Neutral Citation Number: [2017] EWCA Civ 1173

Case No: A3/2016/2911

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
HIS HONOUR JUDGE BARKER QC
(sitting as a Judge of the High Court)
Case No: HC-2014-002213

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2017

Before :

LORD JUSTICE BRIGGS
and
LORD JUSTICE HAMBLEN
- -

Between :

STEVENSDRAKE LIMITED **(trading as Stevensdrake Solicitors)**	**Appellant**
- and -	
STEPHEN HUNT **(Liquidator of Sunbow Limited)**	**Respondent**

- -
- -

Andrew Sutcliffe QC and Cameron Miles (instructed by **Stevensdrake Solicitors**) for the **Appellant**
Hugh Sims QC and Simon Passfield (instructed by **Devonshires Solicitors LLP**) for the **Respondent**

Hearing dates : 18 and 19 July 2017
- -

Approved Judgment

Lord Justice Hamblen :

Introduction

1. The Appellant ("SL") is a firm of solicitors. The Respondent ("SH") is a licensed insolvency practitioner and SL's former client. The partner acting at all material times on behalf of SL was Gavin Pickering ("GP").

2. SL appeals against the judgment of His Honour Judge Barker QC (the "Judge") dated 26 February 2016 (the "Judgment") whereby he dismissed SL's claim against SH for its fees under a CFA dated 10 April 2008 ("the CFA") for legal services provided in relation to the liquidation of Sunbow Limited ("Sunbow"), of which SH was the liquidator.

3. The central issue between the parties at trial was whether SH was only liable for the fees if a recovery was made out of which the fees could be paid. The Judge upheld SH's case that he was only liable in those circumstances as a matter of contract, alternatively by reason of estoppel by convention. Alternatively, if SH was liable irrespective of recoveries made, the Judge upheld SH's claim that SL could not recover its fees by reason of undue influence and/or breach of its contractual and/or tortious duty of care and skill and/or breach of its fiduciary duty of loyalty. He also found that SH was not contributorily negligent. SL appeals against all these grounds of decision.

Factual background

4. This is fully set out in the Judgment at [11] to [73] and is largely undisputed. For the purposes of this judgment it is not necessary to repeat that complete account. Instead a summary will be given drawing on and giving references to the Judgment.

5. SH and GP first worked together on an insolvency matter in 1993 and had worked together on numerous insolvency matters since then [13]. The Judge found that they were both "experienced and skilled at their respective roles in the field of insolvency and that they had a well established working relationship, each knowing what to do and what was expected of the one by the other" [69].

6. It was common ground that in respect of a number of those matters the arrangement was that GP's firm of solicitors agreed to be paid on a recoveries basis, including in instances where there was a CFA in place in respect of the solicitors' fees [14].

7. The Judge found that: "In nil-asset cases SH expected these specialist labour resources to be self-funding in the sense of having no personal recourse against him and being willing to limit their reward to a share of recoveries up to the limit of their time costs and any agreed uplift. In relation to the claims against TP, although GP (and SL) and counsel might advise, SH conveyed the impression of being fully confident as to the prospects of recovery which enabled him to remain in the driving seat without question from his legal team. SH also made clear, from time to time, that if his advisers sought to deviate from the course he was charting in order to protect their own interests he would have no compunction about cutting them adrift. All of

this was known to and fully understood by GP, for SL, from past dealings with SH" [71].

8. The Judge further found that: "Whatever the law might be as to the relationship between a solicitor and client, to which I shall return, in the working relationship between SH and GP SH was unquestionably the dominant party" [72].

9. SH was appointed as liquidator of Sunbow in July 2005. Creditors were keen that the conduct of the former administrators, Theodolous Papanicola ("TP") and Alan Simon ("AS"), should be investigated, and any losses caused by wrongdoing on their part recovered [15].

10. As the judge found: "Shortly thereafter SH contacted GP and engaged SL to act in relation to the Sunbow liquidation. To confirm the instruction SL sent SH a retainer letter dated 1 September 2005 and enclosed SL's standard terms of business. The subject matter of the instruction was the liquidation of Sunbow. Although the standard terms provided for the rendering of monthly accounts and payment within 28 days, the letter modified the terms by providing an assurance that, except in relation to out-of-pocket expenses, the terms of business were amended by the letter so that SL would wait for payment of its charges until recovery of any assets in the estate, regardless of source. The letter also raised the possibility of later consideration of funding, insurance and/or a conditional fee agreement. On 5 September 2005 SH signed and returned SL's terms of business on this basis" [16].

11. By November 2005 SH had instructed SL to prepare an application to challenge TP's and AS's release from liability, which had been granted by an order made on 12 September 2005. There were exchanges between SL and SH in relation to the costs of that application which included GP stating "As discussed on the phone, I am not looking for my own costs at this stage" [17].

12. In March 2006 applications under s.236 of the Insolvency Act 1986 against the former administrators and the former officers of Sunbow were issued [19]. New files were created by SL for each of these s.236 applications [20].

13. As the judge stated at [21]: "As new files had been opened, SL sent SH retainer letters with terms of business for each of the s.236 applications. The retainer letters contained the same modifications to the standard terms of business, confirming SL's willingness to wait for payment of its charges, but not out-of-pocket expenses, until recovery of assets in the estate."

14. SH returned the signed terms of business under cover of a letter dated 27 April 2006 which stated amongst other things as follows:

> "I currently hold a negative balance of £2,601.54 in the estate of Sunbow Limited. In the light of this, your fees in this matter can only be paid out of realisations. In the event that there are no realisations I, as Liquidator, will not be in a position to pay your fees, nor will I accept personal liability for those fees. Notwithstanding anything which may be stated in your terms of business, which may have been, or will be, signed by me, your instructions are given on the basis stated here. If you are not willing to act in this matter on this basis, please return to me all papers currently held by you. Should you wish to

> discuss this matter, please do not hesitate to contact either myself or Linda Golding."

15. The Judge found that in cross-examination GP acknowledged that he accepted these conditions at the time [23].

16. This is borne out by GP's response by email of 26 May 2006 which stated that:

> "… I am happy to wait for payment of our costs until you make a recovery from any source. I would require disbursements to be paid though. In particular this will mean counsel's fees. Smaller travel related costs we can wait for also. If it is possible to get HMRC to pay as we go that would be preferable. This means I do need to know if you recover assets into the liquidation, at which point we should discuss how our fees will be paid. If at any stage it looks like there will be no recovery, we reserve the right to discontinue acting, including if we are instructed in relation to ongoing litigation."

The 27 April 2006 letter and the 26 May 2006 email reply will be referred to as "the 2006 exchange".

17. By February 2007 it had become necessary to engage counsel in respect of a proposed misfeasance claim against AS and TP. By the end of May 2007 counsel had formed a view as to the overall merits of these claims and confirmed to GP that he would undertake work on a CFA if SL was also retained on a CFA, to which GP agreed [25-26].

18. On 3 August 2007 GP wrote to SH to confirm the agreed basis for the main claims against TP and AS and also to confirm that both counsel and SL had agreed to undertake the claim on CFAs. GP explained the perceived risks and sought an uplift of 100 per cent [28].

19. Both GP and SH considered that there were significant assets against which a recovery could be made [29].

20. On 29 January 2008 GP wrote to SH enclosing a proposed CFA for SL's services going forward and an insurance proposal form to obtain quotes for litigation insurance. The letter contained an explanation of the risks which justified a 100 per cent uplift and provided an estimate of SL's future costs of the main claim against TP and AS [31].

21. The Judge summarised the main relevant terms of the CFA as follows at [31]:

> "The CFA starts with the statement:
>
> > "This agreement is a binding legal contract between you and your solicitor/s. Before you sign please read everything carefully. This agreement must be read in conjunction with the attached schedules 1 and 2."

> The CFA itself, which is very short, identifies the parties (SL as the solicitor, SH as the client), what is and is not covered by the agreement, the terms for paying SL, and the success fee (set at 100 per cent). The terms for SH to pay SL are stated as:
>
> > "If you win your claim, you pay our basic charges, 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 premiums as set out in the schedules."
>
> The schedules, which extend to 10 pages and are clearly laid out and easy to read, include the following explanations in relation to dealing with SH's responsibilities under the CFA:
>
> > "You are personally responsible for any payments that you may have to make under this Agreement; those payments are not limited by reference to the funds available in the liquidation;"
>
> and, in relation to dealing with costs if successful:
>
> > "You are liable to pay all our basic charges, our disbursements and success fee.
> > …
> >
> > As with costs in general, you remain ultimately responsible for paying our success fee."
>
> The CFA is not a complex document and it is clear both in its terms and its format."

22. GP's covering letter also referred to existing costs of some £50,000 which were to be paid for out of recoveries, in the following terms:

> > "If we are to conduct the matter on a CFA going forward, this will leave the existing costs of around £50,000 which do not form part of the costs of the claim to be paid for out of any recoveries (excluding any claim against [the officers] arising out of the 236 examination attempts)."

23. The Judge found that in cross-examination GP accepted that there was nothing expressly stated in the letter to alert SH to the fact that, if successful, SL would pursue SH for its costs irrespective of any recovery [33].

24. GP's covering letter had concluded by saying: "It would be helpful to have a discussion with you about the CFA and costs. For that I would be grateful if you could give me a call as soon as you have the chance to consider this letter". SH did not contact GP as requested. On 13 February 2008 SH sent an email to GP stating that the CFA was "fine" and he returned it signed on 19 February 2008 [34].

25. An issue then arose as a result of counsel's CFA being dated 10 August 2007. On 23 April 2008 GP emailed SH and asked him whether he would agree to a retrospective

agreement for SL. He explained that the problem in relation to uplift caused by backdating was that it was not recoverable from the opponent until service of a notice of funding and noted that the uplift for the backdated period "would have to be paid out of damages". In the event it was agreed that all the CFAs would be dated 10 April 2008 [42].

26. In December 2008 AS's solicitors began a without-prejudice dialogue to settle the claim against AS and in May 2009 AS offered £125,000 to settle the claim against him. This was eventually agreed and was reflected in a Tomlin order dated 23 November 2009 [43].

27. On 23 November 2009 SH telephoned GP to discuss apportionment of the £125,000. The Judge found as follows in relation to that conversation at [44]:

> "SH proposed paying counsel's fees, which SH estimated at £40,000, and an in principle 50:50 split of the balance subject to SH requiring £10,000 for Insolvency Services Account ("ISA") ad valorem and a further £6,500 for disbursements. GP said that he would ascertain counsel's fees and revert, which he did on 24 November 2009. GP's attendance note contains no reference to any mention by him to SH of success under the CFA having been achieved or of SL's entitlement under the CFA having crystallised."

28. Over the next few days the following division of fees was agreed: £39,100 was paid to counsel (which represented substantial but not full payment), £35,200 was allocated to each of SL and SH in respect of their fees and the balance, some £15,500, was paid to SH in respect of ISA ad valorem and SH's disbursements. The Judge found that: "It is obvious from the agreed apportionment that GP, for SL, was adopting a recoveries basis split" [45].

29. On 25 October 2010 there was a conversation between GP and SH after a falling out between SH and counsel over fees. On 26 October 2010 counsel telephoned GP whose note of the conversation stated:

> "Of course [SH] was bound to honour his agreement with us, and as we would receive the money not him, we would be paid first and counsel would be paid in front of us."

The Judge observed at [46] that: "GP's statement makes sense in the context of counsel and SL undertaking their work on a recoveries basis but not on the basis that they have a right to be paid in full immediately upon achieving success as defined in the CFA."

30. On 21 April 2010 TP's solicitor made a without prejudice offer to settle the claims against TP in the sum of £300,000. GP's own base costs at that time were in excess of that. GP forwarded the offer to SH with the observation that it was "obviously too low for what you and I have at stake as costs" [48].

31. The trial against TP was scheduled to take place in July 2011. In June 2011 there was a discussion between GP and SH about replacement counsel for the PTR. GP's covering email to counsel's clerk stated that the CFA for the replacement counsel:

"must be on the same condition as with [retained counsel] that entitlement to payment will depend on receipt from [TP] and on that basis we can proceed" [49].

32. On 13 June 2011 GP and SH discussed by email counsel's fees for the trial with GP pointing out areas where reductions might be negotiated and concluding: "… Either way I need to sort it out as it will be a huge drain on recoveries" [50].

33. Shortly thereafter there was a telephone conversation between GP and SH in which GP said that, contrary to SH's understanding, he was "pretty confident" that there was no recoveries based agreement with counsel but made no suggestion that SL was in the same position [52].

34. On 11 July 2011 an agreement was reached in principle for settlement of the claims against TP on payment of £1.9 million. A Tomlin order was agreed on 22 July 2011 and entered on 25 July 2011 [54].

35. No payment was made and in October 2011 SH agreed to GP's request to extend the CFA to enforcement proceedings [55].

36. In December 2012 counsel's clerk began chasing for payment of outstanding fees. By autumn 2013 counsel's claim for fees had been referred to arbitration [57].

37. On 31 March 2013 GP wrote to SH setting out the background to the arbitration and stating that if SL was liable to counsel recovery would be sought from SH. On 5 December 2013 GP emailed SH asking him to state his position in relation to the arbitration failing which SL would present a bill for immediate payment in full of both counsel's fees and its fees. On 11 December 2013 GP sent an email to SH stating that his liability to pay counsel's fees and SL's fees had been triggered by the settlements with AS and TP [58]. This led to an angry telephone conversation between SH and GP in which SH accused GP of dishonesty (SH's recollection) or fraud (GP's recollection) [59].

38. The arbitration in relation to counsel's fees was settled in April 2014 after it had become clear that SH was not alleging that was any express agreement with counsel on the issue of payment of fees.

39. In the meantime, on 28 February 2014, SL issued a bill seeking payment of the fees of counsel and SL. On 17 April 2014 proceedings were issued.

40. On 15 April 2014 Chief Master Marsh gave summary judgment against SH for the fees due to counsel. An appeal was dismissed by HHJ Purle QC, sitting as a judge of the High Court, on 20 May 2015.

The Judgment

41. So far as relevant to the appeal, the Judge considered the issues under the following headings.

    (1) What is the contractual position in relation to the costs/fees claimed?

The Judge concluded that "the answer to the first issue is that the full terms of the agreement between SH and SL operative from 10 April 2008 cannot be ascertained from the CFA alone and that the full terms incorporate a term that SL's fees would only be paid out of realisations and that SH has no personal liability for those fees. In other words, the 27 April 2006 letter from SH and its acceptance by GP had the effect of importing into any agreement for SL to undertake work in relation to the Sunbow liquidation that recovery of assets into the estate was a precondition to SL rendering an invoice to SH for work done by SL. Put more simply, every retainer of SL by SH in relation to any and all aspects of the Sunbow liquidation was to be on the recoveries basis" [100].

(2) Irrespective of any strict legal rights, did the parties work on a convention agreed between them, and if so what was it and does it bind them?

The Judge concluded that "GP's November 2005 email and the numerous communications, written and verbal, referred to above in the section on background/the facts provide a more than sufficient platform on which to found a submission of a common understanding from which it would be unconscionable to permit SL to withdraw or resile [106]. Put at its lowest, SH communicated a requirement as to conduct to GP, for SL, which GP not only acquiesced in but also expressly confirmed back to SH and acted upon; that gave rise to an inferred or assumed state of affairs in relation to SL's charges which affected the way in which the parties conducted themselves in their dealings with each other and from which it would therefore be unjust to allow SL to depart [107]".

(3) Did SH enter into the CFA as a result of presumed undue influence?

The Judge concluded that "If the CFA was to mark a new beginning on wholly different terms which exposed SH to primary and direct liability for SL's charges irrespective of recoveries, the disadvantage of such an arrangement to SH would be so significant that SL, through GP, as SH's solicitor and the beneficiary of this new arrangement could not, in good conscience, do other than expressly draw this new circumstance to SH's attention. This is a fortiori where SH has already made clear that any such condition would have a terminal effect on the retainer" [114].

(4) Was SL in breach of contract and/or negligent and/or in breach of fiduciary duties before and/or at the time of entering into the CFA?

The Judge concluded that "as to negligence, GP's failure to advise SH of the meaning and effect of the CFA (that is the meaning for which SL contends in these proceedings) did, in the circumstances and notwithstanding the qualities attributed to SH by Mr Sutcliffe QC, fall below the standard of reasonable care to be expected of a solicitor [125]. As to breach of fiduciary duty, the disloyalty alleged is non-disclosure of a material change of circumstances to SH's direct financial detriment and to SL's direct financial advantage. In my judgment, SH was entitled to trust and rely on GP to disclose, by taking positive steps to draw attention to, any such change in the commercial

relationship not merely as a matter of fair dealing at arm's length but also as an aspect of the solicitor client relationship. That did not occur" [126].

(5) Is SH guilty of contributory negligence?

The Judge concluded that "the problem with these [SL's] submissions is that they overlook the facts before, at the time of, and for more than three years after the signing of the CFA. As already noted in this judgment, had there been an exchange between GP and SH along the lines of SH being bound by the CFA to pay SL's fees irrespective of recoveries, work by SL on the Sunbow litigation would have come to an end immediately and other solicitors would have replaced SL. That consequence was expressly foreshadowed in SH's letter of 27 April 2006 and was understood at all times by GP. The proposition that SH would—or even might—have retained SL to work on the Sunbow liquidation on a CFA and expose himself to personal liability for SL's fees irrespective of recoveries is fanciful; so too is the proposition that GP would have sought such an arrangement with SH" [133].

42. At [134] the Judge expressed his overall conclusion as follows:

"Drawing the strands of the judgments in this litigation together (1) following the decision of HH Judge Purle QC SH is liable to SL for the fees of counsel instructed in connection with the Sunbow litigation; (2) SH is also liable to SL for all other disbursements or out-of-pocket expenses incurred or borne by SL in connection with the Sunbow liquidation; but, (3) SH is not liable to SL for SL's own charges (basic costs and uplift). SH is also liable to SL for interest on unpaid or late payment of disbursements pursuant to contract or as a matter of general law."

The grounds of appeal

43. The grounds of appeal are:

(1) *Implied term* - The Judge erred in holding that the CFA was subject to a term that SL's right to payment of its basic charges and success fee was conditional or contingent upon there being funds available from realisations or recoveries.

(2) *Estoppel by convention* - The Judge erred in holding that SL and SH established between them a convention whereby SL would not insist on recovery of its basic charges and success fee unless there were funds available from realisations or recoveries and SL was estopped from departing from this convention.

(3) *Undue influence* - The Judge erred in holding that SH had entered into the CFA under the undue influence of SL such that SL could no longer rely on the CFA to recover its fees.

(4) *Negligence and breach of fiduciary duty* - The Judge erred in holding that, in failing to take adequate steps to explain the CFA to SH, SL was in breach of its contractual and/or tortious duty of care and skill to SH and, furthermore, in breach of its fiduciary duty of loyalty to SH.

(5) *Contributory negligence* - The Judge erred in holding that SH was not contributorily negligent in incurring any loss that he could be said to have suffered as a result of SL's negligence.

Ground 1 – Implied term

44. The CFA was a short but clear document, as the Judge held. It was a signed "binding legal contract" relating to the s.212 application against AS and TP. It governed work done by SL "from now until the agreement ends". It made it plain that if the case was lost then SH's liability was only for the other side's costs but that if the case was won he would pay SL's "basic charges, our disbursements and a success fee". A "win" was stated to be the claim finally being decided in SH's favour or "success", as defined.

45. Schedule 1 to the CFA provided:

> "You are personally responsible for any payments that you may have to make under this Agreement; those payments are not limited by reference to the funds available in the liquidation."

46. This provision clearly imposes a responsibility for payment regardless of recoveries.

47. The Judge did not hold otherwise but he considered that it was subject to and overridden by the agreement reflected in the 2006 exchange. He held that agreement to be "fundamental to the scope and the meaning of SL's retainer and, therefore, a necessary and implicit term of their agreement and it overrides or negates any contrary term in the CFA".

48. The proper approach to the implication of terms is as set out by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, a decision referred to by the Judge. In that case the Supreme Court (at [21]) confirmed that the essence of much of the learning on implied terms is to be found in Lord Simon of Glaisdale's well known summary of the conditions which must be satisfied for a term to be implied as stated in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-3:

> "[F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

49. The term implied by the judge does contradict the express terms of the CFA. The Judge acknowledged this, recognising that it "runs contrary to the CFA" (at [100]). As stated by Lord Neuberger in the *Marks and Spencer* case at [28]: "it is a cardinal rule that no term can be implied into a contract if it contradicts an express term".

50. It is also not necessary to give business efficacy to the CFA. The CFA is a coherent and comprehensive agreement that works perfectly well without the need for any implied term.

51. Nor can it be said that it is so obvious that it goes without saying in circumstances where it is contradicted by an express term of the contract.

52. The Judge recognised (at [100]) that his conclusion may "seem at odds with the principles governing construction of and implication of terms" but he considered that "the volume, quality and sheer weight of the contemporaneous evidence does not admit of any other conclusion".

53. That evidence, however strong, cannot allow for the implication of a term where to do so would be contrary to principle and authority, as is the case here. Indeed, SH did not contend at trial that such a term should be implied, nor was such an analysis supported by SH's counsel on appeal, Mr Hugh Sims QC.

54. SH's case on appeal was that, on a proper analysis, what the Judge had held was that the entire agreement between the parties was not contained in the CFA alone but also included the agreement recorded in the 2006 exchange.

55. It was submitted that the earlier agreement was an "umbrella" contract which governed all subsequent agreements in relation to the Sunbow liquidation and prevailed in the event of inconsistency, as borne out by the accepted condition that: "Notwithstanding anything which may be stated in your terms of business, which may have been, or will be, signed by me, your instructions are given on the basis stated here."

56. In my judgment, there are a number of difficulties with this analysis, quite apart from the fact that it was not that adopted by the Judge. In particular:

    (1) The CFA purports to be a complete and self-contained contract. It is a formal "binding legal contract" signed by both parties.

    (2) The CFA works effectively as a contract without the need for any further terms.

    (3) The CFA neither refers to nor purports to incorporate the terms of any other agreement.

    (4) The CFA represented a markedly different basis for the payment for services than the general retainer and the agreement reflected in the 2006 exchange. Under the retainer SH was liable for disbursements, including counsel's fees, regardless of recoveries. Under the CFA (and the allied CFA with counsel) SH was not liable for any fees or disbursements unless there was "success".

    (5) The subject matter of the CFA was a substantial misfeasance claim which was likely to go to court and to involve far greater costs than the applications contemplated and addressed by the general retainer and the 2006 exchange, which reflected an agreement made in different circumstances some two years earlier.

(6) Although the 2006 exchange contemplated SH subsequently signing Terms of Business which contained differing terms it does not address the making of a CFA.

57. In these circumstances, there was in my judgment no contractual justification for going outside the terms of the CFA and making it subject to contrary terms founded on other agreements which may have been made.

58. Mr Sims QC had a further argument, raised by Respondent's Notice, that the agreement reflected by the 2006 exchange and the CFA can and should be interpreted consistently with each other by construing both agreements as imposing personal liability but a liability which would remain future and contingent until recoveries were made. It was stressed that the CFA says nothing about the timing of payment. This was an argument made at trial which the Judge did not address. In my judgment, it is contrary to the wording of both agreements. Under the 2006 exchange there is no personal liability for fees at all unless and until a recovery is made – "In the event that there are no realisations…nor will I accept personal liability for those fees". Under the CFA personal liability for "payment" arises on "success" and that means an immediately enforceable liability, in the absence of some clear contrary provision.

59. For the reasons outlined above I would accordingly allow the appeal on ground 1.

Ground 2 – Estoppel by convention

60. As summarised in *Chitty on Contracts* (32nd edition) at 4-108:

> "Estoppel by convention may arise where both parties to a transaction "act on assumed state of facts or law, the assumption being either shared by both or made by one and acquiesced in by the other." The parties are then precluded from denying the truth of that assumption, if it would be unjust or unconscionable (typically because the party claiming the benefit has been "materially influenced" by the common assumption) to allow them (or one of them) to go back on it."

61. In considering this issue the Judge referred to the summary statements of the doctrine made by Lord Steyn in *Republic of India v India Steamship Co Ltd* [1988] AC 878 at 913E-F and the Court of Appeal in *Christopher Charles Dixon EFI (Loughton) Limited v Blindley Heath Investments Ltd* [2016] 4 All ER 490 at [72]-[73]. Both these cases are referred to in the footnote to the passage cited from *Chitty,* which is in broadly similar terms to Lord Steyn's summary.

62. The Judge therefore directed himself appropriately in law.

63. On the appeal, counsel for SL, Mr Andrew Sutcliffe QC, stressed the need for the assumption to be clear, for it to be demonstrated by matters "crossing the line" and for it to have been "unequivocally" acted upon by both parties– see the *Blindley Heath* case at [88].

64. The Judge found the assumption to be "a shared common understanding that SL's fees would be paid from recoveries and SH would not be personally liable for any shortfall" [106].

65. He found that this reflected a requirement of SH which GP "not only acquiesced in but also expressly confirmed back to SH and acted upon" and that it gave rise to an "assumed state of affairs in relation to SL's charges which affected the way in which the parties conducted themselves in their dealings with each other and from which it would be unjust to allow them to depart" [106].

66. The Judge found that this common understanding reflected the actual understanding of both GP and SH. In this connection, he rejected GP's oral evidence to the contrary. Thus at [97] he found that: "I simply cannot and do not read the contemporaneous documents in a way that is consistent with GP's oral evidence. Nor, having regard to the contemporaneous documents, can I accept GP's evidence that the CFA was not subject to recoveries."

67. This is further borne out by his finding that, as GP understood at all times, if it had at any time been suggested to SH that SL's fees were payable irrespective of recoveries he would immediately have replaced SL with other solicitors. As the Judge found at [133]:

> "…had there been an exchange between GP and SH along the lines of SH being bound by the CFA to pay SL's fees irrespective of recoveries, work by SL on the Sunbow litigation would have come to an end immediately and other solicitors would have replaced SL. That consequence was expressly foreshadowed in SH's letter of 27 April 2006 and was understood at all times by GP. The proposition that SH would—or even might—have retained SL to work on the Sunbow liquidation on a CFA and expose himself to personal liability for SL's fees irrespective of recoveries is fanciful…."

68. Objectively that is what the CFA required, but the Judge is here finding that that is not what SH understood, since he would otherwise have instructed replacement solicitors, and that GP knew this, since he appreciated that this is what SH would have done had he properly understood the effect of the CFA.

69. This is also an important finding in relation to reliance and unconscionability. SH relied on the common understanding by continuing to instruct SL. Had he understood otherwise he would immediately have instructed replacement solicitors who were prepared to act on a recoveries only basis and thereby avoided liability for fees regardless of recovery.

70. These findings were made by the Judge having regard to the evidence as a whole, including the oral evidence of GP and SH, and they represent a formidable obstacle to any challenge on appeal to his finding of estoppel by convention.

71. In challenging the shared common understanding found by the Judge, Mr Sutcliffe QC submitted correctly that what matters are the post-CFA exchanges crossing the line. He further submitted that as these are recorded in the documents this court is as well placed as the Judge to interpret them. I do not agree. In particular, in considering how to interpret these exchanges the Judge had the advantage of having all the evidence before him, including oral evidence, and a detailed appreciation of the full history of the dealings between GP and SH.

72. Mr Sutcliffe QC's main submission in relation to the shared common understanding is that the post-CFA exchanges crossing the line do not establish that there was any such understanding, still less a clear understanding. He points out that at the time both SH and GP were confident that there would be substantial recoveries from TP and that GP's statements and conduct reflected no more than a willingness, in the interests of good client relations, to await such recoveries.

73. The Judge addressed the post-CFA exchanges at [95] of the Judgment as follows:

> "95 The relevant post-10 April 2008 conduct and communications passing between SH and GP include the discussions leading to the apportionment of the recovery from AS, GP's attendance note of his conversation with counsel on 26 March 2010, GP's observation to SH on 21 April 2010 in response to TP's initial settlement offer of £300,000, the basis of instruction communicated by GP to replacement counsel's clerk for the PTR in June 2011, the further discussions between SH and GP in June 2011 about SH's liability for counsel's fees not being linked to recoveries which exclude any reference to SL being in the same position, GP's email to SH about the consequences of delivering counsel's brief for the trial of the s.212 claim against TP, and the informal extension of the CFA in October 2011 without any mention of its immediate effect (success against both AS and TP already having been achieved). It is impossible to overlook the fact that for more than three years following the making of the CFA GP's conduct was entirely consistent with and did not gainsay the application of the recoveries basis to SL's entitlement to payment of its base costs and uplift under the CFA."

74. The court has carefully considered all the documents here referred to by the Judge. It has also considered further documents relied upon by SH which are said to detract from or undermine the finding of a shared common understanding and documents relied upon by SL which are said to support that finding.

75. It needs to be stressed that what matters is the overall effect of the conduct and communications rather than the finer points of interpretation of any particular document. That overall effect was a matter which the Judge was better placed to evaluate than this court could ever be.

76. Having been taken through the documents in detail, with the benefit of submissions from both sides, my conclusion is that there was ample evidential material to support the finding made by the Judge. In this connection, I would refer to five examples from the series of exchanges relied upon.

77. The first example concerns discussions in November 2009 in relation to the apportionment of the £125,000 recovered from AS. The Tomlin order was made on 23 November 2009 and there were various exchanges at the time relating to how this recovery would be apportioned as between counsel, SL and SH. By this time, SL had incurred post-CFA charges of about £60,000 which, with a 100% uplift for the "success", meant an immediate entitlement to £120,000. In addition, there were still unpaid pre-CFA charges.

78. During the discussions as to apportionment there was never any suggestion that SL was entitled to be paid all its charges under the CFA or to payment of its charges prior to any payment being made to SH. On the contrary all the discussions were on the

basis of sharing the recoveries after payment of counsel's fees on effectively a 50/50 basis. This was the agreement ultimately made with approximately £35,000 being paid to both SL and SH. As the Judge found at [45]: "It is obvious from the agreed apportionment that GP, for SL, was adopting a recoveries basis split".

79. After the Judgment there was a dispute between the parties as to whether this agreement was a cashflow arrangement or was final and binding. In a further judgment dated 11 May 2016 the Judge found it to be final and binding. The Judge stated as follows at [35]:

> "35 Throughout this period GP made no reference in his communications with SH to the effect either that the apportionment and distribution of the recovery from AS was not, or might not be, final and binding or that the apportionment and distribution would, or might, be subject to reconsideration and revision in the event that the possibility of no recovery became the reality. Moreover, GP's communications with counsel/counsel's clerk, which he sent after discussions with SH, continued to assert that work, including by SL, was undertaken on a recoveries basis and acknowledged the contingent basis of SL's own entitlement to payment. References to the "split" of the £125,000 recovery from AS contained no statement, suggestion or indication that the division was anything but final and binding."

This summary is borne out by the documents the court has been shown.

80. The second example concerns discussions in relation to a settlement offer of £300,000 made by TP in April 2010. As the judge found at [48] "GP's own base costs at that time were in excess of that". In an email forwarding the offer to SH, GP commented as follows:

> "£300k is obviously too low for what you and I have at stake for costs. It may be that they have designed it to make us think that the costs will only be mitigated and we should take something rather than risk nothing which we are doing anyway."

81. As with the earlier exchanges in 2009, it is clear that GP was adopting and indeed advising upon the basis of a recoveries basis split. Under the CFA, if there was a £300,000 settlement, SL had nothing "at stake for costs" since it would be entitled to its costs in full from SH in the event of such a "success" regardless of the extent of the recovery.

82. The third example concerns discussions between GP and SH in June 2011 about whether SH's liability for counsel's fees was linked to recoveries. These were summarised by the Judge as follows at [50]-[53]:

> "50 Two days later, on 13.6.11, GP and SH discussed, by e-mail, the briefing and structure of counsel's fees for the substantive trial as proposed by his clerk. GP pointed to areas where reductions might be negotiated and concluded:
>
> "… Either way I need to sort it out as it will be a huge drain on recoveries."

> …
>
> 52 The email exchange of 13 June 2011 and developments on 14 June 2011 prompted SH to telephone GP that evening [SH's unchallenged oral evidence] about the fee arrangements with counsel. In the course of that discussion GP informed SH that in respect of counsel's fees the settlement with AS had "arguably" triggered liability to counsel for his fees and GP advised that he was "pretty confident" that in the Sunbow case there was no recoveries-based agreement with counsel. There then followed a discussion which provides an insight into SH's approach to CFAs and lawyers and makes clear SH's view that payment, including of counsel's fees, was recoveries based…
>
> 53 By 17 June 2011 SL was in the process of finalising counsel's brief for delivery and GP sought formal approval from SH of counsel's fee structure. SH emailed to GP that he was not worried about counsel's fee arrangements and continued:
>
> > "I have been left in no doubt that [counsel's chambers] compete on the same basis as all the other chambers in that they agree to take an equal bath with the other professionals in the case. …"

83. That last email was in response to an email from GP in which he discussed an agreement with counsel on fees which did not reflect the CFA and observed that:

> "…If it is not set out in the CFA then we could not recover it from [TP] so it will come out of what ever sum we recover for liabilities and our costs. That will reduce what is available for you and us…."

84. In these exchanges, SH made it absolutely clear that his understanding was that all fees were recoveries based and that all the professionals had agreed to take an "equal bath". Although GP queried whether this was case in relation to counsel, he did not suggest otherwise in relation to SL's fees. On the contrary he was emphasising the mutual need to sort counsel's fees out "as it will be a huge drain on recoveries" and "reduce what is available for you and us".

85. The fourth example concerns the agreement to extend the CFA to cover enforcement proceedings. The Tomlin order against TP was made on 25 July 2011. It was not paid and enforcement steps were taken. As the Judge found at [55]:

> "55 No payment was made and SH then initiated steps to secure and enforce payment of the debt. In October 2011, by exchange of emails, SH agreed to GP's request to extend the CFA to enforcement proceedings against TP's family and corporate interests."

86. In fact the CFA already covered enforcement proceedings and did not require to be extended. Nevertheless an agreement to do so was made at GP's request. If SL was entitled to its fees regardless of recoveries there can have been no reason to agree a CFA in relation to obtaining recoveries. Such an agreement is only consistent with a recognised mutual interest in recoveries.

87. The fifth example concerns exchanges in December 2012 relating to a dispute over counsel's fees. On 11 December 2012 SH sent an email to GP stating in relation to counsel's fees that:

> "They agreed to take on these cases on the same basis we all do which is to be paid from the realisations".

88. GP did not question this. On the contrary he drafted a response to counsel's clerk, which was sent to SH which re-iterated that agreed basis and emphasised how much more SL had at risk than counsel. The draft stated as follows:

> "I have explained the situation to you before, and you have obviously read the exchanges below your email, so I don't understand how or why you have suddenly come to this position when it has been agreed that we are all waiting for recovery of assets. This firms own base cost WIP is well over 4 times Chris Boardman's fee including his uplift!....
> …..
> As it happens I was at a meeting at Griffins when I received your email – specifically to discuss progress with the Bond claims in order to try and get recovery so we can get paid. The position currently is that the matter is in the hands of the bondsman who is working very slowly through a large number of claims connected with Bond Partners of which Mr Papanicola was the senior partner before he declared bankruptcy and the firm collapsed. I am not dealing with the bond claims. They are being dealt with by Moon Beever. They are waiting and pressing for the Bondsman to come back and to let them know what the position will be on the Sunbow claim. It is difficult to give this a definite time frame but it should to me like it is moving forward albeit slowly. You will appreciate I have a far greater interest in making sure this happens than Chris and I can assure you I will not let it drop."

89. The fourth and fifth examples are later than the Tomlin order with TP and therefore subsequent to the most significant element of SH's reliance on the shared common understanding. They do, however, evidence continued dealings on the basis of that understanding. They also provide evidential support for there being such an understanding throughout this period.

90. In my judgment there was ample evidence to support the Judge's finding of a shared common understanding and of that being communicated, shared and acted upon by both parties after the CFA. I would accordingly reject SL's evidential challenge to the finding of a convention.

91. Mr Sutcliffe QC had a further argument that as a matter of law the convention found was incapable of generating an estoppel. It was submitted that a party cannot be liable on the basis of an estoppel by convention where the alleged agreement would, if concluded, be ineffective on the basis of invalidity or unenforceability. Here such an agreement would be unenforceable as a contractual agreement which, despite on its face being unlimited by recoveries, would in reality operate on a "recoveries only" basis, would have represented an impermissible sham.

92. As pointed out by Mr Sims QC, however, the estoppel is not being relied on to render SL liable. It is being relied on to prevent SL from recovering its fees from SH in

advance of any recovery. The question of whether that would affect the recoverability of SL's fees from third parties is a separate one. The argument also proves too much. If there was any substance to it, it would go to the enforceability of the CFA which, for obvious reasons, SL does not question.

93. Mr Sutcliffe QC further contended that even if there was a convention as found by the Judge he erred in finding that it would be unconscionable for SL to be allowed to resile from the parties' shared common understanding. This was not an argument raised in the grounds of appeal or SL's appeal skeleton, although it was adverted to in written submissions at trial.

94. It was pointed out that SH had stopped providing SL with work after their relationship broke down over his non-payment of counsel's fees. In the result SL received no benefit from the considerable work done on the misfeasance claim. By contrast SH benefited by taking over TP's practice as well as any rights in respect of bonds or insurance cover. In all the circumstances it was submitted that it would not be unjust or unconscionable to allow SL to go back on the shared common understanding.

95. The issue of what benefit SH may have obtained from taking over TPs' practice or otherwise was not pleaded, was not explored at trial and was not the subject of any findings. It is not an issue which can be fairly or properly explored for the first time on appeal.

96. In any event, the injustice or unconscionability requirement of estoppel by convention focuses on the reliance placed on the convention by the party asserting the estoppel. As stated in *Chitty*, this will typically be because that party has been "materially influenced" by it. On the judge's findings, this is a case not merely of material influence but of seriously detrimental reliance. SH would otherwise have withdrawn his instructions from SL and found solicitors prepared to do the work on a recoveries only basis. In my judgment no grounds have been shown which would justify this court to go behind the Judge's finding that it would be unjust to allow SL to depart from the shared common understanding.

97. For all these reasons I would dismiss the appeal on ground 2.

Grounds 3, 4 and 5

98. In the light of my conclusion on ground 2 these further grounds do not arise and I do not propose to address them. They are in any event issues of a kind which are more appropriately addressed on the basis of positive factual findings rather than assumed counter-factuals. That said, I recognise that these are issues upon which SL have shown a real prospect of success and this judgment does not involve any implicit endorsement of the findings made by the Judge.

Lord Justice Briggs :

99. I agree that this appeal should be allowed on ground 1 and dismissed on ground 2, for the reasons given by Hamblen LJ. I have nothing I would wish to add to my Lord's analysis of the reasons why the Judge's construction of the contract between the parties should not be upheld.

100. I have found the question whether SH has the benefit of a convention estoppel more difficult than my Lord, so much so that, if it had been necessary to resolve it purely upon the documents before this court, I would have found it to be a very finely balanced question indeed. But where the trial judge has, as in this case, made no error of law in his approach and made clear, well reasoned findings of fact after hearing extensive cross-examination of the witnesses, an appellate court both can and should give real weight to the judge's conclusion on a mixed question of fact and law such as this.

101. Mr Sutcliffe fairly points out that the Judge himself said that the documents had proved to be a more reliable guide to the correct answers that the witnesses' evidence, but this does not of itself mean that the overall impression formed by the Judge from considering the documents and the witness evidence together should be put on one side, and the appeal conducted as if it were an entirely new trial on the documents and the transcripts of evidence.

102. As for the alternative grounds relied upon successfully at trial by SH, namely undue influence, negligence and breach of fiduciary duty, I have considerable reservations about them but, like my Lord, do not consider that any useful purpose would be served by an analysis of what were in the end *obiter dicta*, the outcome of which on appeal can make no difference to the result.