certainly not determinative. What matters is substance, not form. If the agreement fulfilled the criteria for a CBA then it would be one whether or not the parties labelled it as such. So far as it is part of his reasoning that the agreement does not indicate that…" *(the solicitor*) "…could be remunerated at a greater rate than normal, then that is both wrong and irrelevant. The agreement does provide for remuneration at a greater rate than normal in a difficult or complex case, and in any event it is a misreading of the section to suggest that such a departure from the norm is of the essence of a CBA. In referring to the possibility of a higher or lower charging rate than normal, what the section is doing is extending its ambit to include those cases, not confining its ambit to those cases".

68. As to whether the CFA was fair and reasonable, in *Re Stuart ex p Cathcart* [1893] 2 QB 201, 204-205 Lord Esher MR set out the appropriate test (applied in *Bolt Burdon Solicitors v Tariq* [2016] EWHC 811 (QB), [2016] 2 Cost LR 359):

> "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 which the solicitor has to do under the agreement, the Court are bound to say that the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner."

69. Here, says the Claimant, the CFA was manifestly unfair in the mode in which it was obtained and unreasonable in its terms.

70. As to the mode of obtaining the agreement, at the time when the CFA was proposed, the Claimant was already a client of the Defendant. By the time it came into effect, the Claimant had paid to the Defendant over £500,000 and the Defendant had become the Claimant's most highly paid, most important and most trusted legal adviser, whose recommendations were always followed.

71. On well-established principles, there was, at the time the CFA was signed, a fiduciary relationship between the Claimant and the Defendant (*Snell's Equity*, 34th edition, paragraph 7-004). Accordingly the Defendant was under a strict duty of loyalty to the Claimant. One aspect of that duty was that the Defendant was not permitted to put itself in a position where its duty to the Claimant and its own interest conflicted, (*Snell* paragraph 7-018). When the Defendant proposed the CFA, it did just that.

72. The requirement to avoid a conflict of interest, as imposed by fiduciary duty, can only cease to apply where the solicitor obtains the client's fully informed consent (*Snell* paragraph 7-019; *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2018] EWCA Civ 451, [2018] 1 WLR 5831, at paragraph 61). Informed consent must include "a full and fair exposition of the factors relevant" to the decision to be made (*MacDougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118, at paragraph 8).

73. Here, nothing close to fully informed consent was obtained. The requirement for fairness, including the requirement for informed consent, required at least adequate advice on the following matters.

74. A full explanation and analysis of the costs position was needed, including anticipated future costs. This was wholly lacking and that meant that the Claimant was not in a position to make an informed decision about any change in the costs arrangements between the parties. The Claimant complains in particular that at the time the CFA was signed, the Defendant had failed to provide adequate advice as to the desirability of a split trial arrangement that could have reduced costs payable by some £17 million.

75. Equally, a full explanation of all the alternatives available to the Claimant should have been given. If the retainer arrangements were to change, there were of course a whole range of options as to type and structure of future arrangements, and the level of charges to be applied, but none of this was discussed.

76. In circumstances where litigation was well under way and the Defendant had been operating on the terms set out in the retainer for a year, the Claimant should have been advised that the Defendant had no right, or alternatively that any asserted right was doubtful, to refuse to continue to act on those retainer terms. The Defendant had no 'good reason' to terminate the existing retainer (*Richard Buxton Solicitors v Mills-Owens* [2010] EWCA Civ 122, [2010] 1 WLR 1997 at paragraph 40), and if the Defendant had done so it would have been contrary to its professional obligations.

77. A full explanation of the effect of the CFA was needed, including the basis on which the so-called discounted and standard charges were set; the fact that the rates payable by the Claimant in any event actually increased immediately; the definition of success; and the justification for a definition which meant that a financial result ruinous to the Claimant would constitute success.

78. If the Claimant had been properly informed, it would obviously have been open to the Claimant to seek to negotiate both the structure and the level of charges under the CFA, as well as its other terms; or to contend that there should be no change at all to the pre-CFA arrangements.

79. Further, the Claimant submits, in at least one important respect the Defendant positively misrepresented the position when Ms Prince said that the effect of the CFA was that the Claimant would continue to pay the pre-CFA rates.

80. At the time the CFA was signed, the Claimant had been charged at pre-CFA rates for an entire year. Contrary to the suggestion in the original retainer letter there had been no attempt by the Defendant to change those rates after three months.

81. The CFA was, accordingly, wholly to the Defendant's advantage with no value at all to the Claimant. The post-CFA "discounted" rates invoiced by the Defendant and paid by the Claimant were about 11% higher than the pre-CFA rates.

82. On top of that, in the event of what was described as a successful outcome, further-increased hourly rates would be payable, plus "enhanced costs" (or "success fee") at a yet further increase of 20%.

83. That is why the Claimant argues that the CFA was not supported by consideration: the Claimant received nothing of value.

84. The Defendant was not entitled to sidestep its responsibilities by very cursory suggestions that the Claimant might obtain advice elsewhere. Ms Prince's suggestions were markedly unenthusiastic and, if anything, apt to deter the Claimant from that course of action, where the Claimant regarded the Defendant as its trusted legal adviser.

85. Far more forceful advice, as well as direction with respect to the need for independent external professional advice, was required, but even this would not have sufficed: it was at the least incumbent on the Defendant to ensure that the Claimant received the requisite advice on all these issues.

86. As for the reasonableness of the terms of the CFA, the Claimant submits that the matters to which I have just referred also bear on its unreasonableness. In particular it was unreasonable in the circumstances for the post-CFA rates, payable in any event, to represent an increase on (or even to be the same as) the pre-CFA rates that had been paid by the Claimant for one year before the CFA; and/or for there to be additional payment obligations on top of this in respect of the so-called standard hourly rates or enhanced costs. Moreover the level of these costs was unjustified and the definition of success was itself unreasonable.

87. Accordingly all costs under the CFA should be assessed as if the CFA had never been made (Mr Marven, understandably, did not pursue the Claimant's misconceived case to the effect that setting aside the CFA as an unfair or unreasonable CBA would allow the Claimant to escape responsibility for paying a reasonable sum for the work actually undertaken under the CFA).

Conclusions

88. Before I explain my conclusion on whether the CFA was a CBA, I will, on the premise that it was, address the questions of fairness and reasonableness.

89. One of the difficulties in analysing the Claimant's case in that respect is that issues of consideration, fairness and reasonableness are elided, so that for example a lack of consideration is cited as a ground for setting aside and (contrary to the principles of *Re Stuart ex p Cathcart*) the same arguments are advanced in support of the proposition that the "mode of obtaining" the CFA was unfair and its terms unreasonable. In coming to my conclusions, I have tried to untangle the threads as best I can.

Consideration, and whether the Claimant Gained any Benefit from the CFA

90. If the CFA were indeed void for want of consideration then, strictly speaking, whether it might properly be characterised as a CBA would be academic, as would considerations of fairness and reasonableness. It would not bind either party. The Claimant's case as presented, however, ties the issue into the question of whether (applying *Re Stuart ex p Cathcart*) the "mode of obtaining" it was fair. Either way I have to determine whether it did indeed, as the Claimant says, offer nothing to the Claimant and was wholly to the Defendant's advantage. It seems to me quite clear that such was not the case.

91. I start with Mr Lambersy's evidence on this issue. He says that he took Ms Prince's reference to discounted rates to be a mere "sales pitch". He seeks to justify that assumption, in a rather circular fashion, by the fact that the Defendant never charged the Claimant at its full rates. This is hard to reconcile with the fact that on signing the engagement letter, Mr Lambersy and his Co-President, on behalf of the Claimant, had agreed to pay the full rates.

92. Mr Lambersy was at the time a Co-President of the Claimant, which is described in its own documentation as providing services for debt securities from some of the largest and most reputable companies and financial institutions in the world, its senior management being experienced in the field of financial technology and mechanics.

93. Mr Lambersy himself, as Ms Prince describes him and as the evidence of his dealings with the Defendant (both in relation to retainer arrangements and the issues in the litigation) bears out, is an intelligent and sophisticated man, entirely capable of understanding complex legal documents. He is fluent in several languages. He is a senior executive in a highly successful US corporate entity operating in a lucrative specialist market, which has generated annual profits, between 2016 and 2018, of about 2 million US Dollars and which had instructed lawyers in several jurisdictions in connection with the matters that led to this litigation. He and his Co-President made a measured choice about the UK solicitors it wished to instruct for this litigation, making arrangements with another firm before reverting to the Defendant.

94. One has to ask, then, why Mr Lambersy would commit the Claimant, in writing, to pay hourly rates which he regarded as in some way not real, and why he evidently took seriously Ms Prince's reminder on 2 August 2019 that she was coming under pressure to raise rates that had only been agreed for an initial period: an obvious reference to the discount.

95. I would add that the Defendant's standard hourly rates appear unsurprising for a City of London firm instructed (entirely appropriately) to undertake litigation of this kind and on this scale. One may for example compare Ms Prince's standard hourly rate, under the CFA, of £755 per hour with the £750 allowed by Costs Judge Rowley between parties for a Grade A solicitor in *Shulman v Kolomoisky* [2020] EWHC B29 (Costs). Hourly rates payable on a contractual basis as between solicitor and client for cases of this kind may be significantly higher (like the Grade A rate of £940 claimed in *Shulman v Kolomoisky*).

96. In the course of choosing a UK solicitor to represent the Claimant in this litigation, one might expect Mr Lambersy to have gained some broad understanding of City of London commercial litigation charging rates.

97. Ms Prince's evidence confirms that the Claimant's standard rates were just that, and in this respect as in others I find her evidence to be more persuasive than that of Mr Lambersy.

98. I find it impossible to avoid the conclusion that contrary to what he now says, Mr Lambersy knew that the rates described by the Defendant as standard rates were true standard rates, and that the Claimant was receiving a substantial discount on them. He committed the Claimant to the CFA because he wanted the Claimant to continue receiving that substantial discount.

99. This takes me to the proposition that the Defendant was not actually entitled, in the event that the Claimant declined to enter into a CFA, to end the discount on its rates, advanced by the Claimant in support of its case to the effect that the CFA was unfair, unreasonable and void for lack of consideration.

100. The Claimant's case in this respect rests upon two premises that seem to me to be insupportable. The first is that, because the Defendant had not, as it was entitled to under the terms of the engagement letter of 8 August 2018, charged its full (as opposed to discounted) pre-CFA hourly rates from 8 November 2018, it was no longer entitled to do so by 12 August 2019, when the CFA was signed. (Hence Mr Marven's careful reference, in submissions, to "pre-CFA rates" rather than "discounted rates".)

101. Mr Marven offered no authority for that proposition, and I do not think that it can be right. Whether the Defendant, after three months had passed from the date of the engagement letter, continued to discount its hourly rates as an ex gratia gesture, from an unwillingness to press the issue or from mere oversight, seems to me to be immaterial. The Defendant could have started charging its standard hourly rates at any time after three months had elapsed.

102. As Mr Carpenter says, the Defendant's right to end the discount on hourly rates would have lapsed, if not exercised immediately after three months had passed, only if there were a clear contractual provision to that effect in the engagement letter. Unsurprisingly, there is none.

103. Similarly, I am unaware of any authority for the proposition that, not having raised its hourly rates from 1 May 2019 as provided for in the engagement letter, the Defendant was then precluded from raising them from, say, 1 August or 1 September 2019. If the Defendant (as it did) reserved in its retainer terms the right to increase its rates from 1 May 2019, then it would equally have had the right to raise them with effect from a later date.

104. As to what would have happened if the Claimant had rejected the CFA, the evidence of Ms Prince is unequivocal and unsurprising. She says that in that event the Defendant would, under the terms of the existing retainer, have reverted to the standard 2019 rates, possibly with a small discount, but not as much as 30%. Consistently with what the Claimant had been told from the outset the Claimant would, if it wished to continue to

instruct the Defendant, have been obliged under the terms of the retainer of 8 August 2018, to pay the hourly rates incorporated in the CFA, but without the 30% discount.

105. Hence Ms Prince's clear warning to Mr Lambersy, after waiting almost a month for him to respond to the draft CFA, that she was coming under pressure to raise hourly rates which the Defendant had only agreed to discount for an initial period.

106. For that reason Mr Marven's reference to *Richard Buxton Solicitors v Mills-Owens* seems to me to be beside the point. The Defendant was not proposing to end the retainer put in place by the engagement letter of 8 August 2018: it was a matter for the Claimant whether it chose to do so, whether it found the terms of the CFA more attractive, or for that matter if it chose to go elsewhere. If the Claimant did not choose to enter into the CFA, then the Defendant would have continued under the existing retainer.

107. There was no obligation on the Defendant, as Mr Marven suggests, to offer a wider range of retainer options, or to advise upon retainer options that were not on offer. That is not part of the Claimant's case, there is no authority for that and professional standards do not require it. In a situation where both parties had understood from the outset that the choices acceptable to the Defendant were a private retainer or a CFA, it would have been entirely redundant. Notably Mr Marven offered no specific alternatives other than an indefinitely extended discount arrangement to which, for the reasons I have given, the Claimant had no right.

108. It is illustrative of difficulties raised by this argument that I find myself uncertain whether it is suggested that it would have been incumbent on the Defendant to explain the meaning of clause 20.4 (providing that the CBA is not a CBA). As I have said, that is not part of the Claimant's case: Mr Lambersy does not make that assertion.

109. In any case, I do not think it can have been. Clause 20.4 is a very standard provision (I believe that it may have been introduced to the Law Society's model CFA in response to *Hollins and Russell*). The Defendant evidently did not intend to offer a CBA to the Claimant, and an explanation of the Claimant's rights to challenge the Defendant's costs on a non-CBA basis had already been given.

110. In any case, if as the Claimant argues clause 20.4 is ineffective, any failure to advise upon it would be immaterial, and if it is effective, then the section 61 criteria do not apply.

111. In conclusion, as Ms Prince says, the benefit to the Claimant upon entering into the CFA was quite plainly that it continued to receive a 30% discount on the Defendant's standard hourly rates. The hourly rates charged under the CFA offer no basis for any conclusion to the effect that it was unfair (or for that matter unreasonable).

The Definition of Success

112. The Claimant complains that the CFA's definition of "success" was effectively any payment made by the Claimant which was not more than £3,950,000. This amount was, says the Claimant, more than three times its net worth. By that definition of 'success', if the Claimant was placed into liquidation because of a judgment debt to SKAT, the Defendant would be entitled to an uplift on its fees.

113. This argument is presented as pertinent to both the fairness and reasonableness of the CFA, whereas as I have observed, it must be one or the other. As Mr Carpenter said, given that it focuses on a provision of the CFA, it must go to reasonableness. In my view, it fails to establish that the CFA is unreasonable, and insofar as it might have been permissible to extend it to fairness it would also fail.

114. That is first because, as Mr Carpenter submits, one does not look at one provision in isolation. One must look at the agreement as a whole. The success fee is part of a larger document which has advantages and disadvantages for both parties. What is now described by Mr Lambersy, in evidence, as a "ludicrous" definition of success was part of an overall arrangement the terms of which he observed, on 7 August 2019, "make sense and are in line with what we discussed".

115. This change of view, from a person who would have been a better position to understand the Claimant's financial affairs than Ms Prince, goes unexplained. The CFA was clearly up for negotiation and Mr Lambersy, for example, sought a cap on the fees, but he did not query the definition of success.

116. It seems to me that there could only be two explanations for this: either Mr Lambersy took the view, in August 2019, that the Claimant could raise £3,950,000 if it needed to, or he was prepared to commit the Claimant to pay to the Defendant, in at least some circumstances, fees which (he now says) it could not possibly afford.

117. Neither of these propositions offers any basis for concluding either that the conduct of the Defendant in proposing and agreeing the CFA was unfair, or that the success provisions of the CFA were themselves unreasonable.

118. In any case, Mr Lambersy's evidence on what the Claimant can and cannot afford is patently incomplete. He says that in the latest accounts filed in the United Kingdom by the Claimant, total turnover came to £995,688 and it had no more than 8 employees.

119. This clearly refers to the Claimant's UK branch alone. According to extracts from the Claimant's website the Claimant employs (by Ms Prince's count) 25 people, 8 of them (by my count) in London. Similarly, the reference to a turnover of £995,688 appears to be a reference to a set of unaudited accounts for the year ending 31 December 2018 (filed in September 2020) in which the Claimant's "UK branch" is described as having a turnover of US $1,329,014. The turnover of the Claimant itself is shown as more than five times that amount.

120. Even if the UK branch of the Claimant were a subsidiary of a larger parent corporation in the US, which it clearly is not, the figures offered by Mr Lambersy would not present a complete and reliable picture of the Claimant's financial position.

121. Ms Prince confirms that, as the CFA explained, the figure of £3,954,124 within the definition of a "Successful Outcome" was the sterling equivalent of €4,408,517 at the date of the CFA. That in turn was based upon SKAT's claim, in the alternative to £430 million, for restitution of fees received by the Claimant as a result of the allegedly fraudulent transactions. The figure, derived (as Ms Prince recalls) from a spreadsheet which Mr Lambersy sent to the Defendant in May 2019, is slightly lower than the figure given by the Claimant in the course of the SKAT proceedings, because it included only fees from the main alleged fraud defendant, as opposed to all sources.

122. I can see the point of that. On the evidence, both parties understood from the outset that the Claimant wished as soon as possible to extract itself from potentially ruinous litigation in which it was being sued for £430 million. It is accepted by both parties that the Claimant could not afford to pay that. The proposal that the Claimant would pay a 20% success fee for an early escape from the litigation at less than 1% of that sum, and with an attendant saving on legal costs over the coming years, does not seem to me to be remotely unreasonable.

123. Nor can I see no good reason why Ms Prince might have supposed that a corporation that had been generating annual profits of 2 million US dollars could not raise the sum of £3,954,124. I accept her evidence to the effect that the Claimant presented itself as a highly successful business at the top of its field, which nonetheless could not afford to pay £430 million. At the very least, she might reasonably have left it to her client to say so if payment of £3,954,124 (and, by necessary implication, any success fee) would not be possible.

124. In summary, I can find no basis for finding the success fee to be unreasonable (or, if it were open to the Claimant to put its case on those terms, for finding it to be unfair) by reference to the success fee provisions.

Independent Advice

125. The Claimant's complaint that the Defendant did not do enough to ensure that the Claimant had the opportunity to obtain independent legal advice seems to me to go to the question of whether the CFA was fair, meaning whether (*Re Stuart ex p Cathcart*) the "mode of obtaining" it was fair.

126. To be precise, the Claimant's case as put in the Amended Particulars of Claim is that the Defendant obtained through the CFA a financial advantage over the Claimant, as a result of which the Defendant was under an obligation to advise the Claimant to seek independent legal advice, given the conflict of interest that arose or was likely to arise: and that Ms Prince's two suggestions on 5 July 2019 fell short of a clear direction to seek independent legal advice.

127. Having heard submissions on fiduciary duty, before I address the facts of the case I should explain certain conclusions that I have reached on the applicable principles. The first is that I bear in mind Mr Carpenter's warning that the tests to be applied are fairness and reasonableness, and we have the guidance of *Re Stuart ex p Cathcart* on how those tests are to be applied. One must avoid imposing a gloss on that guidance.

128. I have concluded that questions of informed consent or breach of fiduciary duty may well be relevant on reaching a conclusion as to whether a CBA is unfair. One must however not lose sight of the fact that the issues are fairness and reasonableness, or of the *Re Stuart ex p Cathcart* guidance on how those issues are to be determined. Informed consent and breach of fiduciary duty are distinct concepts. So, for example, in considering breach of fiduciary duty, the fairness or otherwise of a given transaction is generally not a relevant consideration (*Snell,* at 7-018). It follows that any breach of fiduciary duty cannot be determinative of the issue of fairness.

129. The second is this. It is common ground, in this case, that by August 2019, the Defendant as solicitor owed fiduciary duties to the Claimant as its client. I would,

accordingly, accept Mr Marven's argument to the effect that, insofar as negotiating and entering into the CFA at that point represented a potential conflict of interest between the Claimant and the Defendant, then any breach of fiduciary duty on the Defendant's part could be avoided by ensuring the Claimant's fully informed consent to the new retainer arrangements.

130. What I do not accept was that that, of necessity, required that the Defendant advise the Claimant to take independent advice, much less that the Defendant insist upon the Claimant doing so. That is the case notwithstanding that a fiduciary relationship did exist. In explaining that conclusion I will focus on those cases where a solicitor/client relationship already existed, although the fact that there was no suggestion of any need for independent advice in *MacDougall v Boote Edgar Esterkin,* and a positive finding in *Bolt Burdon Solicitors v Tariq* that there was no such requirement, does seem to me to be relevant.

131. In *Surrey v Barnet and Chase Farm Hospitals NHS Trust* the Court of Appeal had to determine whether additional liabilities incurred by three claimants who had been persuaded by their solicitors to substitute a CFA for legal aid funding, had been reasonably incurred. The Court concluded that they had not, because the advice given to the claimants had exaggerated (and in two cases misrepresented) the disadvantages of remaining with legal aid funding, and had omitted entirely any mention of the disadvantages of entering into a CFA.

132. In addition, the solicitors benefited from the CFA in earning a success fee that would not have been earned had legal aid funding continued. Lewison LJ accepted (as had the District Judge at first instance) that where one of two or more options available to a client is more financially beneficial to the solicitor, there is a particular need for transparency. It was in that context that Lewison LJ referred (at paragraph 61) to the

> "…fundamental principle of equity that where a person stands in a fiduciary relationship to another, the fiduciary is not permitted to retain a profit derived from that fiduciary relationship without the fully informed consent of the other…"

133. What Lewison LJ did not say, and what (to the best of my knowledge) has never been suggested in any of a clutch of similar cases concerning changes of funding from legal aid to CFAs, is that independent legal advice is a prerequisite to informed consent. The obligation upon the solicitor is rather to ensure that the client is fully and properly advised. Referring the client to an independent advisor may be one way of achieving that, but it does not follow that an absence of independent advice equates to an absence of informed consent.

134. Ms Prince did point out to Mr Lambersy that the Claimant could take independent advice. Mr Lambersy says this about her suggestion:

> "Given our close working relation with SH, and the presumption of trust, SH's words could have been read to convey a subtle sub-text -- a subliminal message which would have reduced the likelihood that we would seek outside independent legal review of the CFA…

> 'It is of course up to you if you want' (I took this to mean: [If you (Acupay) don't trust me (SH))]
>
> 'If you want to seek independent legal advice on the terms of the CFA' (I took this to mean: [please go to another lawyer and seek their advice, if you wish, but if you do, you will be messing with our relationship and questioning our ability to act in your best interests])…"

135. As with discounted rates, Mr Lambersy takes upon himself here to impose his own meaning on Ms Prince's words, turning her suggestion that the Claimant had the option to take independent advice, into some form of pressure not to do so. That is notwithstanding that Ms Prince had stated on 5 July 2019 that the Claimant could not advise the Defendant upon the terms of any agreement between them. The use of the words "could have been read" is also quite telling. Mr Lambersy is, after the event, putting a spin on Ms Prince's words. In my view they do not stand to be interpreted as Mr Lambersy says, and I cannot accept that he did interpret them in that way.

136. Nor does Mr Lambersy offer any evidence as to what the Claimant would have done if it were not, as he alleges, discouraged from taking independent legal advice. In fact he does not seem to say in plain terms that the Claimant did not seek independent advice: he says rather that had it been clearly explained that the Defendant could not advise on a contract to which it was a party (which, in fact, Ms Prince did) and the purported CFA reviewed independently, no lawyer would have advised to enter into such a one-sided agreement.

137. I have already stated my reasons for concluding that the agreement was not one-sided. I do not know, for example, whether Mr Lambersy spoke to Mr Doobay, as Ms Prince recommended, about any implications the CFA might have had for the criminal proceedings, or whether that led to any broader discussion about the terms of the CFA, or what Mr Doobay had to say about independent advice. Given the way in which Lambersy has presented his advice generally, I not sure that he has presented a complete picture.

138. In any event my conclusion, on the available evidence, is that the Defendant reminded the Claimant that it could take independent advice, but that the Claimant did not do so because Mr Lambersy, being aware of that option, chose not to.

Full and Fair Exposition

139. This takes me first, to the extent to which the CFA benefited the Defendant and second, the extent to which the information provided by the Defendant represented a full and fair exposition of the relevant factors, as far as the CFA was concerned.

140. Self-evidently there were advantages and disadvantages to each of the parties in entering into the CFA. As I have observed, and as one might expect, it represented a balance of the parties' interests. The Claimant continued to pay on the basis of heavily discounted hourly rates, when otherwise that discount would have ended. The Defendant continued to accept a 30% discount on its hourly rates in return for the prospect of receiving its standard rates, and a 20% success fee on its standard rates in the event of the ideal outcome of early success. It was not a one-sided transaction, and it was manifestly not to the exclusive advantage of the Defendant.

141. With regard to the information provided to the Claimant by the Defendant, the general structure of a proposed CFA, consistent with the CFA eventually entered into, was put to the Claimant on 28 July 2018. A more detailed, updated summary was provided by Ms Prince on 5 July 2019, together with a draft of the proposed agreement and her suggestion that the Claimant might wish to take independent advice.

142. Mr Lambersy, by reference to the rises on hourly rates and Ms Prince's email of 5 July 2019 (with its reference to the Claimant's continuing to pay the same hourly rates) says that the Claimant was misled and confused by the change in rates at or around the same time that the CFA was entered into.

143. As I have observed, Ms Prince's email could only be misleading if read in isolation, and it was not intended to be read in isolation. All that Mr Lambersy had to do, in order to understand the CFA's provisions for hourly charges, was to read it in full, as Ms Prince not only asked him to do but emphasised the importance of doing. He had over a month to do that then between receiving the draft CFA and signing the finalised version, and it is clear that Ms Prince was available and ready at all times to discuss its terms and answer any queries that Mr Lambersy might have.

144. It would follow that if Mr Lambersy was confused and unclear about the terms of the CFA, it was not through any fault of Ms Prince. In fact I am unable to accept that Mr Lambersy was in any way actually confused or misled. Again, the wording of his statement is telling in this respect because he does not say so: he says rather that "Acupay" was confused and misled, which reads more as a statement of case than as a statement of fact.

145. In any event I do not find it credible that Mr Lambersy could himself have been confused or misled first because he appears to have done what Ms Prince asked him to do, by reading the CFA in detail and raising any queries that he had; and second, because, the day after the CFA was signed, the increased hourly rates were specifically brought to his attention (for the second time) and he had nothing to say about them.

146. This can be contrasted with the complaints now made in Mr Lambersy's evidence about the hourly rates in the CFA. He complains that the rates actually paid by the Claimant went up rather than down, notwithstanding that it was never proposed that they would go down.

147. Mr Lambersy also complains that the rates chargeable for Ms Prince and one assistant, Ms Usorova, went up by between 11%, and 12%, but that is consistent with the terms of the engagement letter of 8 August 2018, which provided for individual fee earner rates to increase with seniority. I have already pointed out that Ms Prince's CFA rate can be compared with that allowed by Costs Judge Rowley between the parties in *Shulman v Kolomoisky*. Ms Usorova was not, as alleged by the Claimant, one of the "two highest fee earners" but a Grade C fee earner, whose CFA hourly rate of £388.50 can, again, be compared with the £400 per hour allowed by Costs Judge Rowley for grade C fee earners.

148. In fact the overall range of charges (depending upon seniority) is broadly comparable with those in the engagement letter of 8 August 2018, and, as with the engagement letter itself, seem to me to be appropriate to the nature of the work. Notably the highest hourly rate chargeable in the engagement letter was £800, whereas the highest hourly rate

specified in at the CFA of 12 August 2019 was £755, and Ms Lewis's hourly rate increased by only 3.2%. The picture presented by Mr Lambersy is a distorted one.

149. Again, these hourly rates were a part of an overall contractual arrangement described at the time by Mr Lambersy as making sense and in line with what the parties are discussed. Against that, the belated outrage now expressed by the Claimant at the rise in fees is, to my mind, artificial: I bear in mind that on the evidence, the Claimant stopped paying the Defendant's bills not because it was dissatisfied with either the Defendant's work or its charges, but because, following the impact of the pandemic on its business in early 2020, it was having difficulty in doing so.

150. It seems to me that if one is realistic, the Defendant could not have done more to ensure that the Claimant was properly informed as to the CFA's terms, and one loosely worded email does not change that. In fact, the Defendant acted at all times consistently with the position it had put to the Claimant both before the signing of the retainer letter and when the retainer letter was signed. The only way in which it acted inconsistently with its retainer was in charging the Claimant less than it could have done. It is, in my view, remarkable that the Claimant has relied upon that in advancing a case to the effect that the Defendant acted unfairly and unreasonably.

151. This takes me back to the question of independent advice. Ms Prince did her reasonable best to ensure that the Claimant was given a full and fair exposition of the CFA's terms. She also pointed out (properly, in my view) that the Claimant had the option of taking independent advice and (rightly, in my view) that that was a matter for the Claimant. I do not believe that it was incumbent on the Defendant to do more.

Costs Estimates

152. I come to Mr Lambersy's evidence to the effect that at the time of signing the CFA, the Claimant had been inadequately advised by the Defendant in relation to the prospective cost of the litigation. I have said that I do not think that it could be right to make any finding against the Defendant based on the Claimant's one-sided evidence on this issue, but also that in any event I do not believe that the Claimant's evidence actually makes out any case against the Defendant. These are my reasons for saying that.

153. Mr Lambersy's evidence focuses on a split trial proposal made by SKAT. On 10 June 2019, SKAT's solicitors had proposed, as an efficient and cost-effective way of managing the proceedings, a split trial arrangement. Their proposal was to stay the proceedings against the non-fraud defendants until the final disposal of the proceedings against the alleged fraud defendants. They estimated that a trial against the alleged fraud defendants alone would take 25 weeks, and against all the defendants twice that. They suggested that this arrangement could minimise duplication of costs, bring forward the listing of the trial against the alleged fraud defendants and save court time.

154. This proposal was discussed with Counsel, and the conclusion was that this arrangement should not be agreed. The reasoning behind that conclusion was set out in a letter to SKAT's solicitors dated 19 July 2019. To summarise a fairly detailed response, the key point was that the proposed arrangement was unworkable and unfair to the non-fraud defendants, who would (given that the case against them rested upon the transactions they had facilitated being fraudulent) end up having to participate in two major trials rather than one. This was a view shared by solicitors for other non-

fraud defendants, who expressed the view that the proposed arrangement was not only unworkable but would be likely to expose their clients to more costs, rather than less, as well as to unacceptable delay.

155. The Claimant has instructed a costs lawyer to prepare costs budgets for a full 50-week trial, as opposed to a three-week trial for the non-fraud defendants, and complains that the Defendant's approach would cost them an additional £17 million, along with the advantages attendant on a deferring costs for several years. Mr Lambersy says that the Claimant could not afford a 50-week trial. Had he been properly advised at the time with this sort of detailed cost information, he says, he would have accepted SKAT's proposal.

156. The point being made in June 2018 by the Defendant, along with solicitors for other non-fraud parties, was however that the proposal offered by SKAT was not actually going to save the non-fraud defendants any money, and was likely in fact cost them more. That did not require, as Mr Lambersy suggests, a detailed breakdown of comparative trial costs. A simplistic comparison between the costs of a 50-week trial and a three-week trial does not begin to address the real issues.

157. As for Mr Lambersy's complaint that the Defendant "simply went with the flow of argument", that does not seem to me to have been the case at all. The apparent consensus of opinion between non-fraud defendants, if anything, tends to indicate that the Defendant's conclusions were correct, or at the very least well within the bounds of reasonable opinion. In November 2019, following months of interparty discussions, the Defendant did recommend, in conjunction with counsel and other solicitors for non-fraud defendants represented by nine firms of solicitors, an alternative split trial arrangement (liability and then quantum) which was thought more likely to save costs for the non-fraud defendants.

158. Mr Lambersy says nothing about how SKAT's proposed arrangement could have been agreed between SKAT and the Claimant while the wider body of non-fraud dependents remained, apparently for sound reasons, resolutely opposed to it. The trial structure was never going to be based around what one of 95 defendants could afford to pay its legal representatives.

159. I appreciate that professional standards require that a solicitor managing contentious business provide a client with the best possible information on present and future costs on a continuing basis. As far as I can see, the Defendant, which in January 2019 produced a quite comprehensive estimate of costs for the coming year (and, to some extent, beyond) did as much as one could reasonably expect at that stage to forecast the forthcoming costs of litigation that, by its nature, was replete with uncertainties.

160. Mr Marven argues that this estimate should have been updated to take into account the effect of the CFA. Mr Lambersy, however, does not. He says only that the Claimant was not given sufficient information to make an informed choice about SKAT's split trail proposal (which, for the reasons I have given, I do not accept) and that a lack of adequate costs information left the Claimant venturing into the unknown, with no costs-based strategy or costs-based leadership from the Defendant as to how the Claimant might best extract itself from the litigation.

161. What Mr Lambersy does not say (apart from how that might have been achieved) is that the Claimant did not have sufficient costs information to make an informed choice about entering into the CFA. Given the uncertainties prevailing in August 2019, when there was no clear consensus about how the litigation should be managed, it is difficult to see how a revised costs estimate (which would, like the January estimate, necessarily have been subject to very many assumptions and provisos) could have helped in that respect, and Mr Lambersy offers no evidence to support the proposition that it would have done.

162. Nothing in the Claimant's evidence about estimates, even on the necessarily one-sided basis that I have had to consider it, seems to me to offer any basis for a conclusion that the CFA was either unfair or unreasonable.

Unfairness and Unreasonableness: Summary

163. Mr Marven has reminded me that in *Re Stuart ex p Cathcart* Lord Esher MR put the onus on a solicitor to satisfy the court that a CBA is fair and reasonable. I am satisfied that the CFA, if it was a CBA, was both. Lord Esher said that where a solicitor makes an agreement with a client who fully understands and appreciates that agreement, that satisfies the requirement as to fairness. Such was the case here. I do not accept that the pre-existing solicitor-client relationship imposed any obligation on the Defendant that was not properly met. As for reasonableness, it seems to me that the CFA, judged properly as a whole, is an entirely reasonable agreement.

164. The Claimant's case to the contrary is based on evidence that I regard as too incomplete, unreliable and one-sided to be reliable, and upon arguments that do not seem to me to bear real examination.

Whether the CFA is a CBA

165. I have already expressed my conclusions to the effect that, if it were a CBA, the CFA was neither unfair nor unreasonable. It would follow that if it were a CBA, the Defendant could hold the Claimant to its terms by charging its standard hourly rates. However the Defendant's case is that it is not a CBA and the Defendant does not intend to charge more than the discounted rates. In consequence, my conclusion as to whether the CFA is in fact a CBA may be somewhat academic for present purposes. Nonetheless, it is one of the issues that I am required, under the terms of the consent order, to address.

166. I start with the observation that the prescribed effect of a CBA is to limit a client's statutory right to challenge a solicitor's costs. Even where the CBA provides for payment by the hour, the client can challenge only the hours worked; an hourly rate that might otherwise be judged irrecoverable will be beyond challenge if the CBA is fair and reasonable.

167. This could have significant disadvantages for a client. For example, a perfectly fair and reasonable Non-Contentious Business Agreement, in *Bolt Burdon Solicitors v Tariq*, allowed a solicitor to be paid £821,045.06 for work to the value of £50,000. Mr Tariq, by virtue of entering into the agreement, had sacrificed the statutory right to a detailed assessment which would probably have limited the solicitor's remuneration to the lower amount.

168. I do not suggest that a CBA will always be to a solicitor's advantage. At the very least, however, one would hope that the parties to a contract of retainer would be free, as Mr Carpenter submits, to choose which of the two mutually exclusive statutory regimes offered by section 59(1) and section 70 of the 1974 Act will apply.

169. The logical conclusion to be drawn from the Claimant's submissions is that any contract of retainer that is sufficiently certain and meets the very wide criteria provided for by section 59(1) will be a CBA, even if the agreement purports to choose the section 70 regime, and to preserve the client's full rights to challenge bills, by saying that it is not. The client's rights to challenge the solicitor's costs will be at best limited and at worst non-existent unless the agreement is unfair or unreasonable. Whether the parties want that, or agree it, is irrelevant. That is not, on its face, an attractive proposition.

170. Mr Marven has attempted to meet that concern by suggesting that where an agreement says that it is not a CBA, a client could prevent a solicitor from executing a later U-turn and insisting that, by virtue of meeting the section 59 criteria, it is. He has also (in the course of other submissions) offered an example of how the CBA regime might benefit a client by arguing that if the CFA in this case were to be set aside, then the consequence would be that all costs rendered by the Defendant pursuant to the CFA would fall to be assessed, even if the time limits prescribed by section 70 have expired.

171. I tend to agree that a solicitor who enters into an agreement with a client that says it is not a CBA would be in some difficulty in subsequently attempting to gain an advantage over the client by saying that it is. Surely, however, the same must apply in reverse. Either the wording of the agreement binds both parties, or it binds neither of them. If anything, this argument militates against the Claimant's attempt to gain an advantage in this particular case by characterising the CFA as a CBA, when it has agreed that it is not.

172. It would seem to follow that, on the Claimant's case, in very many contentious retainers a solicitor and client could ensure that they choose the section 70 regime over the CBA regime only by avoiding a written retainer or making its terms sufficiently uncertain.

173. Again, that does not seem to me to be an attractive conclusion. As a matter of policy, to ensure that professional standards are met and in the interests of clients generally, it is plainly desirable to ensure first that retainers are in writing, and second that the terms of those retainers are as clear and certain as possible.

174. I appreciate, as Mr Marven says, that if that is the effect of section 59(1) then that is its effect, whether the consequences are attractive or not. I do not think, however, that it is.

175. I agree (in fact it is not in issue) that the terms of the CFA are consistent with its being a CBA, with the notable exception of an express provision to the effect that it is not. I have, accordingly, given much thought to whether I am bound, following *Wilson v The Specter Partnership*, to reach the conclusion that it is a CBA, because the fact that it incorporates a provision to the effect that it is not a CBA is not determinative, or even relevant.

176. I have concluded that I am not so bound. Mann J's finding appears to me to have been that the mere fact that an agreement does not say that it is a CBA does not prevent it

from being a CBA. He did not address the question of whether it is a CBA even if it says in express terms that it is not. (Nor, for that matter, did the Court of Appeal in *Hollins v Russell*). In *Healys LLP v Partridge* [2019] Costs LR 1515 Kelyn Bacon QC (as she then was) was clearly open to the conclusion that a specific provision to the effect that a CFA is not a CBA could be determinative, although she did not have to decide the point.

177. It seems to me that the provisions of section 59(1) of the 1974 Act are permissive, rather than prescriptive. A solicitor is at liberty to make an agreement in writing with a client which will qualify as a CBA. Section 59(1) provides that it may take many forms; in fact just about any renumeration arrangement seems to be covered, subject to certain exceptions of policy provided for in section 59(2) and elsewhere.

178. It does not seem to me necessarily to follow that any written agreement providing for remuneration within the wide range of options provided for by section 59(1) must be a CBA, even if the agreement says that it is not. Section 59(1) does not say that, and I see no basis for importing those words into it.

179. It is not in dispute that a party cannot contract out of the provisions of the 1974 Act. However, as Mr Carpenter says, that is not the issue. The issue is whether the parties have agreed to be bound by one or other of two mutually exclusive costs regimes provided for by the 1974 Act. To decide that, one must look to the terms of the agreement. A provision to the effect that the agreement is not a CFA will not merely be a matter of form. It will go to the substance of the agreement.

180. As for *Street v Mountford*, as I understand it the point addressed was that if an agreement for the occupation of property meets certain criteria then it must, in law, be a tenancy. Describing it as a licence will not change that. The same principle would apply if section 59(1) specified that every agreement that falls within the permitted arrangements for a CBA must be a CBA, but as I have observed the section does not say that.

181. As Mr Carpenter says, the characteristics that may make a solicitor's contract of retainer a CBA can also be characteristics of a non-CBA retainer. A clear statement of the party's intentions may be the only sensible basis on which one can distinguish one from the other.

182. For those reasons, my conclusion is that the CFA is not a CBA.

The Consequences of this Judgment

183. The Claimant has applied under CPR Part 8 for the detailed assessment of five bills. That application remains before the court. As I understand it, the application is unopposed subject to the condition that there is some payment on account against outstanding costs. It would seem that the next step will be to determine that. To that end, the matter should now be listed for directions.

184. I do wish to make some further observations, strictly subject to submissions. They are intended to assist the parties: other than as to the issues I have, by virtue of the consent order, been required to decide, I have drawn no final conclusions.

185. The Claimant evidently prepared this case itself, without external advice, in the hope of avoiding any liability to pay anything at all under the CFA by having it set aside. That was always a misconception. If it had been set aside, the work undertaken under the CFA would have been assessed as if it had never been made.

186. Whether that would have resulted in a desirable outcome, from the Claimant's point of view, may be questionable. Even if, as Mr Marven submits, all bills rendered under the CFA would have been open to detailed assessment, whenever rendered and paid, it seems likely that on the assessment of its costs as if the CFA had never been made, the Defendant would have been entitled to fall back upon the original contract of retainer. Even if that were not the case, as I have observed the hourly rates actually agreed by the Defendant seem very much in line with what has been allowed on detailed assessment between parties in cases of this kind, and the Claimant has already received a substantial discount on those rates.

Summary of Conclusions

187. If the Conditional Fee Agreement ("the CFA") signed on 12 August 2019 was a Contentious Business Agreement ("CBA"), then it was neither unfair nor unreasonable and it would not have been appropriate to set it aside.

188. I have concluded however that the CFA was not a CBA. That is because it says expressly that it is not. In my view the parties were free to choose whether the provisions of the CFA should be governed by the provisions of section 59(1) of the Solicitors Act 1974, or the separate statutory regime provided for by section 70. I regard both parties as bound by their agreement in that respect.

189. The next step in this case is for the Claimant's application for detailed assessment of five of the Defendant's bills to proceed under section 70 of the 1974 Act.