[2022] EWHC 3392 (KB)

Case No: QA-2021-000261

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Date: 25th November 2022

Before:

MRS JUSTICE STACEY

- -

Between:

TRX

Claimant

- and -

SOUTHAMPTON FOOTBALL CLUB

Defendant

- -
- -

MR R MALLALIEU KC appeared on behalf of the **Claimant**

MR R DUNNE appeared on behalf of the **Defendant**

- -

Approved Judgment

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MRS JUSTICE STACEY:

1. This matter comes before the Court on the Appellant's appeal against decisions of Costs Judge Brown. Permission was given to appeal three rulings, two which were made on 9th July 2021, and the third on 29th October 2021. I am extremely grateful for the assistance of Costs Judge Rowley, appointed as an assessor pursuant to CPR 35.15, whose value has been immense, and I am also grateful to all counsel from whom I heard in this case and those who instruct them.

2. The Appellant was the Claimant below, and the Respondent to the appeal was the Defendant. I shall continue to refer to the parties as they were below.

3. The Claimant accepted a CPR Part 36 offer on 11th March 2020 that had been made by the Defendant's solicitor to pay damages of £4,000, together with his reasonable costs on the standard basis. Bolt Burdon Kemp (BBK) were acting for the Claimant at the time and were the third set of solicitors to have been instructed and had succeeded in achieving an acceptable settlement for their client. However, the costs issues could not be resolved by agreement and appear to have become a little acrimonious. The costs assessment was a protracted process that took place over a number of days between 2nd March and 29th October 2021 before Costs Judge Brown requiring a number of rulings and decisions. The disputes ranged over a number of issues, from the signature on the bill, to the indemnity principle to when the conditional fee agreement (CFA) between the Claimant and BBK was effective. There were challenges to the hourly rates claimed; the reasonableness of both the number and level of fee earners involved; the recoverability of costs claimed in a number of areas of activity such as transferring instructions, media and lobbying work; and finally, the costs of the costs assessment itself.

4. There were four aspects of the costs judgment sought to be appealed. Permission was granted by Saini J in respect of three matters in the costs judgment: firstly, a challenge to the decision that there was no valid retainer between the Claimant and BBK until 17th October 2019, therefore excluding any earlier costs from assessment; secondly, a challenge to the decision that the CFA dated 3rd October 2019 was not effective until signed by BBK on 17th October 2019; and thirdly, a challenge to the decision to make no order as to costs in respect of the costs of the detailed assessment.

5. Since permission was refused for a further ground which had sought to challenge the hourly rates applied and fee earners used, no more need be said about it.

Factual background

6. The Claimant had brought proceedings for sexual and emotional abuse that he was subjected to by Bob Higgins, a scout and Youth Development Officer for the Defendant football club, when between the ages of 14 to 15 he played for their youth team as an associate schoolboy in 1987 and 1988 (“the main claim or the main proceedings”). It was his case that the Defendant club was liable for Mr Higgins' actions on the basis of vicarious liability and/or in the tort of negligence. The Claimant and four others had given statements to the police about the alleged abuse by Mr Higgins in 1991. Mr Higgins was tried by a jury in relation to one other of those complainants (not the Claimant in this case). After Mr Higgins was acquitted in relation to that complainant, the charges in relation to the other four complainants were discontinued. However,

following a Channel 4 Dispatches documentary in 1997, and after more complainants had come forward, a further criminal trial took place, and in June 2019, Mr Higgins was convicted of 45 offences of indecent assault against 23 complainants.

7. The Claimant in this case, TRX, was not a complainant in the 2019 criminal trial.

8. The Claimant first instructed BL Claims Solicitors on 16th September 2016, acting under a CFA, who served a letter of claim on 14th February 2017, but they were unable to secure a settlement. He transferred to Hudgell Solicitors, also acting under a CFA, on 22 June 2017, whose attempts to settle the claim without the need for litigation were also unsuccessful. The Claimant then approached the solicitors' firm BBK and spoke to them on the telephone on 17th June 2019. They agreed to act for him in his claim against the Defendant and take the case on from Hudgell, his previous solicitors. The precise terms of the agreement between the Claimant and BBK, which is the subject of this dispute, are discussed more fully below, since this part of the judgment is merely recording the agreed factual background.

9. There was then a significant and unanticipated delay in BBK obtaining the file from Hudgell. Meanwhile, in a letter of 10th September 2019, the Defendant provided a substantive response to the claim, denying liability and stating that an earlier agreed limitation moratorium would be deemed terminated in 28 days on 8th October 2019. BBK did not obtain the file of papers from Hudgell until 1st October, and succeeded in obtaining an extension of the limitation moratorium from the Defendant to 22nd October 2019.

10. The Claimant signed the CFA sent to him by BBK on 3rd October but there was some delay in his posting it back and BBK did not receive and sign it until 17th October. The CFA was not drafted as being retrospective in effect.

11. BBK issued proceedings the next day on 18th October 2019, which were served on the Defendant on 18th December 2019. The claim was initially vigorously defended, but on 10th March 2020, with liability still fully disputed, the Defendant made the Part 36 offer, set out above, which was accepted by the Claimant the following day. The Claimant was one of 26 claimants who had instructed BBK to bring claims against the Defendant for the abuse they allege they were subjected to by Mr Higgins. 21 of those claims have now been settled.

12. Following acceptance of the Part 36 offer, the parties' respective solicitors attended to the preparation of the assessment of costs in fulfilment of the agreement to pay reasonable costs to be subject to assessment if not agreed.

13. The Claimant's solicitors claimed £65,523.36 in their letter accepting the Part 36 offer on 11th March and requested £36,000 on account of costs, representing around 60% of the amount claimed.

14. The Defendant responded on 16th March stating that they would make a payment on account of costs of £15,000 and would otherwise request a bill.

15. The Claimant's solicitors' response on 4th May 2020 was to make a Part 36 offer in respect of costs of £33,500 plus interest up to the expiry of the relevant period, which was not accepted by the Defendant. The Defendant was thus formally served with a bill

of costs and the assessment process began. Points of dispute and reply were duly served on 8th July and 27th August 2020 respectively and the first of various hearings before Costs Judge Brown took place on 2nd March 2021. It was adjourned part heard. The Claimant served a witness statement and the Defendant served supplemental points of dispute on the Claimant on 29th July. The adjourned hearing took place on the 8th and 9th September 2021 when Costs Judge Brown ruled in principle on the retainer or indemnity principle points.

16. On 6th October 2021, the Defendant offered a settlement of £35,000 in full and final settlement on a drop-hands basis which was not accepted. There was no breakdown of how the offer had been made up, but on 28th October 2021, on the eve of the final costs assessment hearing listed for 29th October, the parties agreed both individual and generic costs of £23,008.15 subject to appeals and challenges. It represented 65% of the costs claimed. The reductions reflected a reduction to the hourly rates claimed, the Defendant's successful challenge to the fee earners used and the various items that had been disallowed as being unreasonable. The final agreement also excluded the costs claimed for the period from 17th June to 20th October 2019, which had been disallowed by Costs Judge Brown on the basis that the CFA between the Claimant and BBK was not entered into until 20th October 2019, and there had been no general private retainer in place during the earlier period.

17. The letter of 11th March 2020 from BBK to the Defendant's solicitors accepting the Part 36 offer had enclosed BBK's bill of costs and a pre-detailed assessment certificate signed by a partner of BBK, Ms Alison McClure. It set out the costs of each of the three firms that had been instructed by the Claimant in three parts, and a fourth part which represented the generic costs shared between the Claimant and 25 other cases in which BBK acted for young footballers against the Defendant in respect of the abuse they alleged by Mr Higgins.

18. In the bill, which was certified as accurate, it stated that "The Claimant's claim was funded by way of CFAs".

19. Now that the parties had agreed the costs of the main claim, the hearing on 29th October 2021 was concerned only with the costs of the costs assessment. Costs Judge Brown ordered the Claimant to pay the Defendant 50% of their costs associated with the retainer or indemnity issue over the two-day hearing of the 8th and 9th July, about which there is no direct challenge (but it was unclear whether the Claimant may have reserved his rights in the event of grounds 1 or 2 of the appeal being successful) but that in relation to all other aspects of the costs assessment, there should be no order for costs.

The Costs Judge Reasons: first decision

20. In the first decision, which was the first of two ex tempore decisions on 9th September 2020, Costs Judge Brown decided the point of whether the costs in respect of the period before a CFA was entered into were recoverable in principle. It was common ground that there was no valid CFA from 17th June 2019 to 3rd October 2019. There was a further dispute as to when the CFA, which was signed by the Claimant on 3rd October and BBK on 17th October, came into force, the Defendant arguing for the later date and the Claimant the former, which is the second issue in the appeal.

21. The Costs Judge correctly directed himself that the Claimant's own subjective view of the contractual arrangement was not admissible but that he must consider the objective meaning of the language that the parties had chosen to use to express the terms of their contractual relationship. He therefore proceeded to analyse the contemporaneous documents prior to the signing of the CFA that had recorded their agreement which consisted of telephone attendance notes and correspondence. He, therefore, ignored the witness statements and evidence in cross-examination and re-examination of TRX himself. There was no evidence from BBK before the Costs Judge.

22. There was no criticism of the Costs Judge's self-direction and his approach in that regard. What is in dispute is whether the Costs Judge was correct in his interpretation of the meaning of the contractual arrangement. The Judge found that there was no private retainer and no liability for the Claimant to pay for work done by BBK on his behalf in the period prior to the coming into force of the CFA.

23. The judgment does not say so in terms, but the Defendant accepts that the only inference to be drawn is that BBK had entered into an unlawful or unenforceable CFA which did not comply with the formalities necessary to make such an agreement legally binding.

24. The Claimant's first contact with BBK was on 17th June 2019 by telephone, as per the attendance note, which recorded that there had been a telephone call with the client that:

> "Provided funding advice - CFA, 20% success fee that includes ATE [a reference to after the event insurance]". (p205)

25. The Judge found in paragraph 37 of his judgment that this was a discussion about costs and the anticipated funding arrangements; that it was a preliminary discussion since the solicitor involved in the conversation indicated that they would need to speak to the partners regarding the opening of a file. The discussion was preliminary in nature, and although the judgment does not say so in express terms, it can only mean that BBK was not instructed as the Claimant's solicitor on 17th June itself and BBK had not yet decided whether to take the Claimant on as a client and accept instructions from him.

26. It was followed by a letter on 21st June 2019 sent by e-mail that stated:

> "I am pleased to confirm the partners of Bolt Burdon Kemp have agreed for us to act for you under terms of business. Once I have received your previous solicitors' file of papers we should then be in a position to act on a no-win, no-fee agreement. I will shortly send out all the paperwork to you which will explain this in detail. If you have any questions or concerns, please do not hesitate to contact me and I can go through this with you." (p206)

27. The next attendance note is of a telephone conversation on 27th June 2019 between the Claimant and a solicitor who explained the claims procedure, method of working, and it records:

> "I then explained the claims procedure if, once we have got the file from Hudgell, we believe he has prospects. Firstly, we will obtain any outstanding records such as…" (p211)

28. The Costs Judge concluded the anticipation was that Hudgell would be asked for the files first and once they had been obtained, then a decision made as to whether a CFA would be entered into.

29. The letter of 27th June 2019 at page 207 of the bundle is a formal letter which followed on from the telephone conversation just noted:

> "You have advised me you wish to bring a claim against the Defendant, Southampton Football Club, for childhood abuse. I am pleased to accept instructions from you to act on the terms set out in this letter and our current Terms of Business, attached. This letter and our Terms of Business contain important information that we give to all clients when they first instruct us." (p207)

30. He was implored to read the letter together with the terms of business and notice of right to cancel very carefully as they formed the basis of the contract between them.

31. So far so good. One might think that there would be no dispute; that this was a general private retainer, but the letter then goes on in the next paragraph under a heading "The Costs of the Claim" to say:

> "Bolt Burdon Kemp will act for you on a no-win, no-fee basis." (p208)

32. It then contains other paragraphs consistent with that assertion:

> "If you win…as long as you stick to your obligations under our agreement, we agree to cap deductions to your compensation at 20%...If you lose…assuming you have stuck to your obligations under our agreement, you will not have to pay anything." (p208)

33. So from this point onwards the letter is internally inconsistent and some of the later paragraphs contradict the opening few paragraphs.

34. There was then a reference to hourly rates charges in the terms of business enclosed, consistent with the initial paragraphs of the letter and a general private retainer, but the second part refers to a no-win no-fee agreement. The letter is extensively set out in the judgment below, as are the terms of business, which are fairly standard. I will not repeat them all in this judgment, but they provide the usual information about costs, billing arrangements, payments on account and such like.

35. A couple of clauses are worth setting out in full. The first is clause 13, The Funding of Legal Services, which provides:

> "Other than private fees, we will tell you about the other ways of funding that might be available.
> Theses may include:
>
> a) Conditional fee agreements

> b) Much litigation is now conducted on a conditional fee basis. If we are able to offer such a scheme to you its terms will be included in a separate agreement. These Terms of Business will apply in so far as they are not varied by the Conditional Fee Agreement." (p200)

36. Clause 23, "The Legal Contract Between Us", was also found to be significant by the Judge:

> "Delivery of these Terms of Business to you, at any time during the period we are instructed by you, forms part of the contract between us from time to time. Subject to any prior agreement between us these Terms will apply to work undertaken both before and after these terms have been delivered to you. Any dispute or claim arising from our Terms of Business or any other aspect of the contract between us will be determined by the law of England and Wales and considered exclusively by the English and Welsh courts." (p203)

37. The files, as already noted, did not arrive from Hudgell until 1st October, but when they did, there was a telephone attendance note which states:

> "The client called me back and I confirmed that I have now received a file from Hudgell and I have reviewed this. I said that the next steps are as follows: I will send the CFA and letter to him. ". (p216)

38. The CFA letter and the documents sent on 2nd October 2019 to the Claimant explained the CFA principles and the standard wording. It explained that assuming he stuck to his obligations under the agreement, the Claimant's liability for payment of costs out of damages was limited to 20% of the compensation, and, again on the assumption that if he stuck to his obligations under the agreement, if he lost the case, he would have nothing to pay. It was consistent with the second part of the letter of 27th June.

39. The letter also explained that it was important for him to understand the terms and conditions of a CFA before it was formally made, and he was encouraged to read the terms carefully and ring and ask for my further explanation before signing. It included the clause:

> "We [referring to BBK solicitors] are not bound to act on a conditional fee basis until both you and we have signed this agreement." (p224)

40. In schedule 2 of the agreement, headed "Basic Charges", it made clear that the obligation to pay costs started in respect of work from the entry into the CFA agreement and was not retrospective to cover past work. As noted above, it was signed and dated by the Claimant on 3rd October 2019 but not returned by him in the post until the 14th or 15th October. On 17th October, the solicitors signed and dated the agreement and sent him a copy of the document signed by both parties with a covering letter which set out the explanation that:

> "The hourly fee rates set out in the letter I sent to you with our Terms of Business will apply to all work undertaken in the case, including up to and after the time the Conditional Fee Agreement is made." (p236)

41. It also recorded the standard terms and urged him to "Please read the CFA and a document entitled: "CFAs, What You Need to Know,":

> "[A]s they set out terms on which I will act for you. In effect, they are the main terms of the contract between us for me to carry out work for you in this matter. The hourly fee rates set out in the letter I sent you with our Terms of Business will apply to all work undertaken in the case, including up to and after the time the Conditional Fee Agreement is made." (p236)

42. It explained that the Claimant had been advised about the terms and conditions relating to the CFA before it was signed by both him and the solicitors.

43. Having set out the contemporaneous documentation the Costs Judge then construed the meaning of the terms of the contractual arrangement between the Claimant and BBK. He concluded that when it was seen in context, the letter of 21st June 2019 did not create a separate liability for costs by reference to any terms of business because "terms of business" was not capitalised T and B in the letter, unlike the reference in the later letter. He concluded that the reference to terms of business should reasonably be read as a reference to the CFA that was to be entered into in respect of the funding of the claim. The Costs Judge was "not persuaded that in the context in which the Terms of Business were sent out" with the letter of 27th June that either clause 13 or 23 provided for or created a separate private retainer to pay costs on the basis of hourly rates or otherwise. He noted, however, that the hourly rates and charges were the same whether the CFA or private retainer applied.

44. The Costs Judge's interpretation of clauses 23 and 13 of the Terms of Business at paragraph 68 of the judgment was as follows:

> "68. Paragraph 23 says:
>
> *"Subject to any prior agreement between us, these terms will apply to work undertaken both before and after these Terms have been delivered to you."*
>
> That is said to impose a liability to pay for work on the basis of an hourly rate for the work done, the argument being that, considered with the other sections that I read out, this created or was consistent with a separate private retainer. I do not accept this. The Terms were of a generic nature. To my mind in the context of all the documentation the reference to "*prior agreement*" could and should, as Mr Dunne argued, be properly interpreted as a reference to an agreement that the parties would enter into a conditional fee agreement once the files had come through from Hudgells and the solicitors had had an opportunity to consider them. That this was the understanding of the parties

> appears to be supported by the attendance notes. In other words, the Terms of Business were subject to the funding agreement that had been discussed.
>
> "69. Paragraph 13 says:
>
> *"Conditional Fee Agreements…..If we are able to offer such a scheme to you, its terms are to be included in a separate agreement. These Terms of Business will apply in so far as they are not varied by the Conditional Fee Agreement."*
>
> It seems to me that, taken in its factual context, the Claimant could and would reasonably read this as indicating that the Terms of Business were to be read within (which I think was the word used in his evidence) the context of the conditional fee agreement or, as Mr Dunne put it, complementary to it, in that they would be understood as running alongside it. In other words, supported perhaps by the understanding of the Claimant as I understood it to be – at least on the basis of some of the answers that he gave to Mr Dunne – it seems to me that the Terms of Business were indeed to be read as complementary to the conditional fee agreement and not separate from it. They were not otiose even before the CFA was entered into: there were matters which were potentially relevant in the Terms of Business before entry into the CFA such as the authority that was given to the solicitors."

45. The Costs Judge then concluded in paragraph 72 of his judgment that common sense and the commercial consequences meant that Mr Dunne's submissions before him were correct. He was also concerned that insufficient explanation had been given to the Claimant that he would be liable for the costs prior to the CFA which was a point that appeared to concern the Judge considerably.

46. There was then further discussion at paragraphs 73 to 99 of the judgment, reiterating the points made by both parties that do not take matters further which repeat the points previously made and the Costs Judge's explanation for rejecting the subsidiary arguments made by Mr Dunne, which are, therefore, no longer relevant.

Second decision under appeal

47. The second decision under challenge was also given in an extempore judgment on 9th June and concerned the date that the CFA became a legally binding agreement – whether it was when it was signed by the Claimant or only when it had been signed by both the Claimant and BBK as the other party to the agreement.

Third decision under appeal

48. The third decision under appeal is that of 29th October concerning the costs of the detailed assessment. CPR 47.20 provides as follows:

> (1) the receiving party is entitled to the costs of the detailed assessment proceedings except where:
>
> (a) the provisions of any Act, any of these rules or any relevant practice direction provide otherwise; or
>
> (b) the Court makes some other order in relation to all or part of the costs of the detailed assessment proceedings.
>
> (2) [not relevant]…….
>
> (3) In deciding whether to make some other order, the Court must have regard to all the circumstances, including:
>
> (a) the conduct of the parties;
>
> (b) the amount, if any, by which the bill of costs has been reduced; and
>
> (c) whether it was reasonable for a party to claim the costs of a particular item or to dispute that item.

49. Subparagraph (4) provides that the provisions of Part 36 apply to the costs of detailed assessment proceedings with a number of modifications.

50. The Defendant raised four points in support of the argument that the general rule that the receiving party receive its costs of the detailed assessment be disapplied pursuant to Rule 47.20(1)(b) and the Court make some other order. The order sought was that for the retainer point, the paying party's costs be paid by the receiving party and that there be no order for costs as regards the rest.

51. The first point was specific to the costs of the retainer point that the Defendant had won and not relevant to the appeal. The other three points in support of the Defendant's argument that there should be no order for costs were that there had been a dramatic and exceptional reduction in the bill assessed; the conduct of the receiving party (the Claimant), which was not asserted to be misconduct but merely relevant conduct including the mis-certification point; and, finally, that the Claimant's solicitors had unreasonably claimed for costs in a number of categories (paragraph [19] on page 163 of the bundle).

52. In reply the Claimant relied on the wording of CPR 47.20 to argue that the presumption had not been rebutted and referred to the well-known case of *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 in which Jackson LJ ruled on the effect of Part 36 offers on orders for costs. It was submitted that the Defendant's failure to make an effective Part 36 offer was a factor to be given preeminent, if not exclusive, weight, which would mean the receiving party should receive all its costs of the detailed assessment.

53. Costs Judge Brown considered that *Fox v Foundation Piling Ltd* was not necessarily analogous and relied on his own case of *Milbrooke Construction Limited v Jones* [2021] EWHC B20 (Costs). He also considered that this case could be distinguished from the case of *Mullaraj v Secretary of State for the Home Department* [2021] EWHC B5 (Costs), a decision from another costs judge which, in any event, was not binding on

him. He noted the time and work involved by the Defendant in drafting points of dispute and the costs of the detailed costs assessment hearings. He found that the level of costs claimed by BBK was unreasonable in amount and BBK would have known it was substantially unreasonable.

54. He concluded that the total reduction in bill for the amount claimed was exceptional and dramatic. He was also concerned about the mis-certification point which he found to be serious and substantial, although it fell short of misconduct by the solicitors. The bill of costs covered the work of the three firms of solicitors over the period 14 February 2017 to 24 March 2020 and the point in question was what was said to be a lacuna in the period between 17th June and 3rd or 17th October 2019 when the Costs Judge had found that there was no CFA in place and the solicitors, BBK, would have known there was no CFA in place (they were not arguing that there was), which the Costs Judge felt amounted to a serious and substantial mis-certification in the bill of costs when they had stated that "the Claimant's claim was funded by way of CFAs".

55. He did, however, row back a little from his earlier trenchant concern about this point in paragraph 39 when he stated that:

> "The difficulties with certification or scarification had somewhat faded into the background by the time we got to the hearing on the indemnity point because of the way that the case was put, so the issue before me was not mis-certification so much as an issue as to the contractual arrangements between the Claimant and his solicitors, the indemnity principle."

56. The ratio of the decision is set out in paragraphs 32 to 34 of the judgment:

> "32. I am satisfied that there is a substantial basis for departing from the presumed rule, the presumptive rule in 47.20(1) and that it would be unjust not to do so in this case when considering not just the costs of the funding issues but also matters generally. Indeed it seems to me to be clear that some other order is appropriate: if not in this case, it might be asked, when would it be? Plainly, in most cases a Part 36 offer, or the absence of an effective one, will be determinative. But the question might reasonably be asked, what is the point of r.47.20(3) if the making of a Part 36 offer is the only consideration and that this matter assumes such pre-eminence that no or no substantial weight can be attached to the other factors?
>
> 33. I do accept Mr Mallalieu's point nonetheless that the ability to make a Part 36 offer – and I am not making any finding that the Defendants could not have made a Part 36 offer – should be given very substantial weight in determining the issue as to costs. As I think I indicated in the *Milbrooke* decision it is, in my view, right that I should give substantial weight to the failure on the part of a defendant to make an effective offer.
>
> 34. I have difficulty in describing the Claimant as having been successful in this assessment, given the extent of the reduction,

> the findings that I made and the agreements that have been reached. This is notwithstanding that the offer of the Defendant of £15,000 has been beaten."

57. The Costs Judge found that the solicitors were well aware that they were not going to get anything near what they were claiming since they had offered to accept almost exactly half of their total bill of costs at around the same time as they submitted their bill of costs. He considered no order for costs should be available in exceptional cases and this was one such.

The Legal Principles

58. The law on the first and second issues is not in dispute and can be stated shortly. It is common ground that there is no challenge to the Costs Judge's findings of fact but to his contractual interpretation on which there is only a right and a wrong answer. The principles of contractual interpretation are set out in *Lukoil Asia Pacific Pte Limited v Ocean Tankers (Pte) Ltd (Ocean Neptune)* [2018] EWHC 163 (Comm) ("Lukoil") by Popplewell J, as he then was, are well known and were succinctly reiterated recently by O'Farrell J in *2 Entertain Video Ltd & Ors v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC).

> "The applicable legal principles of contract construction are well-established. When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It does so, having regard to the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:
>
> (i) the natural and ordinary meaning of the clause;
>
> (ii) any other relevant provisions of the contract;
>
> (iii) the overall purpose of the clause and the contract;
>
> (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and
>
> (v) commercial common sense; but
>
> (vi) disregarding subjective evidence of any party's intentions."

59. In the context of solicitor's retainers, where disputes may arise by virtue of the indemnity principle, if the paying party is able to establish that the receiving party had no liability to his or her solicitor for costs incurred, or the relevant part of them, the paying party does not have to pay those costs.

60. It is now 103 years since the Court of Appeal ruled in *Adams v London Improved Motor Coach Builders* [1921] 1 KB 495 that once it is established that a firm of solicitors is acting for a party, a presumption arises that the client is liable to pay the solicitor. A client would be liable to pay their solicitor's costs where there was no agreement with them that he should not in any circumstances be liable to them for their costs (per Atkin

LJ at page 503). *Adams* has been consistently followed since then and remained good law. See, for example, *Meretz Investments NV & Anor v ACP Ltd* [2007] EWHC 2635 (Ch) where Warren J expressed it in more modern language that in order to rebut the presumption, it has to be shown that there are no circumstances in which the solicitor would be able to look to the client for payment.

61. The burden of rebutting the presumption rests with the paying party and in order to do so, it must be shown that the party was simply not liable to the solicitor for the work done on his or her behalf. It is not enough that someone else was going to pay the bill, or that they could never have afforded to pay, or that the solicitor was never likely to ask for payment. What must be shown is that the party was simply not liable to their solicitor for the work done.

62. On the third issue, the costs of detailed assessment of costs, the starting point is CPR 47.20. There are two first instance judgments on the specific point in issue here of when the presumption that the paying party pays is rebutted and the courts may make a different order: *Mullaraj v Secretary of State for the Home Department* and *Milbrooke Construction Ltd v Jones*, which came to different conclusions.

63. In *Mullaraj v Secretary of State for the Home Department*, costs were claimed for a total amount of £74,000 on 24th April 2020, and after a provisional assessment under CPR 47.15, the bill allowed was just shy of £41,500 on 20th November 2020, excluding interest and the costs of the assessment.

64. On 30th July, the paying party had made a without prejudice offer save as to costs of £40,000 in full and final settlement of the costs. The receiving party had not responded to the offer throughout August, but on the fourth time of being asked for a response by the paying party, the Claimant replied rejecting the offer without making a counteroffer.

65. Deputy Costs Judge Campbell conducted the assessment. 44.05% was disallowed:

> "….because swathes of the bill had been disallowed as it had been littered with completely unreasonable items…
>
> ….Part One of the bill was disallowed completely for want of a retainer before legal aid was granted, the Claimant went to counsel far too often and every e-mail appears to have been charged for."

66. Deputy Costs Judge Campbell, however, rejected the Defendant's submissions to make a different order. The Defendant had not made a Part 36 offer in relation to the costs of the detailed assessment.

67. Deputy Costs Judge Campbell relied on *Global Energy Horizons Corporation v Gray* [2021] EWCA Civ 123, which stated:

> "Where a defendant is faced with an exorbitant claim which he wishes to defend vigorously but where he is vulnerable to a finding that he is liable for a much smaller amount, there is a clear process provided by CPR Part 36 which he can follow to protect his position. Mr Levey submitted that there was nothing

> that Mr Gray could have done to stop the juggernaut of GEHC's attack on him. We do not accept that a trial of the complexity of the enquiry hearing was inevitable but, in any event, if Mr Gray had made an early payment into court of the proportion of the management fees and the Klamath Falls settlement monies, he would be in a much stronger position now to dispute his liability to pay GEHC's costs."

68. Deputy Costs Judge Campbell described *Global* as guidance that a party who is vulnerable for a smaller sum than the amount claimed in costs should use Part 36 to protect their position.

69. He found at paragraph 21:

> "…[The paying party]…did not put itself in the *"stronger position"* referred to in *Global* that would have enhanced its prospects of now successfully disputing its liability to pay the Claimant's assessment costs"

70. He went on to note that even if the paying party had made a formal Part 36 offer instead of merely a without prejudice save as to costs letter, the offer fell short of the costs awarded. He stated that:

> "it was trite law that in Part 36 cases a near miss is not good enough, see judgment of Stewart J in *JLE v Warrington & Halton Hospitals NHS Foundation Trust*… [and the Costs Judge saw] no reason why the position should be different here, where the Claimant had gained a more advantageous result by going to assessment, with the margin of the win not being a matter which the court can take into account." [22]

71. He next considered Rule 47.20(3)(b), that the Court must have regard to the amount, if any, by which the bill of costs has been reduced when deciding whether to make a different order:

> "25. First, I do not find it persuasive that a paying party who makes no offer at all, should be in a better position than a paying party who does make an offer but one which is just short. That would place a non-offering paying party at an advantage over a paying party who has tried to settle the costs, but whose offer has not been quite enough. It would provide a potential reward for a paying party, who sits back, having deliberately made no offer, to rest secure in the knowledge that a successful challenge can always be advanced later under CPR 47.20(1)(b) if the bill is reduced by a significant amount after a good day in court. In circumstances such as these, Rule CPR 47.20(1)(b) and (3)(b) could simply be argued in every case where the bill has been reduced without an offer made, in disregard of the Court of Appeal's guidance in *Global*, that a party who is vulnerable for a smaller sum than the amount claimed, should use Part 36 to protect their position. Moreover, what tariff should be used to

decide whether enough has come off to reverse CPR 47.20: 25%, 30%, 50%, more? There is simply no guidance upon which to draw.

26. Second, whilst rule 47.20(3)(b) indeed requires the court when considering whether to make a different order, to take into account the amount by which the bill has been reduced, I am puzzled (with one exception) how a circumstance could ever arise in which a paying party who has made an offer to settle which has been short (in addition to those who have deliberately made no offer) could successfully deploy that rule. The exception is where a paying party would have no way of knowing whether there has been fraud or other skulduggery by a receiving party, such as claiming costs where it was known that there had been a failure to comply with the indemnity principle. Such a situation would arise where the receiving party had made a bargain with his solicitor not to be liable for any costs so by operation of the indemnity principle, nothing would be recoverable from the paying party. These would be matters to which only the Costs Judge would be privy, since a retainer letter, which would provide the answer, is a privileged document only available for the court to read upon receipt of the receiving party's papers lodged for assessment under CPR 47.19 PD 3.12. Other than that, I cannot think of a circumstance where a paying party whose without prejudice offers have been too low, could successfully argue that the receiving party should be deprived of the costs of assessment. That is particularly the case here where the SSHD's open offer under PD paragraph 8.3 to CPR 47.9 was also way off the mark, with nil having been offered, a deficiency of over £41,000.

27. Even if I am wrong about that, there are sound explanations here why the costs were reduced substantially. Part One of the bill was disallowed completely for want of a retainer before legal aid was granted, the Claimant went to counsel far too often and every e mail appeared to have been charged for. None of these matters, however, in my judgment, would justify any adjustment under which the SSHD should benefit from a different costs order.

…

33. The conclusion I have reached is that having failed to protect itself by making an effective offer under CPR 36 or by a "without prejudice save as to costs" offer, or through its open offer, the SSHD cannot succeed on a *"Let's see by how much the bill has been reduced"* argument and then deploy CPR 47.20(1)(b). To permit that would be to discourage the making of offers, and enable paying parties who advance no offers, to be in a better position to argue for a "different order", than those who make offers in a genuine attempt to settle the costs. However, as I have

> said, I am aware that there is no consistency on the Costs Judges' corridor on this point. For that reason, I consider a definitive view at a higher level would assist parties in understanding where they stand, when they make a Part 36 offer which is too low, or no offer at all, but then argue that they can rely on CPR 47.20(1)(b) to their advantage, depending upon how good a day they have had in court. If asked, I would give permission to appeal and in that eventuality, invite the parties to transfer the case to the High Court so that the appeal is dealt with by a High Court Judge whose decision will be binding."

72. The case of *Milbrooke* on 15th October 2021 was a case of Costs Judge Brown which reached a different decision to Deputy Costs Judge Campbell. He also considered the wording of the CPR and considered the judgment in *Mullaraj* and concluded that whilst a Part 36 offer is extremely important and will be determinative of the issue of the costs of a costs assessment in most cases, for good reason it is not the sole factor. He did not consider it open to him to disregard the reduction in the bill and dismiss the wording of CPR 47.20(3)(b) or limit its effect without more.

73. In *Milbrooke,* the costs assessment resulted in an overall reduction of 39% of the bill. The amount allowed was significantly above the offers made by the Defendant. The Claimant had not beaten its own Part 36 offers but had beaten some of its own *Calderbank* offers made more recently. The Costs Judge described the costs claimed by the receiving party as highly excessive and unreasonable. In considering all the factors in that case, he made a different order and reduced the paying party's liability to pay the receiving party's costs by 30%. Both costs judges are extremely experienced.

74. The other authorities relied on by the parties were the well-known case of *Fox v Foundation Piling Ltd*, in which Jackson LJ stressed the importance of the starting point for costs set out in Rule 44.3 (2) (a), that the unsuccessful party should pay the successful party's costs. He deprecated what he described as an unwelcome tendency by both first instant and appellate courts to depart from it. He held that:

> "In the context of personal injury litigation where the claimant has a strong case on liability, but quantum is inflated, the Defendant's remedy is to make a modest Part 36 offer. If the Defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure costs protection. Different considerations may arise in cases where the claimant is proved to have been dishonest."

75. *Global Energy Horizons* is referred to in both the Costs Judges' judgments. It was a case where in the main judgment, on the substantive issues, in five separate claims that had been brought by the Claimant against the Defendant the Defendant had been ordered to pay £3.6m to the Claimant. Although on the face of it, it sounds like a lot of money, it in fact, represented just 1.6% of the £227.8m claimed by the Claimant against the Defendant. The Judge, at first instance, considered that:

> "The overall result was that both parties had lost heavily."

76. Standing back, he concluded that the result was a score draw and that the correct starting point was that each party should bear its own costs. The Court of Appeal, however, disagreed and found that the Claimant had won because it had obtained an order that the Defendant pay it over £3m, which is still a significant amount of money, albeit much less than what they had been hoping for.

77. Where a Defendant is faced with an exorbitant claim which he wishes to vigorously defend, the stated proposition from *Fox* is that where there is an exorbitant claim, Part 36 is the shield by which a Defendant may protect itself. It was, thus, no different to the approach in *Fox*. The first instance judgment was thus set aside, and it was declared by the Court of Appeal that the successful party was the Claimant, who had received the £3.6m, which was therefore entitled to its costs, other than in specific regard to one aspect of the case, which was a valuation hearing where the Defendant had succeeded in establishing that the claim of some of the business assets was actually nil.

Submissions

78. For the Claimant it was submitted that the Costs Judge was wrong to conclude as a matter of law that there was no retainer. The terms of business were clear and if one looks at the chronology of the correspondence, the correct interpretation was that there was a general retainer in place prior to the CFA being executed.

79. On ground 2, the Claimant accepted in the course of submissions that the contract was not formed until it was communicated to BBK, which was on 17th October, but it was submitted by Mr Mallalieu that the effect was retrospective to 3rd October once the contract had been formed.

80. On ground 3, the Claimant relied on *Global* to say that the procedure by which the Defendant should have protected itself was in a Part 36 offer and that paragraph 8 of *Global* applies equally to a claim for costs as to a claim for damages.

81. The Defendant relied on the judgments below for the reasons that the Costs Judge had provided. On ground 1, they submitted that the letter of 27th June did not clearly state the position pre-CFA but had informed the Claimant that he was under no obligation to pay for work done by them. The Defendant accepted that there was a solicitor/client relationship by 21st June 2019 but the relationship was that of an unlawful CFA. On ground 2, Mr Dunne argued that as a basic principle of contract law the contract could only be formed when it was communicated and signed by both parties and it had not even been brought to the Defendant's attention until after they received the letter enclosing the signed CFA from their client. It was not binding until both parties had signed and agreed to be bound by it.

82. On ground 3 it was submitted that the decision was not wrong: the Costs Judge, after five days of hearings, was best placed to exercise his discretion as to costs, which he did. It was a simple matter since CPR 47.20(3)(b) explicitly states that the amount, if any, by which the bill of costs has been reduced is relevant in deciding whether to make some other order and was thus a matter he could take into account. 65% is a significant reduction. Furthermore there were other unreasonable elements such as the mis-certification that he was entitled to take into account under CPR 47.20(3)(c). Mr Dunne submitted that CPR 47.20 stands alone and is comprehensive.

Analysis and conclusions

First issue: terms governing the contractual relationship prior to the formation of the CFA

83. The first question is whether the Costs Judge correctly construed the contractual terms which, as noted above, is a question of law? From 21st June 2019 up to the point of the letter of 27th June 2019, there is no doubt. All the evidence is consistent with a general retainer being in place pending the decision by the solicitors whether to agree to act on a CFA and the formalities being completed. There can be no question about that from the evidence which was not in dispute in the attendance note of 17th June and the e-mail from 21st June, and which the Judge accepted in his interpretation [37] was a preliminary discussion in anticipation of being instructed, as Mr Dunne quite reasonably accepted.

84. The problem comes with the letter of 27th June and its internal contradictions and inconsistencies. On the one hand it refers to terms of business and encloses a copy of them and parts of the letter are consistent with a general private retainer. On the other hand, the letter then goes on to refer to a no-win no-fee agreement.

85. There can also be no dispute that after BBK had received the case papers from Hudgell, they immediately explained in the telephone attendance note of 1st October 2019 that the next step would be the entering into of the CFA to be signed by the Claimant and returned and the arrangement of the ATE insurance, which is entirely consistent with there having been a private retainer up to that point.

86. I have set out the Judge's reasoning, and the ratio is contained in paragraphs 63, 67 and 68, which would appear to suggest or imply that there is some prior agreement displacing the terms of business that is not fully articulated in the judgment. The meaning is a little opaque in those paragraphs, but assuming it means, as Mr Dunne suggested, an oral agreement for an unenforceable CFA, I find that the facts are not capable of bearing that interpretation.

87. Up until 27th June, it is clear the Claimant was told that BBK hoped it would be able to offer him a CFA, and up to that point, standard, non-contingent terms of business would apply to "all work done", and BBK then undertook the work of obtaining the Hudgell case papers and contacting the Defendant and did the necessary preparation to be able to issue at very short notice once the CFA was completed. That is the plain meaning of the words and their obvious and natural meaning.

88. The letter of 27th June falls to be construed against that contextual background, and two meanings are contended for. On the Claimant's analysis, a private general retainer; and on the Defendant's analysis, BBK knowingly entering into an unenforceable, non-compliant CFA.

89. It has been established that BBK was acting for the Claimant at least from 21st June, which is clear from the e-mail of that date. The presumption that the Claimant was liable to pay BBK for their legal services, therefore, arises from that moment. The question is whether, in accordance with *Adams* and the line of authorities that flow from that judgment, the Defendant has proved there are no circumstances in which BBK would be able to look to the Claimant for payment for their work over that period. It is

not sufficient to say that the Claimant could never have afforded to pay, that someone else was going to pay his bill or the solicitor was never likely to ask for payment. See *Lewis v Averay* [1973] 2 All ER or *HMRC v Gardiner* [2018] EWHC 1716 (QB). It is not a question of whether the solicitor would actually be paid but whether or not the Claimant was liable to their solicitors for the work that was done.

90. I find that the obvious and natural construction of the terms of the letter of 27th June, derived from the letter itself and attendance notes, letters and e-mails both before and after 27th June, is that the Claimant was a client of BBK on a general private retainer during this period, and that the references to a no-win no-fee agreement in the 27th June letter were to a possible future intended relationship that BBK hoped it would be able to offer to TRX, once it had had a chance to review the papers from Hudgell's. That also chimes with commercial common sense and satisfies the tests identified in *2 Entertain Video Ltd*.

91. It is not necessary to have recourse to the doctrine of *ut res magis valeat quam pereat*, that where there are two competing meanings, one of which would validate the instrument and the other would render it void, the former sense is to be adopted, since there is little competition between the two meanings and I have found that the 27th June letter refers to the intention to enter into a no-win no-fee agreement once the papers have been reviewed and nothing more. But if it is necessary to resort to the doctrine, the meaning contended for by the Claimant would prevail since on the Defendant's interpretation, the agreement would be rendered ineffectual as the Claimant and BBK would have entered into an unenforceable CFA in which they would not be able to claim their costs from either the Claimant or the Defendant. It would frustrate the objective of the contract, which is for BBK to perform legal services for their clients as a business and for-profit organisation.

92. On a proper construction of the contract, the Defendant, therefore, has not rebutted the *Adams* presumption and the proper construction of the contract is as per the Claimant's submissions: that the Claimant had instructed BBK on 21st June 2019, BBK indicated it hoped to be able to offer him a CFA in the future, and if able to do so, those terms would be proposed in due course. In the interim, the Claimant was told that standard non-contingent terms of business would apply, which provided for conventional, non-contingent payment, which was said to apply to all work done. Those terms further expressly applied to work undertaken both before and after the delivery of the terms. BBK then undertook work, obtaining the previous solicitors' file of papers, considered them, contacted the Defendant, addressed issues concerning the limitation agreement and the moratorium in light of the limitation issues, et cetera, and then on 2nd October the Claimant was offered the CFA and the terms made clear that once it had been agreed, those would be the terms going forward.

93. There was a dispute about whether the general private retainer was formed on 17th June, as contended for by the Claimant, or a later date. I find it was 21st June, but nothing turns on it since no work was claimed under the bill for that four day period. I, therefore, conclude that the Judge was wrong to find that there was no general retainer from the 21st June.

Second issue: period between 3 and 17 October 2017

94. It is not necessary for me to decide the second issue, because there is no difference in the hourly rates and material terms relevant to the costs issues as between the general private retainer and the CFA. It therefore matters not whether the relationship between the Claimant and his solicitors was governed by the CFA or a private retainer between 3 and 17 October 2019.

Third issue: Rule 47.20 and the costs order

95. The consequence of my conclusion on issue one is that the assessment of the costs of the main claim proceeded on an incorrect basis and will have to be reconsidered. It was tempting to say that issue three is wholly academic since the application of Rule 47.20 must be considered after the costs have been assessed, the landscape has changed, and it is no longer the case that the bill has been reduced by 65%. However, in the course of argument, both parties have specifically sought a ruling on whether the Costs Judge erred in principle in his approach to the awarding of costs in the detailed assessment proceedings regardless of which way I might find on issues one and two. They seek clarity at appellate level for future cases in light of the tension between *Mullaraj* and *Millbrooke*, and I will oblige.

96. The central issue of principle in dispute is whether, and if so to what extent, Rule 44.2 (general provisions about courts' discretion as to costs) and Rule 36, (the payment-in regime), and the authorities under those provisions concerning costs in main proceedings, should apply to Rule 47.20.

97. To recap, the Claimant submitted that the principles in *Fox* and *Global Energy* are equally applicable to the costs of a detailed assessment of costs. The way in which a paying party could protect itself from adverse costs consequences in a challenge to a bill of costs that was found to be unreasonable, or excessive for whatever reason, lay in Part 36. If a paying party failed to avail itself of the Part 36 procedure, then it must then bear the consequences and be ordered to pay all the receiving party's reasonable costs. There should be no percentage reduction or other order, absent only skulduggery or some other factor that could not be anticipated or known of as per *Mullaraj*.

98. Mr Mallalieu submitted that for all the reasons identified by Jackson LJ in *Fox*, it is important to encourage realistic offers at an early opportunity, and the Part 36 regime is designed exactly for that purpose. It is fit for purpose and equally applicable to costs of the costs assessment. In this case, the Defendant did not have the protection of Part 36 since they had failed to make a Part 36 offer that had not been beaten. In relation to the all-inclusive offer on 6th October, it was not possible to identify whether the sum awarded was more or less than the offer because of the way the offer had been structured. It was in the gift of the Defendant to structure their offer differently so that it had been transparent. They had chosen not to do so. The Costs Judge had therefore been wrong in principle to make no order for costs.

99. For the Defendant, Mr Dunne submitted that Rule 47.20 is stand-alone and comprehensive, and it would be wrong in principle to apply *Fox* and *Global Energy* which would create an additional hurdle for a paying party. He submitted that no order for costs is perfectly appropriate. Indeed there could be no principled objection even if

the Judge had required the receiving party to pay some of the paying party's costs of the costs assessment.

100. The Judge had had regard to the factors listed in 47.20 and taken account of all the relevant circumstances as required by the rule, and his decision was unimpeachable for the reasons the Judge gave and fell well within the exercise of his discretion.

101. It was also suggested that I could provide some guidance and set out applicable principles as to when and in what circumstances some order other than that the receiving party be entitled to the costs of the detailed assessment, particularly as I had had the benefit of having the very experienced Costs Judge Rowley with me. Should there be a sliding scale depending on the percentage reduction to the bill perhaps? What conduct is to be taken into account in Rule 47.20(3)? How important is a Part 36 offer? What about *Calderbank* and other offers? What other factors might be relevant?

Conclusions on issue three

102. The lodestar is the wording of CPR 47.20 and, in particular, 47.20(3). The starting point is the principle that the receiving party is entitled to the costs of the detailed assessment analogous to a successful party in Rule 44.2 unless either 47.20(1) (a) or (b) applies. In this case, it is (b) which is relevant:

> "Where the Court makes some other order in relation it all or part of the costs of the detailed assessment proceedings."

103. 47.20(3) identifies three factors that the Court must take into account in deciding whether to make some other order, but it is not an exhaustive list since the Court must have regard to "all the circumstances" of which the matters listed are just three examples. To describe it as a self-contained regime is, thus, perhaps a little misleading when it is so open-textured and porous. But it is accurate to say that it is the specific provision that applies to the costs of detailed assessment proceedings, although it draws from principles in Rules 44.2 and also Part 36 which is incorporated with relevant modifications by 47.20(4). Nothing much turns on the fact that Part 36 is not expressly referenced in 47.20(3) since there is no dispute that any Part 36 offer would be a relevant circumstance to be taken into account in the generality of 47.20(3).

104. Against that background, I am most reluctant to lay down guidance that fetters the discretion of costs judges, who are specialist judges, in matters of costs (the clue is in their title). There is a clear and comprehensive code in 47.20 and it is the code that is to be dealt with, and it would not be right for me to try to formulate a gloss to be applied to the carefully worded code produced by the Rules Committee after much consideration and deliberation no doubt.

105. Furthermore, the cases are fact and circumstance sensitive, and it would be wrong to try to lay down any hard and fast rules when the facts and the circumstances can vary so much from case to case.

106. With that note of caution in mind, I am willing to say that there will usually be no difficulty where a Part 36 offer is made in detailed assessment proceedings by either party which beats, or is beaten, by the amount allowed by the Costs Judge conducting the detailed assessment. The difficulties emerge, as demonstrated by *Mullaraj* and

Millbrooke, with near, or even not so near, Part 36 misses or where no Part 36 offers have been made by a paying party, or where offers that do not comply with the Part 36 formalities are made. But I cannot accept the Claimant's argument that, in those situations, as a matter of principle, it would be wrong for a Costs Judge to make no order for the paying party to pay any of the costs of the receiving party. It will be ***a*** relevant factor, but will not necessarily be the most important or only relevant factor. *Fox* and *Global* are directed to Part 36 offers in main proceedings for damages. They have some relevance and application to the costs of a detailed assessment, but they must be considered through the prism of Rule 47.20, which is its own comprehensive code.

107. I am also willing to say that, depending on all the circumstances, it may be unusual to make no order for costs where no successful Part 36 offer has been made by the paying party, especially where, as here, both sides are very experienced and specialist personal injury litigators, sophisticated in costs matters. But as set out in the rule, to make a different order will depend on all the other relevant circumstances in the case, including, as per the rule, the conduct of the parties, the amount, if any, by which the bill of costs has been reduced, and whether it was reasonable for a party to claim the costs of a particular item or to dispute that item in question.

108. I, therefore, do not accept the Claimant's argument that Cost Judge Brown's order was wrong in principle when it is such a fact and circumstance specific assessment. Part 36 can be a rather cumbersome procedure that does not always assist the speed and flexibility that may be required in detailed costs negotiation which may just as well be conducted in *Calderbank* offers in less formal steps in a negotiation. The Claimant's argument also fails to address the difficulties for litigants in person who may have difficulty navigating the Part 36 regime.

109. Since the basis on which the Costs Judge assessed costs has changed in light of my conclusions on issue one, it would be inappropriate for me to embark on a line-by-line analysis of the Judge's reasoning which is now academic. But in order to assist the parties I can say that the Judge had identified a number of relevant circumstances, including the very substantial reduction in the bill in almost all areas. It is also relevant that BBK seemingly realised at an early stage that much of the costs claimed might not be awarded when they made a Part 36 offer on 4 May 2020 of approximately 50% of the costs claimed. But even in the absence of a successful Part 36 or other meaningful offer, to make no order for the receiving party costs, which could, of course, also be described as a 100% reduction in their costs, seems a little harsh and would, perhaps, have strayed towards the limit of the wide ambit of discretion accorded to judges in matters of costs.

110. A reduction of less than 100% would have been unexceptional in all the circumstances of the case. It is almost common sense that where there has been a very significant reduction in the assessed costs from the costs claimed, it may well sound in a percentage reduction to the receiving party's costs. Any Part 36 offers must be taken into account and are likely to be relevant to the amount of any percentage reduction, but there can be no hard and fast rules, and I shall not suggest what would have been the appropriate costs reduction in this case in what is now a counter-factual situation. It would not be appropriate for this Court to fetter the discretion of Costs Judges beyond the provisions of Rule 47.20 itself. I therefore decline to offer further guidance. The answers to the question of how to approach the costs are in Rule 47.20 and the parties

will have to agree the appropriate order between them or return for a ruling from a Costs Judge if they are unable to agree between themselves.

(This Judgment has been approved by the Judge.)

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