Neutral Citation Number : [2023] EWHC 3261 (SCCO)
Case No: CR-2016-005543
& CR-2016-005544
SCCO Ref: SC-2022-APP-001089

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

The Royal Courts of Justice, Strand
London, WC2A 2LL

Date: 20/11/2023

Before :

COSTS JUDGE NAGALINGAM

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Between :

Candey Limited	**Claimant**
- and –	
Mr Stephen Finnan	**Defendant**

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David Juckes (instructed by **Candey Limited**) for the **Claimant**
Mr Stephen Finnan (acting as **litigant in person**) for the **Defendant**

Hearing dates: 21/07/2023

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Approved Judgment

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

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COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

Background

1. This judgment follows my order, dated 3 January 2023, that "There be a preliminary issue hearing to decide the validity, enforceability and effect of the agreement between the parties for the Claimant to act on behalf of the Defendant, with a time estimate of 1 day. A further 1 day hearing will be listed, if so required, depending on the outcome of the preliminary issue hearing."

2. Witness evidence has been served in support of each party's position, as well as reference made to witness statements produced during the course of the underlying litigation in which the Claimant acted for the Defendant.

3. At the preliminary issue hearing the parties were afforded the opportunity to engage in the cross examination of Mr Stephen Finnan and the Claimant's representative, Mr Andrew Dunn. Unfortunately, there was insufficient time remaining to hear the parties' submissions and a further hearing was listed for that purpose.

4. References to Mr Finnan in this judgment are to Mr Stephen Finnan, the Defendant (in these proceedings) and otherwise the Claimant's former client. The underlying proceedings were against Mr Finnan's brother, Sean.

The Claimant's Application

5. The application before me is brought by the Claimant, pursuant to section 61 of the Solicitors Act 1974, which provides for the enforcement of contentious business agreements. The application concerns an agreement dated 6 March 2018 and is said, by the Claimant, to be a conditional fee agreement (hereinafter referred to as a CFA).

6. The Defendant argues that the CFA is invalid and/or unenforceable. In the alternative the Defendant argues that the conditions triggering payment of fees have not been met.

7. The Claimant submits that the Defendant's arguments are without merit, that the terms of the CFA should now be enforced, or in the alternative directions for a detailed assessment of its fees should be given.

Section 61 of the Solicitors Act 1974

8. Section 61 (Enforcement of contentious business agreements) provides the court with a wide discretion and states:

"(1) No action shall be brought on any contentious business agreement, but on the application of any person who—

(a) is a party to the agreement or the representative of such a party; or

(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under subsection (1), the court—

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;

(c) in any case, may make such order as to the costs of the application as it thinks fit.

(3) If the business covered by a contentious business agreement (not being an agreement to which section 62 applies) is business done, or to be done, in any action, a client who is a party to the agreement may make application to a costs officer of the court for the agreement to be examined.

(4) A costs officer before whom an agreement is laid under subsection (3) shall examine it and may either allow it, or, if he is of the opinion that the agreement is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.

[(4A) Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.

(4B) If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

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

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

(5) Where the amount agreed under any contentious business agreement is paid by or on behalf of the client or by any person entitled to do so, the person making the payment may at any time within twelve months from the date of payment, or within such further time as appears to the court to be reasonable, apply to the court, and, if it appears to the court that the special circumstances of the case require it to be re–opened, the court may, on such terms as may be just, re–open it and order the costs covered by the agreement to be assessed and the whole or any part of the amount received by the solicitor to be repaid by him.

(6) In this section and in sections 62 and 63 "the court" means—

(a) in relation to an agreement under which any business has been done in any court having jurisdiction to enforce and set aside agreements, any such court in which any of that business has been done;

(b) in relation to an agreement under which no business has been done in any such court, and under which more than £50 is payable, the High Court;

(c) in relation to an agreement under which no business has been done in any such court and under which not more than £50 is payable, the county court which would, but for the provisions of subsection (1) prohibiting the bringing of an action on the agreement, have had jurisdiction in any action on it; and for the avoidance of doubt it is hereby declared that in paragraph (a) "court having jurisdiction to enforce and set aside agreements" includes the county court."

Mr Finnan's opening submissions:

9. Mr Finnan confirmed that he maintains his submissions as per his skeleton argument dated 9 June 2023, as now supplemented by his revised skeleton argument dated 20 July 2023.

10. With reference to the CFA clauses, Mr Finnan submits that the Claimant is in effect severing the CFA by electing not to enforce clause 3. He thereafter questions how can the court consider the reasonableness of the CFA if the CFA has been severed?

11. Mr Finnan additionally observed that if this matter were to proceed to a detailed assessment, he and the court would need to know the hourly rates being charged and at this stage that wasn't clear. In this regard, Mr Finnan refers to the fact the CFA refers to a lower and upper bracket of hourly rates without stating a full range of rates by reference to experience in-between.

12. Mr Finnan also cited apparent discrepancies with the rate applicable to Mr Dunn. This is on the basis that, under cross examination, Mr Dunn stated that that his rate in the underlying action would have been £700/hour (where claimed on an hourly rates basis), and that where a rate of £600/hour was referenced in the filed budget that was in error. Mr Dunn had further explained that the reason the statement of costs for this hearing refers to £600/hr is by voluntary reduction, in recognising that this costs dispute is not as complex as the underlying matter in which the Claimant acted for the Defendant.

13. Mr Finnan made specific reference to paragraph 19 of his 2nd skeleton argument, which in many ways encapsulates my own concerns as to why this particular line of argument has been pursued by the Defendant. It is worth setting out in full:

"*19. For the avoidance of doubt, the Defendant believes the application in any event should be dismissed as it does not clarify the exact sum the Claimant claims, whether by its 'primary limb' or an assessment (for example, the Defendant could succeed on the issue the CFA is unfair and/or unreasonable but be liable to pay more by way of an assessment. In other words, the Defendant would pay more by winning, and the Claimant get more by losing).*"

14. Nevertheless, the Defendant is of course entitled to pursue a course of action which seeks to land the 'knockout' blow which would either limit his liability to £60,000 plus VAT or reduce it to nil, with the associated costs consequences that follow.

15. Mr Finnan relies on Section 60 of the Solicitors Act 1974, and in particular the inferred presumption that there is an agreement to pay a solicitor's costs, with attention focussed on section 60(4).

16. Mr Finnan thereafter sought to dissect and distinguish the two witness statements served by Mr Dunn in these costs proceedings. He observed that Mr Dunn's 1st witness statement was prepared in support of the issued claim form in the present application, whereas as Mr Dunn's 2nd witness statement is a response to Mr Finnan's witness statement made in these costs only proceedings.

17. It is Mr Finnan's case that Mr Dunn's 1st witness statement promoted uncertainty as to what figure the Claimant is actually claiming from him. Mr Finnan thereafter pressed the question of how can the court proceed to assess costs sought under this claim if clause 3 is severed?

18. In support of his contention that it is not clear what the Claimant is actually claiming, Mr Finnan points to the fact that it was only after the hearing on 14 June 2023 that the

additional 2nd invoice was formally withdrawn. It is Mr Finnan's additional contention that clause 3 was also withdrawn at this time.

19. For context, I recall that I reflected to the parties, in writing, as follows after the cross examination hearing:

"*Unless I am very much mistaken, it seems to me that until the filing of the Claimant's skeleton argument and witness evidence, Mr Finnan had been left with the impression that even were he to accept a liability to pay £100,000 plus VAT, he would still be at risk of a claim for payment of a second substantial invoice. If the Claimant's claim is categorically for £100,000 plus VAT with no further invoices to be claimed in the section 994 action then it may be sensible to now make that clear in writing to Mr Finnan, including a formal written withdrawal of the second invoice and an undertaking that no further invoices will be raised*."

20. Indeed that resulted in the Claimant making a formal withdrawal of the 2nd invoice and making it clear that no further invoices would be raised.

21. Mr Finnan submits that, as of today, the Claimant is seeking £100,000 plus VAT but submits that is still inconsistent with what is claimed in the claim form.

22. He also questions how can 3(b) of the claim form be ordered if there is no clause requiring him to make payment on an hourly rates basis.

23. Mr Finnan submits this all amounts to a lack of clarity as to what his maximum cost exposure to the Claimant is, which has required a second witness statement and a cross-examination of Mr Dunn to achieve any clarity.

24. Mr Finnan submits the lack of clarity has only been made worse by what he says is the Claimant's 'abandonment' of clause 3 since the hearing on 14 June 2023.

25. With reference to Mr Dunn's 1st witness statement, Mr Finnan highlighted references in the same to "at least" and "we reserve the right to claim…", and where the claim form, at part (b), refers to "at least". Mr Finnan submits this is suggestive of a claim for a sum in excess of those stated in the claim form, or at least the reservation of a right to seek more.

26. Further, with reference to part (b) of the claim form, Mr Finnan also questions an assessment of what? What bill? What figure? These questions are put in the context of the Claimant's revised position that they seek no more than £100,000 plus VAT from Mr Finnan, exclusive of any arguments as to the cost of the costs only proceedings.

27. With regard to Mr Dunn's 1st witness statement, dated 5 December 2022, Mr Finnan sought to provide his analysis of the same, with particular focus drawn on paragraphs 1, 30, 31 and 33 of the same.

28. Mr Finnan observed that at paragraph 1 there is no reference to enforcement of clause 4, but rather enforcement of the entire CFA. With respect to paragraph 30, Mr Finnan queries the terminology of "or some other sum" and queries what other sum would Mr Dunn be referring to. With respect to paragraph 31, Mr Finnan references the use of "in the case of success", and "a further minimum of.." in terms of characterising the payment of a further £40,000 plus VAT as a success fee. With respect to paragraph 33, Mr Finnan submits this must be a reference to the whole CFA, not just clause 4.

29. Whilst Mr Finnan acknowledged that Mr Dunn had since produced a 2nd witness statement in these proceedings, he points to the fact that it is Mr Dunn's 1st witness

statement which was submitted in support of the Claimant's application and therefore forms part of the same.

30. Mr Finnan's argument is that Mr Dunn's 1st witness statement, along with the application it accompanies, has caused confusion and uncertainty such that the claim should be struck out and the Claimant required to start again.

31. Mr Finnan submits that he has a right to know the sum being sought from him, and that clarity as to that sum only came about after cross-examination. Mr Finnan reminded the court that the original intention had been to hear the parties' submissions immediately after cross examination on 14 June 2023, in which case he and the court would not have the benefit of Mr Dunn's 2nd witness statement.

32. Finally, Mr Finnan referred to the terms and conditions which accompanied the CFA and the reference to raising charges on an hourly rate basis. He questions what was the purpose of this term if there was no intention to charge him on an hourly rates basis?

Mr Juckes' opening submissions:

33. In firstly seeking to address the concerns raised by Mr Finnan, Mr Juckes sought to dismiss the use of the term "at least" as being a 'familiar legal term in pleadings', and that in any event the claim form is clear when read with the accompanying 1st witness statement of Mr Dunn. He further submits that the clarity the Defendant seeks may be found at paragraph 29 of that statement, which provides that:

"*CANDEY seeks payment of the 1st Invoice plus interest at such rate and for such period as the court shall consider appropriate plus costs*.".

34. With reference to page 59 of the core bundle, Mr Juckes invited focus on the clarity provided by the 1st invoice. That invoice is dated 19 December 2019 and is described as being "In the matter of Finnan Developments Limited & Wimbledon Developments Limited" for "Professional Charges for the Provision of Legal Services for the period from first instruction to 14 March 2018". The invoice is in the sum of £100,000 plus VAT and purports to be payable "in accordance with the CFA signed on 6 March 2018".

35. Mr Juckes accepted that Mr Dunn's 1st witness statement states that *in the event* the CFA is set aside, the Claimant asserts a reservation of right to seek a traditional assessment of costs. However, he seeks to argue that the setting out of an alternative position does not detract from the primary basis upon which claim is made.

36. Mr Juckes observed that, pursuant to the signed CFA, the Defendant agreed to pay £60,000 plus VAT on account of costs and a further £40,000 plus VAT in the event of a successful outcome, as defined in the CFA. The Claimant has not been paid hence they have come to court seeking to enforce payment on the terms agreed, or otherwise a detailed assessment.

37. As to the adequacy with which the claim has been pleaded, Mr Juckes submits the claim form is compliant with the requirements of CPR 16.

38. With regards to any notions of severance, Mr Juckes submits that the Claimant is not seeking to sever clause 3 of the CFA, nor is it asking the court to conclude that clause 3 has been severed through conduct. Instead, and following the clarification which

followed the cross examination hearing, the Claimant is rather seeking to confirm that in the event £100,000 plus VAT is ordered to be paid, they do not intend to seek from Mr Finnan any more than that sum, save for the additional costs now also incurred in the costs only proceedings and any contractual right to interest.

39. Furthermore, and in any event, Mr Juckes' submission is that clause 3 was intended to apply in the event of an order for inter partes costs recovery. At the time the CFA was drafted, it was anticipated that any successful outcome would include an order for inter partes costs to be paid. As such, without clause 3 there would be no liability to charge on an hourly rates basis.

40. The fact that the settlement achieved in the underlying proceedings did not include an inter partes order to pay costs meant that clause 3 was not triggered. Mr Juckes submits that the fact that the Claimant has now voluntarily surrendered their right to pursue Mr Finnan on an hourly rates basis does not amount to a severance of clause 3 but rather evidence of the adoption of a pragmatic approach to resolve this dispute.

Mr Finnan submissions:

41. Mr Finnan takes issue with how the Claimant seeks to characterise and present the delivery of invoices to him. He invites this court to find that the 1st invoice was sent to him on condition that a 2nd invoice would follow.

42. In this regard, Mr Finnan submits that it is wrong to characterize the claim form as seeking £100,000 plus VAT only. The claim form is seeking an assessment and at paragraph 30 of Mr Dunn's accompanying 1st witness statement a right is asserted to "seek payment of a 2nd invoice, or such other sum as shall be determined..".

43. As to clause 3 of the CFA, Mr Finnan submits the inclusion of the same is nothing to do with the payment of costs on an inter partes basis. Mr Finnan questions why, if clause 3 relates to the Defendant in the underlying proceedings, was he pursued on an hourly rates basis (prior to the Claimant withdrawing the 2nd invoice and reverting to seeking £100,000 plus VAT only).

44. Mr Finnan submit that's clauses 3 and 4 must be read together, because both refer to the language of settlement and the consequences of the same. Mr Finnan's contention is that they are, in effect, the same clause but with different charging scenarios.

45. With reference to page 56 of the core bundle, Mr Finnan referred me to an e-mail he received from Mr Dunn, dated 13 March 2019. Mr Finnan sought to draw focus on the timing of this e-mail being some 12 months after the date of the CFA. The body of the text of that e-mail reads:

"*Thanks for the email about our costs. I have been thinking about this for some time. In my mind there are two relevant periods:*

(1) work done up to and including settlement on 14 March 2018; and

(2) work done since which is ongoing.

As for (1), you and I have always spoken of a base fee of £100k plus vat. Clause 3 of the CFA provided for our hourly rate costs to be payable from any settlement if possible. The hourly rates come to £129,825. On that basis I would ask for your agreement to a fixed fee of £130k plus vat for all our work to 14 March 2018. This is £30k more than the £100k figure but I hope you agree that it is reasonable for the amount of work we did in that period. The CFA envisaged that interest would also be payable in the event you did not pay us anything on account. You have not paid

anything on account - which I entirely understand given your circumstances - but the interest provision only applied if we obtained judgment following a fully contested trial. This case settled so interest is not payable. As for a date for payment, I have always said that our interests are aligned, and we are happy to wait until you get paid something before we get paid something.

As for (2) the settlement deed contains an indemnity for the costs of enforcement. I am happy to work on the basis that we will seek to recover those costs from Sean (or from his assets) in due course. In other words I am not looking to you for payment. The only costs I do need you to cover are disbursements (as before). You asked about counsel's fees for the bankruptcy hearing. The previous figure of 9k quoted by Ryan was for an application to appoint interim receivers and make Sean bankrupt. We decided against the interim receiver route. Right now the only hearing we are looking at is the bankruptcy petition hearing on 3 April. Hermann will be in South Africa that week but one of his juniors, Albert Sampson, is available and well equipped to do it. Ryan estimates a fee for him of £3k plus vat. I think that sounds fair. Albert is good. He is working with me and Hermann on two other cases right now and I know Hermann rates him highly.

So, in summary, the only liability I ask you to agree for my firm's fees is £130k plus vat. Payable only once you make a recovery. No interest.

I hope you agree this is reasonable."

46. With regard to the timing of this e-mail, Mr Finnan submits this was consistent with his understanding of the agreement in terms of when payment would fall due, i.e. that the Claimant would be paid once Mr Finnan was "paid something".

47. Mr Finnan observed that there was no reference to clause 4 of the CFA in the e-mail dated 13 March 2019. He also observed references to "if possible" and "happy to wait".

48. Mr Finnan also relies on the timing of the 2nd invoice, being dated 31 March 2021. He invites notice to be taken of the passage of time between the 1st invoice and the 2nd invoice, and submits this is a very long time for a client to wait to learn precisely what his liability for costs is. The delay between the 1st and 2nd invoice is further evidence of uncertainty and a lack of clarity as to what Mr Finnan would be charged.

49. The 2nd invoice sets out a charge of £59,245 plus VAT which is said to be "payable in addition to £100,000 invoiced on 19 December 2019 in accordance with the CFA signed on 6 March 2018 and in accordance with the attached detailed narrative". It is further described as "a final invoice for all work up to and including 14 March 2018, excluding any costs for work done in relation to the bankruptcy of Sean Finnan and enforcement of the March 2018 Settlement Agreement".

50. Mr Finnan takes issue with paragraph 9 of the Claimant's 1st skeleton argument, and in particular the reference to "anticipation". Paragraph 9 states:

"*The Claimant's Mr Dunn will say that he anticipated that the Claimant's time costs would be around £100,000 to the end of trial. He will say that [the] parties worked out an agreement whereby the Claimant would be paid £60,000 plus VAT on account of costs, together with a further £40,000 if the Defendant obtained a costs order or obtained any of the relief sought in the proceedings. Additionally, the Claimant also wanted to recover its hourly rate costs in the event of settlement or judgment. These costs are not, however, sought in this application*."

51. Mr Finnan then wished to draw attention to paragraphs 18 and 21 of Mr Dunn's 2nd witness statement.

Paragraph 18 of Mr Dunn's 2nd witness statement provides that:

"*Mr Finnan seeks to develop only the s.1 allegation at paragraphs 7-16 of Finnan 2. He begins by saying that we discussed and agreed terms at our first meeting on 22 January 2018 including terms for: (a) payment of £60,000 plus VAT within 12 months of judgement; and (b) payment of a further £40,000 plus VAT if the proceedings were successful. He says this was a representation made to him. I do not accept this. Specifically, I cannot recall discussing or agreeing those figures on 22 January 2018, and believe we would have arrived at them in subsequent discussions. I do recall discussing the mechanism of one fixed payment with a further payment in the event of success. But it was not a 'success fee' in the traditional sense. I recall us discussing the fact that Mr Finnan expected to succeed at trial (as did Mr Boeddinghaus KC) and that £100,000 was in the region of what we thought our time costs might be to take the case to the end of trial. For that reason this was about giving Mr Finnan credit rather than seeking to give CANDEY some sort of uplift."*

52. Paragraph 21 of Mr Dunn's 2nd witness statement provides that:

"*Mr Finnan tries to suggest that we did not discuss or agree the terms of clause 3 of the CFA. I do not accept this. The clause was intended to provide for CANDEY to recover its hourly rate costs as part of any judgement or settlement. As I say at paragraphs 24-29 of Dunn 1, we did ask Mr Finnan to pay those hourly rate costs when we gave him the second invoice on 25 August 2021, but we do not seek those costs from him now. Our claim is for £100,000 pounds plus VAT as provided for by clause 4 of the CFA (with an assessment as an alternative if the court so orders)."*

53. Mr Finnan considers that such passages in Mr Dunn's 2nd witness statement are an attempt to resolve the confusion and uncertainty highlighted in Mr Finnan's witness statement (made in response to Mr Dunn's 1st witness statement).

54. Mr Finnan submits that the fact that Mr Dunn put in an amended budget (with a witness statement in support) during the course of the underlying litigation means he must have known there was a discrepancy between the £100,000 plus VAT figure discussed with Mr Finnan, and the £129,000 plus VAT budgeted amount.

55. Mr Finnan submits that paragraph 9 of the Claimant's 1st skeleton argument is an attempt to "skirt around" the payment of an additional £40,000 being a 'success fee'.

56. With reference to how the claim form is worded, Mr Finnan submits that the use of the term "Additionally…" opens the door to a 2nd application. Mr Finnan also cited a reference to "in *this* application" (emphasis added), and no reference to the other side.

57. Mr Finnan then took issue with the use of "well understood" in paragraph 18 of the Claimant's 1st skeleton argument, on the basis that he didn't possess the legal knowledge to understand the effect of what he was signing, and there was no reference to a contentious business agreement in the CFA or terms and conditions.

58. As to paragraph 19 of the Claimant's 1st skeleton argument, Mr Finnan rejects the assertion that the terms of the CFA are "clear or easy to follow". He submits that clauses 3 and 4 do not set out what happens in the event of a loss. He also observed that clause 5 allows for further payments come what may.

59. As to paragraph 31 of the Claimant's 1st skeleton argument, Mr Finnan maintains that there must be common ground that the CFA provides for a success fee based on the assertion that the claim form and Mr Dunn's witness evidence refer to a success fee.

60. With regard to paragraph 34 of the Claimant's 1st skeleton argument, and reference therein to s.58(2)(b), Mr Finnan submits that the definition of a CFA with success fee is consistent with the Claimant charging £60,000 plus VAT at the outset and a further £40,000 plus VAT in the event of success.

61. As to the Claimant's contention that the CFA does not provide for a success fee (as per paragraph 35 of the Claimant's 1st skeleton argument), Mr Finnan questions why not just charge him £100,000 plus VAT at the outset? Why was the agreement arranged in a way that £60,000 plus VAT was due at the outset and an additional £40,000 plus VAT only payable in specified circumstances?

62. Mr Finnan submits that he never agreed fees of £100,000 plus VAT to see the matter through to trial, and queried the legality of saying £100,000 plus VAT will be charged if the matter is successful following a trial, but £60,000 plus VAT will be charged if he lost at trial. He submits that the agreement created a liability to pay £60,000 plus VAT in any event, with an additional £40,000 plus VAT payable in the event of success, and that these are the specified circumstances which means section 58(2) of the Courts and Legal Services Act 1990 applies.

63. Mr Finnan reiterated that clauses 3 and 4 are in effect no different because both are triggered by a form of settlement in order for fees to be payable.

64. With reference to paragraph 3 of the 'fees and funding' section of the terms and conditions, Mr Finnan suggested an entitlement arose to apply for an assessment if being charged a fixed fee.

65. My observation *in that regard* is that whilst I accept an entitlement to apply for assessment under the Solicitors Act 1974 is outlined in this section, I cannot see that it

is drafted in terms which would limit that entitlement to the challenging of fixed fees only.

66. Mr Finnan acknowledged that the parties did not proceed on the basis of a no win no fee agreement.

67. He invited the court to find that the terms and conditions are all to do with hourly rates, rather than the raising of charges on a fixed fee basis. Mr Finnan considers that the CFA and terms and conditions, when read together, mean the Claimant should be charging on an hourly rates basis.

68. Notwithstanding the Defendant's general position that clauses 3 and 4 of the CFA ought to be read together, Mr Finnan also sought to highlight a distinction between clauses 3 and 4 in terms the time allowed to pay. Mr Finnan submits that under clause 3 there is no time limit for payment, whereas clause 4 specifies a time to pay.

69. Mr Finnan sought to explain that he was happy to pay Counsel's fees as and when they fell due. *In reality, this was required by clause 5 of the CFA in any event.*

70. As to clause 4 of the CFA, Mr Finnan referenced the provision allowing 12 months for payment, and submits this must relate to the request for £60,000 plus VAT only, i.e. the request for a payment on account.

71. Clause 4 provides that:

"4. Stephen will pay CANDEY £60,000 plus VAT on account of costs. If the Proceedings are successful, in that a costs order is made in Stephen's favour and/or Stephen obtains any of the relief sought by the petitions, Stephen will pay a further

£40,000 plus VAT to CANDEY i.e. a total of £100,000 plus VAT. Stephen shall pay the appropriate amount no later than 12 months from the date judgment is handed down in the Proceedings together with interest at the rate of 8% per annum - except that interest shall not be payable if Stephen pays within 6 months of the date of judgment."

72. Mr Finnan then referenced paragraph 18 of Mr Dunn's 2nd witness statement and in particular where Mr Dunn states "I cannot recall discussing or agreeing those figures on 22 January 2018, and believe we would have arrived at them in subsequent discussions". This is stated in response to Mr Finnan's evidence that there was an agreement to pay £60,000 plus VAT within 12 months of judgment and a further £40,000 plus VAT in the event of success.

73. The reference to Mr Dunn's 2nd witness statement at paragraph 18 continues "I do recall discussing the mechanism of one fixed payment with a further payment in the event of success".

74. Mr Finnan sought to stress the absence of any reference to hourly rates, regardless of whose recollection of discussions were preferred.

75. Mr Finnan then sought to address the circumstances in which he came to instruct the Claimant, citing in particular a discussion on 22 January 2018 and subsequent agreement. Mr Finnan explained that prior to signing an agreement with the Claimant, he had three options. To continue with his existing firm, to transfer his instructions to an alternative new firm based in the North of England, or to transfer instructions to the Claimant.

76. Mr Finnan submits he chose the Claimant because they provided certainty with respect to costs. His understanding was they would not charge on an hourly rates basis, that they would operate on a fixed fee basis, and they would provide him with 12 months to pay.

77. With respect to certainty, Mr Finnan cited *Wilson v Specter Partnership and others* [2007] EWHC 133 (Ch) and in particular paragraphs 15 and 16 of the same in support of the Defendant's argument that the CFA in this matter is not a contentious business agreement (CBA).

78. Mr Finnan submits that the very uncertainty discussed in *Wilson* is present in the index case because when clauses 3 and 4 of the CFA are read together it left him uncertain as to how much he would be charged if his case was won.

79. Mr Finnan further submits that in respect of being charged on an hourly rates basis, there was no certainty because he didn't know which fee earners would be working on his case nor did he know the rates for any fee earners other than the lowest and the highest.

80. Mr Finnan is adamant that a costs agreement was struck on 22 January 2018. He says the Claimant can only point to the date the CFA was signed and is otherwise unclear when a costs agreement was achieved.

81. In further seeking to distinguish clauses 3 and 4 in terms of uncertainty, Mr Finnan observed that clause 3 addresses hourly rates but without confirming what the rates would be or how much the total would be, whereas clause 4 references a "total" figure.

82. Thereafter Mr Finnan cited *Acupay System LLC v. Stephenson Harwood LLP SC*-2020 APP-00377, and in particular paragraphs 172 to 178 of the same. That case explores the certainty provided when a retainer is in writing and its terms sufficiently certain, and the notion that not any written agreement providing for remuneration within the range of options provided for under section 59(1) of the Solicitors Act 1974 must be a CBA.

83. With reference to *Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745, Mr Finnan made out the argument in general terms that the CFA would be invalid and unenforceable if the court made a finding of misrepresentation. Mr Finnan invited such a finding based on the wording of the CFA and pre CFA discussions.

84. With reference to *Diag v Volterra* [2022] EWHC 2054 (QB) Mr Finnan made out the argument that either the whole CFA was enforceable and if not it is unenforceable such that the Claimant would not be entitled to remuneration under the same.

85. Mr Finnan cited *Jones v Caradon Catnic Ltd* [2005] EWCA Civ 1821 with respect to the notion of a success fee exceeding 100%. In Mr Finnan's view, when the Claimant sought £60,000 on account of costs, and then an additional £40,000 in the event of a successful outcome, the raising of an additional invoice for just under a further £60,000 created a scenario by which the Claimant was effectively seeking a success fee in excess of 100%.

86. Mr Finnan also cites *Oyston v The Royal Bank of Scotland Plc* [2006] EWHC 90053 (Costs) in so far as that decision endorses *Jones*, but also the extent to which confusion and uncertainty can result where there is no clear distinction between an additional amount which is only triggered by success as contrasted with the

postponement of payment of fees. As cited in *Oyston*, Mr Finnan submits that the potential for "great confusion" referred to therein has been manifested in the index case.

87. Mr Finnan referenced my correspondence with the parties following the hearing on 14 June 2023 where cross examinations only took place. That letter reflected my observation that prior to the Claimant's skeleton argument and supporting witness statement, Mr Finnan had been left with the impression that even had he accepted liability for £100,000 plus VAT he would still be open to the risk of paying a second substantial invoice. I additionally observed that if, as was heavily alluded to during the cross examination of Mr Dunn, the Claimant was no longer pursuing payment of the 2nd invoice then they may wish to confirm that to Mr Finnan in writing so that he may take stock of matters and make an informed decision as to how he wished to proceed.

88. Mr Finnan argues that my compulsion to send such correspondence demonstrates the level of confusion surrounding this case.

89. Since 14 June 2023, the Claimant did proceed to confirm they are not seeking payment of the 2nd invoice. The Claimant is therefore seeking £100,000 plus VAT in total, plus the costs of the application.

90. With respect to enforceability, Mr Finnan made further reference to *Oyston*, and in particular paragraph 55 of the same which essentially addresses the need for a CFA to comply with section 58(1) of the Courts and Legal Services Act 1990 in order to be enforceable at common law.

91. Mr Finnan next cited *Corsi v Progressive Financial Services Limited T/A Welcome Financial Services* (2012) [2012] EWCA Civ 1044. This case was a 2nd appeal, focussed on the wording of a CFA and the outcomes it did (or indeed didn't) provide for. As Sullivan LJ put it, the first instance judge and the judge on 1st appeal "were both concerned with the same point, that is to say whether or not the statement "if you win you pay a success fee" was or was not qualified by what was said about the success fee in the later part of the agreement". The 1st and 2nd appeals were dismissed, the latter being more a matter of procedure. Thus, in terms of substance, paragraph 4's restatement of the judge on 1st appeal's conclusion is relevant. Namely "In the end and not without hesitation I have come to the conclusion that the District Judge was right and that straightforward statement, 'If you win you pay a success fee' is not qualified by what happens underneath; so there is a provision for a success fee in the event of winning, where the different eventualities are not covered by the percentage. In those circumstances, it seems to me the district judge came to the right conclusion and the appeal falls to be dismissed". The original decision was that due to a defect in the CFA the entire claim for costs be dismissed.

92. Mr Finnan accepts there is no reference to a success fee in clause 3 but submits that there is in clause 4. In this regard, he rejects the assertion that he has made contradictory arguments as alleged in the Claimant's 2nd skeleton argument.

93. In support of his arguments as to "unfairness", Mr Finnan cited *Vilvarajahv West London Law Ltd* [2017] EWHC B23 (Costs) and in particular paragraph 25 of the same, which explores the discussions and correspondence that might pass between solicitor and client prior to the signing of a CFA. Mr Finnan submits this is analogous

to the index case in terms of a lack of recorded communications prior to his signing of the CFA on 6 March 2018.

94. Citing paragraph 26 of the same judgment, Mr Finnan sought to argue further analogy in that the index CFA could be found to be a "complicated agreement" meaning that the lack of demonstrable explanation and discussion prior to signing the same rendered the agreement unfair such that it ought to be set aside.

95. Mr Finnan then referred to *Achara Tripipatkul v WH Lawrence Limited (trading as WH Lawrence Solicitors)* 2021 WL 03055397, and in particular paragraph 75 of the same which addresses reasonableness, and in particular that even where the "mode of agreement" has been found to be fair it does not necessarily follow that the agreement is not unreasonable. Paragraph 75 also invites consideration of the reasonableness of the terms as at the date the agreement was entered into.

96. With reference to 4 March 2018 being the date on which the CFA was signed, Mr Finnan argues that he was under time pressure because he could have been going to trial the next day or on the 6th, which in turn imports notions of unreasonableness in terms of the time he had to consider and sign the agreement.

Mr Juckes submissions:

97. In addressing Mr Finnan's suggestion that the CFA in this matter is not a contentious business agreement, Mr Juckes submits that the language of the Solicitors Act is very wide in terms of the types of charging structures that a client and solicitor may enter into.

98. In so far as the Defendant seeks to rely on *Acupay System LLC*, Mr Juckes observed that the court in that case in fact recognised that the provisions of section 59(1) of the

Solicitors Act 1974 Act "are permissive, rather than prescriptive" and that 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..". The court also observed that an agreement can be a CBA even where the agreement says it is not – being the very issue analysed in *Acupay*.

99. With respect to Mr Finnan's reliance on the case of *Wilson*, Mr Juckes warns against consideration of that case on the limited basis the Defendant invites. In particular, where paragraph 16 of the judgment dissects the absence of a "signed agreement relating to the specific piece of litigation which gave rise to the bill" and an insufficient fixing of charges. Mr Juckes submits this is in contrast to the index matter in which the agreement was signed, it was specific to the litigation which gave rise to the bill (1st invoice) and fixed the charges to be raised at £100,000 exclusive of VAT and any interest in the circumstances specified in the CFA.

100. Mr Juckes submits that, in consistency with the pre-CFA discussions on the Defendant's own evidence, Mr Finnan had certainty in that he knew he was required to pay £60,000 plus VAT on account, he knew he would pay a further £40,000 plus VAT in the event of success (as defined in the CFA) and that neither of those figures were undermined by clause 3.

101. As to how the payment of £40,000 plus VAT is viewed, Mr Juckes observed that contrary to Mr Finnan's submissions, neither Mr Dunn's 1st witness statement nor the claim form make any reference to a success fee.

102. Mr Juckes placed reliance in paragraphs 8-11 of Mr Dunn's 1st witness statement in terms of the funding arrangement in place. Those paragraphs set out discussions

between the Claimant and Defendant on 18 and 22 January 2018 at which the Defendant explained that he was in the process of raising funds to pay counsel, and that he owed money in unpaid bills to his soon-to-be former solicitors. The Defendant thus presented as a man of means but not in a position to pay for the Claimant's services at that moment in time. The Claimant nevertheless came on the record in early February 2018 and discussions took place culminating in an agreement that the Defendant would meet the required counsel's and expert's fees up front, with a proposal from the Claimant that they would act on the basis they would be paid at least £60,000 plus VAT. That proposal was later developed into what we now see at clause 4 of the CFA.

103. Mr Juckes submits that as of today, and in an attempt to avoid paying for the services provided by the Claimant, Mr Finnan is conflating the costs at risk with costs payable in the event of a defined success.

104. In response to Mr Finnan's allegations that a success fee in excess of 100% has been claimed, Mr Juckes cited the analysis provided in the case of *Gloucestershire County Council v Evans and others* [2008] EWCA Civ 21 which looked at consideration of the "costs at risk", and the notion of taking into account the fees which would have been payable if the CFA were not a CFA. Payment of at least £60,000 plus VAT was never costs at risk.

105. The case also analyses the wording of section 58 of the Courts and Legal Services Act 1990, and in particular that one cannot derive from the language of section 58(4)(b) that a "CFA must state the percentage increase payable on the difference between the full and discounted hourly rates (the "costs at risk")", and that it "is not possible to construe the words "the amount of the fees which would be payable if it [the

Agreement] were not a conditional fee agreement" as "the difference between the full and discounted hourly rates" or "the costs at risk"."

106. Mr Juckes rhetorically asked what would the Claimant have been charging if the agreement was not a CFA, and submits they would not have agreed to act on a fixed fee of £60,000 plus VAT. The figure of £100,000 plus VAT was based on Mr Dunn's estimate of the overall costs that would be incurred in providing the litigation services covered by the retainer. In the event, that estimate turned out to be not only a fair assessment to the Defendant but in fact an underestimate, and Mr Juckes submits that ultimately the Claimant was trying to manage their own risk of not being paid.

107. With regard to any allegations of misrepresentation, Mr Juckes submits no cogent argument has been made out. In so far as the Defendant seeks to argue the raising of the 2nd invoice amounts to a misrepresentation because of charges calculated by reference to hourly rates, Mr Juckes points out that the CFA allowed for an hourly rates charge, and in any event the Claimant has withdrawn that invoice.

108. As to fairness and reasonableness, Mr Juckes submits that paragraph 25 of *Vilvarajah* should not be considered out of context. In this regard, he invites consideration of paragraphs 23 and 24 of the judgment, which explain that the client in that particular case was deemed to be of "average sophistication" and required particular care when explaining matters given English was not his first language. Mr Juckes sought to distinguish such a client from the Defendant, who speaks English as his first language, and is above average sophistication with respect to legal documents.

109. Mr Juckes drew attention to that fact that even on the Defendant's own evidence, the funding and payment terms were discussed on 22 January 2018 and that generally there was more pre-signature discussion in the index matter than in *Vilvarajah.*

110. As to the CFA and clause 4 of the same, Mr Juckes submits that the wording of the same is easy to understand, and makes no reference to the term "at least". The term "at least" is referred to in the claim form but the operation of the funding agreement is governed by the terms of the CFA, not the terminology in the Claim Form.

111. Mr Juckes submits that clause 4 is in fact very clear with respect to the triggers for when the two sums are payable. Mr Juckes also submits that reference to the word "judgment" in the clause makes no commercial sense if read so restrictively as to exclude all forms of settlement.

112. Mr Juckes closed by submitting that when the claim form is read together with paragraph 29 of Mr Dunn's 1st witness statement, then it is obvious what is being sought or claimed and in any event there is no reference to "at least" in the CFA.

Mr Finnan counter-submissions:

113. Mr Finnan accepts that clause 4 is clear. However, he considers that when clause 4 is read with clause 3, and the fact of the raising of the 2nd invoice referenced in Mr Dunn's 1st witness statement, the Defendant has created an uncertainty as to precisely what sum Mr Finnan is liable for.

114. In seeking to clarify his earlier submissions, Mr Finnan confirmed that any references he had made to two triggers meant one trigger in clause 3 and another trigger in clause 4.

115. As to whether paragraph 30 of Mr Dunn's 1st witness statement constitutes a fallback position, Mr Finnan submits that the fact that the 2nd invoice was referenced at all

must have created a risk of liability to pay the same.

116. With respect to clause 3 generally, it is not drafted in terms of a discount on hourly rates and therefore is distinguishable from the *Gloucestershire County Council* case.

117. Mr Finnan maintains the dishonesty point because he says the drafted CFA does not compare with what was discussed and agreed.

Decision

118. The agreement in this matter is a contentious business agreement in the form of a CFA. The Claimant acted for the Defendant "in or for the purpose of proceedings", namely s994 petition proceedings. The fact that the agreement retains the ability to raise a charge on an hourly rates basis does not mean that a contentious business agreement has not been created.

119. In seeking to set aside the agreement, the Defendant argues dishonesty, unfairness and unreasonableness.

120. I am not satisfied that that the Defendant's dishonesty point is made out. Even if there had been amendments to the final version of the CFA before it was signed, it was signed nonetheless. Nothing in the evidence I have heard or considered leads me to conclude that Mr Finnan was misled and/or that the Claimant has acted dishonestly.

121. As to unfairness, I find that Mr Finnan was placed under no time pressure to sign the CFA terms, nor is he a client who lacked the intellectual sophistication to understand what he was agreeing to. The Defendant's own evidence supports the contention that he had time to consider three firms before settling on the instruction of the Claimant,

and that decision having been based on discussions as to how he would be charged and in what sums.

122. In reality, there is little between the parties as to what was discussed, but rather when the discussions took place. In addition, the Defendant was not being asked to sign a complicated agreement. The agreement was in fact straightforward.

123. With respect to any arguments as to unreasonableness, I find that the Defendant has conflated the Claimant's conduct in the recovery of monies from him with the agreement itself.

124. As I have outlined below, the process by which the Defendant has been pursued for payment is far from satisfactory. However, that cannot retrospectively render the agreement itself unreasonable.

125. The Defendant agreed to take over the conduct of a complicated, high value claim at a crucial period procedurally. The Defendant agreed to come on the record even before the CFA was signed, and further agreed to defer demands for payment until the Defendant was in a healthier financial position. The CFA covers the work done and is drafted in very straightforward terms.

126. Having considered the same, reflected on the submissions both written and oral, and reviewed the evidence before me, I cannot conclude that the agreement is unreasonable.

127. In reality, the Defendant had the intellectual capacity to understand the CFA, and sufficient time to read it before committing his signature to the same. He was not under any duress. He had taken the time to explore his options, had engaged with the Claimant, and I am satisfied he understood what he was signing up to.

128. Accordingly, the agreement will not be set aside for reasons of dishonesty, misrepresentation, unfairness or unreasonableness.

129. As to the CFA itself, I note that the same is in writing, has been signed by both parties, and covers the work which was subsequently undertaken on the Defendant's behalf. The work done does not relate to family or criminal proceedings, and as set out at paragraph 150 below, it does not seek to permit recovery of a success fee exceeding 100%.

130. The agreement is retrospective in nature and "is to be read alongside the attached standard terms and conditions".

131. Clause 3 of the agreement provides for the recording of time by the Claimant at rates ranging from £150 per hour to £700 per hour (plus VAT). Clause 3 speaks of success in terms of a costs order being obtained in the Defendant's favour, or where any of the reliefs sought in the underlying petition are obtained.

132. I am satisfied that the intention of clause 3 is to set out the circumstances in which costs could be recovered on an hourly rate basis only in circumstances where an order for the losing party to pay the Defendant's costs arose, or the underlying petition was settled on a damages plus costs basis.

133. The intention of clause 3 is to create a liability to pay costs on an hourly rate basis in the circumstances specified therein. It is thereafter a matter for the Claimant as to whether they wished to enforce that liability. In the event, and as confirmed on the record following the hearing at which cross-examination took place, the Claimant does not intend to enforce their right to pursue the Defendant on an hourly rates basis. That is a commercial decision and it is does not amount to the severance or

withdrawal of this clause from the CFA, nor does that decision render the CFA invalid.

134. Clause 4 required the Defendant to pay £60,000 plus VAT on account of costs, but does not specify by what date. The terminology of success is then, again, couched in the language of obtaining a costs order, or if any of the petitions sought are achieved. In either of those circumstances, a further £40,000 plus VAT is payable. Clause 4 also provides for up to 12 months from judgment being handed down to pay the sums owed under the agreement.

135. In so far that it is argued that clause 5 made provision for further charges to be raised in any event, it is clear to me that clause 5 does not relate to charges raised by the Claimant but rather disbursements "including counsel fees and expert fees", which I am satisfied the Defendant understood he would be liable for over and above the Claimant's charges. To put it another way, I do not consider that at any time the Defendant proceeded under the illusion that the £100,000 plus VAT figure discussed was inclusive of all disbursements, nor do I find that his evidence in these costs only proceedings support such a conclusion.

136. There is, ultimately, no basis to read clauses 3 and 4 as though they are exclusive from one another. There is no basis upon which to read the CFA as anything but a whole document and I find there are no contradictions in the same.

137. When the Defendant first elected to oppose the Claimant's claim, it was based on the confusion caused by the claim form as presented.

138. Notwithstanding the Defendant's stance that he considers himself liable for either a payment of nil or £60,000 plus VAT only, it is clear to me that the parties had, at the

outset, settled on an agreement that the Defendant would pay no more than £100,000 plus VAT, save for in the circumstances set out in clause 3.

139. The claim form as presented is inconsistent with that understanding. It references the term "at least" with respect to the payments of £60,000 and £40,000. It is reasonable that the Defendant would have been concerned as to what additional sums might be sought from him as a consequence.

140. The 1st witness statement of Mr Dunn was produced in support of the claim form. That statement acknowledges the circumstances in which Mr Finnan approached the Claimant, and the Claimant's willingness to work for a fixed sum of £100,000 plus VAT, with an expectation that £60,000 plus VAT of that sum would be paid on account with a further £40,000 to be paid in certain specified circumstances.

141. The 'Settlement Agreement' struck between the parties in the underlying litigation triggered the circumstances for payment of a further £40,000 plus VAT. That led to the issuance of an invoice for £100,000 plus VAT for the work undertaken by the Claimant on Mr Finnan's behalf.

142. However, where further confusion arises is the reservation of the right to seek payment of a substantial 2nd invoice (which was exhibited to Mr Dunn's 1st witness statement) or indeed "such other sum as shall be determined".

143. The Application itself requires some analysis. The application has been clumsily drafted and presented. The witness statement accompanying the application concludes by stating:

"31. This is a straightforward matter. Mr Finnan freely negotiated and entered into a retainer with CANDEY, whereby CANDEY agreed to represent him in the s.994

Proceedings. In consideration for these services, Mr Finnan agreed to pay £60,000 on account in respect of CANDEY's fees (which he failed to pay, in breach of the CFA) and, in the case of success in the s.994 Proceedings, a further minimum of £40,000 plus VAT. With the success condition having been satisfied by virtue of the Settlement Agreement, and without any legal costs having been recovered from Sean, Mr Finnan is liable to pay CANDEY at least £100,000 plus VAT."

144. The use of the terminology of "at least" is consistent with the main body of the application where it is pleaded that "Under the terms of the CFA the defendant was liable to pay the claimant at least £60,000 plus VAT plus at least £40,000 plus VAT in the event of success."

145. The Claimant's claim purports to be crystallised at paragraphs 29 and 30 of the accompanying witness statement which set out:

"29. CANDEY seeks payment of the 1st Invoice plus interest at such rate and for such period as the court shall consider appropriate plus costs.

30. CANDEY reserves its right to seek payment of the 2nd Invoice, or such other sum as shall be determined, in the event the court sets aside the CFA and orders an assessment of CANDEY's fees pursuant to s.61(2)(b) of the Act."

146. I am satisfied that the Claimant's decision to present a 2nd witness statement from Mr Dunn was to repair the claim and his supporting 1st witness statement. I also consider the content of the claim form and accompanying evidence to be inconsistent with the funding arrangement between the parties, the contemporaneous communications and the terms of settlement agreed in the underlying litigation.

147. That said, my criticism of the drafting of the claim form and accompanying witness evidence does not render the CFA in this matter invalid or unenforceable.

148. As to the effect of the agreement, it is clear to me the intention was always to give the Defendant value and certainty. The intended effect of the agreement was that the Defendant would pay the Claimant no more than £100,000 plus VAT, with £60,000 plus VAT to be paid on account and £40,000 plus VAT to be paid upon certain outcomes being achieved, but to be otherwise waived if none of the reliefs sought in the petition were achieved or no order for costs in Mr Finnan's favour were made (such that recovery under clause 3 was activated).

149. In this regard, I am not preferring the after the event witness evidence of Mr Dunn over Mr Finnan, but rather reflecting, and in doing so preferring, the contemporaneous documentation in the form of the precise wording of the CFA and accompanying terms when it was signed by both parties.

150. As to the suggestion that the raising of a 2nd invoice created a liability to pay a success fee in excess of 100% I am not in agreement. Firstly, the Claimant's case is that the CFA does not provide for the payment of a success fee, but rather the payment of a specified additional sum of £40,000 in the event that certain specified outcomes are achieved. Secondly, although the Defendant has at various times argued that the CFA and claim form make references to a success fee, the fact is that they don't, and the Defendant has also acknowledged in the course of these proceedings that the parties did not enter into a no win no fee agreement. Thirdly, when Mr Finnan was first invited to pay a sum in excess of the £100,000 plus VAT it was on a voluntary basis. Mr Dunn's e-mail to Mr Finnan dated 13 March 2019 concludes by asking for the Defendant's agreement to pay an additional £30,000 plus VAT. Fourthly, even if the

Defendant had paid the 2nd invoice the sums detailed under the same would, for the purpose of the Courts and Legal Services Act 1990, form part of the base costs under the terms of the CFA. The 2nd invoice does not represent costs which were contingent on a certain success being achieved. They are in fact representative of the actual costs over and above £100,000 plus VAT the Claimant incurred in representing the Defendant. Not only does that demonstrate that the Defendant achieved a good deal in this matter with respect to costs, but it underlines that, under the terms of the CFA, those costs would be incapable of being treated as a success fee. As such, even if the CFA permitted the recovery of a success fee, it would not be invalid for reasons of permitting the recovery of a success fee of in excess of 100% where the amount payable on success is less than the base costs incurred.

151. As to any attempt by the Defendant to characterise the delivery of the 1st invoice as being conditional that a 2nd invoice would follow, there is nothing contained in the text of the 1st invoice which either sets out or infers that a further invoice will follow. Thereafter, it is a matter of what the CFA provided for.

152. Exercising my discretion under CPR 61(2)(a) of the Solicitors Act 1974, I consider the funding arrangement to be enforceable as between the parties, to be not unfair and not reasonable, and thereafter shall be enforced to the extent that the Defendant shall pay the Claimant £100,000 plus VAT under the terms of the same, with credit to be given for any sums paid on account.

153. I thereafter take into account that absent payment of even the £60,000 plus VAT on account, the Claimant had little option but to bring this claim if they were to recover any monies for the work undertaken on behalf of the Defendant.

154. In that regard, the cost of drafting the claim form is recoverable in principle. However, the liability for the costs incurred since that claim form was served are another matter.

155. A further short hearing will now be listed to deal with any further directions required as a consequence of this judgment, including arguments as to the payment of interest on the principal sum (if pursued), and to the hear the parties with regard to the principle of who should pay the costs of these costs only proceedings, and in what amount. In my view, no order as to the costs of the costs only proceedings would be appropriate but I am not prepared to make such an order without giving the parties an opportunity to be heard if they are not in agreement.

156. There are two further matters I ought to address. The name of the Claimant and the time for payment.

157. With regards to the name of the Claimant, The Defendant has set out a line of argument that his instructions were with Candey LLP and not Candey Limited. I am not satisfied that this argument has sufficiently been made out. I very much suspect that any confusion in this regard has been generated by an e-mail from Mr Ryan Tunkel, counsel's clerk, where he mentions "Candey LLP" when following up on a verbal recommendation made by counsel to the Defendant, prior to formal instruction of the Claimant.

158. I can fully accept that the Defendant may well have gone away to check the SRA record for Candey LLP but ultimately for the entire time he engaged the Claimant, all of their correspondence (including e-mail footers) referred to Candey Limited. The CFA terms and conditions also referred to Candey Limited, as did the e-mail attaching a copy of the same.

159. Candey LLP had been trading as Candey Limited long before the Defendant and Claimant entered into a funding arrangement. All new cases were conducted under Candey Limited, including the Defendant's, and legacy cases fell under Candey Law LLP – which is the SRA check results which the Defendant submits he reviewed.

160. The reality is that whether the Defendant had looked at the SRA results for Candey Law LLP or Candey Limited, he would have seen a clean bill of health and in any event they are effectively two arms of the same business.

161. My finding is that the Defendant knew whom they were instructing and whom they had entered into a funding agreement with. The Defendant is liable to make payment to the named Claimant in this matter.

162. Finally, insofar as the Defendant made reference to the time for payment, I observe that in lieu of a trial followed by a judgment, the parties in the underlying litigation entered into a settlement agreement which included a clause as to costs which provided "Save as otherwise set out in this deed, each party shall pay its own costs and expenses in relation to the Proceedings and the negotiation, preparation, execution and carrying into effect this deed". The settlement agreement bears the Defendant's signature.

163. In my view, the reference in clause 4 to the requirement for payment within 12 months of a judgment was intended to include compromise by settlement. Otherwise, it would have created an obligation to proceed to trial in order to receive payment, which I find was never the intention of the parties. Further, if I am wrong about that, then the settlement agreement superseded or varied the solicitor/client agreement such that payment fell due upon execution of the same but in any event was not pursued for

at least 12 months – which is otherwise consistent with the intention of the parties when the CFA was signed.

164. Whilst I acknowledge that outside of the funding arrangement, there appear to be occasions upon which Mr Finnan and Mr Dunn informally discussed the circumstances in which the Claimant might be willing to exercise some patience in awaiting payment, those discussions are not formally recognised in the funding arrangement and the very fact these proceedings have been brought at all indicates the Claimant is unwilling to wait any longer.

165. I will address the time for payment at the hearing referenced at paragraph 155 above, but absent a demonstrable agreement to wait for payment, the Defendant should take heed of the fact that the default order would be for payment within 14 days of the sealing of that order, once made.

166. For the avoidance of doubt, I do not consider Mr Dunn's e-mail dated 13 March 2019 to Mr Finnan as an agreement to delay payment. That e-mail was a proposal which included a term for the Defendant to agree to pay a fixed fee of £130,000 plus VAT. That proposal was rejected and in so doing, the Defendant also rejected any proposal to delay paying the Claimant.