Neutral Citation Number : [2016] EWHC 342 (Ch)

IN THE HIGH COURT OF JUSTICE **Case No: HC-2014-002213**

CHANCERY DIVISION

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

26 February 2016

Before :

HIS HONOUR JUDGE SIMON BARKER QC

sitting as a Judge of the High Court

Between :

STEVENSDRAKE LIMITED

(Trading as stevensdrake solicitors)

Claimant

-and-

(1) STEPHEN HUNT

(2) STEPHEN HUNT as Liquidator of Sunbow Limited

Defendants

Representation :
Andrew Sutcliffe QC instructed by stevensdrake solicitors
Hugh Sims QC and Simon Passfield instructed by Devonshires Solicitors LLP

Hearing Dates 7 – 10 December 2015

JUDGMENT

I direct that pursuant to CPR APD.6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript

HIS HONOUR JUDGE SIMON BARKER QC:

Introduction

1 Stevensdrake Limited, which carries on business as stevensdrake solicitors, ("SL") claims against Stephen Hunt ("SH") outstanding fees due under a Conditional Fee Agreement ("the CFA") between SL and SH dated 10.4.08 relating to work to be done in furtherance of an application under s.212[1] of the Insolvency Act 1986 (respectively "s.212" and "IA 1986") against Theodolous Papanicola ("TP") and Alan Simon ("AS"), the former administrators of Sunbow Ltd ("Sunbow"), of which SH had become the liquidator. The partner acting at all material times on behalf of SL was Gavin Pickering ("GP").

2 It is common ground that the proceedings taken against TP and AS were compromised as follows : (1) in October 2009 AS consented to a Tomlin order to settle the claim against him in the sum of £125,000, which AS has paid; and, (2) in July 2011 TP consented to a Tomlin order to settle the claim against him in the sum of £1.9million, which TP has not paid. It is also common ground that each compromise satisfied the definition of success under the CFA.

3 The CFA provided for an uplift of 100% on SL's base costs as a success fee. The basic structure of SL's bill, which was issued to SH on 28.2.14 for payment after 28 days and forms the basis of SL's claim in this action, is as follows :

	£
SL's base costs (inc VAT)	397,686.24
SL's success fee (inc VAT)	397,684.24
	795,372.48
Disbursements (fees, travel etc, inc VAT as applicable)	2,859.04
Disbursements (counsel, inc VAT)	140,607.19
Total	938,838.71

4 At the core of SH's denial of liability for any part of SL's bill (other than disbursements excluding counsel) are contentions that (1) there is a

[1] Misfeasance or breach of duty by officer or former office holder of company

recognised and established practice in the field of insolvency litigation against estates where there are few or no assets of value that (a) to secure instructions solicitors and counsel offer to provide their legal services on terms that they will become entitled to payment only out of recoveries made in the litigation, (b) to the extent that there are insufficient recoveries, the entitlement to payment would abate pro rata, (c) nevertheless, and so as not to breach the indemnity principle, the strict legal rights created by the conditional fee arrangements stipulate that success in the litigation triggers a liability to pay the fees, and (d) it is known and understood that the parties will not enforce their strict legal rights but operate Recoveries Only Liability ("the Practice")[2]; and, (2) the Practice was (a) an established method of working between SH and GP and (b) expressly adopted in relation to the Sunbow liquidation and the s.212 claims against TP and AS.

5 In relation to counsel's fees, SL has obtained summary judgment against SH for sums due to counsel. On 15.10.14 Chief Master Marsh gave summary judgment for SL in respect of counsel's[3] fees in a sum to be assessed and ordered a payment on account in the sum of £75,000. The Chief Master also struck out paragraphs 4(j) of SH's Defence (reliance on distribution of monies received from AS pro-rata as evidencing agreement to recoveries basis or as estoppel by convention) and paragraphs 14 (breach of fiduciary duty on the part of SL) and 15 (undue influence on the part of SL) of the Counterclaim. On 20.5.15 HHJ Purle QC, sitting as a Judge of the High Court, granted SH permission to appeal and then dismissed the appeal.

6 HHJ Purle QC[4] referred to the different descriptions of SH as defendant as being of no consequence :

> " … Describing [SH] as "liquidator of Sunbow limited" does not turn him into a different person, or affect his liability, and it certainly would not be right to equate him with [Sunbow] just because he is liquidator. Sunbow is not a party".

[2] So defined at [13] of SH's Defence.
[3] In fact 3 counsel from the same chambers were instructed at different times and £140,607.19 represents the aggregate fees of all 3 counsel including VAT but the focus of attention was on the senior of the counsel whose fees represent the majority of the sum claimed.
[4] [2015] EWHC 1527 (Ch) [3]

7 Since the appeal before HHJ Purle QC, SH's Defence and Counterclaim has been re-cast by amendment and re-amendment with permission of the Court. SH (1) maintains that he has no personal liability under the CFA because he entered into that contract as liquidator of Sunbow not in his personal capacity; and (2) seeks, if and to the extent that he is otherwise liable under the CFA, (a) a set off, (b) to have the CFA set aside in equity, or (c) to raise estoppel by convention as a barrier to the claim. The platform for SH's answer to the claim is the Practice and its adoption in previous dealings between the parties and in relation to the Sunbow liquidation.

8 SH further (1) raises undue influence, on the basis that there is an irrebuttable presumption that SL had influence over SH as liquidator and that personal liability under the CFA would be manifestly disadvantageous to SH when compared to his legitimate expectation that the Practice would apply, and seeks an order that the CFA be set aside; (2) contends that SL owed a duty pursuant to the CFA or of skill and care to SH which it broke by failing to advise that the CFA imposed personal liability on SH which SL intended to enforce contrary to the Practice; (3) contends that by reason of its opportunity to gain substantial financial advantage at the expense of SH, SL owed fiduciary duties to SH which it broke by failing to disclose to SH the material difference in his liability before and after entering into the CFA; (4) contends that SL is in breach of express terms of the CFA that SL would (a) always act in SH's best interests (subject to their duty to the Court), (b) explain to SH the risks and benefits of taking legal action, (c) give SH their best advice about whether to accept any offer of settlement, and (d) give SL the best information possible about the likely costs of his claim under s.212; and, (5) contends that SL is estopped by convention from asserting that the Practice does not apply to the operation of the CFA because (a) SL and SH shared an assumption, belief or understanding that the CFA would operate in accordance with the Practice and (b) it would be unconscionable for SL to be entitled to obtain payment from SH having regard to the facts that both as a matter of prior dealing and specifically in relation to the Sunbow liquidation and litigation against AS and TP the Practice was to, and did, apply.

9 In brief opening submissions for SH, Mr Sims QC explained the response to the claim in terms of primary, secondary and, if needed, tertiary cases. The primary case is that, as a matter of collateral contract or of construction of the contractual documentation between the parties or as a matter of estoppel by reference to the dealings between the parties, SL agreed to wait for sufficient recoveries before invoicing SH. The secondary case is that SL, by GP, was in flagrant breach of duties under the Solicitors' Code of Conduct 2007 to advise SH as to the terms and conditions of the contractual arrangements. The tertiary case is that, when advising in relation to offers made by TP and AS, SL (by GP) was under a duty to disclose its intention to enforce the growing liability in legal fees.

10 In the light of HHJ Purle QC's judgment in relation to counsel's fees, the argument has focussed on the claim by SL for its own base costs and success fee. SL has also made clear that, if successful in this action, it will not object to a detailed assessment of its bill but will seek an appropriate payment on account.

Background / the facts

11 SH is an experienced licensed insolvency practitioner; he joined Griffins, a London firm of insolvency practitioners, in 1991 as a trainee case administrator, became a partner in 2000, and has been a licensed insolvency practitioner since 2003.

12 GP is an experienced solicitor who has specialised in insolvency for many years.

13 SH and GP first worked together on an insolvency matter in 1993 and they have worked together on numerous (more than 40 on Mr Sims QC's submissions) insolvency matters since then.

14 It is common ground that in respect of a number of those matters the arrangement was that the 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. However, precisely how recoveries were to be or were apportioned between SH and GP's past and present firms is not clear from the evidence of past and other dealings between SH and GP.

15 SH was appointed as liquidator of Sunbow in July 2005. Creditors were keen that the conduct of the former administrators, TP and AS, should be investigated, and any losses caused by wrongdoing on their part recovered.

16 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 1.9.05 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 5.9.05 SH signed and returned SL's terms of business on this basis.

17 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 12.9.05. GP prepared and issued an application and secured a hearing date, but before serving the application he raised with SH the prospect of HMRC, a creditor of Sunbow and supportive of the proposed action against its former administrators, providing an indemnity for SL's application costs (estimated at £1,500+VAT) and counsel's fees (estimated at £2,000+VAT) and liability for the administrators' costs should the application fail. HMRC asked whether SL would work on a CFA basis alternatively whether insurance might be obtained, to which GP responded for SL :

> "As discussed on the phone, I am not looking for my own costs at this stage. I do not anticipate a large cost between now and the application being heard and I am happy to work for the liquidator in this case, on the basis that I will be paid from recoveries into the liquidation at a later date. … If we cannot get counsel to wait as well then [SH] may have to pay that and in that case it would be fair for HMRC to fund that cost or to suggest counsel used by HMRC who would be prepared to act on that basis ".

GP's note of the telephone call with SH referred to in the letter includes :

> " … I was not so bothered about our own costs. Because we had done so much work with Griffins in the past, I would trust them on the basis that we would be paid subsequently out of recoveries at a later stage. My costs of dealing with the matter at the moment were not likely to be that great. The only issue was the out-of-pocket disbursement for counsel's fees. This I felt they should be asked to call on".

The significance of this application included, as SH noted at the time, that postponing the date of release would postpone commencement of the two year period for making claims of fraud or dishonesty against the former administrators' bond. In the event, HMRC provided an indemnity of up to £15,000 which covered the estimated costs of making the application and meeting the administrators' costs if it failed.

18 By January 2006 SH was keen to press on with the main claim against TP and AS and, as a starting point, to obtain counsel's opinion. In this context SH was considering claims under s.238[5] IA 1986 against the former directors and company secretary for pre-administration transactions at an undervalue and under s.212 in addition to claims against TP and AS.

19 The next step was the issue, in March 2006, of applications under s.236[6] IA 1986 against the former administrators and the former officers of Sunbow. In late March GP notified SH that SL's time costs had reached £24,000 with a further £3,000 estimated as hearing costs of the s.236 applications.

20 In April 2006 SL allocated the ongoing work across three files : a new file was created for each of the s.236 applications (one against Sunbow's former officers and the other against TP and AS), leaving the original file running for claims against TP and AS. The unbilled time value on the main file was £25,120. GP proposed that SL would notify SH as and when further unbilled time was recorded in tranches of £5,000. The available documentary evidence does not show whether or not that proposal was implemented but, in oral evidence, SH did not dispute the proposition that GP kept him informed of increasing costs on a regular basis, and the documentary evidence confirms that he did.

[5] Transactions at an undervalue
[6] Inquiry into a company's dealings by examination

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.

22 Shortly thereafter TP filed evidence resisting the challenge to his release upon which GP advised SH that advice of experienced counsel was required.

23 SH replied by letter dated 27.4.06 enclosing the duly signed terms of business in respect of the s.236 applications. SH concluded the letter 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".

In cross-examination GP acknowledged that he accepted SH's conditions at the time. GP responded by e-mail on 26.5.06 :

> " … 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."

GP concluded by asking SH to confirm that he was happy with GP's proposal. There is no evidence of a response from SH.

24 In the meantime, on 10.5.06 HMRC gave a formal undertaking to indemnify SL's costs in the s.238 application against Sunbow's former officers in the sum of £15,000+VAT and disbursements and declined to give an indemnity in relation to SH's costs on the basis that that was a risk he agreed to accept under his CFA.

25 By February 2007 it had become necessary to engage counsel. SH and GP had agreed upon their counsel of choice, who was prepared to provide an initial advice under HMRC's indemnity and then consider whether to accept instructions on a CFA. GP reported to SH on SL's unbilled costs :

" … I am not so worried about my own costs at the moment although they are high at around £50k".

26 By May 2007 counsel had formed a view as to the overall merits of the main claims against TP and AS and confirmed to GP that he would undertake work on a CFA if SL was also retained on a CFA. GP agreed that SL would also work on a CFA basis.

27 In late July 2007 GP and counsel were considering the definition of success for the purpose of counsel's CFA. At this time GP and counsel were also drafting an originating application under s.212 and s.214[7] IA 1986 against TP and AS based on a catalogue of alleged breaches of duty as administrators and supervisors of Sunbow's voluntary arrangement.

28 On 3.8.07 GP wrote to SH to confirm the agreed basis for the main claim 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%. GP also forwarded a copy of counsel's up to date fee note (then £12,625+VAT). Also on 3.8.07 SL issued the s.212 claim against TP and AS.

29 In his oral evidence GP said that at the time when he was considering a CFA for SL's fees his understanding was that

"this case was swamped with assets : [TP's] home, the enabling bond, and an insurance indemnity".

This was SH's view at all material times before and for some years after the CFA was entered into. There are indications in the evidence that SH formed and maintained this view based on his own research, investigations he commissioned, and information imparted by others in the insolvency business with knowledge of TP. On the evidence before

[7] Wrongful trading

me, GP's view of TP's means appears to have been derived from what SH had told him.

30 During September 2007 GP and SH discussed the possibility of obtaining litigation insurance. The contemporaneous documentary evidence does not indicate any real interest on SH's part in obtaining such insurance. In his oral evidence SH explained that based on his assessment of the merits on an ongoing basis and the fact that TP was at that time, and until a very late stage, a litigant in person, his view throughout was that insurance was an unnecessary expense. Mr Sims QC criticises GP for not advising SH to obtain insurance to cover his own costs in the event of insufficient recoveries; the truth is that any such advice would have fallen on deaf ears.

31 On 29.1.08 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% uplift and provided an estimate of SL's future costs of the main claim against TP and AS. 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%). 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.

32 GP's covering letter also referred to existing costs of some £50,000 which were to be paid for out of recoveries. Not unfairly, SH referred in his oral evidence to this passage in the letter being "mangled" :

"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)".

To a reader coming 'cold' to this sentence it might be unclear; however, to someone knowing the background its meaning is clear enough and SH did not say otherwise. Indeed, had SH been unclear he could and should have done as GP requested at the conclusion of the letter and telephoned GP to discuss the CFA and costs.

33 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. As noted above, the letter concluded with a request that SH should telephone GP to discuss the CFA and costs. This may, in part at least, have been because the terms of the schedule to the CFA envisage a conversation between the solicitor and the client, before the CFA is signed, during which they discuss specified matters which are to include the circumstances in which the client may be liable to pay the solicitors expenses and charges.

34 SH did not contact GP as requested. Instead, on 13.2.08 he sent an e-mail to GP :

"CFA and Insurance fine. Signed both but signed CFA in wrong place[8]. What do you want me to do?"

The CFA was returned to SL on 19.2.08.

[8] On the line for the solicitor's signature instead of the line for the client's signature.

35 SH found cross-examination about the circumstances surrounding his signing of the CFA challenging. He said that subsequent events and had interfered "hugely" with his recollection. He had no real answer to Mr Sutcliffe QC's questioning about the e-mail to GP, along the lines that it conveyed an assurance that SH had considered and approved the terms of the CFA, beyond an assertion that he would not normally send an e-mail like that other than in response to something else. In re-examination Mr Sims QC reminded SH of GP's e-mail response an hour later ("Send as discussed. I will sign when I get it back") which prompted SH to observe that he had in his mind "some form of 'hurry up' because it had been two weeks" as the prompt for his 13.2.08 e-mail. That may be so; it may alternatively have been that GP had been pressing for the conversation envisaged in the schedule to the CFA.

36 As I see it, SH's e-mail was understood by GP to cover SH's response to GP's written request for a discussion and was intended to assure GP that a discussion was unnecessary.

37 SH was also reluctant to admit in cross-examination that he had actually read the CFA on the basis that that would be a matter for his staff who would alert him to anything he might need to consider before signing when passing it to him for his signature; that evidence does not assist SH.

38 As to the general effect of his signing a CFA, SH did not accept that by signing such an agreement he was accepting personal liability for the fees and disbursements the subject of the agreement. He said that some lawyers he dealt with would set a limit of liability in the CFA, others would have a side letter, and others still would not enforce the agreement.

39 With regard to his reasons for signing the CFA , SH denied that he signed it because he was confident that there would be a full recovery. Rather, and as throughout his cross-examination, SH maintained that this e-mail and his signing of the CFA had to be viewed in the context of his letter of 27.4.06, GP's response on 26.5.06, and their past course of dealings on other matters on a recoveries only basis. In other words, unless there was a recovery it was of no effect :

> "I thought it was a perfectly normal CFA, like [two named firms of solicitors], like others, which recorded the terms but were part of a general understanding that they would not be enforced against the insolvency practitioner if there were no recoveries".

40 What SH's evidence came to was that, whatever the formal arrangement might be, every solicitor that he dealt with on a few or nil asset estate case always worked on a recoveries only basis implicit in which was pro-rating.

41 Mr Sutcliffe QC also asked SH about the way in which recoveries were allocated when less than full and in re-examination Mr Sims QC asked SH about the treatment of uplifts under CFAs. SH denied that he or Griffins would load time onto a matter (that is encourage excessive staffing of matters) but accepted as arithmetically correct the proposition that the more time an insolvency practitioner has recorded on a matter the greater his proportion of any recovery. In relation to uplift under a CFA, SH said that pro-rating was calculated by reference to base costs and that insolvency practitioners and solicitors were "very, very happy" if they recovered their base costs and regarded uplifts as "super profits" which would quite often be forgiven to enable a dividend to be paid to creditors.

42 Returning to the chronology, the dating of the CFA was not without incident. On 16.4.08 GP received counsel's CFA which had been signed on or dated as effective from 10.8.07. GP had intended that the CFA's would bear the same date and had 10.4.08 in mind as the appropriate start date. Counsel's CFA posed a problem for GP because it would expose SL to liability for an uplift to counsel over a nine month period which preceded and, therefore, fell outside the terms of SH's liability to SL. On 23.4.08 GP explained the problem to SH in an e-mail and asked whether SH would agree to a retrospective agreement for SL; GP also explained the problem in relation to uplift caused by backdating (that it is 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 that e-mail GP refers to having signed the CFA (between SL and SH) on 16.4.08 and having dated it 10.4.08. It does not appear that SH replied to GP. On 1.5.08 GP telephoned SH and told him that, after speaking to counsel, all CFAs would be dated 10.4.08. GP relies on this

incident as a further demonstration of him impressing the consequences of the CFA upon SH. On 18.6.08 GP sent SH fully signed and dated copies of the CFA and of counsel's CFA with SL.

43 In December 2008 AS's solicitors began a without prejudice dialogue to settle the claim against AS. In May 2009 AS offered £125,000 to settle the claim against him and provided limited information via his solicitor in answer to a series of questions asked by SH through SL. SH decided to accept the offer subject to being advised (which counsel did) that acceptance would not prejudice the claim against TP and subject to sanction from HMRC (which HMRC gave). Progress to a concluded Tomlin order took several months. During that time counsel advised that the Official Receiver's ("OR") approval was also needed. On 6.11.09 that sanction was given on the basis that SL's costs to be charged on a CFA basis were not to exceed £46,500 with a 100% uplift and exclusive of VAT and disbursements. The submission to the OR for sanction had given SL's base costs at that point as £46,500 and counsel's fees before uplift and VAT as £9,175; the total, including uplift, was stated as £111,350+VAT. The Tomlin order was entered on 23.11.09 and provided for payment by 24.11.09.

44 On 23.11.09 SH telephoned GP to discuss apportionment of the £125,000. 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 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 24.11.09. 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.

45 Over the next few days SH and GP discussed the division of fees, on a VAT inclusive basis, and GP had discussions with counsel. The upshot was that £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. GP's attendance note of a conversation with counsel refers to counsel acknowledging that the

recoveries principle applied to the CFA subject to counsel being paid in priority out of recoveries. It is obvious from the agreed apportionment that GP, for SL, was adopting a recoveries basis split. It is equally obvious that condition (b) of the Practice, pro-rating of recoveries, was not sought by SH or applied in the agreement between GP and SH.

46 Mr Sims QC probed GP's approach to apportionment of the recovery from AS in some detail during cross-examination. GP's evidence as to apportionment included that

" … we have done a commercial split of the money, we have come to an arrangement. We have to work together. So going forward we have taken something each there and we are going to go forward.
…
I did not have to do it …
But, had I not done that then, I suppose [SH] would have been pretty upset".

Mr Sims QC put to GP that he did not at any time alert SH to the fact that his not insisting on the right to enforce the CFA was an act of forbearance, to which GP responded :

"I did not see the need to do that, to be honest. The liability was set out under the CFA at the beginning. [SH] knew what the liability was. In fact he went on to say "I will honour the CFA"".

It appears from the documents that the reference to SH honouring the CFA is to a conversation on 25.3.10 between GP and SH after a falling out between SH and counsel following which SH had directed GP not to instruct counsel on his matters and GP had responded that counsel should be retained at least on the claim against TP. On 26.3.10 counsel telephoned GP who passed on SH's assurance that he would honour the agreement. GP's note of that conversation continues :

"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".

I observe here 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.

47 Shortly before the settlement with AS was finalised, TP's solicitors initiated without prejudice settlement discussions. A meeting took place

on 8.12.09 which was attended by SH, GP, TP and his solicitors. The claim was put as a claim to recover £1.5million. TP sought to persuade SH and GP that he was of limited means on the basis that the equity in his home belonged to his wife, his firm's assets were subject to a first charge to a bank in the sum of £1million, he had existing legal costs in excess of £240,000 which were rising, and his only relevant asset was his professional insurance policy, which might be avoided. After the meeting, SH emailed GP on the basis that a payment of £875,000 under the insurance policy would meet all costs with uplifts and leave £175,000 as a dividend for creditors. In any event, SH did not believe TP's professed impecuniosity and believed him to have a buy to let property portfolio and was of the view that TP could pay £500,000 in cash. SH communicated all of this to GP.

48 On 21.4.10 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". SH agreed and instructed SL to reject the offer without making a counter offer. GP advised SH that the offer gave counsel the opportunity to terminate his CFA and seek payment of, at least, the base fees. SH's response was that he thought TP would pay £1million and that if counsel "gets silly I will deal with him". In fact counsel shared SH's and GP's view that the offer should be rejected. Over the course of 2010 TP became a litigant in person. In early 2011 TP revised his offer to an immediate payment of £150,000 and a further £180,000 paid in monthly instalments of £3,000 over five years. That was not attractive to SH or GP. SH and GP kept in mind that directions had been timetabled to a trial in July 2011; on the one hand they were unwilling to permit any delays in order to keep TP under pressure but on the other they were conscious of the fact that their own preparation was also under time pressure.

49 A pre trial review was scheduled for June 2011 but retained counsel was unavailable; GP and SH discussed replacement counsel for the PTR. Other counsel was instructed for the PTR on a CFA and GP's covering e-mail 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".

In cross-examination GP confirmed that he intended that condition to be of binding application to counsel's CFA.

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".

SH replied :

"On counsel I told you that [he] hasn't been around much on the cash job I gave him to balance the CFAs".

51 At the PTR the trial date was fixed for 11.7.11. On 14.6.11 SH instructed SL to make a CPR 36 offer to TP in the sum of £650,000 inclusive of interest but before costs. SH was aware that at that point costs were estimated at £100,000 for counsel (before delivery of brief) and more than £500,000 for SL. TP had instructed new solicitors whose response, in a without prejudice telephone conversation between TP's solicitor and GP, was to outline a summary of TP's assets and liabilities pointing to significant net liabilities and to mention that, by reference to his own dealings with counsel's chambers, it would be unlikely that SH's counsel would be instructed on a recoveries only basis. GP passed on a summary of this conversation to SH by e-mail.

52 The e-mail exchange of 13.6.11 and developments on 14.6.11 prompted SH to telephone GP that evening[9] 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 CFA's and lawyers and makes clear SH's view that payment,

[9] SH's unchallenged oral evidence

including of counsel's fees, was recoveries based which might render the CFAs unenforceable. GP's note includes the following :

"[SH] wanted to understand the arrangement with Counsel and the success fee first. I explained to him that under the CFA if there is a success then he has a liability to pay. It is not dependent on whether money is received from the other side. I said it was already due because of the settlement we had with [AS].
He said that he has a general understanding with [counsel], just as he does with other barristers who work for him, that they will be paid when money is recovered.
…
I said that I was pretty confident in this case that we had not agreed that [counsel] would have to wait until we got paid before he got his money. I said I would get someone to check the file and see if that was the case. … [SH] said at worst he could complain about [counsel]. [SH] said he knows how to argue it against a lawyer if he has an unlawful CFA. I said I was sure it was not an unlawful CFA. There is nothing wrong with waiting for a payment.
[SH] said we should go ahead. He said it might be that [counsel's] fees were slightly higher because he was covering the extra risk of not being paid. We do not have to challenge it hard. [SH] said he was very comfortable that he had had the conversation with [counsel's clerk]. SH would not have used [counsel] if it was to be any other way. [SH] said that he had paid him already and if the CFA was illegal then he would be entitled to recover the monies paid. [SH] said he could make things very difficult for [counsel] if he was going to be difficult with [SH].
…
GP explained that the problem was the brief fee. [SH] said that [if necessary] then he would stand by it and pay [counsel] his fees but [SH] was not anticipating it getting to that stage.
We should carry on against [TP]. He was pretending to be poor".

In cross-examination SH said that he was questioning GP's assertion as to the enforceability of counsel's CFA irrespective of recoveries because that was inconsistent with an e-mail from GP barely a week earlier and inconsistent with his understanding of his arrangements with counsel and with counsel's clerk.

53 By 17.6.11 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 e-mailed 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. … [Counsel] will still be the smallest part of the costs on this case and will get pro rata.
If he [objects] in the end then have no doubt that I shall be talking very hard to his clerk about mine and [a partner's] cases with [counsel's chambers]. We cannot have any chambers breaking this gentleman's agreement as we and our other lawyers rely on it to get work".

54 By 5.7.11 negotiations for settlement with TP were at an advanced stage and by 11.7.11 agreement was reached in principle. The compromise of

SH's claims against TP was the subject of a Tomlin order agreed on 22.7.11 and entered on 25.7.11. The agreement was that TP would pay £1.9million forthwith in settlement of SH's claims against him and including interest and costs.

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

56 One consequence of success against TP was that the insolvency practitioners' firm of which he was a limited partner, Bond Partners LLP, went into administration. On 20.3.12 HHJ Purle QC made a block transfer order, on the application of the Association of Chartered Certified Accountants, transferring all insolvency matters that had been dealt with by TP, and had been transferred to another principal within Bond partners, jointly to SH and another insolvency practitioner, Kevin Hellard of Grant Thornton UK LLP.

57 In December 2012 counsel's clerk drew SL's attention to the fact that counsel's fees had been outstanding for more than three months and referred to the obligation to report the matter to the chairman of the Bar Council. GP reported this to SH who instructed GP to respond that, if need be, SH would make his own complaint and would withdraw all instructions from all members of counsel's chambers. GP did as instructed but also took a more conciliatory line and explained the ongoing work to achieve recoveries. This had the effect of delaying a reference of counsel's fees to arbitration for some months while efforts to secure recoveries were progressed, however by autumn 2013 counsel had referred his outstanding fees to arbitration and the arbitrators had been appointed.

58 On 31.10.13 GP wrote to SH setting out the background to and facts of the arbitration in some detail. GP informed SH that SL would run the recoveries basis argument but advised that counsel's CFA and the fact of success entitled counsel to payment, and further notified SH that if SL was liable to counsel recovery would be sought from SH. GP also advised

SH of the arbitrators' fees and offered SL's services to defend the arbitration subject to indemnification for SL's work at normal hourly rates. On 8.11.13 SH replied that he had not read the letter as he had been busy and that he would need to instruct his own lawyers. In November 2013 the arbitrators issued directions which were passed on to SH and required SL to file Points of Defence by 24.12.13. Having been unable to elicit a response from SH, GP sent an e-mail to SH on 5.12.13 asking SH to state his position within 24 hours failing which SL would present a bill for immediate payment of counsel's and its fees in full. SH replied that he was still taking legal advice and was very busy on another matter and he asked GP to research attendance notes or e-mails with counsel and/or his clerk that might show refusal on counsel's part to undertake work. On 11.12.13 GP replied by e-mail to SH that SH's liability to pay counsel's fees and SL's fees had been triggered by the settlements with AS and TP and notified SH of the elements and amounts of SH's liability to counsel and to SL.

59 Although not covered by an attendance note or referred to in the witness statements of either GP or SH, possibly because SH had initiated it on a without prejudice basis notwithstanding that it was no such thing, it became common ground during the cross-examination of SH that SH telephoned GP at some point in this period. SH thought it was in response to the 31.10.13 letter; however, he acknowledged that he was taking advice from another solicitor at the time and that his telephone call may have come after an hour or after some weeks. Having regard to the contemporaneous documents I think it is probable that the telephone call to GP was made in response to the 11.12.13 e-mail; but, the precise timing is not material. On instructions from GP, Mr Sutcliffe QC agreed that SH had made a telephone call to GP. There was some disagreement as to what was said but the tenor and gist may be summarised as follows : SH was very upset and incensed; he accused GP of dishonesty (SH's recollection) or fraud (GP's recollection); SH took the view that GP was attempting to re-write all the history of the dealings between himself, SL and counsel, and undermining their working relationship; and, SH threatened some disciplinary process against GP and/or SL.

60 On 24.1.14, in order to be able to defend the fees arbitration, GP sought precise details from SH of the making of a recoveries basis agreement between SH and counsel or counsel's clerk. GP was aware that there had been a lunch meeting in 2010 between SH, counsel and counsel's clerk but did not know precise details of the discussion; GP had received SH's e-mail of 17.6.11 following on from their conversation on 14.6.11; and, GP was also aware that SH had referred to his dealings with counsel and counsel's clerk generally in the context of work on a recoveries basis in a number of cases but, again, did not know the details. On 30.1.14 GP chased for a reply. On 31.1.14 SH's solicitor, Jim Varley of Locke Lord LLP, replied on SH's behalf that :

> "There may be a bit of a misunderstanding here on your part – whilst there was an "understanding" between SH and counsel, brokered through [counsel's clerk], that counsel would wait for payment on [four other] cases, there was no express agreement as such".

In oral evidence GP said that this response caused him to feel as if he had been "thrown down a well". In cross-examination SH denied that he had led GP to believe that there had been any agreement between himself and counsel or counsel's clerk and asserted that GP had been "clutching at straws". SH's evidence does not sit well with the attendance note of the conversation between SH and GP on 14.6.11 or SH's evidence when cross-examined about the 13.6.11 e-mail, but SH's e-mail to GP on 17.6.11 was, at least, ambivalent and referred in terms to the arrangement with counsel as a "gentleman's agreement".

61 Unsurprisingly, SH's solicitor's e-mail led to prompt capitulation by SL in the fees arbitration, which was compromised by an agreement signed on 17.4.14.

62 What SH's solicitor's response did not do was provide any comfort to GP that SH would, as he had previously assured GP, "honour" counsel's CFA. Rather, it had the opposite effect and confirmed to GP that SH would, in the absence of recoveries, seek to avoid, or defer for as long as possible, his own obligations. GP felt that there was no alternative but for SL to render a bill, with counsel's fees being incorporated as a disbursement.

63 SL's bill was issued, accompanied by detailed time records and an account of disbursements paid, under cover of a letter dated 28.2.14. The letter maintained that the bill was due for immediate payment by SH as liquidator of Sunbow, personally and by Griffins. The reality was and is that SL's contracts relating to work on the Sunbow liquidation had at all times been with SH personally.

64 On 17.4.14, in the absence of any response from SH to SL's bill in the meantime, SL commenced these proceedings. SH's initial Defence and Counterclaim was served on 13.5.14 in which SH raised the recoveries basis as a defence and conceded liability for disbursements. By his Re-amended Defence and Counterclaim served on 22.10.15 SH asserts the Practice, denies liability to SL, seeks a declaration that he has no personal liability under the CFA save in respect of counsel's fees, and seeks other relief including damages for breach of contract and equitable compensation.

65 As already noted in this judgment, SL has the benefit of summary judgment against SH in respect of counsel's fees which has been upheld on appeal.

66 The above chronological recitation of the facts has been drawn very largely from the contemporaneous documentation.

The principal witnesses

67 Neither SH nor GP has a detailed recollection of their arrangements about SL's and counsel's engagement in the Sunbow matters. This lack of recollection is also reflected in their witness statements. SH's witness statement is based around extracts from a chronological selection of documents to which he has added comments. GP's statement also appears to have been prepared by reference to a selection documents which have been cross-referenced in the margin for the purposes of the trial.

68 My impression of GP and SH is that neither of them sought to mislead the court. GP generally sought to answer the questions asked of him, but this was subject to a resolute adherence to SL's case. SH was less direct in

his answers in cross-examination and was inclined to respond by putting forward the core of his case irrespective of its direct application to the question asked. The safe and sensible course is to found my decision principally on the contemporaneous documents.

69 What the contemporaneous documents reveal to me is that SH and GP are 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.

70 On the Sunbow matter SH had no hesitation in retaining SL for GP's expertise. The contemporaneous documents show that they worked together well and with the objective of securing recoveries from TP and AS, the outcome asserted by SH.

71 In terms of the balance of the relationship, SH, both by reason of being the office holder and through the force of his personality, sought legal advice if and as he thought he needed it and utilised GP and SL and counsel as specialist labour resources. 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.

72 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.

73 The above assessment is amply evidenced by the contemporaneous documents and confirmed by GP's and SH's own evidence.

SH's other witnesses and the Practice

74 SH adduced evidence from five other witnesses with experience in insolvency : Kevin Goldfarb, a chartered accountant and licensed insolvency practitioner and a partner of SH in Griffins, Ian Defty, an FCCA and an ACA and a licensed insolvency practitioner, Christopher Potts, a solicitor specialising in commercial litigation with experience of insolvency through MTIC fraud cases in particular, Nicholas Oliver, a solicitor in charge of his firm's insolvency and business turnaround team, and Frances Coulson, a solicitor and head of her firm's insolvency and litigation department and an R3 council member.

75 Mr Sims QC explained that the purpose of calling these additional witnesses was to adduce relevant similar fact evidence to corroborate the existence and terms of the Practice and also to confirm that the Practice, or recoveries only liability for lawyers' charges, is not unusual in nil asset estate cases.

76 It was common ground that work on estates which have no assets causes problems for the professionals (insolvency practitioners and lawyers alike) and that a particular difficulty is caused by the indemnity principle underpinning lawyers' charges in contentious matters.

77 Speaking of their own approaches to nil asset estate cases, there was no common thread as to the use of insurance to cover fees; there was a general recognition that it was undesirable to leave an insolvency practitioner exposed to lawyers' charges where recoveries had not been achieved or fell short of the professionals' charges; but, there was no common view as to how that problem should be, or was, resolved.

78 There is no direction for expert evidence in this case. As Mr Sutcliffe QC submitted in his closing submissions, and for the reasons he stated, this evidence adduced by SH did not result in corroboration of the Practice as advanced by SH. There was a general recognition that insolvency practitioners would generally be unwilling to expose themselves to liability for lawyers' charges in nil asset matters, but no common ground on how

this would be achieved ~ whether by contractual agreement, voluntary act, or mutual understanding.

79 I confess to being left none the wiser in regard to the determination of the issues between SL and SH by this evidence, which occupied at least a half-day of trial time, and continue with the view that everything depends on the particular facts of the case. That is not an adverse reflection of these witnesses, rather it is an observation aimed at the decision to adduce such evidence.

80 I unhesitatingly find that the Practice is not a general practice adopted between insolvency practitioners and lawyers dealing with contentious matters in nil asset estates.

81 It is also not the case that the Practice, as defined by SH in his pleading, was either an established method of working between SH and GP or expressly adopted in relation to the Sunbow liquidation and, in particular, the s.212 claims against TP and AS. For example, the recovery from AS was apportioned and divided on a pragmatic basis taking various factors into account and was unquestionably not pro-rated; further, it is beyond argument that counsel's services were provided on a CFA not qualified by or limited to recoveries[10].

[10] In response to the circulation of this judgment in draft to counsel Mr Sims QC draws attention to the notes to the CPR at 40.2.1.0.3 and invited me to delete the words following the semi-colon at [81] and to consider amending [103] and amplifying [125] and [127(6)] of my judgment. I decline that invitation. SH's counterclaim founded in negligence was part of SH's original pleaded case and, in so far as the plea of negligence in the counterclaim related to counsel's fees, it was (1) before the Chief Master ([24] of his judgment) and rejected in his judgment, (2) embraced by the extremely wide grounds of appeal (the Chief Master was wrong) on which permission to appeal was given, (3) therefore before HHJ Purle QC who heard full argument ([1] and [16] of HHJ Purle QC's judgment), and (4) excluded the disbursement for counsel's fees from the issues going forward to trial ([27] HHJ Purle QC's judgment refers only to the remaining fees – ie SL's fees). HHJ Purle QC's decision concluded consideration of SH's counterclaim in negligence in so far as it related to counsel's fees. The documentary evidence referred to at [45], [46] and [49] of my judgment may have come to SH's attention as a result of disclosure, ie after HHJ Purle QC's decision, but that is not a basis for re-formulating and re-arguing the point at first instance or for a judge to re-try of his own motion an issue that is already settled by decision on appeal. That is why SH's case in negligence is beyond argument if and in so far as it is intended to revive or continue an attempt on SH's part to avoid personal liability for counsel's fees. In any event, those documents, taken with the oral evidence, would not have caused me to come to a different conclusion about counsel's fees had the matter been live before me; disbursements were no part of SH's stipulation in his e-mail of 27.4.06 and ran contrary to GP's reply, the Practice was not adopted in the Sunbow litigation, and, when it came to counsel's fees and brief, SH gave GP the impression that he (SH) had made his own arrangements with counsel through his clerk.

The issues and the findings sought

82 At paragraph 48 of their skeleton argument and opening note Mr Sims QC and Mr Passfield list nine issues for determination at this trial. Mr Sutcliffe QC agrees that that list encapsulates the main issues, other than whether the Practice exists, in this case. I shall adopt the list in arriving at my decision.

83 *(1) What is the contractual position in relation to the costs/fees claimed?* The issue for determination at trial is not as open or wide as the issue framed by SH's counsel. The issue at trial is whether or not the terms of the CFA are affected by the terms of SH's 27.4.06 letter and GP's reply of 26.5.06. This involves consideration of whether the exchange constitutes a collateral contract and/or whether as a matter of ascertainment of the scope and meaning of the CFA the terms of the 27.4.06 letter form part of that agreement by reason of GP's acceptance thereof on 26.5.06.

84 By the 27.4.06 letter SH made clear that all future work on the Sunbow litigation would have to be on the basis that SL's fees would only be paid from recoveries and that if this was not acceptable the retainer would be terminated. On 26.5.06 GP, for SL, confirmed that that was an acceptable basis for continuing to work on the Sunbow liquidation and re-emphasised that disbursements were a separate matter and would have to be paid irrespective of recoveries, albeit that SL volunteered a willingness to allow time for payment of small out of pocket expenses.

85 Chitty on Contracts 32nd Edition at 13-005 notes that courts are not unwilling to accept that a pre-contractual assurance gives rise to a collateral contract and that such contracts are no longer rare. However, such assurances are normally given as part of the negotiations leading to a contract and the consideration for the collateral contract is frequently the making of the main contract. At the time of the exchange between SH and GP in 2006 the CFA, which was entered into almost two years later, was not in contemplation; moreover, the existing contractual arrangements were already agreed upon a recoveries basis. The word 'collateral' imports something running parallel or related and taking priority. The facts of this case are not in the territory of collateral contracts.

86 That being said, it is also clear that SH intended the recoveries basis to be applicable to the retention of SL and the working relationship between himself and GP at all times and in all circumstances going forward on the Sunbow matter, and it is clear that GP communicated SL's consent to that stipulation.

87 The real issue is, therefore, about whether or not the terms of the retainer letter and/or the dealings between SH and SL prior to execution of the CFA impact upon the terms of or colour the true construction of the CFA. This is a matter of ascertaining and construing the agreement between SH and SL (acting by GP). Ascertainment of the terms may include their implication.

88 When construing a commercial contract the aim is to determine what the parties meant by the language they used, which is achieved by ascertaining what a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant, Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [14].

89 As the recoveries basis runs contrary to the express terms of the CFA it is also important to bear in mind that when considering what may be implied into a commercial contract the court has no power to improve the contract, or introduce terms to make it more fair or reasonable, and further that the implication of a term is not to have the effect of adding to a contract but only to spell out what it actually means, Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10 [16] and [18]; further,where a term to be implied would contradict an express term that is a good reason for finding that a reasonable man would not have understood that to be what the contract meant, Belize [27]. Moreover an unexpressed term may be implied if and only if the court finds that the parties must have intended that term to be part of their contract; it must be a term that goes without saying and which, though tacit, formed part of the contract which the parties made for themselves, Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board [1973] 1 WLR 603, Lord Pearson p.609 and Belize [19]. The principles reduce to one question : what would

the contract, read as a whole against the relevant background, be reasonably understood to mean? Belize [20].

90 Mr Sims QC draws attention to the very recent judgment of the Supreme Court in Marks and Spencer plc v BNP Paribas Securities Services Trust co (Jersey) Ltd and another [2015] UKSC 72[11] in which the approach of the Privy Council in Belize to the implication of terms into a commercial contract was considered. For the purposes of this judgment, the important point to draw from Marks and Spencer is that while the scope and meaning of the contract is the subject matter of the decision whether the question be as to construction of or implication of a term into the contract, determination of the question of construction precedes that of implication.

91 Positing the hypothetical reasonable person circumstanced as the parties were in fact circumstanced, it is not open to serious doubt that the CFA was subject to a mutual understanding and acceptance by SL, through GP, that SL's right to payment of its basic charges and a 100% success fee was conditional or contingent upon there being funds available from realisations or recoveries.

92 The evidence to support this finding is inescapable. The foundation is the consensus between SH and SL, expressed in SH's letter of 27.4.06 and GP's reply by e-mail on 26.5.06; that the condition of realisations based liability for SL's charges should apply in the future in the Sunbow liquidation and should not be overridden by later contrary terms is plainly stated by SH and equally plainly accepted by GP for SL. It cannot but have been intended by both SH and GP, for SL, to be of legal effect and to govern contractual relations concerning payment for work done by SL on the Sunbow liquidation in the future.

93 Mr Sims QC submits that it is apparent that when entering into the CFA GP had the applicability of the recoveries basis in mind and referred in this context to GP's e-mail of 23.4.08 to SH explaining the problem caused by backdating a CFA (uplift "would have to be paid out of damages") as drawing a distinction from and making clear that it was not understood

[11] After judgment circulated in draft to counsel before handing down.

to be an unconditional liability of SH. The CFA did provide in terms that SL could require interim or provisional damages to be applied in paying disbursements, including counsel's fees, and SL's own base costs and uplift, but Mr Sims QC's point is well made because GP's explanation implicitly excludes SH from any risk of personal liability absent backdating.

94 SL's evidence and contention that the CFA marked the drawing of a line in the sand and a fresh start on new terms unaffected by what had gone before is also resoundingly contradicted by the conduct of GP and course of dealings between SH and GP after 10.4.08, at least until the falling out when SH sought to renege on his liability for counsel's fees and leave SL in the lurch. GP's silence in his covering letter to the CFA cannot be taken as a positive act contradicting, vitiating or abandoning an ongoing and accepted stipulation. Had GP raised any such proposition I have no doubt that SH would not have entered into the CFA with SL and would have done as his letter of 27.4.06 indicated, namely withdrawn instructions and retained alternative solicitors.

95 The relevant post 10.4.08 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 26.3.10, GP's observation to SH on 21.4.10 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 e-mail 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.

96 Mr Sutcliffe QC's opening remark in his closing submissions, that the outcome of this trial depends, to a large extent, on findings of fact to be made in relation to GP and SH, is a proposition with which I agree entirely.

97 Mr Sutcliffe QC places reliance on GP's evidence under cross-examination and submits that, no matter how many times it was put to him, GP did not accept that the CFA was on a recoveries basis, and further that his evidence confirms his belief that the CFA and its covering letter marked a clear break with the recoveries basis which thereafter applied only by concession. Mr Sutcliffe QC further submits that SH's e-mail confirming that the CFA was "fine" constituted an acknowledgment of SL's departure from the recoveries basis. 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.

98 Mr Sutcliffe QC asks me to make a finding that SH did in fact read the CFA before signing it and that his evidence to the contrary is false. I accept that he may well have read the CFA, but I also accept SH's evidence that he has a team of people at Griffins who undertake a substantial volume of reading and research on his behalf and feed documents to him for his signature with covering notes or comments. My conclusion on this is that it is at least a possibility that SH did read the CFA before sending an e-mail to GP stating that it was "fine" and signing it. Even if he did not, that would not have assisted SH in avoiding personal liability under the CFA. But, returning to Mr Sutcliffe QC's submission, I do not consider that even if SH's evidence on this point was false, SH's case in relation to the recoveries basis is undermined.

99 Mr Sutcliffe QC also asks me to make a finding that the first time that SH raised the recoveries basis as a defence to SL's claim under the CFA was when serving his Defence in May 2014. Apart from the conversation which came to light during SH's cross-examination, this appears to be correct. However, such silence is not an indication that SH had no answer to SL's claim, rather it is likely to be the consequence of SH not wishing to

commit time or resources to the argument and preferring to move on to profitable work and leave GP and SL to stew.

100 In my judgment the answer to the first issue is that the full terms of the agreement between SH and SL operative from 10.4.08 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 27.4.06 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. As to whether incorporation of such a term is a matter of construction or implication, and having regard to the Supreme Court's decision in Marks and Spencer and, in particular, the speech of Lord Neuberger at [26]-[28], the exclusion of personal liability for SL's fees on the part of SH and agreement that payment should be conditional or contingent on and limited to recoveries cannot be found in and runs contrary to the CFA but it was a stipulation communicated to and accepted by SL and is 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. I recognise that this conclusion may, at least superficially, seem at odds with the principles governing construction of and implication of terms into a contract but the volume, quality and sheer weight of the contemporaneous evidence does not admit of any other conclusion.

101 GP's reply of 26.5.06 raises a further point in relation to payment by SH for work done by SL. GP required SH to inform him when recoveries were received and proposed that at that point there should be a discussion about payment. In this way GP volunteered that SL would or might be amenable to sharing recoveries with SH if the recoveries fell short of what was required to meet SL's and SH's costs in full. GP also volunteered that SL would be willing to allow time for payment of smaller travel related out of pocket expenses. SH does not appear to have responded to GP's

proposal. However, the parties' conduct in relation to the recovery from AS evidences the parties operating GP's voluntary proposal.

102 As to SH's liability for disbursements, counsel's fees are no longer in issue. I understand it to be common ground that SH accepts personal liability for SL's other disbursements and out of pocket expenses; that was conceded in SH's Defence and addressed by HHJ Purle QC ([24]-[25] of his judgment). If that is not correct, it is, in my view, plain from the evidence before me that (1) SL's standard terms of business, on which SH retained SL on 1.9.05 through to 10.4.08, operate to oblige SH to reimburse SL for such expenditure irrespective of recoveries and entitle SL to contractual interest under clause 5.2 of the terms of business, and (2) payment of disbursements incurred under the CFA is not covered by SH's 27.4.06 letter which refers only to SL's fees. SL's willingness to allow time for payment of disbursements is a retractable concession not forming part of the contract between SH and SL.

103 My finding on this issue renders my conclusion on the other issues unnecessary or obiter.

104 *(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?

Put shortly, this is Mr Sims QC's estoppel by convention point. SH contends that he and GP, for SL, shared an assumption, belief or understanding that the CFA should operate in accordance with the Practice and that it would be unconscionable to permit SL to recover any of its charges from SH personally having regard to their course of dealing on other nil asset insolvency matters, other CFAs entered into by GP for SL with other partners at Griffins, assurances contained in an e-mail from GP in November 2005, the retainer letters for the s.236 applications, the exchange between SH and GP on 27.4.06/26.5.06, GP's knowledge of SH's business model for funding nil asset insolvency litigation, and assurances given by GP to SH over the course of their working relationship and in particular when continuing to work on the Sunbow liquidation after entering into the CFA.

105 Mr Sutcliffe QC submits that SH's case is hopeless because it is plain that the parties did not share a common understanding in relation to the CFA.

106 Whilst I do not accept the entirety of the case advanced by SH in his pleading and through Mr Sims QC, I have no hesitation in rejecting Mr Sutcliffe QC's submission. As I see it, the CFA cannot be severed from SH's letter of 27.4.06 and GP's e-mail of 26.5.06, which contain a clear expression by each party of a shared common understanding that SL's fees would be paid from recoveries and SH would not be personally liable for any shortfall. This shared understanding is not the Practice as defined by SH and on that point SH's pleading fails, but it would be unrealistic to reject the estoppel by convention point on that ground. GP's November 2005 e-mail 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.

107 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. This more than satisfies the statement of the doctrine made by Lord Steyn in Republic of India v India Steamship Co Ltd [1998] AC 878, p.913E-F and more recently by the Court of Appeal in Christopher Charles Dixon EFI (Loughton) limited v Blindley Heath Investments Limited and others [2015] EWCA Civ 1023 [72]-[73].

108 *(3) Did SH enter into the CFA as a result of presumed undue influence?*
It is common ground that GP, and therefore SL, by reason of being a solicitor dealing with a client, is to be presumed to have had influence over SH in relation to SH's agreement to the CFA. Mr Sutcliffe QC submits that GP's influence was not undue and, further, that the CFA was not a manifestly disadvantageous transaction requiring explanation.

109 Mr Sutcliffe QC draws attention to the alleged basis for the manifest disadvantage which is limited to an asserted legitimate expectation on the part of SH that the Practice would apply as it had done immediately prior to the making of the CFA. I have already found that the Practice did not at any time apply to work undertaken by SL for SH. The aspect or element of the Practice that did apply to the working relationship was that payment of SL's charges for SH on the Sunbow liquidation was conditional or contingent upon recoveries being received into the estate.

110 Mr Sutcliffe QC submits that the CFA is a fair and clearly explained document, that it entirely explicable on normal commercial principles, does not constitute the making of a personal gain going beyond just remuneration, and further that, when proposing the document to SH, GP invited SH to telephone him to discuss the CFA and costs.

111 Mr Sutcliffe QC submits that SH was a sophisticated client, familiar with CFAs and, as his communications forming a significant part of the documentary evidence show entirely comfortable when dealing with lawyers and no shrinking violet when it comes to expressing his views to lawyers. However, the overarching point is that GP did not abuse his influence over SH.

112 All of those submissions are well made by Mr Sutcliffe QC.

113 Mr Sims QC's case is short : if GP intended that SH would, by entering into the CFA, introduce for the first time into SL's retainer for work on the Sunbow liquidation a term imposing direct personal liability on SH it was incumbent on him to draw that expressly to SH's attention for two reasons (1) it would obviously introduce a materially disadvantageous financial change in SH's position and (2) it ran counter to the agreed basis upon which SH and SL had been working and had expressed themselves willing to work together on the Sunbow liquidation. SH's commercial sophistication, familiarity with CFAs, staunchness of character, are all nothing to the point. This represents a refinement of SH's pleaded case, at least in so far as it is not pinned to – or pinned down by – the Practice.

114 Although not at first attracted to SH's revised case on this issue, on reflection I accept Mr Sims QC's submissions. 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.

115 *(4) If so, what remedy should be granted?*

Mr Sims QC submits that the appropriate remedy would be to set aside the CFA with the result that SH would be discharged from liability under it, and, in addition, require SL to repay monies already received under the CFA.

116 Such a remedy would be utterly inequitable, disproportionate and absurd.

117 The dismissal of SL's claim will provide effective relief and adequate comfort to SH that he is not personally liable for SL's charges for their work.

118 *(5) 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?*

Mr Sims QC maintains that the fundamental change in the terms on which SL was to be engaged proposed by the CFA sent to SH under cover of a letter dated 29.1.08 required express mention to SH and that his failure to do so gave rise to breaches of contract, GP's duty of care to SH and GP's fiduciary duty to SH.

119 In this context Mr Sims QC relies on the requirement under the Solicitors' Code of Conduct 2007 that a solicitor should discuss with the client at the outset and as appropriate as the matter progresses how the client would pay the solicitor's fees. GP accepted in cross-examination that he was under such a duty and asserted that he did have such discussions. The evidence before me is that such discussions invariably centred on SL's

fees being paid from recoveries and in so far as there were actual discussions about SH's personal liability they were all on the footing that SH would not accept and did not have personal liability for SL's fees.

120 The particular complaint in SH's pleaded case is that SL (1) was in breach of the CFA by (a) failing to act in SH's best interests by acting on the basis that SH was personally liable for costs and disbursements, (b) failing to advise SH that he was personally liable, (c) failing to advise SH of the risks of continuing to pursue the litigation against TP if he was personally liable, (d) failing to give the best advice on whether to accept TP's offers, and (e) failing to give the best, or any, information about the likely costs of the litigation against AS and TP; (2) negligent in failing to advise SH of the meaning and effect of the CFA and that it was SL's intention not to follow the Practice; and (3) in breach of fiduciary duty by failing to disclose the material difference to SH's liability intended to result from the CFA and the financial benefit to be derived by SL.

121 Mr Sutcliffe QC submits that GP's conduct throughout did not at any point breach a contractual obligation, fall below the standard of reasonable skill and care expected of a solicitor in such circumstances, and that the particular circumstances concern commercial arrangements and do not concern matters in respect of which GP owed a fiduciary duty to SH.

122 Mr Sutcliffe QC also submits that the precise scope of a solicitor's duty depends upon the circumstances, which include the extent to which the client appears to need advice, Carradine Properties Ltd v D J Freeman & Company [1999] Lloyd's Rep 483, Donaldson LJ p.487, and that once that is recognised it is plain that GP was not negligent.

123 Mr Sutcliffe QC further submits that all claims in this action should fail for want of causation because at all times until TP declared his own bankruptcy SH was so convinced of making a full recovery that an appreciation when signing the CFA that he would become exposed to personal liability for SL's charges would not have made any difference to his conduct. I reject that submission. However self-confident SH was in his assessment of TP's means, there is ample evidence to support a conclusion that he simply would not have departed from the principle of

refusing to accept personal liability in nil asset estate cases. Moreover, he saw the commercial advantages to himself in being able to hold solicitors and counsel to the recoveries only basis of fee recovery while cases were ongoing.

124 In relation to the alleged breach of contract, particulars (d) and (e) are unsustainable on the facts apparent from the documentary evidence. The central point of (a) to (c) as Mr Sims QC explains it is that it was a term of the CFA, which GP broke, that he should appraise SH of his personal liability under the CFA. That is not how the case is put in the pleadings and the pleaded case is not made out. Either way, on my findings, this point adds nothing to my decision.

125 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.

126 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.

127 *(6) If so what loss has been suffered by SH?*

For SH to have suffered a loss he personally would have had to have paid some or all of SL's charges. That has not happened. My assessment of SH is that nothing short of a court judgment would have procured such an event. No loss has been suffered by SH.

128 (7) If not at the outset, was SL in breach of contract and/or negligent when advising as to settlement?

No, GP's advice was based upon the material available to him which included SH's resolute views as to TP's means and the prospect

(effectively a near certainty as SH saw it) of full recovery. Counsel was of the same view as GP for SL. Overarching this, SH's mindset was such that advice from lawyers would not override his own commercial view as to settlement.

129 (8) If so, what loss has been suffered as a result?
None.

130 (9) Is SH guilty of contributory negligence?
Having found that SH has suffered no loss and, indeed, no loss at all having been identified by or on SH's behalf, this issue does not arise for determination.

131 Mr Sutcliffe QC invites me to consider SL's case on contributory negligence in the context of SH's case on negligence, and possibly other grounds, succeeding but SH's primary case being rejected and SH establishing loss and being awarded damages. Mr Sutcliffe QC directs my attention to [36] of the Re-Amended Defence to Counterclaim and [94]-[98] of his skeleton argument. SL's pleaded case is that if SL is liable to SH, SH caused or contributed to any loss by (1) failing to contact GP as requested by GP's 29.1.08 letter, (2) implicitly representing in his CFA "fine" e-mail of 13.2.08 that he had considered and agreed to the CFA, and (3) signing the CFA without reading or understanding it. SL's case on (3) appears to be ambivalent; on one hand I am asked to make an express finding of fact that SH did read the CFA and to conclude that SH's evidence to the contrary reveals him to be a liar, but, on the other hand to find that SH's failure to read the CFA was an omission on his part "so egregious as to break the chain of causation". As I understand it the polarity of these submissions is no impediment to the findings I am asked to make.

132 In his skeleton argument Mr Sutcliffe QC submits that (1) had SH read the CFA he would have appreciated immediately that his liability to SL was not limited to recoveries; (2) had SH told GP that he had not read the CFA GP would have made sure that SH understood its meaning and effect (ie that it imposed personal liability irrespective of recoveries); and, (3) having failed to communicate with GP or read the CFA he signed it

believing it to be binding and to govern payment of substantial legal fees without bothering himself about its content; with the result that (4) such conduct is so unreasonable and foreseeable as to break the chain of causation or result in a substantial reduction in any award of damages to SH, which Mr Sutcliffe QC quantified in his oral submissions at 100%.

133 The problem with these 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 27.4.06 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.

134 Overall conclusion

Drawing the strands of the judgments in this litigation together (1) following the decision of HHJ 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.

135 Postscript

This has been a trial in which an elephant has been lurking in, or at least peering through the glass panelled doors into, the courtroom. The issues as presented and decided have not called for consideration of or a decision upon whether the arrangements that SH insists upon in few or nil asset estate cases offend the indemnity principle, the essence of which is that if a solicitor expressly or impliedly agrees that the firm will not in any circumstances charge the client no costs are recoverable from the other

party (Cook on Costs 2015 [12.3]). There is a public interest in there being a practical means by which insolvency practitioners are able to obtain the assistance of lawyers to advise and represent them in the pursuit of misfeasant and dishonest officers and former office holders in nil asset estate cases where no creditor is willing to provide an indemnity, and it is the case that litigation funding is evolving, but at present the indemnity principle remains the law.