Neutral Citation Number: [2019] EWHC 2809 (QB)

Case No: QA-2019-000049

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2019

Before :

MR JUSTICE PUSHPINDER SAINI

- -

Between :

HIGGINS & CO LAWYERS LTD	**Claimant**
- and -	
EVANS	**Defendant**

- -
- -

Roger Mallalieu (instructed by **Higgins & Co Lawyers Ltd**) for the **Appellant**
Andrew Roy (instructed by **Fieldfisher LLP**) for the **Respondent**

Hearing dates: 17 October 2019

- -

Approved Judgment

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

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MR JUSTICE PUSHPINDER SAINI

MR JUSTICE PUSHPINDER SAINI :

This judgment is divided into 10 sections as follows:

I. Overview

1. This appeal concerns the enforceability of certain provisions of a Conditional Fee Agreement (CFA) under which the estate of a deceased litigant party to the CFA is said to be liable for basic charges in respect of legal work undertaken by his solicitors prior to his death. The issue is of some importance because the clause which is said to give rise to this financial consequence incorporates the terms of the Law Society Model Form Conditional Fee Agreement. That Model Agreement is widely used within the profession for personal injury claims and has been in its current form since at least 2014.

2. The clause of the CFA in issue ("the Clause") is in the following terms:

> "(c) Death
>
> This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate.
>
> If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee agreement as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you."

3. By a judgment and consequential order dated 5 February 2019, Master McCloud held that the Clause was unenforceable under what was called the *Interfoto* principle, referring to the well-known case Interfoto Picture Library Limited v Stiletto Visual Programmes Limited [1989] QB (CA).

4. The CFA in issue in these proceedings was signed by the deceased, Mr. Frank William Hughes ("Mr. Hughes") on 19 April 2016. In her succinct judgment, to which I will refer to in more detail below, the Master held that the Clause was void and unenforceable on the basis that it was unusual and onerous and was not brought reasonably and fairly to the attention of the deceased client.

5. The Master's judgment was given in the context of a solicitor-client assessment of a Bill of Costs ("the Bill") presented by the Appellant firm, Higgins & Co. Lawyers

Limited ("the Firm") to the Respondent ("Dr. Evans"), the executor of the estate of the late Mr. Hughes ("the Estate"). The Firm claimed that the costs in the Bill were a liability of Mr. Hughes' Estate, relying upon the Clause. The Master assessed the Bill at nil (based on her finding that the Clause could not be relied upon) but left open the possibility that the Firm might find some other basis on which to claim costs from the Estate.

6. Permission to appeal against Master McCloud's Order was granted by Stewart J on 2 April 2019.

7. As appears below, I have had the benefit of much more detailed argument than the Master. The cogent written and oral submissions from Counsel before me (neither of whom appeared below) have ranged substantially beyond the points raised before the Master in what seems, from the transcript, to have been quite a short hearing.

8. I have also been referred to a number of crucial authorities which were regrettably not drawn to the attention of the Master. Further, the Respondent has advanced new points. The first is on the construction of the CFA and the second concerns the enforceability of the Clause under the Consumer Rights Act 2015. Although the Master did not address these points they were raised in the Points of Dispute.

9. The parties eventually agreed that, although this is strictly an appeal from the Master's decision, I should address these new points. I agreed to take that course for reasons I will set out below. The parties also took me to the evidence in some detail with an invitation to make my own findings. This was because the issues argued before me went beyond points the Master was required to decide and the evidential record had expanded somewhat since the matter was before her.

II. The Facts

10. On 2 March 2016, Mr. Hughes, a retired engineer, was diagnosed with asbestosis. He was at that time 89 years of age. On or about 4 March 2016, he instructed the Firm to pursue a claim for damages for personal injuries in relation to that diagnosis and his exposure to asbestos during his employment. As I will explain in more detail below, on 19 April 2016, Mr Hughes signed the CFA at his home in the presence of the Firm's agent, Mr. Jacewicz.

11. I will return to the chronology, but should record at this stage the written evidence of Mr. Morgan (the Respondent's solicitor) to the effect that following Mr. Hughes' death on 30 April 2018 a number of leaflets relating to the group *Asbestos Victim Support* and Asbestosis.org.uk were found in Mr Hughes' house. There was no evidence before the Master or before me as to whether Mr. Hughes had ever read any of these documents, whether, if he did, he had any particular understanding of them or whether, and if so to what extent, he relied on anything contained within them. There were no findings made in this regard and I can make no findings. I will however summarise what was put before me because the Respondent does seek to rely on such materials in relation to the arguments on construction and fairness of the Clause.

12. As stated above, Mr. Hughes was introduced to the Firm by the group Asbestos Victim Support, the Firm being on that group's panel. I was referred to the group's literature which sets out the following as advantages of using a panel firm:

> "… all of the Solicitors that make it onto our panel must first agree to work on a "no-win no-fee basis", so you will not need to pay a penny to pursue your claim – and there will be no hidden, nasty surprises."

13. The Respondent also referred me in some detail to the Firm's own literature where under the title "Why instruct Higgins & Co" it is said:

> "The Higgins & Co "no-nonsense" approach to claims ensures that your claim will be dealt with in a clear, simple manner with no jargon or hidden surprises for you to worry about along the way…
>
> **Benefit from our NO WIN – NO FEE – NO DELAY philosophy**
>
> …We guarantee that our success fee, including VAT, will not be any more than 25% leaving you with 75% of your compensation (less the cost of any After the Event Insurance Policy).
>
> **Pay nothing from the beginning, simply make your claim and we will do the rest**
>
> …With Higgins & Co you don't have to worry about any of the fees, before, during or after."

14. In addition, Mr. Morgan made reference to certain entries from the Asbestosis.org.uk website which I was taken to in submissions. Again, there was no evidence that these entries had been seen by Mr Hughes, let alone whether, if he did, he had any particular understanding of them or whether and, if so, to what extent he relied on anything contained within them. Unsurprisingly, there were no findings made in this regard. Equally I am unable to make findings.

15. The more detailed and uncontradicted evidence before the Master and before me as to how Mr. Hughes came to sign the CFA may be summarised as follows:

(a) On 4 March 2016, Ms. Crowder, a solicitor in the Firm, and Mr Hughes had a telephone conversation. Mr Hughes was informed that if the Firm considered there were 'reasonable prospects' it would offer a CFA.
(b) On 4 March 2016 the Firm wrote to Mr Hughes requesting some initial information and enclosing a leaflet. On 17 March 2016 the Firm wrote to Mr. Hughes making some further enquiries which are not material.
(c) On the 15 April 2016, there was a 30 minute telephone conversation between Ms. Crowder and Mr Hughes. The relevant part of the attendance note before me records the following:

> "I explained that we were willing to take this on under a CFA. I discussed the funding options and told him how the CFA works. I explained that if the claim is successful that we would

> be entitled to a success fee in addition to claiming the basic costs from the Defendant's insurers. I explained that the success fee would come out of his damages and would be capped at 25% of the damages for injuries and any past financial losses."

(d) Nothing in the attendance note, or indeed any other document recording pre-CFA communications with Mr. Hughes, refers to what would happen under the CFA in the event of his death.
(e) On 15 April 2016, the Firm wrote to Solicitor Assist UK Limited (agents) instructing them to take the relevant funding documentation to a meeting with Mr. Hughes at his home. The letter expressly required the agent to take 2 copies of the documentation, one copy of which should be left with the client and one signed and returned. On its third page, the letter repeated this point in bold capitals.
(f) On 15 April 2016, the Firm wrote to Mr. Hughes enclosing a copy of the CFA and various other items of documentation and on 19 April 2016, Mr Jacewicz, an employee of the agents, attended on Mr Hughes. In his written evidence he said that he had no particular recollection of that meeting. In his statement he sets out his usual practice, including that he would leave a copy of the paperwork with the client. Mr Jacewicz further states that he would always give a client an opportunity to ask questions before allowing them to sign the documentation. There is no reason to doubt that his evidence is accurate and truthful.
(g) On that day and in front of Mr. Jacewicz, Mr. Hughes signed the CFA.
(h) Dr. Evans' evidence was that when she went through her grandfather's papers after his death on 30 April 2018 she did not find copies of any of the funding documentation, the CFA or the terms and conditions.
(i) Sadly, Mr. Hughes died on 30 April 2018. His claim vested in the Respondent as executor of the Estate.
(j) Although the Clause provided that the Firm could offer to continue the claim for the Estate, they ultimately decided not to make an offer. The parties are not agreed as to why the Firm declined, but I do not need to resolve that dispute. The Firm had a choice but declined.
(k) On 27 July 2018, the Firm served the Bill on the Respondent and in due course the Respondent commenced the solicitor-client assessment which gives rise to this appeal. It declined to continue the claim for the personal representatives under a new CFA.
(l) I understand, however, that the substantive claim continues under the Estate's current solicitors (Fieldfisher LLP) but has not been concluded.

16. There was no factual dispute either before me or before the Master as to the events leading to the signature of the CFA. I have the same evidence as was before the Master supplemented by a number of witness statements which essentially simply exhibit certain documents. There was no oral evidence before the Master and because of the nature of the expanded number of issues before me I need to make my own findings as to the facts.

17. Specifically, the following matters appear to me to be established on the evidence, and I so find:

(a) The broad thrust of the pre-CFA communications with Mr. Hughes emphasised that this was a "no-win no-fee" retainer without any suggestion that on his death

there might be a liability for charges. He is likely to have relied upon such communications and they did not address the liabilities the Estate might face upon his death;

(b) Mr. Hughes was a person of reasonable intelligence, but he was not computer literate;
(c) Mr. Hughes was fastidious in keeping and filing written records;
(d) Mr Hughes kept himself and his house in an immaculate fashion;

(e) Mr. Hughes had legal capacity and signed the CFA without any pressure being applied to him, and had the opportunity to ask any questions of the Firm's agent who attended upon him for about 1 hour at his home;
(f) There is no evidence that anyone made representations to Mr Hughes which were false concerning the scope and nature of the CFA he signed.
(g) Mr. Hughes is likely to have received the CFA documentation before signature and copies were likely to have been left with him following signature; and
(h) Whether or not he retained such copies (which is not ultimately important), there is nothing to suggest he did not read the CFA before signing it (as the CFA indicated on its face one should do).

18. Before leaving this matter, I emphasise that I am not willing to draw any inferences as to Mr. Hughes' abilities or potential vulnerability based on what would inevitably be inappropriate stereotypes in relation to persons of his age.

III. The Conditional Fee Agreement

19. Given its length I will not set out the full terms of the CFA in this judgment but quote below from the most material clauses. With variations which are not relevant, the CFA followed the Law Society Model CFA ("the Model CFA") which can be found at the following web address for those who wish to consult the full terms: https://www.lawsociety.org.uk/support-services/advice/articles/new-model-conditional-fee-agreement/.

20. The Model CFA has been in use since at least July 2014. Each of the provisions with which I am concerned follows the Model CFA. The CFA is essentially in two parts: first, general terms and Schedules 1 and 2 (with a signature page) and second, attached "Law Society Conditions" which the Master held were incorporated into the CFA. That is not disputed and I consider that in any event the Master was clearly right to make that finding.

21. The heading to the CFA says:

> "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 Schedules and the Law Society Conditions attached."

22. The second page of the Law Society conditions deals with what happens when the CFA ends before the claim for damages ends. It provides:

> "What happens when this agreement ends before your claim for damages ends?

(a) Paying us if you end this agreement

- You can end the agreement at any time. Unless you have a right to cancel this agreement under Schedule 3 and do so within the 7 day time limit we then have the right to decide whether you must:

- Pay our basic charges and our expenses and disbursements including barristers' fees but not the success fee when we ask for them; or

- Pay our basic charges, and our expenses and disbursements including barristers' fees and success fees if you go on to win your claim for damages.

(b) Paying us if we end this agreement

We can decide to end this agreement if you do not keep to your responsibilities. We then have the right to decide whether you must:

- Pay our basic charges and our expenses and disbursements including barristers' fees but not the success fee when we ask for them; or

- Pay our basic charges and our expenses and disbursements including barristers' fees and success fees if you go on to win your claim for damages.

We can end this agreement if we think that you are unlikely to win. If this happens, you will only have to pay our expenses and disbursements. These will include barristers' fees if the barrister does not have a conditional fee agreement with us.

We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then:

- Pay the basic charges and our expenses and disbursements, including barristers' fees;

- Pay the success fee if you go on to win your claim for damages.

If you ask us to get a second opinion from a specialist solicitor outside our firm, we will do so. You pay the cost of a second opinion.

We can end the agreement if you do not pay your insurance premium when asked to do so.

(c) Death

> This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate. If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee arrangement, as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you.
>
> What happens after this agreement ends
>
> After this agreement ends, we may apply to have our name removed from the record of any court proceedings in which we were acting unless you have another form of funding and ask us to work for you.
>
> We have the right to preserve our lien unless another solicitor working for you undertakes to pay us what we are owed including a success fee if you win.
>
> Explanation of words used
>
> ….
>
> (a) Basic charges
>
> Our charges for the legal work we do on your claim for damages as set out in Schedule 2
>
> …"

23. Schedule 2 provides:

> "Basic Charges
>
> These are for work done from now until this agreement ends. These are subject to review.
>
> How we calculate our basic charges
>
> These are calculated for each hour engaged on your matter. Routine letters and telephone calls will be charged as units of one tenth of an hour. Other letters and telephone calls will be charged on a time basis. The hourly rates are:
>
> ……
>
> We review the hourly rate annually and we will notify you of any change in the rate in writing.
>
> Fixed Fees/Costs

> The above hourly rates may not apply if your claim is subject to a specific fixed fee arrangement agreed between us. If a specific fixed fee arrangement has been agreed with you it is set out below and that fee plus expenses payable by you will be the amount of legal costs payable by you less any amount recovered from your opponent.
>
> Overall cap on your liability for costs
>
> We will limit the total amount of charges, success fees, expenses and disbursements (inclusive of VAT) payable by you (net of any contribution to your costs paid by your opponent) to a maximum of 25% of the damages you receive. However, in the event that we have been required to take out an After The Event insurance policy on your behalf, the cost of that policy, i.e. the premium, will fall to be deducted from your net damages."

24. Although not strictly relevant to the issue of construction, I should record the Law Society's own understanding of the effect of the Law Society's Model conditions in circumstances of death. In its published Conditional Fee Guidance (also available in its full form at the weblink I have set out above), the Law Society says:

> "Death
>
> Under the Law Society's Model Conditions, the CFA Contract automatically ends upon death of the client. In a transitional case, the Solicitor would thus need to enter into a new agreement with the estate after the client dies. However, the solicitor can recover costs under the old CFA up until the point of death."

IV. Other CFAs in evidence

25. Examples of CFAs used by at least two of the leading firms in personal injury law were produced before me and deployed in argument in support of various propositions.

26. I set out below the material parts of those agreements which govern the liabilities of the estate of deceased clients.

27. A CFA used by the Respondent's Solicitors (Fieldfisher LLP) provides:

> "General Terms
>
> If any of the following events occur, you will break the Agreement and you will be liable to pay our fees immediately as set out in paragraphs 3 and 4 below.

(a) You fail to co-operate with us

(b) You fail to attend any medical, expert examination or Court hearing which we reasonably request you to attend

(c) You fail to give us necessary instructions when we ask for them

(d) You withdraw instructions from us

(e) You mislead us in any way

In the event of your death, this agreement will survive subject to your Personal Representative agreeing to continue to instruct us under the terms of this agreement.

If your Personal Representative does not provide such instruction, this agreement will be deemed terminated pursuant to sections (c) and (d) above and we may seek recovery of our basic charges and expenses up to the date of your death from your estate."

28. An earlier iteration of a Fieldfisher LLP CFA is in the following terms (with underlined emphasis):

"(c) Death

This agreement automatically ends if you die before your claim for damages is completed. However your personal representatives are entitled to instruct us to continue your case on the terms of this agreement and, if they do so <u>with our consent</u>, the agreement is treated as having continued without interruption despite your death and for the purposes of this agreement your personal representatives shall have all your rights and obligations under the agreement. If your personal representatives do not instruct us to continue your case on the terms of this agreement, we will be entitled to recover our basic charges and disbursements up to the date of your death from your estate."

29. Irwin Mitchell LLP's standard form CFA provides as follows:

"Death

- This Agreement automatically ends if you die before you Win your Claim for damages.

- Your estate (and in practice your personal representatives) would then be liable for our Basic Charges and Disbursements incurred up to that point in time.

- Should your personal representatives or your dependents wish to continue to pursue claims arising from your death for the benefit of your estate and/or for any of your dependents we would offer to represent them under the terms of a new Conditional Fee Agreement, provided that they agree to pay our Full Legal Charges from the beginning of this Agreement (in addition to their claims for recovery of their own legal costs) if they go on to win their claims.

- In those circumstances, your personal representatives and/or your dependents will normally be able to recover our Full Legal Charges from their opponents providing that they are reasonable and proportionate to the value of their claims.

- We would agree to waive or write off any part of our full Legal Charges which we fail to recover from your or their opponents and will not make any further charge to them.

- If your personal representatives or your dependents were to decide not to instruct us to continue to pursue claims arising from your death for the benefit of your estate and/or your dependents, your estate would then be liable for our basic Charges, Disbursements and VAT up to the date of your death, even though you had not at that stage won your Claim. We would then have the right to elect whether to ask for payment of those Basic Charges and Disbursements at that point in time or, if they were to decide to instruct other legal representatives to pursue their claims, to wait until the conclusion of their claims and then seek payment of our Full Legal Charges including the Success Fee."

30. Insofar as an "industry standard" has developed, I draw the following conclusions from this evidence and from the Law Society's Model CFA:

(a) All CFAs terminate automatically on death.
(b) There is always a liability on the estate of the deceased to pay basic charges and expenses (disbursements).
(c) But, in some cases, the firm is obliged (if the personal representatives so wish) to offer a new CFA to continue the claim and in other cases (including the Model CFA and one of the Fieldfisher LLP CFAs) there is no obligation on the firm but merely the opportunity for the firm and personal representatives to make a new CFA if they wish.

V. The Master's Judgment

31. The transcript of the hearing before Master McCloud which has been provided to me indicates that the Master gave an *ex tempore* ruling on the *Interfoto* point during the course of what counsel called "rolling exchanges" between counsel and the bench. That is not an uncommon process. It appears that the Master then gave a further, more formal, *ex tempore* judgment containing her detailed reasons when dealing with the application for permission to appeal. That second ruling was corrected and approved.

32. The parties were sensibly agreed that both the informal and more formal reasons represent the Master's judgment for the purposes of this appeal. I will set them out in full below.

33. The more informal ruling was as follows:

> "OK. Um, we've got agents instructed to deal if you like with the formalities of the CFA and showing information, and briefing the client and so on, and those instructions are very clear to those agents that they can make it abundantly clear to this client that he's guaranteed to get 75 per cent of his damages. They also contain various other instructions such as leaving a copy of the agreements with him, rendering a note for the time they've spent. They didn't do either of those.
>
> They don't in fact generally, entirely, seemed to have followed their instructions but what is missing in these instructions is any suggestion that they should tell the client that if he – let them draw attention specifically to the fact that if he dies, his daughter out of his estate may have to pay the full amount of their basic charges, which for present purposes I'm taking to be the full bill, not capped at 25 per cent.
>
> So at best, I think the position evidentially, and it's accepted that there was no specific drawing – there's no evidence of specific drawing attention to discussions, so at best what we've got here is an 89 year old who's passed his natural life expectancy, who was disabled on oxygen, not in the presence of any relatives, but who is capacitous is I think on the balance of probabilities told his liability is limited and he will get – he or his estate will get 75 per cent guaranteed.
>
> And somewhere in the documents there's a clause that says on a lawyer's proper construction of it, if you die you are liable for our basic charges. You'd need a lawyer to explain that actually because there is some difficulty in understanding what it really means given that the contract actually caps charges at 25 per cent, it would need to be explained. Actually what this really means is the whole lot because it's slightly counterintuitive. When one is applying InterPhoto, one's got to bear in mind that if terms are standard terms, then per the court in that case, I think it was page 445 was it?

> …To the extent the conditions are common form the usual terms regularly encountered in this business, I do not think the defendants could successfully contend they were not incorporated. Now these are standard terms in the business. The deceased wasn't in the business. This is his one and only asbestos claim. They may well be standard terms but InterPhoto is about a photographic library and a photo company and business dealing on standard terms in the industry.
>
> The fact that this happens to be a pro forma and it's standard in that sense I don't think helps. InterPhoto does say you look at all the circumstances including the characteristics of the contracting parties. Here we've got lawyers sending agents, brief to sell the message you're guaranteed your 75 per cent, and on the other side, a man of 89, disabled on oxygen, not advised separately and not in the presence of any relatives.
>
> That's all the circumstances. It's not just the wording of the contract. It's the context as well. And I think that context where this man was probably going to die during the litigation, so that probably his estate would be liable save in the event that the solicitors agree to roll over the contract, of which there was no right, was something to which a pointy red hand had to be attached to destroy the elegance of Lord Denning's original words.
>
> There is no evidence that clause was drawn to his attention specifically or explained, and in my judgment that is unenforceable because it is in context usually onerous. So I hold that that's unenforceable."

34. The full terms of the more formal approved ruling are as follows:

> "I have partially corrected/amended this transcript from a poor text version transcribed by transcribers and from my memory. This is a mini judgment on leave to appeal. I refuse leave to appeal, there is no real prospect and there is no other good reason to appeal, the reason being that the case of InterPhoto is really clear that you look at the circumstances of the case, it is not merely agreement-specific devoid of consideration of the facts.
>
> I have set out the factual circumstances of this client which are specific to this client with this condition and claim at that time. They may not be uncommon facts in asbestos work, but that's goes with the territory in that area of work where a client is likely to die during the case. This is a generic set of terms which might apply to other types of work where such terms may not be onerous and death is very unlikely and the client is fit and well: each case differs. Whilst I do not attach too much to this next point, this clause is not I believe typically seen as

> typical or best practice for such work among practitioners in the field of asbestos work, based on what I was told in submissions.
>
> This may be a standard term in the generic fee agreements which are available for use, but in a particular case such as this if you've got a man who's 89, he's on oxygen, you need to explain the terms to him. That's just the professional obligation. It isn't something that's going to bring the walls crashing down to have to explain the terms. It's something that actually just should be done. And yes it does involve an assessment of the circumstances of any given client. That I think clear in InterPhoto which deals with all the circumstances not merely the terms of the agreement.
>
> Now, as to it being a standard term, I think the proper understanding of InterPhoto must be that you are talking about standard terms in the industry and that the parties deal on those terms and those on the terms in industry, then that affects the position.
>
> So if this gentleman had in life, let's say been an asbestos litigator or some such or he had brought a claim before for asbestosis and perhaps was aware from experience that would be one thing, but this is his one and only claim in a disease that was killing him, he was unwell and unfamiliar with the terms. The fact it's somebody's standard term really doesn't solve the problem in his particular circumstances.
>
> It's not standard from his point of view. It's unique from is point of view and the professional duty I think is to explain it. And that is especially offset here in circumstances where the agents were given express written instructions which seem to require them to explain anything but that clause and to stress other aspects.
>
> So, no, this case of course turns on the facts of this gentleman's circumstances and that's what InterPhoto requires me to do so I don't think I have even arguably mis-applied InterPhoto. Thank you."

35. The actual Order of the Master dated 5 February 2019 makes clear beyond doubt what she had decided. It provides as follows:

> "IT IS DECLARED AND ORDERED THAT:
>
> 1. The Law Society Conditions were incorporated into the Conditional Fee Arrangement entered into between Mr Hughes and the Defendant on 19 April 2016.

> 2. In all the circumstances, the "death clause" within the Law Society Conditions is void and unenforceable on the basis that it is unusual and onerous and was not brought fairly to the attention of Mr Hughes.
>
> 3. The Defendant's Bill dated 27th July is therefore assessed as £0.
>
> 4. The Defendant shall have liberty to apply, if so advised, to amend the bill should it contend that it is entitled to deliver a bill on a different basis. Such an application to be on notice.
>
> 5. The Defendant to pay the Claimant's costs of the assessment save that the Defendant's costs of drafting the bill are reserved. The Claimant's costs are summarily assessed in the sum of £38,502.92.
>
> 6. Permission to appeal refused."

36. One can readily identify from her rulings that the Master was essentially concerned that even if the terms were in standard form, given the age and circumstances of Mr. Hughes (and the fact that he might die during the currency of the CFA), the *Interfoto* principle demanded that the Clause be specifically drawn to his attention as an onerous provision. This was not done in the Master's view. However, there seems to have been little or no consideration of the relevance of signature of the CFA in the judgment.

37. However, as is apparent from the Master's judgment (and indeed as is clear to me from the full transcript of the oral submissions before the Master), the Master was referred to few authorities and specifically not addressed on a number of relevant Court of Appeal decisions (to which I make reference below).

38. I now turn to the three major issues in dispute. The construction issue, as the parties are agreed, is logically the first point which arises. One needs to identify the nature of the obligation said to be imposed by the Clause before considering issues of common law and statutory fairness of the Clause. I accordingly turn first to the issue of construction.

VI. Construction of the CFA

39. There was no argument on construction before the Master because she (with the agreement of Counsel then appearing) decided to approach the *Interfoto* issue on the basis of an assumption that the effect of the Clause was that upon death the CFA came to an end and there arose an immediate entitlement to the defined "Basic charges" on the part of the Firm from the Estate. As Counsel before me agreed, that was not necessarily a logical course.

40. The dispute as to construction arises before me because the Respondent has taken the point in her Respondent's Notice that the Master could have made a different decision below which would support an order that the bill be assessed at nil. The Appellant Firm originally seemed to object to the point being taken on appeal. At the hearing there was no dispute it should be addressed by me. Given that it is a point of law and it would have been necessary for me to construe the CFA in any event (in order to consider the *Interfoto* point which is properly before me) I would have decided as a matter of discretion and case management to allow the Respondent to argue the point (had the Firm's objection been maintained).

41. I will first summarise the Respondent's position on the construction issue which dominated Counsel's oral and written arguments on the appeal. The Respondent argues that if the Clause is enforceable and entitles the Firm to its costs but does not address the question of *quantification* of those costs. On that matter, the Respondent contends that the CFA itself provides the answer. It refers to the fact that the Clause states that Higgins is entitled to its "*basic charges*" which are defined as follows:

> "Basic charges
>
> Details of our basic charges are set out in Sch 2."

42. The Respondent then refers to the "Explanation of words used" section of the Law Society Conditions:

> "Basic charges
>
> Our charges for the legal work we do on your claim for damages as set out in Schedule 2."

43. It is then said that by Schedule 2, basic charges are capped at (a) costs recovered from the opponent(s) (the defendant(s) in the substantive claim); plus (b) 25% of damages received. Put shortly, the Respondent argues that as things stand no costs have been recovered from any opponent, nor have any damages been received. So as things stand, the Firm is entitled to nil in costs as the Master found (but for different reasons). For this reason the Respondent says that the Firm's case that they have an immediate entitlement to full fees without regard to Schedule 2 is wrong and that is said to be sufficient to dispose of the appeal.

44. However, the Respondent does not rest its case there and argues that it is preferable to follow through the effect of its arguments. It says there are two possibilities: (i) the Firm's costs fall to be quantified at the date of termination and this results in nil costs; or (ii) the Firm's costs fall to be determined at the conclusion of the claim and this will result in their being calculated in accordance with Schedule 2.

45. The Respondent's primary case is that the correct construction is (ii) and it says this for a number of reasons which were persuasively argued by Counsel for the Respondent:

(a) As matter of business efficacy and common sense that second construction would give effect to the Clause while the first construction would render it meaningless.
(b) It would give effect to the "basic charges clause" and to Schedule 2. These provide for costs to be quantified at the conclusion of the claim.
(c) It would give proper effect to the term *"If you lose you do not pay our charges".*
(d) Construction (i) would mean that the Firm agreed not to be paid for work properly undertaken, in the event of death. This would be surprising in respect of any CFA. It would be particularly in respect of a CFA in respect an elderly man with asbestos disease.
(e) Construction (ii) reflects the accepted manner in which CFAs operate, namely recovery of any costs shortfall at the conclusion of the case. Reliance is placed on Mr. Morgan's evidence and the pre-contractual literature in this case.
(f) It is also said to reflect the nature of CFAs. They are referred to, and marketed to clients as "no win, no fee agreements".
(g) Reliance is also placed on the client care materials. On 15 April 2016, when confirming his willingness to act under a CFA, the Firm advised Mr. Hughes that his claim was likely to be worth £25,000-£35,000. The client care letter posed the question *"is my case worth pursuing, given the risks of litigation?"*. The Firm's answer was *"In the overwhelming majority of cases the compensation payable greatly exceeds the likely base costs and disbursements which would be incurred in bringing your claim. Accordingly, we have no hesitation in confirming that your case is worth pursuing, given the risks of litigation and the likely costs involved"*. The Respondent argues that the Firm could not have properly so advised if the contractual arrangements exposed the Estate to a high risk of £30,000 costs even if no damages or costs were recovered from the opponents.
(h) Reliance is placed on the other pre-contractual literature to which I have made reference above and it is said that these form an important part of the factual matrix and tell heavily in favour of construction (ii).
(i) The Respondent also relies on the Firm's Risk Assessment. This identified as a risk factor that the "Claimant might die during investigations". It is said that the only risks relevant for a CFA are in respect of the solicitor not being entitled to payment. If the Clause entitled immediate recovery irrespective of the claim's ultimate success this could not, it is argued, have been properly included. Indeed, it would have been a factor decreasing the risk of the Firm not being entitled to their costs. That this was identified as increasing the risk reflects the understanding that the Firm would only be entitled to their costs if and when the claim was concluded successfully.
(j) Finally, reliance was placed on the operation of the ATE policy. It is said that this was not payable unless and until the claim concluded successfully.

46. For these reasons, the Respondent argues that construction (ii) is the only one that in Counsel's words "makes sense" and indeed the only one which even works. If this is wrong, the Respondent says that the only other outcome is construction (i) and that this is presumably not an outcome desired by the Firm.

47. In response, the Firm in its clear and well-structured submissions, has described construction (i) as the "quantum point" and construction (ii) as the "timing point". It relies upon the well-known principles of contractual construction identified in Arnold v. Britton [2015] UKSC 36 [2015] AC 1619. I will not repeat those principles save that it is right to emphasise that a Court can only consider facts or circumstances

known or reasonably available to both parties that existed at the time that the contract or order was made.

48. Before turning to the Firm's submissions on the Clause, I should record that the Firm relies upon certain contextual factors as follows:

(a) The general background is that the client has agreed to instruct the solicitor on the basis of a CFA and the solicitor has agreed to act on the basis of a CFA. The solicitor is therefore putting at risk his right to payment. If the claim proceeds to its conclusion and at that point does not succeed he will not be entitled to payment.
(b) This is a material risk for a solicitor (hence why he is entitled to a success fee, if he wins, for taking that risk).
(c) However, the further risk is that the case might not proceed to a conclusion. If it does not, the solicitor would be denied both the chance of payment of his fees and of payment of any success fee.
(d) There are a number of reasons why the case might not proceed to conclusion. The solicitor might no longer want to act. The client might no longer want to pursue the claim. Something may intervene – for example, the death of the client.

49. Based on that context, the Firm argues that the CFA seeks to address these issues from the outset. They are addressed under the specific heading of: "What happens when this agreement ends before your claim for damages ends".

50. It is said that the first point to be made about the construction of the sub clauses (set out above in para. [22]) is that they are all intended to deal with the situation where not only has the contingency under the CFA not occurred, but something has happened which means that the contingency will not occur – at least not within the currency of the CFA. Accordingly, they are expressly dealing with the situation where there will neither be a 'win' nor a 'loss' under the CFA.

51. The first sub clauses (a) and (b) deal with either the solicitor or the client ending the agreement. Those clauses in this CFA are in entirely standard form.

52. The Firm argues that, in broad terms, if the client ends the agreement, the solicitor is entitled to payment immediately. However, at the solicitor's option, a firm can instead decide to take its chances and wait to see if the client wins (for example after going to new solicitors). If so, it has no right to immediate payment, but essentially decides to keep its fees contingent. If that 'gamble' pays off, it is also then entitled to a success fee as a reward.

53. It is said that if the solicitor ends the agreement then the consequences broadly depend on whether this is because the solicitor choses to do so for general reasons (a lack of appetite for the case) or because the client is either not acting responsibly or not accepting advice. If the solicitor simply walks away, the firm gets no payment, but the client must pay expenses. However, if it is the client's 'fault' then the solicitor is entitled to payment and that is broadly similar to the position if the client had ended the agreement.

54. The most favourable position arrived at is if the client rejects advice about making a settlement and the solicitor ceases to act further. Under this provision, the solicitor is not only entitled to immediate payment of basic charges and expenses, but is also entitled to a success fee if the client goes on to win (without having had to keep its entitlement to basic charges contingent on that outcome). It is said that this is presumably because, in this scenario, the client, by rejecting the advice, has essentially turned down a 'win' (which would have occurred on acceptance of the offer).

55. The Firm says that all of these clauses are entirely standard and common to many hundreds of thousands of CFAs. But it argues that the key point to note is that they all operate on the basic provision that, where the solicitor is entitled to payment because the CFA ends, that entitlement is immediate and is divorced from any contingency that would otherwise have applied, unless the solicitor chooses to re-engage that contingency.

56. The Firm further argues that it is inherent in the CFA "bargain" that the solicitor retains some control over the conduct of the claim and the advice given and therefore over whether a win (whether by success at trial or settlement) is likely to be achieved. If that control is removed other than as a result of the solicitor losing faith or simply ceasing to act, then the solicitor is entitled to be paid its fees on a non-contingent basis because the underlying premise on which the Firm was prepared to make payment of its fees contingent has been removed. The Clause immediately follows these clauses at (c) and it is argued that it follows a very similar pattern and operates on the same basis.

57. Having summarised the submissions and turning to my own conclusions, I should record at the outset that I consider the Clause to be simple to construe and reject the Respondent's arguments. The issue of construction is for the Court and cannot be dictated by how the industry may have historically interpreted these CFAs. I do not find the evidence as to what is said to have been the approach to these CFAs in practice to be admissible or relevant. I am also sceptical as to whether much of the material (in terms of pre-CFA literature) is relevant by way of so-called "factual matrix" but I have taken it into account and it does not, in my view, support the Respondent's arguments on construction.

58. I can summarise my reasons shortly and as follows:

(a) The first and obvious point to make is that, consistently with this section of the CFA generally, the Clause applies and only applies in circumstances when the CFA ends: "This agreement automatically ends if you die before your claim for damages is concluded."
(b) Accordingly, the Clause is addressing a specific set of circumstances, namely where: (i) because of a specific event the solicitor and client relationship is at an end; (ii) this has happened before a win or loss in the claim; (iii) the solicitor no longer has any control over the conduct of the claim or even whether it will continue to be pursued; and (iv) whether the contingency (win/lose) will now eventuate is no longer under the solicitor's control.

(c) Further, the Clause expressly sets out the consequences of these events occurring: *"We will be entitled to recover our basic charges up to the date of your death from your estate."*

(d) In my judgment, this is clear and unambiguous language from which no amount of claimed factual matrix material provides an escape (even though that material does not assist me, having set it out at some length above and taken it into account).

(e) Consistently with the earlier clauses, there is provision for moderation of this result in the Clause. The personal representatives may be offered a new CFA on certain conditions and at the solicitor's option. Although it does not expressly say so, this admits of the possibility that the solicitor may agree to make its now accrued entitlement to fees to date further contingent on the success of the claim if the personal representatives choose to instruct it and agree to pay a success fee on success. There is nothing inappropriate or unworkable in this.

59. I need to address the Respondent's reliance on the point (referred to at para [43] above) that the provision at the end of Schedule 2, that refers to a 'overall cap on your liability for costs' (and which provides that the total amount of charges, success fees, expenses and disbursements will be limited to a maximum of 25% of damages received) means that until damages are received there is no entitlement to payment. I have no hesitation in rejecting this argument. That cap does not apply or arise in circumstances where the client has died. It is simply not intended, either as a matter of language or common sense, to apply to the liability to pay Basic Charges which arises when (by definition) no damages have arisen because the client has died before damages would have been awarded.

60. In my judgment, the underlying premise of each of the relevant clauses concerning the early termination of the CFA is that they address the position of *'What happens when this agreement ends before your claim for damages ends'*. They are expressly addressing a situation where an entitlement to costs arises where not only has the claim for damages not ended, but the claim for damages may not continue or even if it does the solicitor may have no knowledge or control over it or if or when it does end.

61. If the Respondent's arguments on construction were correct, then each of these clauses (not merely the Clause which is concerned with the situation of death) in this section make little sense. In particular, those clauses which expressly provide the solicitor with an option of taking immediate payment of basic charges or agreeing instead to keep the contingency alive and take basic charges and a success fee on a win make no sense at all. Counsel for the Respondent rightly and realistically accepted that this was the result of his argument on construction.

62. In my judgment, the clear effect of the relevant clauses concerning the end of the CFA before the end of a claim for damages, including specifically the Clause, and the proper construction of their interaction with the overall cap is plainly that the cap only operates if the client wins, and not if the client is liable in other circumstances. How can a cap – calculated by reference to damages received – apply in a situation which expressly deals with a liability arising in a situation where the claim has not concluded? It cannot.

63. Were it necessary to find further support for this construction, the fact that the cap only applies where costs are payable because the client has won is expressly provided for on page 1 of the CFA. The cap is introduced in the penultimate paragraph on that page;

> "The overall amount we will charge you for our basic charges, success fee, expenses and disbursements is limited as set out in Schedule 2 below."

64. This clause is under the express heading of 'Paying us if you win'. It is not addressing any other situation. Nor is the explanation of this cap, set out in Schedule 2, intended to apply in any other situation.

65. In accordance with the express terms of the Clause, where the Clause is triggered, basic charges (not capped by reference to the cap which applies to basic charges, expenses and success fees in the different situation of a 'win') are payable forthwith. In my judgment, construction (i) (the quantum point) also fails for the same reasons. It is unarguable.

66. So, I conclude that the assumed construction before the Master, namely that the Clause gave an immediate entitlement to basic charges, was based on a correct construction of the Clause on the death of Mr. Hughes. I should again add for the avoidance of doubt that I have not overlooked the detailed material deployed by the Respondent as part of the claimed factual matrix (see paras. [12-13] above). That material does not persuade me that the obvious meaning based on the language used by the parties to the CFA and the context lead one to construe the Clause in the way contended for by the Respondent. The fact that general comments have been made on the "no win no fee" basis does not alter the plain meaning of the signed CFA and this is not a claim for misrepresentation or rectification.

67. For completeness (and because it is relevant to the issues under the Consumer Rights Act 2015, Section 69), I emphasise that I do not consider there to be two arguable constructions of the Clause. There is a single and obvious construction: the words mean what they say.

68. My conclusion on construction leads me to the next question, namely whether the Master was right to find that the Clause, so construed, falls foul of the *Interfoto* principle.

VII. The Interfoto Principle

69. Before turning to the application of the law to the Clause in the CFA, I should summarise the substance of the principle in the modern case law which was reviewed relatively recently by the Court of Appeal in Goodliffe Foods Ltd v Hall Fire Protection Ltd [2018] EWCA Civ 1371, [2018] BLR 491 at [32-33]. The basic principle, as restated at [29], is that:

> "i] is a well-established principle of common law that, even if A knows that there are standard conditions provided as part of B's tender, a condition which is "particularly onerous or unusual" will not be incorporated into the contract, unless it has been fairly and reasonably brought to A's attention."

70. Paragraph 13-015 of Chitty on Contracts (38th ed. 2018) summarises the relevant principle as follows:

> "Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention."

71. In Goodliffe, the Court cited with approval Bingham LJ's dictum in Interfoto that;

> "The more outlandish the clause the greater the notice which the other party, if he is to be bound, must in all fairness be given."

72. In assessing the correctness of the Master's decision, the first question is whether the Clause was "onerous or unusual" (and, if so, how "outlandish" it is). The second is, if it is, whether it has been fairly and reasonably brought to the other party's attention

73. It is clear that "onerous or unusual" is a high standard. The authorities also refer to like terms as "unreasonable and extortionate", "particularly onerous", "outlandish" and "Draconian": Goodliffe Foods at para. 33. In another case such clauses are referred to as being like a "penalty": Woodesen v Credit Suisse Limited [2018] EWCA Civ 1103, per Longmore LJ at para. [42]. Although not cited by the parties, one can add to this Rix LJ's description of terms within the doctrine as being clauses which are "very onerous, unreasonable and extortionate": HIH Casualty and General Insurance v New Hampshire Insurance Co Ltd [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161, para. [211]. One is looking for something out of the ordinary and which would cause serious fairness concerns.

74. For reasons which will become apparent, I will take the two requirements ("onerous or unusual" and "fairly and reasonably brought to the party's attention") in reverse order and start with the second which I label the "attention/notice requirement".

Interfoto: "the attention/notice requirement"

75. As to this issue, the Master was regrettably deprived of the benefit of any authority or argument on this point. In particular, she was deprived of reference to the well-established principle that a party who signs a document knowing that it is intended to

have legal effect will *generally* be treated as being bound by its terms and will be taken to have read them and be on notice of them – at least absent the case being an extreme one where there is cogent evidence of the signature being obtained under pressure or by some other improper conduct.

76. I refer in this regard to L'Estrange v Graucob [1934] 2 KB 394, Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 All ER (Comm) 519 and Do-Buy 925 Ltd v National Westminster Bank PLC [2010] EWHC 2862 (QB). I also find assistance in the Peekay case which was not cited to me but addresses the issue of signatures and was cited in Do-Buy 925 Ltd.

77. I respectfully adopt Andrew Popplewell QC's summary of the case law in Do-Buy 925 Ltd at paras. [91-92] where, sitting as a Deputy High Court Judge, he observed in relation to the *Interfoto* principles as follows:

> "I agree with [Counsel for the Defendant] that such principles have no application to clause 21.2 in the present case. He rightly points out that it remains an undecided question whether the Interfoto principle can ever apply to a signed contract. In that case the Defendant was held not to be bound by a term in a printed set of conditions which had been provided to him in the form of a delivery note, but which he had neither signed nor read. In *Ocean Chemical Transport v Exnor Crags Ltd* [2000] 1 Lloyds 466 , Evans LJ, with whom Henry and Waller LLJ agreed, was prepared to assume that the principle might apply to onerous and unusual clauses in a signed contract "in an extreme case where a signature was obtained under pressure of time or other circumstances". In *HIH v New Hampshire* [2001] 2 Lloyds 161 , Rix LJ doubted whether the principle was properly applicable outside the context of incorporation by notice (see paragraph 209). In *Amiri Flight Authority v BAE Systems Plc* [2004] 1 All ER 385 , 392, Mance LJ, with whom Rix and Potter LLJ agreed, noted the doubts of Rix LJ in *HIH v New Hampshire* and stated that it was unnecessary to decide whether the principle could ever apply to signed contracts. He envisaged that it might do so where for example a car owner was asked to sign a ticket on entering a car park or a holiday maker asked to sign a long small print document when hiring a car which in either case proved to have a provision of "an extraneous or wholly unusual nature"; but that such cases might be ones where the application of the provision was precluded by an implied representation as to the nature of the document. He reiterated the normal rule that in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms. This is a reflection of the well-known principle whose existence and importance was recently emphasised by Moore-Bick LJ in *Peekay v Australia and New Zealand Banking Group* [2006] 2 Lloyds Reports 511 , 520 at paragraph 43:

> It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in *L'Estrange v Graucob* [1934] 2 KB 394 . It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community."
>
> This is not an extreme case, nor one in which there is any reason to depart from the principle that a party should be bound by a contract he has signed. The signature on the Application Form was immediately below an acknowledgement that the signatory had read the General Terms and Conditions which came at the end of a section headed "Important-you should read this carefully". Ms Searle accepted that she was provided with the General Terms and Conditions and had had an opportunity to read them; and that the Bank were entitled to assume that she had done so. I see no room for the application of the *Interfoto* principle in this case, even were it capable of applying to some signed contracts."

78. It is important to note that the principle in *Interfoto* is not concerned with a general doctrine of unfairness in contract law. There is no common law doctrine of this nature (that is why one sees statutory interventions such as the CRA 2015). *Interfoto* and cases applying the principles to be derived from it and the earlier case law are concerned with a different question: whether the term in issue has been properly incorporated within the contract and consideration of the nature or fairness of the term is confined to whether the law will regard the term as properly incorporated if it has not been the subject of appropriate notice.

79. That is why in a number of decisions (including those I have cited above) the courts have been doubtful (but without finally deciding the matter) that the doctrine could apply to contracts which have been signed where, by definition, the notice requirement would have been satisfied absent some form of vitiation such as fraud or misrepresentation.

80. So, without even needing to decide whether the Clause was "onerous or unusual", and on the basis of the facts before the Master and before me, it is clear that Mr. Hughes willingly signed the CFA without being pressured. The CFA also said on its face that it was a binding legal agreement which the client was asked to read carefully before signature.

81. The circumstances of the case are very far removed from the sort of cases of incorporation of terms in a parking ticket or of implied representation as to the nature of the document where the doctrine relied on by the Respondent might apply. There is no principle of law common law that the Firm's agent was in these circumstances obliged to draw the specific Clause to Mr. Hughes' attention when he had in fact signed the CFA having been warned by its terms that it was a binding document.

82. No doubt due to a lack of citation of relevant authority, the Master failed to take into account the fact that, by signing the document, Mr Hughes was confirming that he had read and understood all material terms of the CFA, including the Conditions. He was also given a chance to ask questions. In my judgment, the attention or notice requirement was clearly satisfied.

83. I have considered the additional decision cited to me in relation to the relevance of a signature (Kaye v Nu Skin Limited [2012] EWHC 958) but it appears that His Honour Judge Denyer QC did not have cited to him Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 All ER (Comm) 519 or Do-Buy 925 Ltd v National Westminster Bank PLC [2010] EWHC 2862 (QB).

84. The conclusion above on its own disposes of this aspect of the appeal: the *Interfoto* principle did not apply and I have no doubt that the Master would have so held had she had her attention drawn to the authorities.

85. For completeness, it should also be noted that the signature of either client or solicitor on a CFA is not a mandatory requirement of the statutory provisions concerning enforceability of CFAs (such a requirement formed part of the CFA Regulations 2000, which were revoked with effect from November 2005 and does not form part of either section 58 Courts & Legal Services Act 1990 or the CFA Order 2013). So, the signature was not therefore included merely as some general statutory requirement, but is instead included specifically to record the client's assent to the terms of the agreement and his confirmation that he has read, understood and agrees to all of those terms.

Interfoto: was the Clause onerous or unusual?

86. Turning to the question whether the Clause was correctly found by the Master to be "unusual and onerous", in my judgment the Master erred for the following reasons (which are again largely based on matters which were not canvassed before her):

(a) On the evidence before me, the Clause is a standard clause directly taken from the Model CFA for use in personal injury claims and indeed is reflected in the bespoke CFAs of two other leading firms.
(b) Whether based on that model or on solicitors' own variations of that model, it is not merely a, but the usual clause relating to the consequences of death in the context of a CFA and one which has been used in countless personal injury claims, including mesothelioma claims. Accordingly, it cannot properly bear the description of being "unusual".
(c) Further, in my judgment, the Clause cannot properly bear the description "onerous". The fact that it may operate harshly (on one view) does not satisfy me that it is onerous or so draconian as to engage the doctrine. It is not extortionate but reflects a sensible and fair allocation of risks when the client is essentially receiving professional services for free depending on the solicitors' expectation that a claim will be successful at trial or earlier settlement for damages.
(d) I would add that the Clause cannot be regarded as either "onerous" or "unusual" in circumstances where its effect is simply to impose a liability on a contracting party for the cost of the provision of services of value under a partially performed contract in the event of that party's death preventing

> completion of the contract. Such a consequence, even if not an express term of the contract, is a common consequence of death – see, for example, s.1(3) Law Reform (Frustrated Contracts) Act 1943 - and in such circumstances cannot properly satisfy either, let alone both, of the descriptions imposed upon it.

87. For completeness, I should address the Respondent's further submission that the appeal under this ground should be rejected because the Master's conclusion was a "multifactorial evaluation by a specialist costs judge".

88. It is said by the Respondent that the appeal court will only rarely be entitled to interfere with such an assessment and it is insufficient that the appeal court might have reached a different conclusion. Reliance is placed on the observations of Warby J (sitting with Master Leonard as an Assessor) in Bloomsbury Law Solicitor v Macpherson [2017] EWHC 2708 (QB) at [13-14]:

> "An appeal court will not upset a discretionary decision unless it is shown that the lower Court has either erred in principle in its approach, or ignored a relevant factor or taken account of an irrelevance, or reached a decision that was so wholly wrong that the Court is driven to conclude that it has failed to carry out a fair and proper balancing exercise … A somewhat similar approach is to be taken to decisions which require the court to take into account, weigh, and balance multiple factors in order to arrive at an overall evaluative decision. Such a decision is not a discretionary one, but the nature of the exercise means it is one with which an appeal court will be reluctant to interfere; though it will do so if there are circumstances which would invalidate the exercise of discretion …"

89. In my view these principles do not apply. First, the decision made was not made exercising a specialist costs expertise but was an application of the common law. Secondly, the decision was not a discretionary one: it was the application of law to facts which were largely undisputed. Third, the Master was not directed to the applicable and binding case law.

90. The appeal succeeds on the *Interfoto* point.

VIII. The Consumer Rights Act 2015 ("the CRA 2015")

91. By this Ground, raised by way of Respondent's Notice, the Respondent argues that if the Clause is otherwise enforceable (and gives the Firm a right to immediate payment of costs of more than nil) it is unenforceable under Section 62 of the CRA 2015.

92. As I explained above, the Master did not deal with this issue in her judgment and (initially, at least) the Firm complained in its written submissions before me that this was not properly a matter for a Respondent's Notice on this appeal, and the evidential materials required for its disposal were not before the appeal court. The Firm also rightly raised the point that its ability (and that of the Respondent) to mount an appeal to the Court of Appeal on any decision would be limited.

93. By the time of the hearing, however, both parties agreed that I should deal with CRA 2015 point. The evidential materials upon which they wished to rely overlapped with the materials already before me on the construction and *Interfoto* points.

94. Ultimately, I was satisfied that I had appropriate material and submissions to equip me to resolve the CRA 2015 point and I also concluded that it would be costly and time consuming for me simply to leave this issue for the Master on remittal, particularly given the relatively modest amounts in issue and substantial level of costs already incurred. Ideally, a matter of this nature concerning the Law Society's Model CFA would be determined on notice to the Law Society but that was not to be.

95. I begin by recording that it was common ground that the CRA 2015 applies to the CFA as a contract between the Firm ("the trader") and Mr. Hughes ("the consumer") because they meet the definitions within section 61(1).

96. The Respondent argues that the Clause falls foul of section 62 of the CRA 2015 which provides as follows (I underline the particular subsections relied upon):

> "62. Requirement for contract terms and notices to be fair
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> (2) An unfair consumer notice is not binding on the consumer.
>
> (3) This does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.
>
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined-
>
> (a) taking into account the nature of the subject matter of the contract, and
>
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract on which it depends.
>
> (6) A notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.
>
> (7) Whether a notice is unfair is to be determined-

> (a) taking into account the nature of the subject matter of the notice, and
>
> (b) by reference to all the circumstances existing when the rights or obligations to which it relates arose and to the terms of any contract on which it depends.…."

97. Reliance is placed by the Respondent on section 62(4) above (significant imbalance in the parties' rights and obligations) and it was also argued that the Clause is a term falling within Part 1 of Schedule 2 (terms which may be regarded as unfair) as I shall further set out below. The Respondent accepted that insofar as its complaint was about the quantum of costs, such a complaint would be precluded under the provisions of section 64(1)(b) of the Act (which essentially takes certain complaints about prices out of the Act).

98. Turning to the submissions of the Respondent, I summarise the main arguments as follows:

(a) By reference to Section 2 the Clause is unfair because of its onerous nature in light of both "the nature of the subject matter of the contract", and "the circumstances existing when the term was agreed". The salient features in this regard are said to be that it enables the Firm to claim costs without bringing the claim to a conclusion and this created a "a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer". The Respondent bears the obligation of paying without the right to have the claim prosecuted successfully. It said to be antithetical to how such CFAs are meant to operate.

(b) The unfairness is compounded because there was a high likelihood that the Clause would be engaged. When it was, it entitled the Firm to claim full fees irrespective of whether the claim succeeded. They thereby turned a legitimate CFA "gamble" into what the Respondent calls a one way bet.

(c) It is thus argued that the Clause completely alters the nature of the parties' rights and obligations in the (always likely) event of Mr Hughes' death. This is not fair. It constitutes not just shifting the goalposts but moving them to a different pitch.

(d) The obligation on the Respondent thereby arising is said to be particularly onerous as:

i. If the Firm's costs were not capped by reference to Sch. 2, they would accrue at exorbitant rates.

ii. The Clause enables the Firm to charge full costs before any recovery of costs and damages from the opponents, thus inflicting possible penury.

iii. As set out in the arguments on construction, the pre-contractual literature and client care materials were liable to lull Mr Hughes and the Respondent into thinking that no costs were payable until the claim concluded. Reliance is placed on the material I have already referred to above to the effect that the Firm had, it is argued, agreed to "work on a "no-win no-fee basis", so [Mr Hughes would] not need to pay a penny to pursue [his] claim – and there will be no hidden, nasty surprises." Contrary to this, Mr Hughes's estate is being charged fees despite not having won; far from not being required to pay a penny, the Respondent is being required to pay £30,410.40 without having recovered anything from the defendant. Overall, Counsel for the Respondent

says it is very difficult to imagine a more egregious example of a nasty hidden surprise.

99. The Respondent concludes by asking me to conduct what is called "a holistic multi-factorial assessment", and to look at the matter in the round and ask myself whether in these circumstances a clause which permits solicitors acting under a CFA to recover their costs in respect of a claim which has not concluded, and may never conclude, in the claimant's favour is fair by reference to section 62**.**

100. I have conducted such an assessment and considered each of the points argued before me which, as will be apparent, overlap in substantial respects with the points made on construction and in relation to the *Interfoto* principle. I have no hesitation in rejecting the argument that the Clause is unenforceable under the CRA 2015.

101. My reasons are as follows and supplement those which I have already set out above concerning the common law attack on the Clause as being allegedly "onerous":

(i) First, given the prominence given in the Respondent's submissions to the claimed "hidden" nature of the Clause, it is important to record at the outset that I consider the Clause to be clear and transparent. It is phrased in simple language which requires no legal training to follow. It is not hidden. At the risk of repetition, what could be simpler than the statement "This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate"? I do not agree that there was any "nasty surprise" in the Clause if one reads it (as one is asked to do on the face of the CFA) and I do not consider that the pre-contractual material deployed before me made the Clause misleading. Even though the message of that material was "no-win, no-fee", reading and signing the CFA with its clear provisions superseded any claimed earlier understanding of Mr. Hughes. Had he either asked the question of the Firm or looked at the CFA, he would have seen a simple and clear answer to the question: what happens if I die before the claim concludes?

(ii) Second, the clause is common to many CFAs and serves in my judgment an entirely fair and transparent purpose, set out in terms in the CFA, which is to address a situation where the solicitor's 'bargain' of putting its fees at risk by virtue of a contingency over which it has some control no longer exists. The calculus of risk in a personal injury action fundamentally changes when a claimant dies. The Clause should not be read in isolation but it part of the overall 'deal' in the CFA which reflects a 'gave and take' in circumstances where professional services are being provided at a risk of nil payment being received.

(iii) Third, in my judgment, the Clause is plainly not "antithetical" to how CFAs operate. Without the ability to have terms which protect the solicitor in certain circumstances (be it death, or client ceasing to instruct otherwise), one can identify why some solicitors would not be prepared to enter into such agreements and access to justice – and in consequence, consumers rights generally - would be impaired.

(iv) Fourth, as to the balance between a firm and a client which is struck by the Clause, in the circumstances of this specific case, I do not regard it as being harsh or unfair that Mr. Hughes' Estate should have to pay reasonable costs if his Estate is in sufficient funds.

(v) Fifth, I also do not consider that the Clause falls within item 7 of the Schedule 2, Part 1 list. The Clause does not give the Firm the power to terminate the CFA on a "discretionary basis". In fact, the CFA automatically terminates on death (as one would in any event expect in a contract for personal services) and simply gives the Firm and the personal representatives the ability enter into a new contract, if they agree.

(vi) Sixth, it was common ground that if the Clause violated the CRA 2015 that would simply make it (alone) unenforceable. The balance of the CFA would remain in force and it was agreed that there would remain an obligation on the Estate to pay reasonable fees (or some form of *quantum meruit* as described by the Respondent's Counsel). But the obligation to pay such basic charges as are reasonable is all that the Clause in effect provides for (see para [102] below in relation to the Solicitors Act 1974).

(vii) Finally, my conclusion that the Clause achieves a fair balance is reinforced by the fact that the Clause reflects the Law Society Conditions and indeed the CFAs put before me from other firms (including the Respondent's own solicitors in this appeal) also provide for payment of basic charges on death of the client (although they vary in relation to whether a firm is obliged or has the option of entering into a new CFA with the personal representatives). The fact that there are variations in this regard does not persuade me that the *only* fair clause for CRA 2015 purposes would be one which obliged the firm to offer to continue a claim on death as a condition of receiving basic charges. There are a number of different bargains which can be struck.

102. For completeness, and insofar as a complaint is made about the potential size of fees (which does seem to be part of the Respondent's attack, despite the terms of section 64(1)), the Clause merely gives the Respondent an entitlement to payment of its fees in principle. The amount payable in respect of those fees is subject to statutory protection provided to the client and the personal representatives pursuant to section 70 of the Solicitors Act 1974 (and indeed the Respondent has separately raised this issue in the present proceedings). So, if the rates are unreasonable, the Firm will not get them but will instead only recover such basic charges as are reasonable. Accordingly, the Clause must therefore be read not merely as entitling the Defendant to its basic charges, but as only entitling it to its reasonable basic charges.

103. I accordingly reject the argument that the Clause is unenforceable by operation of the Consumer Rights Act 2015.

IX. Conclusion

104. I allow the appeal.