Neutral Citation Number: [2021] EWHC 3410 (Ch)

Case No: CH-2020-000234

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
ON APPEAL FROM
THE SENIOR COURTS COSTS OFFICE
MASTER JAMES (Costs Judge)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/12/2021

Before :

MR JUSTICE TROWER
Sitting with MASTER GORDON SAKER (Senior Costs Judge) as Assessor

- -

Between :

THE WINROS PARTNERSHIP
(FORMERLY KNOWN AS ROSENBLATT
SOLICITORS)

Appellant

- and -

GLOBAL ENERGY HORIZONS COPORATION

Respondent

- -

ALAN GOURGEY QC and DAN STACEY (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Appellant/Defendant**
BENJAMIN WILLIAMS QC and NICO LESLIE (instructed by **Eversheds, Sutherland (International) Ltd**) for the **Respondent**

Hearing dates: 13 and 14 October 2021

- -

Approved Judgment

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

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 10am on 16 December 2021

Mr Justice Trower:

Introduction

1. This is an appeal against an order made by Master James sitting as a Costs Judge in the Senior Courts Costs Office on 28 August 2020. The order was made on the hearing of two preliminary issues and an application she had directed to be tried in the course of proceedings brought by Global Energy Horizons Corporation ("GEHC") against its former solicitors, The Winros Partnership, formally known as Rosenblatt Solicitors (the "Solicitors").

2. The proceedings before the Master had been commenced on 31 March 2016 and were brought by GEHC under section 70 of the Solicitors Act 1974 ("section 70" and "SA 1974"). The bill with which the claim was concerned is the Solicitors' invoice number 39618 dated 21 December 2012, in the sum of £3,269,131.54 (the "December Bill"). It was rendered for the provision of legal services to GEHC in respect of proceedings against one of GEHC's former associates, Mr Robert Gray. GEHC's claim ("the Gray Action") alleged misappropriation of an opportunity to develop innovative technology. The Gray Action was commenced on 8 December 2010, alleged breaches of fiduciary duty by Mr Gray and included allegations that he was liable to account to GEHC for sums received, together with appropriate accounts and inquiries.

3. The two preliminary issues ordered by the Master relate to (a) the enforceability of the conditional fee agreements (the "CFAs") which governed the terms of the Solicitors' retainer and (b) what was said by GEHC to be the wrongful termination of that retainer. The third matter relates to the scope of the application of section 70, which makes provision for the assessment of a solicitor's bill on the application of the party chargeable with the bill.

4. Where an application is made within one month from the time of the bill's delivery, section 70(1) entitles the party chargeable to an assessment as of right. After one month from the time of the bill's delivery, section 70(2) gives the court a discretion to make an order that the bill be assessed, but section 70(3) provides that the discretion can only be exercised in special circumstances after the expiration of 12 months from the time of delivery (section 70(3)(a)) or after the bill has been paid (section 70(3)(b)). Where a bill has been paid, section 70(4) further provides that the power to order an assessment under section 70(2) can no longer be exercised on an application by the party chargeable with the bill after the expiration of 12 months from the payment of the bill. The application of section 70(4) to these proceedings is one of the principal issues with which this appeal is concerned.

5. The partner at the Solicitors who was responsible for managing the Gray Action on behalf of GEHC was subject to serious criticism and adverse findings in the Master's judgment. Those findings included a conclusion that where the only evidence of something having happened was the partner's unsupported recollection, the Master was unlikely to accept their version of events. It is considered by both the Solicitors and the partner concerned that this finding has the potential seriously to damage their professional reputation. The Master therefore granted an order that the references to the partner in her judgment be anonymised until after determination of the permission

to appeal application and, if granted, the substantive appeal. The partner has therefore been referred to throughout by the initials ABC. I propose to continue to adopt that course for the purposes of this judgment, although it will be necessary to reconsider the position at the consequentials hearing once this judgment has been handed down.

The Conditional Fee Agreements

6. The terms of the Solicitors' retainer by GEHC were contained in three CFAs. The first of the CFAs was dated 8 December 2009 ("CFA1"). It covered pre-action work, including an attempt at early mediation, which did not in the event succeed. It did not cover any work subsequent to the mediation process.

7. Prior to the commencement of the Gray Action, the Solicitors entered into a second CFA with GEHC dated 31 October 2010 ("CFA2"). It contained the terms of the retainer pursuant to which the Solicitors delivered the December Bill. It was a single page written agreement which provided that it was to be read in conjunction with the Law Society document 'What you need to know about a CFA', a bespoke form of which was attached.

8. CFA2 stated that it covered the Gray Action, any enforcement proceedings brought by GEHC and any cost assessment proceedings. It did not cover any appeal (by either side) against any final judgment or order. The way in which this was expressed was as follows:

> *""What is covered by this agreement*"
>
> *• The claim brought by you against Robert Gray and others (if appropriate and arising out of the same subject matter) ("your opponent")*
>
> *• Any proceedings you take to enforce a Judgment, Order or agreement.*
>
> *• Negotiations about and/or a court assessment of the costs of this claim.*
>
> *What is not covered by this agreement*
>
> *• Any appeal you make against a final judgment or order.*
>
> *• Any appeal your opponent makes against a final Judgment or Order*"

9. The remaining substantive parts of the single page were as follows:

> "***Paying us***
>
> *You agree to pay us the sum of £1,000,000 as an advance fee ("the Advance Fee"), which will be retained by us whether or not you are successful in the claim. We are responsible for the payment of disbursements as and when they are incurred, during the course of this retainer. We are also responsible for the payment of Counsel's fees up to the due date for the payment of Brief fees for the Trial. You will pay all Brief fees and refreshers for the Trial.*

> *If you win your claim, you pay our basic charges from 30 September 2009, our disbursements and a success fee. You are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium as set out in the document "What you need to know about a CFA". Credit will be given for the Advance Fee already paid, which will be set-off against the total of our basic charges and the success fee.*
>
> *If you lose you remain liable for the other side's costs.*
>
> ***The Success Fee***
>
> *The success fee is set at 95% of basic charges. In addition 5% relates to the postponement of payment of our fees and expenses and can not be recovered from your opponent. The Success fee inclusive of any additional percentage relating to postponement cannot be more than 100% of the basic charges in total*."

10. The Law Society document in conjunction with which the single page was to be read, provided for the circumstances in which the success fee was to be payable. It stated that "*If you win your claim, you pay our basic charges our disbursements and a success fee*" and it defined the word 'Win' as meaning:

> "*You achieve a settlement or any other benefit arising out of the Claim, or if you do not achieve a settlement and you go on to issue proceedings, the court orders in your favour and orders your opponent to pay you costs.*"

It also provided that a success fee would not be payable in the event that GEHC loses the claim, but that:

> "*If you end this agreement before you win or lose, you pay our basic charges and disbursements. If you go on to win, you also pay a success fee.*"

11. This part of CFA2 also recited a number of factors which were said to reflect, and therefore justify, the success fee percentage (i.e., the maximum allowed of 100%). They included:

> at (a) "*the fact that if you lose, we will not earn anything beyond that portion of the Advance Fee, which we have been able to retain against our costs and not gone to pay disbursements and Counsel's fees*" and
>
> at (d) that "*the fact that if you win we will not be paid our basic charges until the end of the claim*".

12. The language of the 'Paying us' and 'The Success Fee' parts of CFA2 was the same as the equivalent parts of CFA1. The only material differences were that in CFA1 the amount of the Advance Fee was described as CAN $350,000 converted at an agreed exchange rate and the references to Counsel's fees, brief fees and refreshers were not included.

13. The third CFA ("CFA3") was dated 6 March 2013. It was drafted in a different form from CFA1 and CFA2 and covered the costs of GEHC's claim against Mr Gray "*in relation to accounts and enquiries and other relief ordered by Mr Justice Vos on 17 January 2013*". The reference to Vos J's order was to an order he had made after

handing down a judgment on liability in the Gray Action on 21 December 2012 ([2012] EWHC 3703 (Ch)).

14. In that judgment, Vos J concluded that GEHC was entitled to declarations that Mr Gray had acted in breach of fiduciary duty and was liable to account to GEHC for certain benefits that he had received. In the event, Asplin J gave judgment on the account on 28 July 2015 ([2015] EWHC 2232 (Ch)) after a 21 day trial, but she was unable to resolve all of the issues and there was a further enquiry in relation to the value of what were called the Business Assets which took five days before Arnold J in 2019 ([2019] EWHC 1260 (Ch)). The result of the order made by Asplin J was that c.£3.6 million was ordered to be paid by Mr Gray to GEHC. No further amounts were ordered to be paid to GEHC as a result of the further hearings before Arnold J who valued the Business Assets with which the hearing before him was concerned at nil.

15. The Master recorded that GEHC had always believed that the technology with which the Gray Action was concerned was worth hundreds of millions of dollars. The relief it has obtained indicates that this expectation was misplaced. Disagreements about the true value of both the technology and the claim, together with the limited recoveries so far made, appear to have played no small part in the breakdown of the relationship between GEHC and the Solicitors and the progress of these proceedings to date.

16. As was the case with CFA1 and CFA2, CFA3 also included provision for payment of an Advance Fee on completion of the agreement. It was in the amount of £300,000 and was to be retained by the Solicitors whether or not the account and enquiry ordered by Vos J was successful. It also provided for a success fee if GEHC's claim on the account and enquiry was finally decided in its favour. As with CF1 and CFA2, this was set at 100% of what were called the Solicitors' "*fees at the normal rates*", which was the terminology used in CFA3 to describe their basic charges.

17. Clause 14 of CFA3 dealt with termination. It permitted GEHC to terminate the agreement at any time and the Solicitors to do so if GEHC rejected their advice to accept a reasonable settlement offer. In either of those eventualities, GEHC was required to pay fees at the normal rate and disbursements to the date of termination and, if GEHC went on to win the claim, it would also have to pay a success fee on the work done up to termination.

18. Clauses 14.3 and 14.4 of CFA3 also made specific provision for the Solicitors' ability to terminate the agreement in two further circumstances in which a success fee would not be payable:

> "*14.3 [The Solicitors] can end this agreement if [GEHC] does not meet its responsibilities. If this happens, GEHC will have to pay [the Solicitors'] fees for the work done to the termination date and disbursements.*
>
> *14.4 [The Solicitors] can end this agreement if [they believe] [GEHC] no longer has a reasonable prospect of success. If this happens, [GEHC] will only have to pay [the Solicitors'] fees and disbursements.*"

19. During the period between the order made by Asplin J and the order made by Arnold J, GEHC's retainer of the Solicitors was terminated. The circumstances of this termination relate to one of the issues which the Master was required to consider in the

context of the proceedings under section 70. The Solicitors contend that the retainer was terminated by their letter dated 24 February 2016 (the "Termination Letter") which amounted to an acceptance of GEHC's repudiatory breach. GEHC do not deny that the retainer was terminated, but it submitted before the Master (and reiterated on this appeal) that the termination by the Solicitors was itself wrongful.

Section 58

20. It was common ground that each of the CFAs was a conditional fee agreement within the meaning of section 58 of the Courts and Legal Services Act 1990 ("section 58" and "CLSA") and that each was therefore only enforceable if it satisfied all of the conditions applicable to it by virtue of sections 58(2) to 58(4). (Sections 58(4A), 58(4B) and 58(5) are not relevant to the issues with which these proceedings are concerned.)

21. The relevant parts of section 58 are as follows:

> "*(1) A conditional fee agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.*
>
> *(2) For the purposes of this section and section 58A—*
>
> > *(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and*
> >
> > *(b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances; and*
> >
> > *(c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase.*
>
> *(3) The following conditions are applicable to every conditional fee agreement —*
>
> > *(a) it must be in writing;*
> >
> > *(b) it must not relate to proceedings which cannot be the subject of an enforceable conditional fee agreement; and*
> >
> > *(c) it must comply with such requirements (if any) as may be prescribed by the Lord Chancellor.*
>
> *(4) The following further conditions are applicable to a conditional fee agreement which provides for a success fee —*
>
> > *(a) it must relate to proceedings of a description specified by order made by the Lord Chancellor;*

> *(b) it must state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased; and*
>
> *(c) that percentage must not exceed the percentage specified in relation to the description of proceedings to which the agreement relates by order made by the Lord Chancellor*."

22. Section 58(2)(c) was not in force at the time the CFAs were entered into, but in the light of the approach to the construction of these provisions adopted by the Court of Appeal in *Gloucestershire CC v Evans* [2008] EWCA Civ 21 it is clear that this subsection simply confirms what the law in any event was. The success fee is the amount of the increase over and above the amount that would be payable if it were not payable only in specified circumstances.

The Issues for trial and the hearing before the Master

23. The issues the Master directed on 16 June 2016 to be tried as preliminary points were described by her as follows:

    i) The unenforceability issue: whether the CFAs were unenforceable for non-compliance with section 58.

    ii) The termination issue: whether the Solicitors wrongly terminated their retainer under CFA2, whether CFA3 was entered into as a result of a misrepresentation and whether CFA3 was wrongly terminated.

24. The Master also determined what has come to be called the scope issue. This was whether the December Bill was a statute bill for the purposes of section 70. It was paid in a number of tranches starting in January 2013 and had been paid in full by 15 January 2015. The section 70 proceedings were commenced on 31 March 2016. It follows that, if it was a statute bill, the terms of section 70(4) mean that the court can no longer order it to be assessed pursuant to section 70.

25. The Master determined each of these three issues in favour of GEHC.

    i) As to the unenforceability issue, the Master concluded that each of the CFAs could lead to what she called (at paragraph [239]) "*a claim in excess of 100% success fee*". She held that this meant that they were each invalid and unenforceable for breach of section 58(2)(b) of CLSA.

    ii) As to the termination issue, the Master concluded that the Solicitors' termination of their retainer under CFA2 and CFA3 by the Termination Letter was wrongful. As I understand her conclusion, she held that there were reasonable grounds on which the Solicitors could have terminated the retainer, but that those grounds were not in fact relied on. She said that the Solicitors' acceptance of what they contended to be GEHC's repudiatory breach was not justified and that they therefore acted wrongfully in purporting to do so.

    iii) As to the scope issue, the Master held that the December Bill was not a statute bill for the purposes of section 70(4), with the consequence that the costs

claimed under it are still amenable to detailed assessment. The reason that she reached that conclusion was that it was not accompanied with sufficient materials to enable GEHC properly to understand it.

26. As will appear, the Master's resolution of the unenforceability issue did not depend on contested oral evidence. It was determined by reaching a conclusion on the true construction of the CFAs and applying to them what the Master considered to be the effect of section 58. The same cannot be said for the determination of the termination issue and more particularly the scope issue. The Master resolved those two issues by reference to contested oral evidence in which she was required to reach conclusions on the reliability and accuracy of the evidence of more than one witness. On the critical matters of fact, the findings that she made preferred the evidence adduced by GEHC to that adduced by the Solicitors.

27. The Solicitors now appeal against the Master's findings on each of the three issues with permission granted by Fancourt J on 11 February 2021. Each of them gives rise to a number of discrete questions and I shall consider them in the order in which they were addressed by Mr Gourgey QC in his skeleton argument and the Solicitors' grounds of appeal.

The Unenforceability Issue: section 58

28. This part of the appeal was against paragraph 10a of the Master's order which determined that the CFAs are unenforceable for want of compliance with section 58.

29. The starting point is that it was common ground that each of the CFAs was a conditional fee agreement within the meaning of section 58(2)(a) of CLSA. It was also not in dispute that each of the CFAs was "*a conditional fee agreement which provides for a success fee*" as that phrase is used in section 58(4). This is because the provisions of the CFAs relating to success fees fall within section 58(2)(b) in the sense that each one provides for the amount of any fees to which it applied "*to be increased in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances*".

30. The specified circumstances for which each CFA made specific provision were if GEHC were to 'win' its claim, as that concept was described in each of the CFAs. In some circumstances, this would be the case whether or not the Solicitors were still acting for GEHC, although the increase was only applicable to the work done by the Solicitors prior to termination.

31. The consequence of this was that the relevant conditions that had to be satisfied in order for the CFAs to be enforceable included those provided for by section 58(4). Each was required to state the percentage by which the amount of the fees which would be payable if it were not a conditional fee agreement is to be increased (section 58(4)(b)) and that percentage was not to exceed the percentage specific by the Lord Chancellor (section 58(4)(c)). It was common ground that the percentage specified in relation to the description of proceedings to which each of the CFAs relates is 100%: Art 3 of Conditional Fees Agreements Order 2013 (SI 2013/689).

32. 100% was the percentage identified in the clause of each of the CFAs describing the amount of the 'Success Fee'. The way in which each was drafted stated that the amount was set at 95% of basic charges, but in addition in the event of a 'win' there was a 5% uplift relating to the postponement of payment of the Solicitors' fees and expenses which could not be recovered from GEHC's opponent. At first blush, therefore, it would appear that the requirements of sections 58(4)(a) and 58(4)(b) were complied with because the percentage increase was stated on the face of the CFA as being 100%.

33. However, it was argued by GEHC that the effect of the Advance Fee, included as it was in essentially the same form in each of the CFAs, was that there were certain circumstances in which the amount payable to the Solicitors under each CFA would be increased by more than 100% of the amount that was otherwise payable. The illustration which was used to explain when this might arise is where the case settled early; what I shall call an early win. It was said that, if the amount of the Advance Fee (£1 million in the case of CFA2) were to exceed the amount of the Solicitors' basic charges plus the 100% success fee, the amount that GEHC called the 'fee premium' to which the Solicitors were then entitled would exceed 100%.

34. The reason that this was said to be the case was that the CFAs provided for the Advance Fee to be retained by the Solicitors irrespective of whether or not GEHC were to be successful. It was not, therefore, a payment on account refundable in the event that only limited costs were incurred before an early win, but rather was a payment to which the Solicitors were entitled come what may.

35. If, therefore, the case were to settle after basic charges (of say £250,000) were incurred, the Solicitors would be entitled under CFA2 to a 100% success fee amounting to a further £250,000, which would be paid by way of set-off of one half of the Advance Fee of £1 million. But critically it was said that the balance of the Advance Fee amounting to £500,000 could also be retained, thereby giving the Solicitors a return of £1 million for a case in which basic charges of only £250,000 were payable.

36. It therefore followed, so it was submitted, that there was a potential both for the Solicitors to make a claim in excess of a 100% success fee and for the condition contained in section 58(4)(c) not to be satisfied. It was submitted that it did not matter whether or not the 100% limit was in fact breached. What mattered was whether at the time the CFA was entered into, there were circumstances that might arise in the future in which the breach could occur.

37. The Solicitors disagreed and made their argument in two main stages. First, they pointed to those parts of the CFAs which identified GEHC's liability on a win as being to pay the Solicitors' basic charges, disbursements and a success fee without regard to the Advance Fee if it was not exceeded by those itemised liabilities. It followed, they submitted, that in that eventuality there was no liability to pay anything more than the basic charges, disbursements and a success fee, and so any excess amount of the Advance Fee was then refundable to GEHC. They also submitted that the fact that CFA1 and CFA2 both provided that "*the success fee inclusive of any additional percentage relating to postponement cannot be more than 100% of the basic charges in total*" reflected the fact that the Advance Fee was capable of being refunded in the event of an early win where the amount paid upfront was more than the basic charges actually incurred plus 100%.

38. They also submitted as stage two of their argument that, even if the Advance Fee was not refundable on an early win, the entitlement to retain such part of the Advance Fee as was not applied against payment of the basic charges and the success fee was not itself an entitlement to a success fee within the meaning of section 58(2). It followed that it did not fall to be taken into account as part of the amount by which the Solicitors' fees were to be increased on an early win above the amount which would have been payable if that circumstance had not occurred.

39. The way that the Master described the impact of the first stage of the argument was as follows (paragraph [221] of her judgment):

> "*The CFAs drafted by [the Solicitors], provide for two potentially incompatible outcomes. One, that the Advance Fee will belong to [the Solicitors], win or lose, and two, that it will be set-off against billing. [The Solicitors] assert that this means that any excess, after the matter has been billed, would of course be refunded to GEHC (and that GEHC knew this perfectly well). GEHC assert that this means that, if the matter had settled or folded at an early stage, [the Solicitors] would have retained the Advance Fee, even if it meant retaining more than disbursements including Counsel's fees, plus VAT (if applicable) plus base costs plus 100%*"

40. Referring to the unenforceability issue more generally, the Master then went on to hold that "*The question hinges on whether the CFAs as drawn could potentially lead to a claim that (in effect) was in excess of 100% success fee, rather than upon the forensic dissection of whether, on a hypothetical end date, the claim was ever actually in excess of 100%*". She concluded on this part of the argument that the Advance Fee was fixed and non-refundable and that, because the CFAs "*could indeed lead to a claim in excess of 100% success fee*" (i.e. in the event of an early win), there was a breach of section 58.

41. As to the Master's conclusion on the first part of the argument, Mr Gourgey submitted on appeal that this was not correct. It was necessary to distinguish between the right to retain the Advance Fee which was not dependent on winning the claim and those parts of each CFA which were said to have made provision for the total amount that was payable by GEHC in the event of a win. That included the following: "*Credit will be given for the Advance Fee already paid, which will be set-off against the total amount of our basic charges and the success fee*." He submitted that this was part of the description of the totality of GEHC's liability on a win, and the giving of credit and the set-off made clear that, once a win had been achieved, the credit extended to the return of any surplus part of the Advance Fee once the set-off had been applied.

42. In effect, it was said by Mr Gourgey that, although the first paragraph under 'Paying Us' provided that the Solicitors had a right to retain the Advance Fee irrespective of a win, this right was qualified in the event of a win by the provisions which entitled GEHC to have the amount of the Advance Fee already paid set-off against the total of the basic charges and the success fee. It was said that this prescribed the total amount for which, on a win, GEHC would be liable. The Advance Fee was not payable in addition and it therefore followed that the set-off provision confirmed that the liability was limited to the basic charges plus a 100% uplift and disbursements.

43. However, this argument as to the treatment of the Advance Fee drew on the credit and set-off wording dealing with the consequences of a win, which do not apply if there is

a loss. This led, as Mr Gourgey accepted, to a surprising result: if GEHC achieves an early win, part of the Advance Fee (i.e. the balance after the set-off) is repayable whereas, if it were to lose, no part of the Advance Fee would be repayable. The fact that the parties intended that no part of the Advance Fee would be repayable on a loss was also clear from factor (a) reflecting the justification for the 100% success fee set out in my description of the terms of CFA2 above. He submitted that, while surprising, this was not fatal to his argument, not least because nobody contemplated that the situation would arise in which the Advance Fee would not be exceeded by the basic charges and the success fee.

44. Mr Gourgey also submitted that, if there were two available constructions, one of which led to CFAs being invalid and unenforceable and one of which did not, the latter should be preferred. He relied on *Egon Zehander Ltd v Tilman* [2019] UKSC 32 (at paras [38] to [42]) in support of a submission that a realistic alternative construction will be adopted if it ensures the validity of an agreement that would otherwise be invalid.

45. Mr Gourgey accepted that the submissions he made at this first stage of the unenforceability argument were more difficult for CFA3 than they were in relation to CFA1 and CFA2. The reason for this is that the provision for credit was slightly different. It stated in clause 4.3 that "*Credit will be given for the Advance Fee in the event that further fees are payable*" and does not appear to be dealing only with the circumstances of a win when a success fee is payable.

46. It was also submitted (anyway in the Solicitors' skeleton argument) that, because it was specifically provided in CFA1 and CFA2 that their entitlement to a success fee "*cannot be more than 100% of the basic charges in total*", they were not entitled to retain the Advance Fee in addition to the 100% success fee uplift. This submission is only sustainable if the amount of the Advance Fee is included within the definition of success fee. Otherwise it cannot be taken into account as part of the fee to which the limitation to a 100% increase applies

47. I do not agree with this part of the Solicitors' case. In my view, the Master was correct to conclude that the Advance Fee was not refundable once paid, which it was required to be on the date of completion of CFA2, although I would not express the point in quite the way that the Master did because I do not think that the outcomes are incompatible. The right to retain the Advance Fee whether or not the client was successful in the claim means exactly what it says. The fact that the retention is qualified by the mandatory obligation to apply by way of set-off an appropriate part of the Advance Fee against the basic charges and success fee on a win does not in my view affect the answer. In economic terms, the Advance Fee amounts to a conditional prepayment for services provided between the time of receipt and the time the condition is satisfied with a win, but that does not mean that any part of it is refundable in the event that the condition is satisfied but there is a surplus after the set-off has taken effect.

48. I think that the three paragraphs of the 'Paying Us' section of CFA2 are each dealing with a separate circumstance. The first is concerned with what occurs irrespective of whether GEHC wins or loses. The second is concerned with what occurs if GEHC wins, but does not affect what is set out in the first paragraph. The third is concerned with what occurs if GEHC loses but again does not affect what is set out in the first paragraph.

49. Subject only to the right of set-off, there is nothing in the language of the three paragraphs to indicate that either the second paragraph or the third paragraph is intended to affect or override the retention entitlement contained in the first paragraph. In particular, the words "*credit will be given*" emphasise that what is contemplated is that the Advance Fee will be available to be set-off against an obligation incurred, but they do not contemplate a refund of any surplus.

50. It follows that the fact that credit is to be given against an amount already paid in the event of a win, does not indicate that any part of the Advance Fee is refundable to GEHC in the event of an early win so as to avoid the total payment received by the Solicitors exceeding their basic charges plus a 100% uplift. In light of the netting provision, I think that, if a refund of the balance were to have been intended, it would have said so and the more limited concept of giving credit by way of set-off would not have been used.

51. It also follows that the Solicitors were entitled to retain the Advance Fee come what may. All that the credit by way of set-off requirement did was to impose a separate obligation on the Solicitors to apply an appropriate part of the Advance Fee against their basic charges and the success fee, while still permitting them to retain the balance without specific application in any event.

52. As to the provision that the Success Fee cannot be more than 100% of the basic charges in total, it seems to me that the correctness of the Solicitors' submission must depend on what is included with the concept of a 'Success Fee' the amount of which is so limited. In other words the submission is only capable of working if the phrase 'Success Fee' where it appears in the CFAs is intended to include all or any part of the Advance Fee. In that situation, but only in that situation, would there be the potential for a conflict in the event of an early win between that part of CFA2 which permitted retention of the Advance Fee whether or not GEHC were successful in the claim and that part of CFA2 which restricts the Success Fee to 100% of the basic charges in total.

53. I have reached the conclusion that there is no such conflict, because I do not consider that the language of any of the CFAs includes the Advance Fee as part of the Success Fee (as that phrase is used in the CFAs), the amount of which is so restricted. The reason for this is that Success Fee is defined in CFA1 and CFA2 to mean "*The percentage of basic charges that we add to your bill if you win the claim and that we will seek to recover from your opponent*". A similar form of words was used in CFA3 where the phrase was "*The percentage of [the Solicitors'] fees at the normal rates which are added to [GEHC's] bill if [GEHC] wins the claim*".

54. These forms of words mean that the Success Fee as defined in the CFAs does not cover anything other than the percentage increase added to the basic charges if GEHC wins its claim. That cannot extend to the Advance Fee which does not in itself amount to an addition to GEHC's bill in the event that it wins the claim. It is an amount that is paid at the outset and which GEHC is entitled to retain "*whether or not [GEHC] are successful in the claim*". As a matter of construction of the CFAs there is therefore no conflict between those provisions which provide for retention of the Advance Fee and those which restrict the Success Fee to 100% of the basic charges. The provisions are dealing with different aspects of the remuneration which, as a matter of contract, the Solicitors were entitled to receive.

55. It follows that each of the CFAs provided that the Advance Fee would be retained by the Solicitors whether or not GEHC was successful in the claim. Despite the attractive way in which Mr Gourgey presented his submissions on this point, I do not think that there is any ambiguity in the words which describe the retention right, nor do I think that there is any realistic alternative construction. They mean on their face that the Advance Fee will be retained both in the circumstances in which success is achieved and when it is not. The fact that Mr Gourgey had to accept that his argument meant that credit by way of refund had to be given on an early win but not on a loss is, in my view, a strong pointer to a conclusion that his construction is incorrect.

56. Having reached the conclusion that the Advance Fee was not refundable in the event of an early win the Master did not really grapple with the second stage of the Solicitors' argument. She simply said that there was an infringement of section 58 because the Solicitors were receiving more than 100% of the basic charges. She did not go on to identify why it was that the Advance Fee was to be treated as part of the Success fee for this purpose.

57. In some respects the approach adopted by the Master is not surprising, because the focus of the argument advanced by the Solicitors at trial (and indeed in their initial skeleton argument on this appeal) was on why the Advance Fee was in part refundable as opposed to the argument that, even if it was not, there was still compliance with section 58. Nonetheless, although the point seems to have played a subsidiary role at trial, it is not a new point and was raised by the Solicitors in the grounds of appeal. What has changed is that it is now put forward by Mr Gourgey as the most important part of the analysis – what he called in his oral submissions the cut-through point.

58. The starting point on the correct approach to construing section 58(2)(b) and section 58(4)(b) is *Gloucestershire CC v Evans* [2008] EWCA Civ 21, [2008] 1 WLR 1883. In that case, the argument revolved around the question of whether the prescribed percentage increase (100%) was to be measured by reference to the increase over the costs at risk or the increase over the basic charges. The Solicitors basic charges were £145 per hour which would be discounted to £95 per hour on a loss (so the costs at risk were £50 per hour) but increased to £290 per hour on a win. The Court of Appeal held that the increase over the basic charges was what mattered because that was the increase over the fees payable with all of the conditional elements removed. The way that Dyson LJ explained (at para [20]) that section 58(2)(b) ought to be read is as follows

> "*a conditional fee agreement provides for a success fee if it [the CFA] provides for the amount of any fees to which it [the CFA] applies to be increased, in specified circumstances, above the amount which would be payable if it [the amount of fees to which the success fee is applied] were not payable only in specified circumstances*."

59. Dyson LJ then went on to express his essential conclusions on the application of section 58 as follows:

    i) at para [27] that "*the lawfulness of the percentage increase is measured not by reference to the costs at risk, but by reference to the fees that would have been payable if the CFA were not a CFA*"; and

ii) at para [32] that the court is not concerned with the factual enquiry as to the bargain that the parties would have struck if they had not entered into a CFA. For the purpose of ascertaining the amount of fees which would be payable if it were not a conditional fee agreement "*all that is required is that the conditional elements of the CFA are removed. In this case, that means removing the provision for a success fee in the event of a win.*"

60. Section 58(2)(a) also explicitly contemplates that an agreement may be a conditional fee agreement if it provides for all or any part of a solicitor's fees and expenses to be payable only in specified circumstances, and section 58(2)(b) explicitly provides that an agreement will be a conditional fee agreement providing for a success fee if it provides for the amount of any fees to which it applies to be increased in specified circumstances. Both of these subsections recognise that a conditional fee agreement and a conditional fee agreement providing for a success fee are to be characterised as such even where part but not necessarily all of the fees with which they are concerned are only payable or to be increased as the case may be in specified circumstances.

61. It follows that the enquiry with which the court is concerned when applying section 58(4)(b) and section 58(4)(c) is to identify the specified circumstances, to determine that there is an increase above the amount that would be payable in the specified circumstances and then to identify the percentage amount of the increase over and above the amount which would be payable if the CFA were not a conditional fee agreement. The Court of Appeal has made clear that this is an objective exercise which in the present case involves stripping out the elements of the Solicitors' entitlement to fees which causes each of the CFAs to be a conditional fee agreement in the first place.

62. In the present case, the specified circumstances are those in which a 'win' as defined is achieved. The Solicitors submitted that the success fee is therefore quantified by reference to their basic charges, because that is the element of the fees which is increased on the achievement of a 'win', i.e. the specified circumstances in which the success fee is payable. The regulated percentage (i.e. not more than 100%) is a reference to the difference between the amount that is payable if a win is achieved and the amount that is payable if it is not. Even on the Master's construction of the CFAs, which I have held to be correct, the condition for validity of the CFAs is satisfied.

63. GEHC submitted that this was not the correct approach and overlooked a critical part of the Advance Fee, i.e. the fact that it was to be credited against future billing. It said that it therefore represented a substantial premium the value of which eroded over time as more work was performed under the CFA. It submitted that the argument that the Advance Fee was fixed was superficial and that it gave insufficient weight to the reality that the value of the Advance Fee and what Mr Williams QC for GEHC called its 'fee premium' fluctuated over time and was determined by the date of resolution of the Gray Action. It characterised the Advance Fee as being in effect a success fee to reward the Solicitors for securing an early resolution of the proceedings, in which eventuality they would receive more than the amount they would receive if the win was only achieved later in the process.

64. Mr Williams submitted that this became clearer with what he submitted was a gloss to Dyson LJ's explanation of how section 58(2)(b) ought to be read. He submitted that the words as it applied in the present case should be read as follows:

> "*a conditional fee agreement provides for a success fee if it [the CFA] provides for the amount of any fees to which it [the CFA] applies to be increased, in specified circumstances, above the amount which would be payable if it [sums due under the CFA] were not payable only in specified circumstances*."

65. Mr Williams said that, in essence, this means that it is necessary to look at the totality of the fees payable under the CFAs. He submitted that the question that needs to be asked is whether there is any enhanced consideration resulting from the agreement to conditional payment terms. If there is, then there is a success fee. This means, so he submitted, that it does not matter that the Advance Fee is payable come what may (the hypothesis on which the argument arises in the first place). All that matters is that it arises out of the agreement that qualifies as a conditional fee agreement as defined. He accepted that the consequence of this argument is that it is not possible to have a structure which involves the payment of a fixed advance fee (anyway one which is more than *de minimis*) in any case in which a success fee payable on a contingent specified circumstance is set at 100%.

66. I do not accept GEHC's submissions on this point. They did not engage with the wording of the statute which is concerned with identifying increases in fees (i.e. the amount of the success fee) over and above the amount that renders the CFA a conditional fee agreement. The regulated percentage then relates to the amount of that increase. It is clear from the *Gloucestershire CC* case that this requires the stripping out of the conditionality, which does not include the Advance Fee that was payable in any event. In particular, it does not involve the stripping out of any other terms of the conditional fee agreement that do not increase on the occurrence of the specified circumstances because that would involve an undesirable factual enquiry as to what the position would have been if no conditional fee agreement had been entered into at all, an exercise that Dyson LJ said in *Gloucestershire CC* (at para [32]) would be misconceived.

67. Another way of looking at the point is that Mr Williams' submission also served to conflate the fixed Advance Fee with the basic charges and the success fee, giving insufficient weight to the fact that section 58 is only concerned with the part of the fees that are increased in specified circumstances and recognises that there may be separate parts of the fees payable under a 'conditional fee agreement which provides for a success fee' that may not be increased in those specified circumstances. It also sought to treat the Advance Fee as if it were part of the basic charges plus the success fee, when on the basis that the Master was correct in her conclusion on the construction point, it is a separate fee that is retainable in full in any event and is only to be applied by way of set-off against future work.

68. Mr Williams also said that there is nothing in section 58(2) which identifies the form that the specified circumstances must take. I agree with that as a matter of principle, but as the Advance Fee is payable at the outset in any event, the only specified circumstances which could apply to it would be the entering into of the conditional fee agreement in the first place. I think that one of Mr Williams' oral submissions was to that effect, but in my view that simply serves to illustrate the difficulty with his argument.

69. I therefore agree with Mr Gourgey's submission that the rather imprecise concept of a general premium fluctuating over time is not a concept which fits with the wording of

section 58. It is simply wrong to have regard to any other amounts that may be payable under the CFAs apart from the increase in the basic charges for which the client is liable in the specified circumstances. Section 58 is concerned with the regulation of agreements under which all or part of the fees are only payable or increased in specified circumstances and restricts the permissible extent of the increase to a percentage calculated by reference to the difference between the amount that is payable under the CFA on the one hand if the specified circumstances do not occur and on the other hand if they do. Despite Mr Williams' submissions to the contrary, there is no indication that it is concerned with the quite separate question of regulating advance fixed fees which are payable (and paid) at the outset of the retainer. This gives rise to quite different questions which are more concerned with the bargaining power of the parties as opposed to the extent to which solicitors have an interest in the results of litigation in which they are instructed.

70. I should add that I have not considered it necessary to deal with an additional argument made by the Solicitors based on *Hollins v Russell* [2003] EWCA Civ 718 to the effect that not every departure from the strict requirements of section 58 will automatically render a CFA unenforceable. It was submitted that there must be a materially adverse effect on the protection of the client or on the proper administration of justice, that materiality is to be determined by reference to the circumstances at the time of the making of the CFAs and its potential (as opposed to actual) consequences and that in that context the Master failed to have any regard to the fact that it was not then in the contemplation of the parties that the 100% cap might be exceeded.

71. It seems to me, particularly in the light of the judgment of the Court of Appeal in *Garrett v Halton* [2007] 1 WLR 554 at para [31] that the principles explained by Brooke LJ in *Hollins v Russell* at paras [105] to [109] would be unlikely to save the CFAs from the invalidity imposed by section 58 if I were to be wrong about its true construction. As Mr Williams submitted, on that hypothesis the nature of the breach in the form of what is capable (anyway in theory) of leading to a substantially greater return for the Solicitors than would have been the case if the Advance Fee had not been paid is quite different from the type of relatively trivial breach the Court of Appeal had in mind in *Hollins*.

Unenforceability issue: breach of the SRA Code of Conduct

72. At the trial before the Master, GEHC made a further argument that the CFAs were unenforceable for illegality. The illegality relied upon was a breach of the Solicitors' Regulation Authority ("SRA") Code of Conduct (the "Code"), and in particular the obligations of solicitors to act with integrity and in the best interests of their client, which were said to have been significantly breached by the terms of CFA2 and CFA3.

73. This argument was not identified as being one of the preliminary points the Master had directed to be determined whether by the directions she gave on 16 June 2016 or otherwise, nor was it referred to by the Master in her judgment, presumably on the basis that it was unnecessary to deal with it in the light of her findings that the CFAs were in any event unenforceable for non-compliance with section 58. However, it is resurrected by GEHC in its respondent's notice as a further ground on which CFA1 and CFA2 were unenforceable. In the light of my conclusions on the section 58 argument, I must

consider how to deal with it on this appeal.

74. In his oral submissions, Mr Williams did not attempt to argue that I should decide this point on the merits in the light of the fact that it was not dealt with by the Master. He accepted that it would not be an insubstantial exercise to show how the findings of fact which the Master made evidenced breaches of the Code that were sufficiently serious to mean that the CFAs were unenforceable. He said that all he would therefore seek to do was to show that his case was arguable and, if I was minded to allow the appeal, invite me to remit the issue for a further hearing.

75. The way that GEHC put its case was that the Code has the force of statute, a proposition that was accepted by the Solicitors, and that a contract made or performed in significant breach of the code will be unenforceable.

76. The parts of the Code to which GEHC referred included a number of general duties such as the Solicitors' obligations under the Code to act with integrity, to act in the best interests of their client, to behave so as to maintain public trust, to give their clients the best information about costs confirmed in writing, to give a full explanation of any CFA and to insist on their clients taking independent advice before making gifts. It is not in issue that many of the statements of general principle reflected duties to which the Solicitors were subject under the Code.

77. In its respondents' notice, GEHC then relied on a number of acts by the Solicitors in support of its submission that the CFAs were unenforceable because they amounted to acts "*in flagrant breach of the Code*". They related both to the making and performance of CFA2 and CFA3. As to the making of CFA2 and CFA3:

    i) The terms of CFA2 were said to have been agreed in breach of the Code because they retrospectively required GEHC to pay substantial fees that should have been written off under CFA1 and to pay a fixed and non-refundable Advance Fee in addition to a further 100% success fee.

    ii) The terms of CFA3 were said to have been agreed in breach of the Code because they required GEHC to pay a fixed and non-refundable Advance Fee in addition to a further 100% success fee, they stipulated for a success fee which was out of kilter with the *de minimis* risk taken on by the Solicitors and they included changes to the terms of the retainer so that they were significantly more disadvantageous to GEHC than the terms of CFA2.

78. As to the breaches of the Code which were said to have been committed in the performance of CFA2 and CFA3, they were particularised in GEHC's respondent's notice as follows:

    i) In relation to CFA2, a wrongful refusal to refund a sum in excess of £600,000 which ceased to be payable by virtue of part of the Solicitors' success fee under CFA2 having been disallowed on an *inter partes* assessment, and misrepresentations that CFA2 had ended, that a sum in excess of £3 million was due and subsequently taking payment that was not due.

    ii) In relation to CFA3, a misrepresentation to GHC that a win had been achieved and that payment was due when there had been no win, forcing GEHC to make

> a further advance payment which was not contractually due and threatening to stop work if it did not do so, wrongly appropriating £2.5 million in client money to payment of sums said to be due in circumstances where no sums were in fact payable and asserting that £1.1 million needed to be withheld from money due to GEHC because of estimated future disbursements when the realistic level of future disbursements was far lower.

79. Mr Williams submitted that both the making and the performance of a contract such as the CFAs in a manner that breaches the Code rendered CFA2 and CFA3 themselves unenforceable. As to the applicable principles on illegality in the making of CFA2 and CFA3, Mr Williams relied on *Awwad v Geraghty & Co* [2001] QB 570, 598H, a case in which the Court of Appeal determined that a solicitor's retainer was unenforceable because it provided for the solicitor to be paid at a higher hourly rate in the event of success, a provision that was forbidden at the time.

80. As to illegality in the performance of CFA2 and CFA3, Mr Williams relied on the general principle explained by Waller LJ in *Colen v Cebrian (UK) Ltd* [2003] EWCA Civ 1676 at para [23]:

> "*If the contract was unlawful at its formation or if there was an intention to perform the contract unlawfully as at the date of the contract, then the contract will be unenforceable. If at the date of the contract the contract was perfectly lawful and it was intended to perform it lawfully, the effect of some act of illegal performance is not automatically to render the contract unenforceable. If the contract is ultimately performed illegally and the party seeking to enforce takes part in the illegality, that may render the contract unenforceable at his instigation. But not every act of illegality in performance even participated in by the enforcer, will have that effect. If the person seeking to enforce the contract has to rely on his illegal action in order to succeed then the court will not assist him. But if he does not have to do so, then in my view the question is whether the method of performance chosen and the degree of participation in that illegal performance is such as to "turn the contract into an illegal contract" ... not every illegality in performance will turn a contract into an illegal contract; on one side of the line appears to be Ashmore Benson Ltd v AV Dawson Ltd and on the other St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267. In the latter case the court was concerned with a breach of statute, and performance in breach of that statute. The question in relation to performance, it asked itself, was whether the statute intended to prohibit the type of contract sued on, and held on the construction of the relevant statute that it did not. In the former case the citation by Scarman LJ of the dictum of Jenkins LJ suggests that where illegality by virtue of the common law is concerned the question is whether the common law would say that a contract has by its illegal performance been turned into an illegal contract. Of course much may depend on the question whether the party seeking to enforce the contract needs to rely on the illegal performance in order to succeed.*"

81. Mr Gourgey did not concentrate so much on the making of the CFAs but submitted that the short answer to GEHC's submission was that a contract such as the CFAs will only be rendered unenforceable for breach of statute in respect of its performance where the statute provides for that to be the consequence. He cited two passages from *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, 283 and 288 (per Devlin J) in support of that proposition:

> "*There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable … The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable*." [283]
>
> "*If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract*." [288]

82. It was not said that the making of these CFAs was expressly prohibited by any of the terms of the Code, such as occurred in (e.g.) *Awwad v Geraghty & Co* [2001] QB 570 or *Mohammed v Alaga & Co* [1999] EWCA Civ 3037. Nor was it said that there were any explicit provisions to the effect that their performance in the manner complained of rendered any of them unenforceable. What was said was that the making and performance of CFA2 and CFA3 involved more general breaches of the Code in the form of conduct which reflected a lack of integrity by the Solicitors, albeit a lack of integrity which is described by reference to a number of more specific breaches of the Code.

83. In my view Mr Gourgey was right to criticise GEHC for not identifying anything in the Code which demonstrates that the sanction for the breaches on which they rely has the effect of rendering either of the CFAs unenforceable for illegality. It is much more difficult to say that conduct of that quality should, even if established, render the making or performance of the relevant contract (in this case CFA2 and CFA3) unenforceable for illegality.

84. The difficulty in reaching a conclusion that the Code contemplated (whether expressly or impliedly) that a contract of retainer in the form of the CFAs entered into or performed in breach of the general provisions relied on by GEHC would be unenforceable, is illustrated by *Garbutt v Edwards* [2006] 1 WLR 2907. In that case there was a failure to provide costs information (one of the failures also relied on in the present case). Arden LJ (at para [35]) said the following:

> "*Mr Morgan does not suggest that the statutory framework prevents the formation of a contract of retainer before a sufficient costs estimate has been given. What Mr Morgan submits is that it is unlawful to perform a contract of retainer unless the appropriate costs estimate is given. The correctness of this submission has to be determined as a matter of the true construction of the statutory framework. The fact that statute imposes a requirement to take some step, as here the making of a costs estimate, is not of itself sufficient to render the performance of a contract in disregard of that step unlawful and unenforceable: see for example the St John Shipping case and the Awwad case, which Mr Morgan cited in support of his*

> *submissions. What the court has to do is to determine the effect of the requirement as a matter of the true construction of the statutory provision*."

85. *Garbutt* therefore makes clear that it is necessary to show as a matter of construction of the statutory framework not just that the Solicitors acted in breach of the duty imposed by the statute (in this case the SRA Code) but rather that a contract entered into or performed in breach of that duty was to be illegal or unenforceable. The more general the circumstances in which the duty may be breached, the more important it is to adopt a careful approach to analysing how it is that each breach is said to have that effect.

86. In recognising that the court is not in a position to do more than determine that GEHC's case on illegality was arguable, Mr Williams adopted a realistic approach to the fact that it would be impossible for me to determine on this appeal that the Master should have decided that CFA2 and CFA3 were unenforceable for that reason. But it goes rather further than that, because I was not shown any aspect of the Master's findings that demonstrate that such a link had been made and I was unable, on the basis of the submissions that were made, to gain any more than an unfocussed impression of conduct which was capable of amounting to serious breaches of the Code. It is clear however that the Master was very critical of a number of aspects of the Solicitors' conduct, which may or may not have given rise to claims against them and many of them were not appealed in any event. But those criticisms were not of themselves enough to justify a conclusion that there is an arguable claim that the CFAs were unenforceable on these grounds. Apart from anything else, the fact that the Master did not determine the issue meant that the criticisms she made were not directed towards it.

87. Mr Williams was right to say, however, that the question of unenforceability of an agreement for illegality in its performance is a question of fact and degree. This requires a proper assessment by the court of first instance as to what those facts are and how it is said that the contract of retainer has by its performance been turned into an illegal contract. I am far from saying that GEHC has a strong case, but although I have not found this point very easy, I am not in a position to say that it is unarguable that the conduct of this particular retainer was in sufficiently serious breach of the Code to render CFA2 and CFA3 unenforceable for illegality, and that this is an issue which should have been dealt with by the Master.

88. I have also considered whether it is possible or practical to remit this issue for reconsideration with a direction that requires the Master who hears the matter going forward to determine the point on the basis of the primary findings of fact already made. I do not think that it is. While it remains open for the Master to give case management directions for the remitted hearing which limit the evidence, I am not sufficiently confident that justice can be done in this way to be able to prejudge that issue now. In particular, it is not clear to me that the findings of fact that the Master made were made in light of a proper appreciation by both parties of the allegations that were being advanced by the other on this part of the case or of the particular issues linking the Solicitors' duties to their conduct in the performance of the CFAs being the matters to which those allegations were intended to refer.

89. However, I consider that the issue to be determined must be properly formulated and the parties are to attempt to agree on its formulation so that it can be included in the order that I make. I should also stress that, in giving this direction I do not intend to prejudge the question of whether or not it remains appropriate for the point to be

determined as a preliminary issue. Nor do I rule out the possibility that, once the issue has been properly formulated and the facts relied on have been related to those parts of the Code that are said to cause either the terms of the CFAs or their performance to be illegal, it may be that GEHC's case will then be seen to be unarguable. In giving this ruling I do not preclude the Solicitors from seeking to have it struck out at that stage.

The Termination Issue

90. This part of the appeal is against paragraph 10b of the Master's order which determined that the Solicitors wrongly terminated their retainer under CFA2 and CFA3.

91. In paragraph [300] of her judgment the Master recorded that it was common ground that GEHC's retainer of the Solicitors "*was terminated when the solicitors "sacked" GEHC by letter dated 24 February 2016*" i.e., the Termination Letter. The core of the Solicitors' appeal on this point was that the Master erred in her conclusion that, although she had found that there were circumstances which entitled them to terminate the retainer, the termination by the Termination Letter was wrongful.

92. The circumstances which gave the Solicitors what the Master found to be an entitlement to terminate were that they were mistakenly being asked to fund disbursements going forward, that GEHC had retained another firm of solicitors, Bird & Bird, alongside the Solicitors and that GEHC had required the Solicitors to act as directed by them. The Master found that "*had the solicitors terminated the retainer because of those issues, it would in my view have been reasonable*", but went on to find that the termination was in fact based on other grounds.

93. The other grounds referred to by the Master were that the Solicitors chose to walk away over financial issues. What she meant by that was a dispute between GEHC and the Solicitors as to whether an agreement had been reached that the Solicitors were entitled to retain a sum of £1.342 million and that GEHC would still continue to be obliged to pay for any disbursements as required by CFA3 and the terms of engagement. It is worth setting out the Master's conclusions on this in full:

> "327. *Whilst I am grateful to RS for the erudite submissions which I understand to be directed to whether, by entering into CFA3, [the Solicitors] contracted out of the right to exercise its rights in the case of a repudiatory breach, in my view those submissions are beside the point. Firstly, I do not find that [the Solicitors] did accept a repudiatory breach by GEHC, they chose to walk away over financial issues. Secondly, it would have been open to [the Solicitors] to invoke the relevant provisions of CFA3 to cease to act and still claim their base costs. Had they successfully argued repudiatory breach by GEHC, they would maintain their right to recover their success fee. Instead, based upon the sequence of events laid out in the documents and in the parties' oral evidence, it was question of the Gray moneys and not the involvement of Bird & Bird (or of Mr de Clare's approach to disclosure), that poisoned the well.*"

94. Against this background the Solicitors advanced three main grounds appeal:

i) The first was that the Master misconstrued the Termination Letter interpreting it as relying exclusively on grounds other than those that she had held in paragraph [325] of her judgment to be a reasonable basis for terminating the retainer.

ii) The second was that the Master was wrong to have regard to the Solicitors' motivation in terminating the retainer. They submitted that the relevant test was whether GEHC was in repudiatory breach entitling the Solicitors to terminate, and that motive was of no relevance.

iii) The third was that, even if the Master had been correct to construe the Termination Letter as failing to rely upon the grounds for termination set out at paragraph [325] of her judgment, the conclusion that the termination was unlawful was wrong. They relied on the well-known principle that termination of a contract where a party is in repudiatory breach is effective regardless of whether the valid grounds for termination are stated by the innocent party in its notice or letter accepting the repudiatory breach, a principle that applies even where the innocent party does not know of the valid ground at the time it does so.

95. It is clear that one of the grounds on which the Solicitors relied in terminating the retainer was GEHC's refusal to reimburse the Solicitors' outstanding disbursements, which they expressly identified in paragraph 8 of the Termination Letter as evincing an intention not to be bound by its obligations under CFA3. To the extent that the Master concluded that none of what she regarded as reasonable grounds for terminating the retainer were in fact relied on by the Solicitors, that finding is plainly wrong. The disbursement ground was described at some length at the beginning of the Termination Letter and, in my view, was plainly relied upon by the Solicitors as part of its justification for accepting GEHC's repudiatory breach.

96. It is also clear that the instruction of Bird & Bird, together with GEHC's imposition of an obligation on the Solicitors to comply with Bird & Bird's instructions, while still expecting the Solicitors to be responsible for their fees was another of the grounds relied upon in the Termination Letter as a repudiatory breach of the contract of retainer. However, the Master concluded that this ground was included in the Termination Letter as an afterthought. She said that the real reason for the Solicitors' deciding to cease to act was a dispute over what was called the Gray money which she held the Solicitors were not legally entitled to retain. Mr Williams submitted that when the Master concluded that termination for the grounds she identified would have been reasonable she was focused on clause 14.3 of CFA3 (cited earlier in this judgment). In effect he said that the Master decided that the Solicitors could have invoked clause 14.3 had they chosen to do so, but that if they had this would have affected their right to recover the success fee, because CFA3 would then have come to an end before a win was achieved.

97. Mr Williams also made detailed submissions on what had occurred prior to the sending of the Termination Letter. He submitted that, by the time that it had been sent and received, it was not just the case that the relationship between GEHC and the Solicitors had broken down but it was also the case that, on the Master's findings, the Solicitors had engaged in extraordinary conduct which may well have justified GEHC in treating them as being in repudiatory breach of the retainer. I was not asked to analyse the facts in great detail and the materials with which I was supplied would not have enabled me

to carry out that task in any event, but I shall assume for present purposes that this was the case. In particular, I shall assume that, to the extent that the Solicitors gave inaccurate advice on whether or not a win had been achieved under CFA3 with the consequence that the Solicitors retained money paid by Mr Gray to which they were not entitled, that amounted to a repudiatory breach which they were entitled to accept, thereby themselves bringing the contract to an end.

98. Notwithstanding the vigour with which those submissions were made by Mr Williams, they are only relevant to the issue with which this part of the appeal is concerned if they bear on the question of whether or not the Termination Letter was effective to bring the contract of retainer to an end. It is that relatively narrow issue which I am required to determine. I must guard against a more general foray into the Solicitors' conduct, and the Master's findings in relation to it.

99. In my view they do not. As Mr Gourgey emphasised, and I agree, there was no question that any repudiatory breaches by the Solicitors were accepted by GEHC. Indeed, quite the contrary, it remained the case that GEHC wanted the Solicitors to continue to act and therefore disavowed any intention to accept what they contend to be repudiatory conduct by the Solicitors so as to bring CFA3 to an end. In my judgment, the question of whether or not they might have been entitled to accept the Solicitors' conduct as repudiatory had they chosen to do so is neither here nor there; they did not in fact do so.

100. GEHC submitted that the Solicitors' case on termination was based on two false premises. The first was that it equated the issue of wrongful termination of the retainer with the issue of whether there had been a repudiatory breach of CFA3. The second false premise was that the Master's own findings demonstrated that the Solicitors would have been entitled to terminate for a repudiatory breach by GEHC.

101. Dealing first with the question of whether or not the Master concluded that GEHC were in repudiatory breach, I am not satisfied that she held that it was. I think that Mr Williams' submission to the effect that her finding was directed at a conclusion that GEHC had not met its responsibilities within the meaning of clause 14.3 (see above) or because its instructions were unreasonable or non-cooperative within the meaning of clause 13.1 of CFA3 is more likely to be correct:

> "*13.1 The Client's responsibilities include giving Rosenblatt full, honest and timely instructions, not asking Rosenblatt to work in an improper or unreasonable way, cooperating fully with Rosenblatt in the preparation of its claim, and paying all amounts due to Rosenblatt within 30 days of receipt of an invoice*."

102. The three findings towards the end of the Master's judgment that matter on this issue were as follows:

> "*325. However, much more relevant are facts including that RS were (mistakenly) being asked to fund disbursements going forward, including disbursements incurred by Bird & Bird without any prior reference to RS, and the fact that RS were in effect being asked to follow Bird & Bird's instructions. Had RS terminated the retainer because of those issues it would in my view have been reasonable."*

> *"327. … Had they successfully argued repudiatory breach by GEHC, they would maintain their right to recover their success fee. Instead, based upon the sequence of events laid out in the documents and in the parties' oral evidence, it was question of the Gray moneys and not the involvement of Bird & Bird (or of Mr de Clare's approach to disclosure), that poisoned the well."*
>
> *and*
>
> *"329. … As to whether CFA3 was wrongfully terminated I find that RS would have been entitled to terminate the retainer by invoking the terms of CFA3, thereby restricting RS to base costs under CFA3. However, in choosing instead to invoke a repudiatory breach that did not (based upon the evidence) constitute its reason for ceasing to act, RS did indeed wrongfully terminate the retainer*."

103. In my view the Master was clearly distinguishing between termination in accordance with clause 14 and termination in consequence of the acceptance of a repudiatory breach. While it is correct that her characterisation of the reasonableness of the Solicitors' conduct bears on the question of whether or not GEHC had evinced an intention no longer to perform under CFA 3, the question is not quite the same. However, the point can be overdone because, for reasons that I shall come to a little later one analysis of the juridical basis for a solicitor's right to terminate his retainer for good reason in a case such as the present is that he is accepting his client's repudiation of the contract.

104. Whatever the description by which the Master may have characterised GEHC's conduct (whether it be unreasonable or repudiatory) the real question is not the label that she applied but whether, based on the findings of primary fact that she made, the conduct of GEHC did amount to a repudiatory breach of CFA3 which entitled the Solicitors to serve the Termination Letter thereby bringing it to an end in a manner that was lawful. The answer to that question is not dependent on whether the Master's findings characterised the conduct as repudiatory. It is whether that is what it in fact was, irrespective of how she herself treated it.

105. As to that Mr Williams submitted that motivation is relevant as a matter of evidence. By that I think that he meant that the involvement of Bird & Bird was not really a ground on which the Solicitors genuinely relied as a repudiatory act. He pointed to evidence that the true position was that the Solicitors' welcomed their involvement, and that the reality was that this was no more than a makeweight point. He also demonstrated in his submissions that the dispute over the Gray monies was of much longer standing than the concerns that the Solicitors had about the role of Bird & Bird. I accept that was the case.

106. However, even if motivation were to be a relevant consideration, and I do not think that it is, I do not agree with the underlying submission for two reasons. The first is that it sits uneasily with the Master's conclusions on reasonableness albeit for clause 14.3 purposes. Although she did not put it this way, for that purpose the Master must have been satisfied that GEHC was not meeting its responsibilities, being the language in which clause 14.3 is couched. True it is that that this is not quite the same as being satisfied that GEHC had evinced an intention no longer to be bound by CFA3 but, if she was satisfied that GEHC was not meeting its responsibilities in instructing Bird & Bird and requiring the Solicitors then to act in accordance with their instructions while

still being responsible for the disbursements, that is far removed from a mere makeweight point.

107. Secondly, I think that GEHC's insistence that the Solicitors should act in accordance with Bird & Bird's instructions while being responsible for the disbursements is a very clear example of an act evincing an intention no longer to be bound by the existing contract of retainer. Even if the Solicitors might have welcomed Bird & Bird's input and expertise going forward, there is no suggestion that they agreed to a relationship that took this form and it is difficult to conceive of a clearer act repudiating the existing contract of retainer under which the Solicitors were responsible for the conduct of the Gray Action.

108. Similar points can be made about the request to fund disbursements going forward. Mr Williams took me to some evidence and parts of the Master's judgment in relation to a costs estimate relating to disbursements produced by the Solicitors in November 2015. He said that the Solicitors' insistence on retaining sufficient from the Gray monies to fund disbursements was over-inflated (in fact he expressed it rather more forcefully than that) and submitted that to the extent that the Solicitors were mistakenly being asked to fund disbursements, this was a short term issue not least because the Solicitors had already retained more than enough to cover the position in the immediate future.

109. Mr Williams also said that, to the extent that there was an issue on the proper construction of CFA3, which there was in relation to the disbursements and Bird & Bird issues, conduct which was simply consistent with one party's belief (albeit mistaken) as to the true meaning and effect of the contract will not necessarily be repudiatory. He said that this will be the case if it can be said that the party affirms the contract but simply puts in issue its true effect and he cited the decision of the Court of Appeal in *Sweet & Maxwell v Universal News Services Ltd* [1964] 2 QB 699, 737 in support of this submission.

110. In general terms I do not disagree with the proposition, although it has to be read in the light of the later decision of the House of Lords in the *Federal Commerce & Navigation Ltd v Molena Alpha Inc ("the Nanfri")* [1989] AC 757. As Lord Wilberforce said in distinguishing Sweet & Maxwell at p.780E:

> "*If a party's conduct is such as to amount to a threatened - repudiatory breach, his subjective desire to maintain the contract cannot prevent the other party from drawing the consequences of his actions*."

111. The difficulty for GEHC goes back to the Master's finding in paragraph [325] of her judgment which neither party said was wrong. It must follow from her conclusion that it would have been reasonable for the Solicitors to end the retainer on those grounds that the Master had concluded that, in acting in the way she referred to, GEHC was not meeting its responsibilities. There is no indication or finding that there was anything approaching acts that were capable of being construed as affirmations by GEHC of CFA3 while simply putting in issue its true meaning and effect.

112. In any event, Mr Gourgey also satisfied me from his analysis of the correspondence that the position maintained by GEHC as to its insistence that the Solicitors should fund the disbursements going forward and should take instructions from Bird & Bird went much further than a simple debate as to the precise nature of the parties' respective

rights, all the while intending to abide by the contract if they proved to be wrong. In my view they clearly amounted to a renunciation of CFA3 and a repudiation of the contract of retainer on its subsisting terms. It satisfied the well-known test described in Chitty on Contracts, Vol 1 (33rd ed) at 24-018:

> "*the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions*."

113. As I understood their case, GEHC also argued, anyway before the Master and in its skeleton argument, that it was not open to the Solicitors to terminate the retainer for repudiatory breach for two additional reasons. The first was that the right to terminate for repudiatory breach was excluded by the terms of CFA3 itself and the second was that a solicitor can only terminate his retainer for reasonable cause. It was not entirely clear to me whether those arguments were being maintained, but if they were, I am satisfied that they do not assist GEHC.

114. It is certainly the case that parties to a contract can agree to exclude the right to terminate for repudiatory breach, but the exclusion must be clearly stated: *Newland Shipping & Forwarding v Toba Trading* [2014] EWHC 661 at para [51]. There was nothing to that effect in CFA 3.

115. Likewise, while a solicitor is entitled to cease to act if he is placed in such a position by the client as to absolve him from future performance (*Underwood, Son & Piper v Lewis* [1894] 2 QB 306, 314), I was shown no authority to the effect that this right operates to the exclusion of the right to terminate for a repudiatory breach. Indeed, as Mr Gourgey submitted, basing himself on the judgment of Dyson LJ in *Richard Buxton v Mills-Owen* [2010] EWCA Civ 122 at para [55], the analysis as to why in many cases a solicitor may be entitled to terminate a retainer for reasonable cause is that he is entitled to accept conduct that amounts to a repudiation by his client.

116. For these reasons, I am satisfied that the Master was wrong to conclude that the Solicitors were not entitled to terminate CFA3 for repudiation by GEHC. In my judgment, she came close to deciding for herself that GEHC's conduct was repudiatory, but even if she did not, I am satisfied that she was wrong not to do so. In those circumstances, whether or not the solicitors were also entitled to terminate CFA3 on some other basis (such as breach of clause 14.3) which would have led to alternative consequences, is irrelevant.

117. There was also a separate and independent argument advanced in relation to the termination of CFA2. Mr Williams submitted that the Solicitors incorrectly represented to GEHC that CFA2 had come to an end in 2012 / 2013 and that therefore a large liability for fees had become due. He said that this was a misrepresentation by the Solicitors (and advice given in breach of duty) and caused the Master to reach conclusions (a) that CFA2 had been wrongly terminated at the stage at which CFA3 was entered into, (b) that CFA3 was therefore entered into on false basis. He said that the Master's findings to that effect were not challenged on appeal.

118. I do not accept the submission, in large part because I do not consider that the Master's finding amounted to a determination that CFA2 had in fact been terminated in the way

that is suggested by GEHC. The Master's conclusion was expressed in paragraph [329] of her judgment as follows:

> "*I find that, based upon the evidence that GEHC were advised that CFA2 had come to an end, as such if CFA2 was terminated, it was terminated wrongfully and/or CFA3 was entered into as a result of that misrepresentation that CFA2 had ended, and is therefore tainted.*"

119. This does not appear to be a finding that CFA2 was in fact terminated, but was rather a finding that, if it was, the termination was wrongful because GEHC should not have been told that it had come to an end and CFA3 was "tainted" for misrepresentation. It is not at all clear what the Master meant by "tainted" and the Solicitors submitted that the finding should be set aside on that ground alone.

120. They also submitted that it is clear that CFA2 was not terminated, anyway in respect of the consequences of past performance, and continued to apply to the costs assessment proceedings against Mr Gray for the December Bill. Mr Gourgey said that, even if the Solicitors gave advice to GEHC that a new CFA was required (in the form of CFA3), that did not mean to say that CFA2 came to an end. He pointed out that GEHC continued to pay costs and fees to the defendant under CFA2 in respect of the assessment of costs that Mr Gray had been ordered to pay thereby confirming that CFA2 continued in force.

121. I think that the Solicitors are correct on this point. The arguments made in paragraph 5 of the respondent's notice all proceed on the erroneous basis that CFA2 had come to an end at or about the time that CFA3 was entered into. In my judgment the Master made no finding to that effect and for the reasons explained by Mr Gourgey she would have been wrong to do so if she had. The mere fact that CFA3 may have been entered into in the erroneous belief by GEHC that a win had been achieved on CFA2 and that it thereby "*came to an end*" in the sense that there were no further acts of performance required from the Solicitors under it, does not mean to say that they were not entitled to be paid under it for the costs that had thereby been incurred.

122. It follows that the order that the Master made determining that the Solicitors had "*in any event wrongly terminated its retainer under its second and third CFAs*" did not amount to a freestanding declaration relating to termination other than through the acceptance by the solicitors of GEHC's repudiatory breach in February 2016. To the extent that paragraph 5 of GEHC's respondent's notice seeks a determination of wrongful termination on alternative grounds (i.e., at the time that CFA3 was entered into) it is misconceived. To the extent that the question of whether or not CFA3 was entered into on the basis of some form of misrepresentation was one of the issues that was before the Master, it would not in my view have affected the quite separate question of how if at all CFA2 came to an end.

Scope issue: the timesheets

123. The Solicitors did not challenge the point of principle explained by the Master in paragraph [55] of her judgment that, unless sufficient narrative was provided to GEHC at the time the December Bill was submitted or at any time before the 12 month period

prior to payment, it could not be a statute bill within the contemplation of section 70 and was therefore still susceptible to detailed assessment. In support of this finding the Master cited *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500 at para [70]. The challenge was to the Master's factual conclusion that this did not happen, because the Solicitors said that she was wrong to conclude that timesheets were not provided to GEHC on the occasions and by the means by which the Solicitors said that they were.

124. Both parties agreed that the resolution of this issue is concerned with contested questions of fact and that the onus is on the Solicitors to show that what is delivered to the client amounts to a statute bill (*Re Romer and Haslam* [1893] 2 Q.B. 286 at 298). The contest related to whether the Master was entitled to find, as she did in paragraph [108] of her judgment, that the December bill was still capable of detailed assessment because it was only ever emailed to GEHC as a single sheet with no timesheets or other narrative provided in December 2012 or thereafter.

125. There were also two other reasons raised by GEHC as to why the December Bill was not a statute bill. Although the Master did not deal with them fully in her judgment they were raised by GEHC in its amended respondent's notice and raise matters of substance. Less argument was taken up with them at the hearing of the appeal, but I will consider them later after I had given my conclusions on the contested questions of fact.

126. In the normal course, an appeal court will be very reluctant to interfere with the lower court's findings of fact. The principles as to the correct approach were recently summarised by the Court of Appeal in *Kalma v African Minerals* [2020] EWCA Civ 144 at para [48]:

> "*The Supreme Court has regularly explained that, unless a critical finding of fact has no basis in the evidence, or is based on a demonstrable misunderstanding of relevant evidence, or a failure to consider such evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified: see Henderson v Foxworth Investments Limited [2014] UK SC 41 , Lord Reid at paragraph 67; Volcafe Ltd v Cia Sud Americana de Vapores SA [2018] UKSC 61 , Lord Sumption. This applies equally to findings of primary fact and any inferences to be drawn from them: see Staechelin v ACLBDD Holdings & Others [2019] All ER 429* ."

127. The Solicitors submitted that some of the Master's central findings of fact were clearly erroneous and contrary to the evidence, and fall well within these principles. They also submitted that a slightly different approach is required where, as in the present case, the conclusions that the Master reached were expressed in a judgment that was seriously delayed.

128. As to the delay, the trial of the preliminary issues and hearing of the application took place over an extended period between December 2018 and May 2019 (with further written submissions filed in August and September 2019). The main part of the trial was heard over 8 days between 5 and 14 December 2018. Further evidence (primarily relating to the termination issue) was given by one witness on 28 March 2019 and there was then a day of oral submissions on 10 May 2019. Unfortunately, a draft of the Master's written judgment was only circulated on 12 June 2020 and then was only eventually handed down in final form on 20 August 2020.

129. This meant that the draft judgment was circulated 18 months after the date in December 2018 on which most of the oral evidence was given and more than 13 months after the final hearing. The Solicitors point to this delay in support of their grounds of appeal on the scope issue. It is said that, because of the delay, the Master's findings of fact are unreliable and that as a result the principles discussed most recently by the Court of Appeal in *NatWest Markets Plc v Bilta (UK) Limited* [2021] EWCA Civ 680 (at paras [43] to [59]) should apply.

130. Whenever a judgment is seriously delayed in any case in which contested oral evidence was given, the appeal court must scrutinise any challenge to the findings of fact made by the lower court with very great care in order to ensure that the delay has not of itself caused injustice to the losing party. In such circumstances there is an enhanced risk that a retrial will have to be ordered because (as Arden LJ explained in *Bond v Dunster Properties Limited* [2011] EWCA Civ 45 at para [7]):

> "*If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment), it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion*."

131. The same point has been expressed in a number of other decisions of the Court of Appeal, two of which I was referred to in oral submissions: *Bank of St Petersburg PJSC v Archangelsky* [2020] EWCA 408 and *Goose v Wilson Sandford and Co* [1998] TLR 85.

132. There are two central relevant findings of fact which the Solicitors challenge on this appeal as being unsafe. They go to the Master's conclusions that the December Bill was not a statute bill, because both of them are findings rejecting the Solicitors' case that timesheets were supplied to GEHC. I should also add that GEHC did not accept that, even if they had been sent, all other things being equal, there would have been sufficient narrative to enable the December Bill to be a bill *bona fide* complying with SA 1974, the test described in *Ralph Hume Garry v Gwillim*.

133. The first finding of fact challenged by the Solicitors was that they only sent the December Bill to GEHC by email in Canada in the form of a single sheet. The second was that the timesheets were not provided to GEHC in January 2013.

134. The challenge to the Master's finding to the effect that the only material sent to GEHC was an email containing the December Bill in the form of a single sheet without enclosures is based on a contention that she misunderstood the evidence in a number of respects. The logical starting point is the Master's understanding that the Solicitors' evidence before the start of the trial "*was very clear that the Bill was not sent by email at all, and there was no question that it went by email alone*." She reiterated this finding on more than one occasion later in her judgment for example when she referred to "*ABC's initial, equally clear recollection, was that the Bill was never emailed at all*". GEHC continued to maintain in its skeleton argument produced for this appeal that this had been the effect of ABC's evidence.

135. I accept the Solicitors' submission that this betrayed a misunderstanding by the Master

of the evidence adduced by the Solicitors prior to the hearing. The point was dealt with in two witness statements made by ABC. The first witness statement simply said that, on 21 December, ABC sent Brian de Clare of GEHC the December Bill which set out the Solicitors' basic charges and success fee from which there was then set-off what remained of the Advance Fee after disbursements. The second witness statement explained that the December Bill was sent by post together with its accompanying narrative / time report. In it ABC explained that the December Bill was sent by post together with its supporting materials because the size of the supporting time report was so large that it was likely to crash GEHC's email.

136. In my view it is not possible to read this evidence as a clear statement that the December Bill itself was not sent by email at all. The first statement says nothing about how the December bill was sent, let alone that it was not sent by email, and the second statement was concerned with the question of what was sent by post in the form of supporting narrative, not whether or not a copy of the December Bill may also have been sent by email, whether by ABC or anyone else in the Solicitors' office. Contrary to the submissions made by GEHC, the mere fact that the December Bill itself was sent by email (possibly, as ABC surmised, from elsewhere in the Solicitors' office) is not inconsistent with it also being posted together with the timesheets as enclosures. I do not agree that this amounted to what Mr Williams called a deathly silence about an email having been sent but, even if there was silence when there might have been a positive assertion, I think that the submission made by the Solicitors in their skeleton argument to the following effect is accurate:

> "*the most that can be derived from that evidence is that ABC explains why it was impractical to email the timesheets or the bill and the timesheets; but the Master unjustifiably extrapolates that to an incorrect conclusion that ABC's evidence was that the Bill was never sent by email*."

137. The significance of this misunderstanding is that the Master built a number of other conclusions adverse to the Solicitors off the back of her finding that ABC had originally said that the December Bill was not emailed. This became highly relevant, not to the question of whether or not the December Bill was in fact emailed (by the time of the appeal if not long before there was no longer an issue that it was), but to the Master's assessment of the credibility of ABC. It is plain that this assessment was critically affected by her findings (a) that in a late development "*GEHC had found the email sending the bill*" and (b) that "*ABC's evidence changed: ABC now accepted that the Bill had been emailed*". Both of these findings seem to have underpinned much of the Master's approach to ABC's evidence more generally but are themselves problematic.

138. As to finding (a), I think that the judge was wrong to characterise the document that had been found by GEHC in the late development as the "*email sending the bill*". The document to which she was referring was a screen shot of a copy of the December Bill that appeared to have been saved as a two page Pdf on a GEHC computer. The email was not produced at trial by GEHC and I think that the Master was wrong to find that it was.

139. As to finding (b), I do not think that any of ABC's answers in cross examination support a conclusion that they accepted that the December Bill had been emailed, anyway from their own awareness of what had occurred. The most that could be said is that they surmised that it had been sent by email by somebody else (probably from Mr

Rosenblatt's office). In my view the Master's conclusion that ABC's evidence had changed on this point is not substantiated by the reasoning that she adopted. It follows that the question which she asked herself when assessing the credibility of ABC as a witness "*How then did ABC come to give such specific evidence up to the last possible minute, that the Bill had never been emailed and that GEHC's witnesses were lying when (as we now know) it had*?" is in my view a question that is flawed. It is based on a misunderstanding of the evidence that had been given.

140. This misunderstanding is particularly significant because the Master described ABC's original evidence as including an assertion by ABC that GEHC's witnesses were lying when they said that the December Bill had been emailed. This was clearly a serious thing to accuse a former client of doing (as the Master herself thought) and had the effect of accentuating what the Master characterised as the change in ABC's position.

141. Mr Williams urged me to be cautious about interfering with the Master's conclusions on this point because he said that there was a shift in emphasis in the way that the Solicitors' case was put which was telling, but which is precisely the kind of point on which an appeal court should be particularly careful about gainsaying the conclusions of the court of first instance. I am very conscious of this, but nonetheless I think it is clear that the Master was mistaken in her assessment, because ABC's evidence never went so far as to accuse their own former clients of lying. They simply said that they could not understand how Mr Monych (one of the witnesses for GEHC) could say that GEHC had not seen a timesheet when ABC had gone through it with him at the January meeting to which I refer below. GEHC relied on the fact that, in cross examination, leading counsel for the Solicitors put to Mr de Clare that "*your whole case is based on fabrication*" which can only have been based on instructions from ABC. It is not at all clear that the allegations of fabrication relate to what the Master said was an allegation by ABC that their clients were lying, but in any event the important point is that the Master reached the wrong conclusion on what ABC's evidence had originally included.

142. Having asked herself the question as to how it was that ABC came to give such specific evidence, the Master then identified a number of things that she would have expected ABC to do by way of confirmation if it had indeed been ABC's case that GEHC's witnesses were lying. It seems to me that those expectations were built on a false premise because of the Master's misunderstanding of the evidence that related to the email, but they had the important consequence of justifying the Master's conclusion that "*where the only evidence of something having happened is ABC's unsupported recollection, I am unlikely to accept their version of events*". This finding then underpinned a number of the Master's conclusions about the likelihood of the timesheets having been supplied to and seen by GEHC.

143. The second aspect of the Solicitors' challenge related to the Master's finding that the following passage from ABC's evidence was also to be rejected:

> "*I recall printing off the stack of time reports of our pre 21 December 2012 costs for a second time and giving them to Perry during the meetings I had with him to discuss costs when he came to London in January 2013. At these meetings, Perry and I also discussed the terms of our a new cfa, how Mr Gray's cost assessment would work and what proportion of GEHC's cost liability to Rosenblatt they could expect to recover from Mr Gray. I assumed Perry would not have brought the time report with him on his flight and therefore wanted it physically there to show what*

work had to be done for the assessment - using the time print to show how him how we would go through the time records and how certain features get discounted etc. I recall Perry shaking his head in a 'goodness this is a big and painstaking procedure' kind of way and me explaining that because it is such a big job most parties settle, but probably not Mr Gray."

144. Mr Monych (Perry in the passage I have set out above) was cross examined on this aspect of ABC's evidence. I will recite the passage in full, because the Master's recitation does not include all of the questions and omits the last two questions and answers, which I think gives a rather different flavour to the exchange. When asked if he remembered what ABC said happened by reference to the passage in ABC's witness statement cited above, Mr Monych said:

"*A. I don't, but [ABC] says it's - that was the case, and I don't recall it but ABC says it's the case, so…*

Q. So you accept it?

A. You know, you don't make something up that's that detailed, so I accept it

Q. So on that basis we would withdraw, wouldn't we, in your paragraph 25 where you said, "I was not provided with a breakdown of the time" -

A. I don't recall ever getting a breakdown at the time

Q. But on the basis of what you have just said, if you accept what [ABC] says –

A. I don't recall ever getting a breakdown at the time. It was never – I don't recall ever getting a posted Bill. I do accept that [ABC] printed all this stuff up for me and we went over it after the fact.

Q. And on that basis therefore when you say in paragraph 25, "I was not provided with a breakdown" that wouldn't be right? (Pause)

A. I'm in B, am I not?

Q. Yes, sorry. That's B3.

A. (Pause) Yes.".

145. The Master's description of Mr Monych's evidence was that it was far from as helpful as the Solicitors would like to think and that the most that could be got out of it was that he had no memory of receiving the timesheets as alleged. The Master put down Mr Monych's acceptance that ABC printed up the timesheets and "*we went over it after the fact*" to what she called his innate courtesy.

146. In my view that is a problematic finding, not least because Mr Monych went on (in a passage the Master did not recite in her judgment) to accept that he had not been right to say, as he did in paragraph 25 of his statement, that he was not provided with a breakdown. Mr Williams described these last few questions and answers as a forensically worthless exercise, but I do not agree. It is very difficult to see how evidence that *"I do accept that [ABC] printed all this stuff up for me and we went over*

it after the fact" followed by a considered acceptance that a passage to the contrary in his statement was incorrect could be put down to the witness' innate courtesy or be the result of a forensically worthless exercise.

147. It seems from a reading of this part of the Master's judgment that she was much influenced by the fact that an important event involving a large sum of money was unsubstantiated by any form of paper trail. She regarded this as particularly surprising in light of the fact that the Solicitors were a commercial firm well-versed in the importance of reducing important agreements to writing. This was a point that was emphasised and developed at some length in GEHC's skeleton and in Mr Williams' oral argument, who stressed that this was a striking omission given that it was for the Solicitors to prove that the detailed assessment timetable had been triggered during the course of their performance of the CFA.

148. I agree that this is a significant factor that the Master was entitled to take into account. I also agree that there are a number of other aspects of the evidence which either did or were capable of supporting the conclusion that she reached. They included evidence from GEHC's solicitor that none of his principals recalled ever having been shown the relevant timesheets. They also included the abandonment by ABC in cross examination of what Mr Williams called a "*Soft, but what light through yonder window breaks*" moment in the form of a later e mail of 6 February 2013 initially said to support the Solicitors' case. But the point of real materiality is the lack of any documentary record for what was one of the main bills that the Solicitors raised during the course of their relationship with GEHC.

149. Nonetheless, it is clear from the Master's discussion of the evidence (see e.g. paragraph [99]) that she did not find resolution of the question of fact an easy one and that, in reaching the conclusions that she did, she placed great weight on (a) her understanding of the evidence in relation to the email and her consequential finding that she was unlikely to accept ABC's version of events where the only evidence of something having happened was their unsupported recollection and (b) her construction of what Mr Monych had said. There is also little doubt that the Master's factual findings in relation to this evidence affected her whole approach to ABC's evidence. On a number of occasions in her judgment she made clear that her conclusions had given her what she described as an insight into ABC's uncorroborated recollections upon which a great deal of the Solicitors' case depended.

150. In support of its argument that the Master reached erroneous conclusions on the relevant factual findings relating to the timesheets, the Solicitors also drew attention to a number of other factual findings which they submitted were obviously wrong. These were findings which were not directly related to the errors on which the appeal is based but were said to be illustrative of the impact which the delay in the production of her judgment may have had on the ability of the Master to recall or assimilate the evidence. Most of these illustrations were insignificant in their own right, but they do build up a picture which causes me some concern that the Master may have had some difficulty in drawing together the threads in relation to the questions with which the appeal is concerned.

151. Taken over all, I consider that they support a conclusion that the Master's factual conclusions on the critical issue of what documentation was provided to GEHC at or shortly after the time that the December Bill was rendered, are unsafe. In particular,

her explanation of Mr Monych's concessions as being driven by innate courtesy, rather than reflective of the words as they appear on the face of the transcript, seems to me to be exactly the sort of conclusion which is vulnerable to challenge on the grounds that she may have misremembered or failed to appreciate the real significance of what the witness was saying in a case where there has been serious delay in the production of her judgment.

152. This engages the approach that Arden LJ explained in *Bond v Dunster Properties*. The special advantage which the trial judge would normally have in the assessment and interpretation of the evidence is at best neutralised in the present case, and the court must therefore consider whether, in the light of the conclusions it has reached, justice requires a new trial of all or any part of the issues.

153. I have concluded that, in the light of the Master's misunderstandings of the evidence in relation to the December email and her misconstruction of the evidence given by Mr Monych in relation to the timesheets, she was wrong to rely on the evidence that she did to conclude (see paragraph [108] of her judgment) that for those reasons the costs contained within the December Bill were still capable of detailed assessment. In my judgment the Master's findings to that effect are unsafe and must be set aside.

154. If that were to be the only question I think that the appeal on the scope issue would have to be allowed. However, I am conscious that there is significant other material which was capable of enabling the Master to reach the same conclusion. I am not in a position to reach a clear conclusion as to what in fact occurred, and, notwithstanding the errors that I have found that the Master made, it is possible that she might have reached the same conclusion on the facts, albeit by a different route. On balance, although I am conscious that this would not be a satisfactory outcome for this longstanding dispute, all other things being equal these considerations point to the just order being to remit the scope issue to be reheard.

155. However, as I have already foreshadowed, GEHC also argued that the December Bill was not a statute bill for reasons that were not directly related to the two specific findings of fact that were subject to the Solicitors' challenge. If this argument were to succeed, remittal for a rehearing may not be an appropriate order to make.

Scope issue: the legal points

156. In its amended respondent's notice GEHC contended that the Master was right to hold that the December Bill was not a statute bill for the purposes of section 70 for the following additional reasons:

    i) The Solicitors had no contractual right to deliver such a bill in December 2012 and GEHC did not give any informed consent to it nonetheless doing so; and/or

    ii) The Solicitors did not make it plain to GEHC that the December Invoice was intended to stand as a self-contained statute bill for the purposes of section 70.

157. In its skeleton argument, GEHC said that the Master adverted to these arguments but did not need to decide them given her factual findings. I think that Mr. Williams was

correct to construe the Master's judgment in this way, because she said in paragraph [76] that there was no need to go into great detail on what she called the legal points because of her factual findings and in paragraph [80] that she was "*in some doubt*" about whether the Solicitors were entitled to raise the December Bill in any event, a conclusion that falls someway short of a finding that that was indeed the case.

158. The same is not so obviously the case in relation to the Solicitors' counter arguments based on a estoppel, approbation and reprobation and *Davidsons v Jones Fenleigh* [1980] WLUK 43, which she seems to have concluded were not well-founded. I shall deal with those a little later, but as I read paragraphs [82] to [84] of her judgment, what the Master had to say were findings rejecting the Solicitors' case, not simply recitations of the points that had been argued.

159. GEHC also seems to have relied on the fact that there was no appeal by the Solicitors against what the Master said in paragraph [81] of her judgment to the effect that the Solicitors had no contractual entitlement to render a bill at what she called the earliest opportunity (i.e. in December 2012) rather than the end of the claim. She did not identify with any specificity what she considered to be the end of the claim, but I think it is tolerably clear that she meant final judgment after the conclusion of any account or enquiry. I shall come back to this point a little later as well.

160. The commercial context of this argument is important. The effect of a bill being a statute bill is that the time period during which a challenge can be made starts to run. This means that it is important for clients to know that the challenge period has started, so that they can take appropriate steps to require or seek an assessment of the bill if that is what they are minded to do.

161. GEHC advanced the argument raised in its respondent's notice on two bases. The first was that a Solicitor must show that he has a right to render his bill at the time he does so. In the absence of agreement in the contract of retainer to the contrary, he will have no right to deliver a statute bill, which sets the timetable for detailed assessment running, until the case has concluded or until there has been what is referred to in the authorities as a natural break in the litigation. In support of these propositions, Mr Williams relied on *Re Romer and Haslam* [1893] 2 Q.B. 286 at 297. As a matter of general principle I accept GEHC's submission.

162. GEHC also submitted that the natural break principle did not apply in a case such as the present where the contract made provision for the Solicitors' entitlement to charge only on the occurrence of a 'win'. As to that, although Mr Gourgey did not develop the point in his oral submissions, he said in his supplemental skeleton that either a win or a natural break was sufficient and relied on *In re Romer & Haslam* [1893] 2 QB 286, *Underwood, Son, & Piper v Lewis* [1894] 2 QB 306, 312 and *Vlamaki v Sookias & Sookias* [2015] EWHC 3334 (QB) at para [10].

163. I think that GEHC is correct on the application of the natural break principle, in the sense that it must defer to any agreement to the contrary, a point made by Walker J in *Vlamaki*. For that reason it has no freestanding application in the present case. The CFAs themselves deal with the time at which the Solicitors' entitlement to charge their basic and success fees arises in a manner that is inconsistent with their ability to render a statute bill, which carries with it a requirement that it be complete and self-contained, any earlier than the time at which a 'win' has occurred. It is only then that it is possible

for the Solicitors to say that they have any right to recover the basic charges and the success fee and even then, for reasons that I shall come to next, it may be necessary for them to show that a stage has been reached that amounts to the end of the claim. It follows that, in my view, the natural break principle cannot apply unless a 'win' occurs. It therefore adds nothing to the analysis.

164. GEHC then submitted that sums were not due and payable under CFA2 at the time that the December Bill was rendered because neither a win nor the end of the claim had been achieved by 21 December 2012. As to the former CFA2 provided that 'win' meant "*You achieve a settlement or any other benefit arising out of the Claim, or if you do not achieve a settlement and you go on to issue proceedings, the court orders in your favour and orders your opponent to pay you costs"*. As to the latter one of the factors described in CFA2 as to what the success fee percentage reflected included at (d) that "*if you win we will not be paid our basic charges until the end of the claim*".

165. GEHC submitted that all that had happened on 21 December 2012 was that Vos J had handed down a judgment on liability. This was simply a stage in the proceedings in respect of which no amounts had been ordered to be paid to GEHC and the claim only came to an end after the protracted proceedings for an account and enquiry leading to the orders made by Asplin J in 2015 and Arnold J in 2019. Furthermore, no order for costs was made until 17 January 2013 which was almost a month after the December bill was rendered.

166. GEHC then submitted that they could not be said to have consented to the rendering of the December Bill as an interim statute bill at a time which was not contemplated by CFA2 itself, because for any such consent to have been given it would have had to be fully informed consent. This would have required the Solicitors to explain that GEHC was being asked to pay sums that were not yet due, which they did not do.

167. GEHC also said that the December Bill was not a statute bill because its status as such was not made clear. It relied on what the Master said in paragraph [84] of her judgment about the obligation of a solicitor to make plain to their client that a bill rendered before the final conclusion of a case is intended to be treated as a complete self-contained bill of costs to date. In that context she cited the judgment of Roskill LJ in *Davidson v Jones Fenleigh* [1980] WLUK 43, where he said the following:

> "*But as the judgments in In Re Romer & Haslam show, for this entitlement to remuneration to arise a very clear intention had to be manifested by the solicitor when he sent in his bill to the client that it was intended to be a complete bill to date, which the solicitor wanted to have finally settled and that the solicitor was not, in sending in that bill, merely either telling his client how matters were going on or only seeking a payment on account towards whatever the final bill might be.*"

168. The need for the client to be in no doubt that the purpose of sending the bill at the time it is sent is that it is to be treated as a complete and self-contained bill of costs to date is also emphasised by Fulford J in *Adams v Malik* [2014] 6 Costs LR 985, 996. *Adams v Malik* was a case in which the natural break principle was being relied on In cases such as the present, where the Solicitors' entitlement arises on a 'win', the requirement that the client should be aware of the purpose of the bill and the consequences of its being rendered is equally applicable. In my view the Solicitors must have provided enough information to enable them to appreciate not just that the entitlement to bill at

all had arisen, but also that the consequences of the entitlement to render the bill as a statute bill was that time for its assessment had started to run.

169. The Solicitors' answer to these submissions was that they did not accept that GEHC did not consent to interim billing. They submitted that a 'win' under CFA2 had been achieved both because GEHC had achieved a benefit arising out of the Claim and because the court had made an order in GEHC's favour. The argument was not that there was any separate consent: they submitted that GEHC gave its consent simply through the wording of CFA2 itself. It was said that the consent flowed from the Solicitors' entitlement to charge their basic charges and a success fee because a 'win' had been achieved. They submitted that having achieved a 'win' it followed that an interim statute bill could be rendered.

170. They also relied on the fact that the Master was wrong to conclude that the statutory right to an assessment was not made plain to GEHC, a conclusion which she appeared to reach in paragraph [84] of her judgment when dealing with *Davidson v Jones Fenleigh*:

> "*Given GEHC's case that it was never made plain, plus the fact that it is not stated on the face of the Bill, nor – since there was none – in any covering letter, that this was RS's intention in sending it, I do not find that point persuasive in RS's favour either*.

171. In my judgment, the Master was entitled to reach the conclusion that she did on the point in time at which, under the CFA itself, the Solicitors' right to bill arose. There are a number of interlinked reasons for this.

172. The first is that there are a number of places in the CFA in which the liability to pay basic charges and a success fee is said to arise. They all presuppose that a 'win' has been achieved. CFA2 makes no sense if that liability is held to have accrued before a 'win' has been achieved. If that were not to be the case, CFA2 would provide for an obligation to pay a sum that might never become payable.

173. Secondly, the meaning of the phrases "*other benefit arising out of the Claim*" and "*the Court orders in your favour*" where they appear in the definition of 'Win' are both inherently uncertain in the sense that they are capable of referring to any form of benefit of favourable outcome, whether interlocutory or otherwise. However, on any view, there must be limitations as to when that is capable of occurring: it would be absurd to suggest that, every time during the course of the litigation that an interim or other order is made which has some beneficial consequences to GEHC's conduct of the litigation or is otherwise favourable to GEHC, a 'win' is treated as having been achieved. 'Win' has to be read in contradistinction to 'lose' and it makes no commercial sense for a benefit arising out of the claim or an order in GEHC's favour to be anything other than the grant or obtaining of some form of substantive relief.

174. It might be said, and was I think the gist of the submission in the Solicitor's supplemental skeleton argument, that what the parties had in mind when using the concept of 'benefit' or 'favourable order' was that a stage had been reached in the litigation in which the benefit or favourable order would be sufficient to justify the application of the natural break test if it were to be applicable. I am not persuaded that that is the right way of looking at the question. It seems to me that what was meant by

a benefit or favourable order such as to give rise to a 'win' with a consequential right to basic charges and a success fee is informed by paragraph (d) under the description of what the success fee percentage reflects: "*if you win we will not be paid our basic charges until the end of the claim*".

175. This provision is concerned with the time at which the obligation accrues due. It follows that much the better view is that this means that the end of the claim is the time at which an assessment has to be made as to whether or not a 'win' has occurred. In any event, even if the wording of CFA2 allows a 'win' to occur before the end of the claim, the entitlement to charge and be paid does not. In my view the wording under (d), which is dealing with the period of time for which the obligation to pay the basic charges is deferred even in the case of a 'win' as a justification for charging a 100% success fee, cannot sensibly be construed any other way.

176. The final piece of the puzzle is what is the end of the claim? The word 'claim' is not defined but the description of 'What is covered by this agreement' that I recited at the beginning of this judgment makes clear that CFA2 covers the claim, proceedings to enforce any judgment or order, and cost assessment proceedings, but does not include any appeal against any final judgment or order. The way it is drafted indicates that enforcement proceedings, costs proceedings and appeals against final orders are not to be treated as part of the 'claim' per se, otherwise they would not be mentioned separately. But it seems to me that all other aspects of the claim that had been brought against Robert Gray (i.e. the Gray Action) are included in the word 'claim' both where it appears in the 'What is covered by this agreement' section and elsewhere in CFA2.

177. For these reasons I think that the phrase "*benefit arising out of the Claim*", can only refer to the stage at which the claim has ended. I should also add that I have real difficulty in seeing how a benefit which arises out of the claim which also takes the form of an order that is made in GEHC's favour can amount to a 'win' unless the court has also ordered GEHC's opponent to pay its costs. This was the status of Vos J's judgment prior to 17 January 2013, because it was only then that he made an order for costs in GEHC's favour. If that were not to be the case, the last part of the definition of 'Win' would have no meaning.

178. As to the point based on *Davidson v Jones Fenleigh*, the Master was not persuaded (see paragraph [84] of her judgment) that the mere fact that GEHC paid and accepted the December Bill meant that it was accepted as a bill that was to be treated as a complete self-contained bill of costs to date, so as to qualify as an interim statute bill. This I think was for two reasons. The first flowed from GEHC's argument as described in paragraph [62] of her judgment that it had not been fully informed because it was told that a win had occurred and that therefore payment was due. The second was that there was nothing said on the face of the bill that the intention in rendering it was to enable time to start running.

179. These conclusions were not specifically appealed by the Solicitors. Furthermore, as Mr Williams submitted, there was nothing to suggest that what was sent to GEHC included reference to the ability to have the costs assessed apart from what I understood would have appeared on the back of the December Bill. I was not shown what that was or would have been, but I am very doubtful that, in the absence of GEHC's attention being specifically drawn to it, the mere sending of a bill with those words on the reverse would have amounted to the clear manifestation of the Solicitors' intention that it be treated

as a statute bill that is required by the principles explained in *Davidson v Jones Fenleigh.*

180. The Solicitors also made bare reference in Mr Gourgey's supplemental skeleton argument to the arguments that had been made in their written closing submissions to the Master at the trial. Those arguments were not further developed in their oral submissions and do not seem to me to take matters very much further. In broad terms they related to the question of whether or not GEHC's subsequent conduct still entitles it to challenge the December Bill as a statute bill, whether or not the CFA itself contemplated that the time at which the obligation to pay had fallen due.

181. There were a number of ways in which these arguments were advanced by the Solicitors in their written closing submissions at the trial. They included the fact that the December Bill was both accepted and paid and a submission that GEHC was barred by estoppel from denying the Solicitors' right to render the bill. It was also said that GEHC had claimed and obtained the success fee on a party and party detailed assessment before Master Leonard, despite the fact that the defendant (Mr Gray) had argued that it was not yet due on the same grounds that are now put forward by GEHC.

182. As I read paragraphs [82] and [83] of her judgment the Master rejected these arguments. I think that she was entitled to do so for the reasons that she gave and I was not in any event presented with any reasoned argument as to why she was wrong. There is no basis on which I can conclude that, in the light of the totality of the information with which GEHC was provided, the December Bill ought to be treated as what Roskill LJ called "*a complete bill to date, which the solicitor wanted to have finally settled*". In particular I do not consider that the Master's conclusions on these points are affected by the conclusions I have reached about the unreliability of the Master's factual findings as to what GEHC was sent, and how much information it was given in December 2012 and January 2013.

183. Accordingly, I accept GEHC's submission that the December Bill was not a statute bill because, at the time it was rendered, the Solicitors were not entitled to payment under the terms of CFA2 itself and GEHC gave no sufficient consent to its early delivery. This conclusion means there is no reason to remit the scope issue to be reheard so that the court can reconsider the factual points, the conclusions to which I have described in paragraph 153 above. In my judgment the appeal against paragraph 8 of the order made by the Master must be dismissed, although I have reached that conclusion for reasons that are different to those that she gave.