Case No: HQ15P05372, HQ16X00032, HQ17XO16A5
SCCO reference: SC-2020-BTP-000037

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date: 18/03/2022

Before:

COSTS JUDGE LEONARD

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Between:

Liverpool Victoria Insurance Co Ltd	**Claimant**
- and –	
(1) Kamar Abbas Khan	
(2) Shafiq Sultan	
(3) Dr Asef Zafar	
(4) Mohammed Shazad Ahmed	**Defendants**

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Roger Mallalieu QC (instructed by **Horwich Farrelly**) for the **Claimant**
Gaurang Naik (instructed by **Chivers**) for the **Second Defendant**
James Newman (instructed by **Avisons**) for the **Fourth Defendant**

Hearing dates: 13 and 14 December 2021

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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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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. On 7 January 2016, the Claimant issued an application, under Part 8 of the Civil Procedure Rules ("CPR"), for permission to commence committal proceedings against four Defendants. On 21 June 2016, HHJ Walden-Smith gave permission as against the second and third Defendants. On 21 October 2016, she gave permission as against the first and fourth Defendants. On 2 March 2017, in an order recording that permission had been given, she ordered that all four Defendants pay the Claimant's costs of the permission proceedings. On 12 May 2017, the Claimant issued a further Part 8 application for committal.

2. The first Defendant, Mr Khan, was the founder of a firm of solicitors called Taylor Knight and Wolff Ltd ("TKW"). The second defendant, Mr Sultan, was the proprietor of a claims management business. The third Defendant, Dr Zafar, was a GP. The fourth defendant, Mr Ahmed, was an employee of TKW.

3. The contempt applications arose from an action for damages for personal injury brought by Mr Mudassar Iqbal, a taxi driver, following a road traffic accident which occurred on 3 December 2011. Mr Iqbal was the driver of a Vauxhall Zafira, which was struck by a motor vehicle driven by Ms Nicola Versloot. Ms Versloot was insured by the Claimant. TKW represented Mr Iqbal.

4. A medical report prepared by the third Defendant on 17 February 2012 stated that Mr Iqbal had experienced some mild pain and stiffness in the neck, which had resolved within a week of the accident. Subsequently, on 24 February, the report was amended to indicate that Mr Iqbal had continuing symptoms likely to resolve within about six months (which was untrue). The fact that the report had been altered came to light when the original version was inadvertently included in a trial bundle by the fourth Defendant, who then advised Mr Iqbal's counsel that the original report had been created in error and that the correct report was the amended one. The contempt allegations concerned the circumstances in which the alteration had taken place and the Defendants' responses to the investigations undertaken by the Claimant after it came to light.

5. The application for permission and the committal proceedings themselves set out 33 grounds of alleged contempt against the Defendants (listed as B1-B33), all described as interference with the administration of justice. All save B23 concerned making, or causing to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth, contrary to CPR 32.14. B23 was an allegation to the effect that the fourth Defendant had advised Mr Iqbal to give false evidence about his symptoms.

6. On 29 November 2017 (there appears to be some confusion about the exact date, but that is the date on the copy of the order in the hearing bundle) Mr Justice Sweeney gave permission for the Claimant to add against the first Defendant seven more grounds, based on allegations that he drafted in the name of the second Defendant a witness statement which he knew to be untrue in several respects; that he forged the second Defendant's signature on that statement; that he forged Mr Iqbal's signature on a witness statement; and that he made a false witness statement of his own.

7. In a judgment dated 5 October 2018, Mr Justice Garnham found 11 of the grounds against the first Defendant to have been proven and 10 of the grounds against the third Defendant to have been proven. He dismissed the grounds against the second and fourth Defendants.

8. On the same date, Garnham J ordered the first and third Defendants each to pay the Claimant's costs of the committal proceedings against them, and one quarter of the common costs attributable to all four Defendants. He made no order for costs in respect of the second Defendant, and he ordered the Claimant to pay the fourth Defendant's costs of the committal proceedings.

9. The fourth Defendant had been legally aided in the committal proceedings. The Grant of Representation was dated 2 March 2016 and headed "Grant of Representation for the Purposes of Criminal Proceedings". It confirmed that it was a determination by the Director of Legal Aid Casework under section 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. His solicitors at the time were Haider Solicitors Ltd: the case transferred to Avisons, his current solicitors, on 24 March 2017.

10. The first Defendant had also been in receipt of legal aid. On 4 December 2018, Garnham J made a further order confirming, as against the first Defendant, the costs provisions of his order of 5 October. He did so after considering written submissions to the effect that the first Defendant should enjoy the protection of section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"), which provides that Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including their financial circumstances and their conduct in relation to the proceedings.

11. Garnham J accepted submissions from the Claimant to the effect that the first Defendant's legal aid was criminal legal aid, not civil legal aid, so that section 26 had no application. He found that although the proceedings before him were civil contempt proceedings, for the purposes of LASPO they were criminal proceedings (the relevant provisions and his decision are considered in more detail below).

The Detailed Assessment Proceedings

12. Before setting out the history of these detailed assessment proceedings, I should put matters in context by observing that CPR 47.14(6) provides that only items specified in a paying party's Points of Dispute to a receiving party's bill of costs may be raised at a detailed assessment hearing unless the court gives permission. Practice Direction 47, paragraph 13.10 provides:

> "(1) If a party wishes to vary that party's bill of costs, points of dispute or a reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties.
>
> (2) Permission is not required to vary a bill of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation."

13. I need also to mention the indemnity principle, summarised in *Harold v Smith* [2860] 5 H&N 381;

> "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out the extent to which costs ought to be allowed is also ascertained."

14. The indemnity principle prevents any party, on detailed assessment, recovering from an opponent costs in excess of those that the party has to pay his or her legal representatives. That principle extends not only to the total sum paid by the receiving party but to detailed items such as hourly rates.

15. On 7 March 2019 the fourth Defendant commenced detailed assessment proceedings, in respect of the costs awarded to him. The bill of costs served by him totalled £438,388.95. The Claimant served Points of Dispute on 29 March 2019 and Replies were served by the fourth Defendant on 16 April 2019. A request for a detailed assessment hearing was filed by the fourth Defendant in January 2020. The case was referred to me, and a detailed assessment hearing listed for 7, 8 and 9 July 2020.

16. The Claimant, in the meantime, commenced detailed assessment proceedings in respect of the costs awarded to the Claimant. A Notice of Commencement was served upon all four Defendants on 27 May 2020. The first Defendant has never participated in the detailed assessment proceedings. The second Defendant, for reasons to which I shall come, did not become actively involved in the proceedings until February 2021. The third Defendant served Points of Dispute to which the Claimant replied on 16 July 2020, but the points raised do not appear to have much bearing on the matters to be considered in this judgment.

17. The fourth Defendant served Points of Dispute to which the Claimant replied on 9 July 2020.

18. The Claimant's bill of costs stated that the proceedings had been funded by a Collective Conditional Fee Agreement ("the CCFA") and claimed a success fee of 100%. The fourth Defendant in his Points of Dispute argued that the contempt proceedings were criminal proceedings and that a conditional retainer for the conduct of such proceedings was unlawful, so that the Claimant's costs should be disallowed in full. The Claimant replied to the effect that this was a civil matter concerning a dispute in a personal injury claim and that it was entirely legitimate for the case to be funded under the CCFA.

19. In a letter dated 11 January 2021, the Claimant however accepted that a success fee would not be recoverable between the parties and formally conceded the success fee claim. A statement by Mr Ronan McCann, a partner in Horwich Farrelly, the Claimant's solicitors, attributes that to a failure by the Claimant to give notice of funding to the Defendants.

20. At some point between January and June 2020 it was established that the bill of costs that had been served by the fourth Defendant in March 2019 incorporated an error, so

that the costs claimed by Haider, the solicitors who acted for the fourth Defendant before his current solicitors Avisons, were substantially overstated. The court made an order by consent on 25 June 2020, based on an agreement between the Claimant and the fourth Defendant. The order provided for the fourth Defendant to amend his bill and for the hearing listed for July 2020 to be vacated.

21. Instead, there would be a hearing of what were described as "preliminary technical points of dispute" raised by the Claimant and the fourth Defendant in respect of each other's bills, the parties having agreed that that would be proportionate and assist in their attempts to agree settlement. The fourth Defendant's amended bill, served on 29 June 2020, was reduced to £336,419.31 and the Claimant served amended Points of Dispute on 19 July 2020 to which the fourth Defendant replied on 3 June 2021.

22. Both the original and the amended Points of Dispute served by the Claimant include an indemnity principle challenge to the effect that work carried out over certain periods could not have been covered by a contract of retainer or by the fourth Defendant's legal aid certificate. A penalty is also sought for delay by the fourth Defendant in commencing detailed assessment proceedings. The Claimant has challenged some of the costs claimed on the basis that they fell outside the scope of Garnham J's order, being the Claimant said costs of the permission proceedings rather than the committal proceedings. Following the amendment of the fourth Defendant's bill of costs, the amended Points of Dispute also sought a penalty for the miscertification of the first bill.

23. With regard to hourly rates, both versions of the Claimant's Points of Dispute expressly agree a claimed Grade A hourly rate for Avisons, of £217 but take issue with a claimed hourly rate for a Costs Lawyer of £125, arguing that it should be reduced to £118. It is not quite clear to me now why the copies of the Points of Dispute in the hearing bundle appear to be silent on (and so, given the provisions of CPR 47.14(6), effectively to accept) Haider's claimed hourly rates of £210 (Grade A), £165 (Grade C) and £110 (Grade D), but my understanding is that they accepted the Grade A rate and the Grade D rate but disputed the Grade C rate. That is consistent with the fact that I did reduce Haider's claimed Grade C rate, as recorded in the order referred to below.

24. The preliminary issues hearing took place on 9 and 10 February 2021. The Claimant and the second, third and fourth Defendants were all represented by counsel. It proved not to be practicable, at that hearing, to address the fourth Defendant's challenge to the enforceability of the CCFA, at least in what I would have considered to be a fair way. The evening before the hearing Counsel for the Claimant filed a skeleton argument which incorporated an argument, not foreshadowed in the Replies to the fourth Defendant's Points of Dispute, to the effect that the permission proceedings (the only proceedings in which the second and fourth Defendants have any costs liability to the Claimant) were separate to the committal proceedings and in themselves could not be categorised as criminal proceedings.

25. Concluding that the fourth Defendant had not had an adequate opportunity to consider and address that argument, I set out in an order of that date a timetable for the Claimant to produce an addendum to its Bill of Costs which would set out its case on the enforceability of its retainer relating to the permission proceedings and the committal proceedings, and for the Defendants to respond. A further hearing for directions was listed for 16 April 2021, with a time estimate of one hour.

26. In respect of the preliminary issues raised by the Claimant on the fourth Defendant's bill of costs, I made a number of findings which were recorded in the order of 9 February 2021. These included that the alleged miscertification was not serious and did not merit sanction; that the indemnity principle challenge would be dismissed (including a specific finding to the effect that the fourth defendant was not obliged to disclose his legal aid certificate); that costs incurred prior to the commencement of the committal proceedings could be costs incidental to them; and that the fourth Defendant's delay in commencing detailed assessment proceedings did not justify any penalty. As to hourly rates the order said this:

> "The following hourly rates were allowed:
>
> Avisons
>
> [a] Grade A £217
>
> [b] Grade C Costs Lawyer £125
>
> Haider
>
> [a] Grade A £210
>
> [b] Grade C £146
>
> [c] Costs Lawyer £125
>
> [d] Grade D £110".

27. On 15 March 2021 I gave the second Defendant permission to be heard in the detailed assessment proceedings and to rely upon Points of Dispute dated 16 February 2021 (which repeated the fourth Defendant's challenge to the CCFA). That was an order for relief from the sanction provided for at CPR 47.9(3), to the effect that a party who files Points of Dispute late may not be heard further in the detailed assessment proceedings unless the court gives permission.

28. I gave permission because in the very long interval between the conclusion of the committal proceedings and service of the Claimant's bill of costs, the second Defendant had lost touch with his solicitors; because there had been a degree of uncertainty about the extension of his legal aid funding to the detailed assessment proceedings; and because allowing the second Defendant to be heard would have no material effect upon the progress of the detailed assessment proceedings. Nor would it cause prejudice to any other party.

29. On the same date, the Claimant filed an application for permission to argue that the Fourth Defendant's entitlement to costs is limited by virtue of the indemnity principle) to the amount prescribed by the Paragraph 7(2) of Schedule 4 to the Criminal Legal Aid (Remuneration) Regulations 2013, with an upper ceiling of £1,368.75.

30. This would appear to have followed the service by the Claimant on 9 March 2021 of the addendum to its bill of costs ordered on 9 February 2021, along with supplemental Points of Dispute which raised this point.

31. The Claimant wishes to argue that the statutory provisions which disapply the indemnity principle for parties in receipt of civil legal aid have no application to criminal legal aid, so that the fourth Defendant may, for the period over which his case was funded by legal aid, recover from the Claimant only the amount authorised by the Criminal Legal Aid (Remuneration) Regulations 2013.

32. The application of 15 March was supported by a witness statement of Mr Paul McCarthy, a partner in and Head of Costs at Horwich Farrelly. Mr McCarthy explained that he had joined Horwich Farrelly "during the Covid outbreak" (meaning, presumably, between spring and summer 2020) and that the point came up only when considering the fourth Defendant's arguments about the criminal nature of the committal proceedings. Neither the previous costs team, nor experienced counsel, had before then considered the point, which he suggested could be taken without disrupting the detailed assessment proceedings, which were still at a relatively early stage. Otherwise, he said, the fourth Defendant would receive a windfall, prejudicing the Claimant.

33. Mr McCarthy argued that both the Claimant and the fourth Defendant's representatives appeared to have overlooked the point and that the fourth Defendant's claim for costs should have been limited to £1,378.75. Although he was not pursuing a miscertification point, he argued that this constituted good reason for permitting the point to be taken late. In summary, insofar as his application might be seen as an application for relief from sanctions, the failure to raise the points in was not serious or significant; there was good reason for it; and it would be in the interests of justice to allow the point to be taken.

34. The Claimant's application was listed to be heard at the directions hearing on 16 April. According to the court's file, in the meantime, the supplemental points of dispute of 9 March were amended again on 12 April to incorporate in the alternative a slightly wider argument to the effect that the fourth Defendant was entitled only to recover such costs hourly rates as were recoverable under his Legal Aid Certificate.

35. On 16 April 2021 I made an order providing for the Claimant to file and serve Supplemental Points of Dispute in response to the Fourth Defendant's bill of costs, the Fourth Defendant being permitted to argue that any such Supplemental Point of Dispute is inconsistent with the findings made at the hearing on 9 February 2021 and recorded in the court's Order of that date.

36. The Claimant served amended supplemental Points of Dispute on 30 April, again in a different form from the 9 March or 12 April versions but with the same underlying point. The amended supplemental Points of Dispute recognised that whether the costs payable by the Legal Aid Agency ("LAA") to the fourth Defendant's representatives are limited to £1,378.75 applies depends upon the date of the determination, but argued in any event that the fourth Defendant can reclaim from the Claimant only such sums as are payable under the 2013 Regulations.

37. It is now accepted that the determination awarding legal aid to the fourth Defendant pre-dated the implementation of the £1,378.75 limit, which came into effect in April 2017 and so has no application to the fourth Defendant.

38. A hearing to address the second and fourth Defendants' challenge to the CCFA, the Claimant's supplemental Points of Dispute as permitted by my order of 16 April 2021, and the second and fourth Defendants' objection to those supplemental points of dispute in the light of my findings of 9 February 2021, was listed for 13 December 2021 with a time estimate of two days.

39. On 22 November 2021 the Claimant filed an application for permission, insofar as necessary, to argue that the Fourth Defendant's costs can be recovered from the Claimant only as prescribed by law, limited to the amount that the Legal Aid Agency was obliged to pay in respect of his representation. The application, which was listed for the substantive hearing 13 December, was supported by a second witness statement from Mr McCarthy.

40. In his second statement, Mr McCarthy repeated that the Claimant had not been advised, until after the hearing of 9 February 21, that the fourth Defendant's right to recover costs would be limited to what the LAA would be obliged to pay.

41. Mr McCarthy stated that the Claimant understands the meaning of the Court's order of 9 February 21 to be that if, as a matter of law, the Fourth Defendant is entitled to recover costs from the Claimant unfettered by the rates that the Legal Aid Agency is required to pay for his representation, then such costs will be assessed at the rates set out in that order. On this "model", as he put it, it is entirely permissible for the Claimant to argue that the Fourth Defendant is not entitled to recover more than the amount that the Legal Aid Agency is required to pay for his representation.

42. Mr McCarthy suggested that the Court would not permit the Fourth Defendant to recover at the rates set out in the order of 9 February 21 if, as a matter of law, that is not permissible. There was no argument at the 09/02/2021 hearing as to whether the Fourth Defendant was entitled to claim more than the Legal Aid Agency was required to pay, so the Court is not being asked to revisit an issue and no estoppel arises.

43. If however the order of 9 February 2021 would prevent the Claimant from arguing that the Fourth Defendant from raising that argument, even if such recovery is impermissible as a matter of law, the Claimant would seek to vary order on the ground that in February 2021, the Court was innocently misled by the Fourth Defendant into believing that he had an entitlement to recover at the rates contended for, and that there had been a material change of circumstances since the order was made.

44. Mr Verma, the solicitor for the fourth Defendant, responds by pointing out that the Claimant has been represented throughout these detailed assessment proceedings by experienced, competent Solicitors and Counsel. The hourly rates to be recovered by the fourth Defendant's solicitors have been determined by the court, most of them on the basis that they have been agreed. Although the points which have been raised are not entirely straightforward, they cannot, he argues, be said to be novel or overly complex.

45. He also complains that the Claimant has constantly shifted its position since the hearing of 9 February 2021. The Fourth Defendant should not, he says, be penalised for the changing advice that is being received by the Claimant throughout the detailed assessment process. It would in any case be impossible to determine what amount they LAA would pay, because it will depend upon who assesses it: the prescribed rates can be enhanced by up to 200% in appropriate cases.

46. Mr Verma argues that the Claimant is seeking to rectify its initial decision not to challenge the fourth Defendant's solicitors' hourly rates. The Claimant has chosen not to appeal that order, but is attempting to have it varied, which should not be permitted.

47. This judgment addresses the issues raised at the hearing on 13 and 14 December. Before explaining my conclusions, I should express my gratitude to counsel for their very thorough and skilful submissions.

Whether the Claimant Should Be Permitted to Raise the Indemnity Principle Point: The Fourth Defendant's Submissions

48. Mr Newman referred me to *Arnold and Others v National Westminster Bank PLC* [1991] 2 AC 93, *Tannu v Moosajee* [2003] EWCA Civ 815, *BT Pension Scheme Trustees Limited v BT Telecommunications* [2011] EWHC 2071 and *Daewoo Shipbuilding and Marine Engineering Company Limited v Songa Offshore Equinox Limited* [2020] EWHC 2353.

49. He argues that the Claimant cannot set aside the hourly rates that have been judicially determined by arguing that contrary to its previous concessions, the fourth Defendant is only entitled to recover the rates specified in the 2013 Regulations. The issue of the hourly rates the fourth Defendant is entitled to recover has already been determined and the Claimant is estopped from raising this issue again.

50. The Claimant's new position is entirely inconsistent with its previous concessions and the findings made at the hearing on 9 February 2021. Issue estoppel is a complete bar to relitigating a decided point (*Arnold v NWB*) and the principle can apply following the determination of a preliminary issue decided earlier in the same action between the parties *Tannu v Moosajee*, *BT Pension v BT Telecom, Daewoo v Songa*).

51. An issue can only be relitigated in exceptional circumstances. Those exceptional circumstances are usually fraud or fresh evidence (*Arnold v NWB*). The circumstances relied upon by the Claimant amount to a change of Counsel and change of legal advice, which is simply insufficient.

Whether the Claimant Should Be Permitted to Raise the Indemnity Principle Point: The Claimant's Submissions

52. Mr Mallalieu submits that the decision on hourly rates on 9 February 2021 was as to the reasonableness of the rates claimed, on the assumption that they were otherwise recoverable. There is nothing to appeal in that decision in relation to whether the indemnity principle applied; if so, what its effect was; or whether the Claimant should be allowed to raise the indemnity principle. None of those points were before the Court.

53. Any appeal on the issue actually decided (the reasonableness of rates) is a different issue and one which in any event would only arise at the conclusion of the detailed assessment, if appropriate and if the fourth Defendant's costs are otherwise recoverable.

54. There is no requirement for permission to amend the Claimant's Points of Dispute and amendment has already been permitted in a general sense. Judicial guidance on applications under CPR 17.3 to amend statements of case where permission is required should therefore be approached with caution, since they start with a higher hurdle, but

may nevertheless be of some assistance. Ultimately, the question is one of what justice requires.

55. This is an ongoing detailed assessment, still in the preliminary issues stage. It is a single detailed assessment, albeit split into parts, and it is one which is a long way from concluding. The point raised by the Claimant is not one that has been raised after close of evidence (as at a trial) or in any circumstances where, in order to hear it, there will be a need to recall witnesses or hear fresh evidence. It is a pure point of law, applied to essentially undisputed facts;

56. There was some delay in making the point. That is, at least partly explained by the fact that this is an unusual point of law upon which advice was not received until after 9 February 2021. (An earlier contention by the Claimant that this was a response to a late development of the fourth Defendant's case was, rightly, not pursued by Mr Mallalieu).

57. Once the point was identified it was timeously raised. It has been raised and set out in detail since March 2021. The fourth Defendant has not indicated any inability to respond to the point, or that the timing of the raising of the point has made it impossible to adduce any evidence or argument upon which he would wish to rely. Beyond having to address the point, the fourth Defendant can point to no prejudice at all. Having to address a point of law cannot, of itself, be prejudice.

58. The point is precisely the sort of point that can arise during the course of a detailed assessment. It is precisely the sort of point that a court may feel obliged to raise of its own motion if it spots it.

59. The point plainly has merit. In such circumstances, it would plainly be unjust to not allow the point to be taken. In fact, now the point has been identified it would be wrong for the Court to allow costs to be recovered which breach the indemnity principle.

60. The decision on hourly rates is no bar to this. If this assessment had concluded, and the Claimant was only pursuing this point as part of an appeal, it is accepted that the Claimant would face the usual, but not insignificant, hurdle or persuading an appellate court why it should be allowed to pursue a new point on appeal. This is not that scenario.

61. To allow the fourth Defendant to take payment in breach of the indemnity principle would not merely be a breach of that principle, but would result in fourth Defendant's solicitor acting in breach of an express statutory bar, at section 28 of the Legal Aid, sentencing and Punishment of Offenders 2012 ("LASPO") and regulation 9 of the Criminal Legal Aid (Remuneration) Regulations 2013, on taking such payment. It would be an unlawful act.

62. If (which is not accepted) the Claimant's approach to the hourly rate argument is said to have involved some implied concession that the indemnity principle was satisfied, then there is no bar in any event to the Court permitting the Claimant to resile from that concession if, in all the circumstances, it would be just to allow the Claimant to do so. For the reasons given, it would plainly be just.

63. This point is an interesting and novel point of law, potentially of wider importance. It is capable of fair and just determination in these proceedings by this Court, which is a specialist tribunal. It is a point which, if not determined by this Court, the Claimant

would seek permission to argue in an appellate court, which is likely to be much assisted by a first instance determination of the point.

64. There is and should be no bar to the point being substantively argued and the interests of justice would be far better served by it being argued. There is no prejudice to the fourth Defendant other than that, if the point is correct, he will not be able to recover costs which breach the indemnity principle, something he should never have sought to do in the first place. The parties are prepared and able to argue the point and should do so.

Whether the Claimant Should Be Permitted to Raise the Indemnity Principle Point: Conclusions

65. The authorities to which I have been referred seem to me to refer to two discrete, if overlapping, principles that have been applied in different proceedings between the same parties. The first is issue estoppel. I understand this to be the principle that even where the cause of action in later proceedings is not the same as it was in an earlier one, an issue which is necessarily common to both was decided on the earlier occasion and is in consequence binding on them. The second is the rule against *Henderson* abuse (after *Henderson v Henderson* [1843] 3 Hare 100), which I understand to preclude a party from raising in subsequent proceedings matters which were not, but could and should have been, raised in the earlier proceedings.

66. *Arnold v NWB* confirmed that issue estoppel constitutes a complete bar to relitigation between the same parties of a decided point, and that it extends to a point that might have been, but was not, raised earlier. Its operation could however be prevented in special circumstances, and where further material became available which was relevant to the correct determination of a point involved in earlier proceedings but could not, by reasonable diligence, have been brought forward in those proceedings, such an exception arose.

67. It has not been suggested that those are the only circumstances in which such an exception might arise. In his judgment (page 292 H) Lord Keith quoted Lord Upjohn in *Carl Zeiss Stiftung v Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853:

> "All estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind."

68. It seems me that *Tannu v Moosajee*, *BT Pension v BT Telecom* and *Daewoo v Songa* establish that the *Henderson* abuse principle, rather than issue estoppel, can apply within the same action. The only authority to which I have been referred that supports the proposition that this is also true of issue estoppel is the judgment of Mr Justice Coulson (as he then was) in *Seele Austria GmbH Co v Tokio Marine Europe Insurance Limited* [2009] EWHC 255 (TCC), as analysed in some detail by Mrs Justice Jefford DBE in *Daewoo v Songa*.

69. Having found that an issue which the claimant in *Seele* wished to raise by way of amendment had already been determined at a trial and on appeal, Coulson J said (at paragraphs 91-92):

> "91. The final point is whether the fact that this debate has arisen at a later stage of the same proceedings, rather than in subsequent proceedings, makes any difference to the issue estoppel argument.
>
> 92. In my judgment, there will be cases where the fact that the issue estoppel argument arises at a later stage of the same proceedings may constitute a 'special circumstance' of the type envisaged in *Arnold*. I am conscious that the CPR encourages the parties and the court to try and find ways in which the underlying disputes between the parties can be resolved in the quickest and most cost-effective way possible, having regard to the overriding objective. This means that there has been an increase in the number of cases which are resolved by way of preliminary issues, sub-trials and the like. In those circumstances, it is possible to see how a potential issue might slip completely through the net early on, and be decided as it were by default, only for it to become of great significance and relevance at a later date. In such circumstances, I could see that a court may baulk at the potentially draconian consequences of the issue estoppel principle...".

70. Having found that *Seele* was not such a case, Coulson J went on, on the express assumption that issue estoppel had no application, to address the question of whether the amendment would fall foul of the *Henderson* abuse principle. At paragraphs 21 to 27 of his judgment he helpfully summarised some of the authorities and the *Henderson* principles to which I have been referred by the parties in this case:

> "21. The decision in *Henderson v Henderson* is authority for the proposition that the court "will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case".
>
> 22. In *Johnson v Gore Wood and Co* (a Firm) [2002] 2 AC 1, Lord Bingham restated these similarities between issue estoppel and Henderson abuse as follows:
>
> > 'The underlying public interest is the same; but there should be finality in litigation and that a party should not be twice vexed in the same manner. This public interest is reinforced by the current emphasis on efficiency and economy in the context of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse of the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it were to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the abuse proceedings involves what the court regards as unjust harassment of a party. It is however wrong to hold that because the matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in

> later proceedings necessarily abusive. That is to adopt too dogmatic approach to what in my opinion should be broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question, whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'

23. On a closer analysis, it can be seen that some of the elements of Henderson abuse are rather different to those arising under issue estoppel. For example, the principle is not, on any view, limited to the ingredients of a cause of action. In addition, the requirement that, in order for a finding of Henderson abuse, there needs to be a "broad merits-based judgment" means that the court must consider all the circumstances when analysing whether it is an abuse for a party now to raise an issue that it could have raised in either previous proceedings or in an earlier stage of the current proceedings. In addition, there will rarely be a finding of abuse without the court deeming the subsequent claim to amount to unjust harassment or oppression.

24. Thus, the mere fact that the issue could have been raised before, but was not raised, will not, of itself, amount to Henderson abuse. A finding that an issue could have been raised is not the same as whether, in the round, that issue should have been raised: see *Dexter v Vlieland-Boddy* [2003] EWCA 14 and *Aldi Stores v WSP Group Plc* [2007] EWCA Civ 1260.

25. Another example of this principle is the decision of the Court of Appeal in *Tannu v Moosajee* [2003] Civ 815... In *Tannu*, there was a trial of liability at which the judge concluded that there was a partnership between the parties pursuant to which the claimant had paid the defendant the sum of £110,000. He dissolved the partnership and ordered the taking of accounts. During that process, the defendant alleged that the money had been paid to her in exchange for 50% of the partnership, to do with as she pleased. The claimant denied that, and asserted that the £110,000 was a capital contribution to the partnership, maintaining that the defendant was estopped from alleging that the £110,000 had been paid in exchange for 50% of the partnership. The Master agreed that the judge's findings at the liability hearing meant that the defendant could not deny that the sum was a capital contribution, but Lloyd J found that, because he had failed to raise the issue of capital contribution in response to the defendant's defence and/or at the first trial, the claimant was prevented by the principles of Henderson abuse from denying that the £110,000 was the purchase price for a half-share in the partnership.

26. The Court of Appeal allowed the appeal, concluding that the claimant was not prevented from raising the contribution issue because, at the original trial, "neither party addressed evidence or argument which was directed specifically to the question of the terms of the partnership. Despite the fact that there are passages in the judgment of Judge MacDuff QC in which he appears to be dealing with the basis on which the £110,000 was paid, I am satisfied that he did not in fact decide that issue": see the judgment of Dyson LJ at paragraph 35. He went on to say that it was always possible that, if the

> taking of accounts was ordered, that might give rise to issues as to the terms of the partnership itself.
>
> 27. I consider that *Tannu* is also important for two other reasons. First, the Court of Appeal expressly recognised that Henderson abuse could apply to the later stages of the same litigation, although they expressed the view that such a situation was "unusual". It seems to me that there is no reason in principle why Henderson abuse should not be applicable, just like issue estoppel, to the later stages of the same action. It is however no more than common sense to observe that it might be significantly easier for a party facing a Henderson abuse allegation to defeat it if the point arose for decision in the same proceedings, rather than in a subsequent action, for the reasons explained by the Court of Appeal in *Tannu*."

71. At paragraph 118 of her judgment in *Daewoo v Songa*, Mrs Justice Jefford DBE quoted Mr Justice Andrew Baker in *Gruber v AIG Management France SA* [2019] EWHC 1676 (Comm) (at paragraph 11) on *Henderson* abuse:

> "g. The doctrine is not restricted to cases where the alleged abuse comes in a separate, later action. It is possible to conclude that a claim or defence not initially raised ought properly, if it was raised at all, to have formed part of an earlier stage within a single action at which at least some matters were finally determined.
>
> h. It is a strong thing to shut out pursuit of a point not actually decided previously against the party raising it; and it may be an even stronger thing to do so in relation only to different stages of a single action. I would though add, as to the latter, that much may depend on the nature of the stages involved. Here, the parties had their final trial of all issues, not merely, for example, a decision on preliminary issues or a summary judgment decision on some particular claim or defence or a final determination of an individual point as part of dealing with some other interlocutory application. If the doctrine be available, as indeed it is, in the context of a single set of proceedings, the potential for it to apply on the facts where those are the circumstances plainly may arise more readily than during the interlocutory life of the process."

72. In *BT Pension v BT Telecom* Mr Justice Mann considered an attempt by a party to raise an issue which amounted to resiling (with very significant financial implications) from a concession previously made in part 1 of complex and substantial proceedings, upon the outcome of which further decisions could be made in Part 2.

73. In arriving at the conclusion that this amounted to *Henderson* abuse, in raising a point that could and should have been raised earlier, he accepted that the position was analogous to that which obtains where a party seeks to change position between a first hearing and an appeal, and he followed the guidance of the authorities as to the circumstance in which that should or should not be permitted. At paragraphs 43 and 44 of his judgment (referring in particular to *Paramount Export Ltd v New Zealand Meat Board* [2004] UKPC 45 and the judgment of Arden LJ in *Crane v Sky-In-Home Ltd* [2008] EWCA Civ 978) he summarised the guidance in this way:

> "44. … i) The resiling party has the burden of establishing that the previously forgone point should be raised.
>
> ii) It will be harder to raise a point which has been expressly conceded.
>
> iii) If taking the point would risk causing prejudice to the other party, in the sense that it might have been deprived of the opportunity of dealing with the case differently in the court below, then it is unlikely that resiling will be allowed. The greater the risk, the less likely it is that it will be allowed.
>
> iv) There is a low threshold of risk for these purposes (see "any possibility" in *Paramount*).
>
> v) The burden of establishing no risk is on the party who wishes to withdraw the concession, and the other party should have the benefit of any doubt in this area.
>
> 45. Those are the general principles. In paragraph 22 of her judgment Arden LJ gave some instances of the sort of specific factors which the court might take into account in allowing a conceded point to be taken…"

74. Paragraph 22 of Arden LJ's judgment in *Crane*, as referred to my Mann J, reads:

> "22. The circumstances in which a party may seek to raise a new point on appeal are no doubt many and various, and the court will no doubt have to consider each case individually. However, the principle that permission to raise a new point should not be given lightly is likely to apply in every case, save where there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet (see *Pittalis v Grant* [1989] QB 605). (If the point succeeds, the losing party may be protected by a special order as to costs.) Sometimes a party will seek to raise a new point because of some other development in the law in other litigation, which he could not fairly have anticipated at the time of the trial. In some cases, the court may wish to take into account the importance of the point raised. Likewise, in the Paramount case cited by Mr Macpherson, one of the factors which influenced the Privy Council was the fact that it was in the public interest to allow a public body, which would otherwise end up liable to pay large sums, to raise on appeal a point of construction involving no new evidence."

75. I have made a finding as to the hourly rates recoverable by the fourth Defendant's solicitors. That finding was however made absent any argument to the effect that the cost recoverable by the fourth Defendant must be limited, by virtue of the indemnity principle, to the amounts payable by the LAA. (Although there have been some changes in the way the Claimant has taken the point, the underlying issue is the same). The approach I must take is therefore that appropriate to an issue that has not been raised before, rather than an issue that has already been raised and determined. Bearing that in mind, and in the light of the authorities to which I have been referred, I have drawn the following conclusions.

76. As I have observed, *Arnold v NWB* furnishes authority for the proposition that issue estoppel can apply to a point that could have been, but was not, raised before. Issue estoppel is however, at least arguably, a principle that is limited to the ingredients of a cause of action. If it is, it is not evident to me that it has any application to an objection raised as to the amount to be recovered under an order for costs.

77. Insofar as the principle has any application, the fact that the new point is raised in the same proceedings, as opposed to later proceedings, may, as Coulson J observed, in itself be a special circumstance. One would in any event take a less rigid approach to its application in those circumstances. If there is any specific guidance on what that less rigid approach should be, I have not been referred to it.

78. The rule against *Henderson* abuse has a much more obvious application to this case and there is ample guidance, among the authorities to which I have been referred, on its application. The appropriate approach is the *Johnson v Gore Wood* approach.

79. In taking that approach, I should, in line with Mann J's judgment in *BT Pension v BT Telecom*, keep in mind the principles applicable to allowing new points on appeal.

80. It seems to me tolerably clear that the Claimant is not in a position to argue that the circumstances have changed simply because advice was received, after hourly rates were determined on 9 February 2021, to the effect that the hourly rates claimed by the fourth Defendant's solicitors were open to challenge on the indemnity principle. It cannot be said that the point could not, with reasonable diligence, have been raised earlier.

81. Similarly, the proposition that the court was in any way misled by the fourth Defendant, simply because he claimed hourly rates that are inconsistent with the proposition that his recoverable costs are limited to those payable by the LAA, seems to me to be insupportable. It is and remains the fourth Defendant's position that he is entitled to recover the hourly rates claimed. Neither the court nor the Claimant has been misled in any way.

82. Both parties have argued that if I find against them on allowing the point to be raised, they will be unfairly prejudiced. I do not think that prejudice is a real issue. The obvious difficulty with the Claimant's suggestion that the fourth Defendant would receive a windfall if hourly rates are not revisited, is that the fourth Defendant, for the period in which he was in receipt of legal aid, has no financial interest in the recovery of the costs awarded to him.

83. Nor am I convinced by Mr Newman's argument that the fourth Defendant will be unfairly prejudiced by a new indemnity principle argument. I accept that his legal representatives may, reasonably, have evaluated the claim for costs, and approached any question of settlement, on the basis of what was understood from the outset to be conceded. That can be said of any new point taken in the course of detailed assessment proceedings. If the timing of any new point has undermined the party's negotiating position, then it will be possible to compensate for that in costs.

84. It seems to me, applying the *Johnson v Gore Wood* approach, that it must be right to allow the Claimant to raise the point now, for these reasons.

85. First, there is Mr Mallalieu's argument that to shut out the point now could result in the fourth Defendant's receiving costs in breach of the indemnity principle and unlawfully. It is not necessary to assume that the Claimant is right, or to predetermine the issue, to recognise that the point needs to be addressed. If the Claimant's arguments prevail, then a breach of the indemnity principle and an unlawful payment will be avoided. If they do not, the fourth Defendant's position will be unaffected.

86. Second, the issue is not going to go away. It applies not just to the hourly rates recoverable by the fourth Defendant's solicitors, but equally to counsel's fees, which have not yet been determined and are some way from being determined. It seems to me that it would be wrong to prevent the Defendant from raising what could be an important point in relation to counsel's fees at a point when the level of counsel's fees has yet to be addressed, in particular where not to do so might facilitate a breach of the indemnity principle and the receipt of an unlawful payment.

87. Even if I did refuse to allow the argument to be raised in relation to counsel's fees, it could be raised again, without the court's permission, on the summary assessment of the fourth Defendant's costs of the assessment. It has not been determined yet whether the fourth Defendant will receive his costs of the detailed assessment proceedings, but if he does it will be open to the Claimant to raise any point it wishes to raise on the assessment of those costs, and in that event, inevitably, the indemnity principle point will fall to be determined.

88. The indemnity principle point is a point of law. It does not require the introduction of evidence, nor any bearing on evidence that has already been given. Allowing it to be heard now does not have any impact upon the way in which the case has been conducted to date, or at least no impact that cannot be adequately compensated in costs. The fourth Defendant has not been denied the opportunity to make his case as well as he can. There is no question of unjust harassment or oppression.

89. All of that, applying the *Johnson v Gore-Wood* test, leads to the conclusion that it would be wrong in all the circumstances to conclude that the Claimant is misusing or abusing the process of the court by seeking to raise now an issue which the Claimant could have raised before.

90. Insofar as issue estoppel might apply, I bear in mind the observations of Coulson J in *Seele Austria*. The new point is being raised in the same proceedings, not in subsequent proceedings between the same parties. That might in itself constitute special circumstances and at least requires that the principle should not be applied rigidly. Even if I were to apply the principle strictly, the concerns identified by Mr Mallalieu as to breach of the indemnity principle and unlawful payment would seem to me to furnish special circumstances which would justify allowing the point to be raised.

91. As a footnote I should add that although some of the submissions I have heard and the evidence I have considered touch upon the relevant principles, I do not believe that I have been referred to any of the authorities on the appropriate exercise of the court's power to vary an order under CPR 3.1(7). In the course of preparing this judgment, I give some thought to whether I should invite further submissions in that respect. I concluded that it is unlikely that the parties could add anything pertinent to what they have already said, and that to do so would only delay this judgment.

92. To be clear, however, my view is that the fact that my order of 9 February 2021 recorded the finding as to the hourly rates payable to the fourth Defendant's solicitors was really a matter of administrative convenience. The court's findings to date were recorded in an order for ease of reference, but findings made in the course of detailed assessment proceedings are not normally embodied in orders. They are simply noted by the parties and the court before they move on to other matters.

93. Although on its face the order of 9 February 2021 awarded given hourly rates, it would be a triumph of form over substance to treat it as a final order in continuing detailed assessment proceedings where, (until those proceedings have concluded) there is no prohibition upon amending points of dispute, unless the court chooses to impose one.

94. If that is wrong, and it should be treated as a final order, then for the reasons I have already given I am of the view that the circumstances of this case are so out of the ordinary as nonetheless to justify variation.

The Indemnity Principle and the Fourth Defendant's Costs: Statutory and Contractual Provisions

95. I have been referred to a number of statutory provisions, and to contractual provisions from the standard contracts between the LAA and solicitors who undertake legally aided civil or criminal work. I will set them out here. (References to "the Act" in the secondary legislation and the contractual provisions are to LASPO).

96. Before doing so I should mention that the hearing bundle includes the 2010 Civil Specification and some of Mr Newman's submissions refer to the relevant paragraphs of the 2010 Civil Specification. As Mr Mallalieu says, the 2013 Civil Specification would seem to be the correct one, and I have referred to that. There is no material difference in the relevant provisions. Only the numbering of some paragraphs varies.

97. Section16 of the Prosecution of Offences Act 1985 confers upon the Magistrates Court, the Crown Court, the Divisional Court of the Queen's Bench Division, the Court of Appeal (Criminal Division) and the Supreme Court (when exercising criminal jurisdiction) the power to make costs orders in favour of those acquitted in criminal proceedings.

98. Section 16(6):

> "(6) A defendant's costs order shall, subject to the following provisions of this section, be for the payment out of central funds, to the person in whose favour the order is made, of such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings."

99. Part I of LASPO is, expressly, dedicated to "Legal Aid". Section 8(3):

> "In this Part 'civil legal services' means any legal services other than the types of advice, assistance and representation that are required to be made under sections 13, 15 and 16 (criminal legal aid)".

100. Section 23(1) of LASPO:

> "An individual to whom services are made available under this Part is not to be required to make a payment in connection with the provision of the services, except where regulations provide otherwise."

101. Section 28(2) of LASPO:

> "A person who provides services under arrangements made for the purposes of this Part must not take any payment in respect of the services apart from—
> (a) payment made in accordance with the arrangements, and
> (b) payment authorised by the Lord Chancellor to be taken."

102. Regulation 21, (1)-(3) of the Civil Legal Aid (Costs) Regulations 2013 ("the Civil Costs Regulations"):

> "(1) Subject to paragraphs (2) to (4), the amount of costs to be paid under a legally aided party's costs order or costs agreement must be determined as if that party were not legally aided.
>
> (2) Paragraph (3) applies only to the extent that the Lord Chancellor has authorised the provider under section 28(2)(b) of the Act to take payment for the civil legal services provided in the relevant proceedings other than payment made in accordance with the arrangements.
>
> (3) Where this paragraph applies, the amount of costs to be paid under a legally aided party's costs order or costs agreement is not limited, by any rule of law which limits the costs recoverable by a party to proceedings to the amount the party is liable to pay their representatives, to the amount payable to the provider in accordance with the arrangements..."

103. Regulation 2 of the Civil Costs Regulations defines "legally aided party":

> "…an individual or legal person to whom, in relation to relevant proceedings, civil legal services have been made available under Part 1 of the Act".

104. Paragraph 1.39 of the Civil Specification:

> "This Paragraph represents our authority pursuant to section 28(2)(b) of the Act, for you to receive payment from another party under a Client's costs order or Client's costs agreement (as defined in Legal Aid Legislation) and to recover those costs at rates in excess of those provided for in this Contract or any other contract with us. This applies in respect of both Licensed and Controlled Work and applies also to costs recovered in respect of Counsel's fees. It also applies notwithstanding any Costs Limit on a Certificate in Licensed Work cases."

105. Paragraph 6.45 of the Civil Specification:

> "Where a Client's costs order or Client's costs agreement has been made you may in addition to the costs under that order or agreement ("inter partes costs") claim from us your Legal Aid only costs, as defined by Paragraph 6.52, at the rates specified in the Remuneration Regulations."

106. Paragraph 6.51 of the Civil Specification defines "Legal Aid only costs", broadly speaking, as costs that are not recoverable from the other party.

107. Regulation 8, paragraphs (1) and (2) of the Criminal Legal Aid (Remuneration) Regulations 2013 ("the Criminal Remuneration Regulations"):

> (1) This regulation applies to…representation pursuant to a section 16 determination in proceedings prescribed as criminal proceedings under section 14(h) of the Act…
>
> (2) Claims for fees in cases to which this regulation applies must—
>
> (a) be made and determined in accordance with the 2010 Standard Crime Contract; and
> (b) be paid in accordance with the rates set out in Schedule 4…"

108. Regulation 9 of the Criminal Remuneration Regulations:

> "Where representation is provided in respect of any proceedings, the representative, whether acting pursuant to a section 16 determination or otherwise, must not receive or be a party to the making of any payment for work done in connection with those proceedings, except such payments as may be made—
>
> (a) by the Lord Chancellor; or
>
> (b) in respect of any expenses or fees incurred in—
>
> (i) preparing, obtaining or considering any report, opinion or further evidence, whether provided by an expert witness or otherwise; or
>
> (ii) obtaining any transcripts or recordings,
>
> where an application under regulation 13 for an authority to incur such fees or expenses has been refused by a committee appointed under arrangements made by the Lord Chancellor to deal with, amongst other things, appeals of, or review of, assessment of costs".

109. Paragraph 1.2 of the Standard Crime Contract Specification 2010 ("the Criminal Specification"):

> "This Specification set out the rules under which criminal Legal Aid services must be carried out by you and Service Standards applicable to you. The rates and procedures governing payment for the work, which you must abide by are referred to in this Specification and can be found in Legal Aid Legislation."

110. Paragraph 1.4 of the Criminal Specification:

> "This Specification only covers criminal Legal Aid in the Criminal Category as divided by (a) Classes of Work and (b) Units of Work. For the avoidance of doubt, Crown Court work is included within the scope of this Contract. The Service Standards in Section 2 of this Specification apply to you when undertaking Crown Court work and the remuneration provision for this work are contained in the Criminal Remuneration Regulations and must be complied with."

111. Definitions from paragraph 1.13 of the Criminal Specification include:

> '"Criminal Proceedings" has the meaning given in section 14 of the Act and regulation 9 of the Criminal Legal Aid (General) Regulations 2013…
>
> "Prescribed Proceedings" means proceedings which have been prescribed by Regulations as criminal for the purposes of Legal Aid by virtue of section 14(h) of the Act and are listed under regulation 9 of the Criminal Legal Aid (General) Regulations 2013."

112. Paragraph 8.10 of the Criminal Specification:

> "In accordance with s.28(2) of the Act, where an agreement or order provides for costs to be paid by any other party in favour of a Client for whom you have been providing Representation in the High Court, Crown Court or magistrates' court under this Contract then you may retain the element of any costs recovered under that agreement or order which exceeds the amount paid or payable to you by us in relation to the relevant dispute or proceedings under the terms of this Contract."

113. Paragraphs 8.50 to 8.53 of the Criminal Specification:

> "8.50 Subject to Paragraph 8.52 below, you must not charge a fee to the Client or any person for the services provided under this Specification or seek reimbursement from the Client or any other person for any Disbursements incurred as part of the provision of such services. This Paragraph does not apply to services you provide which cannot be paid under this Contract or the Act, but which are in connection with a Matter or Case.
>
> 8.51 Where you have been carrying out Contract Work on behalf of a Client, you may not accept instructions to act privately in the same matter from that Client unless the Client has been first advised by you in writing of the consequences of ceasing to be in receipt of services and as to the further services which may be available under criminal Legal Aid, whether from you or another Provider, (including the possibility of an extension of the limit for Advice and Assistance or Advocacy Assistance, an application for Representation or the availability of Advocacy Assistance or the Duty Solicitor) and has nevertheless elected to instruct you privately.
>
> 8.52 Where an application for prior authority for costs to be incurred under a determination has been refused and the Client has expressly authorised you to: -

> (a) prepare, obtain or consider any report, opinion or further evidence, whether provided by an expert witness or otherwise; or
>
> (b) obtain or prepare any transcripts or recordings of any criminal investigation or proceedings, including police questioning; or
>
> (c) instruct Counsel other than where an individual is entitled to Counsel (as may be determined by the court) in accordance with regulation 16 and 17 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013,
>
> then Paragraph 8.50 will not apply to payment by the Client on a private basis for that work.
>
> 8.53 You must not charge the Client for the provision of Contract Work or seek payment of Disbursements incurred from the Client unless an exception under this Contract applies. All payments for Contract Work must come through us. You cannot be retained to act for the Client in the same Matter or Case under this Contract and on a privately paying basis at the same time. Where a Client elects to instruct you privately in relation to a Matter or Case in which you have been providing Contract Work, a copy of the letter dealing with the requirements of Paragraphs 8.50 to 8.53 must be kept on the file."

114. Paragraph 1.5 of the Criminal Specification states "You may undertake only the following Units of Work…" and lists specific categories ("Units") of work within classes such as criminal investigations, criminal proceedings and appeals. The "units" include representation in "Prescribed Proceedings" (as defined in paragraph 1.13 above) in the Crown Court and representation in the High Court or County Court, but do not specifically include representation in "Prescribed Proceedings" in the High Court.

115. Detailed contractual terms for representation in the High Court or County Court are to be found at paragraphs 10.152 to 10.163 of the Criminal Specification. They include these provisions:

> 10.152 This Unit of Work covers only civil proceedings in the High Court or (if approved in advance by us) the county court in any proceedings arising from Criminal Proceedings except bail proceedings, appeals by way of case stated or Associated Civil Work. You must obtain Prior Authority from us to undertake work under this Unit of Work.
>
> 10.153 This Unit of Work covers civil proceedings that may be regarded as incidental to Criminal Proceedings (e.g. an application to obtain papers from a civil case that are relevant to Criminal Proceedings).
>
> 10.156 The procedures under this Specification for the Assessment of remuneration for Representation under this Unit of Work are the same as those contained in section 6 of our 2013 Standard Civil Contract specification and Prior Authority may be applied for and granted in accordance with this Unit of Work.

> 10.157 You must claim for work undertaken under this Unit of Work at the rates specified in the **Criminal Remuneration Regulations**.
>
> 10.158 The remuneration provisions which govern this work are the same as those rates (including enhanced rates) which are payable for Legal Representation in accordance with the civil Specification.
>
> 10.162 Where we consider (taking into account all the relevant circumstances of a Case), that the exceptional circumstances of a Case mean that the rates set out in the **Criminal Remuneration Regulations** would not provide reasonable remuneration for some or all of the work allowed, we may allow such amounts as appear to us to be reasonable remuneration for the relevant work."

116. It is not in issue that the committal proceedings in respect of which the fourth Defendant has an order for costs against the Claimant are "Prescribed Proceedings", prescribed as criminal proceedings under section 14(h) of LASPO and that paragraph 7 of Schedule 4 to the Criminal Remuneration Regulations sets the rates and fees to be paid by the LAA for representation in Prescribed Proceedings. Paragraph 7(2) sets hourly rates and fixed fees for representation in the High Court. The question is whether the fourth Defendant is entitled to recover from the Claimant costs in excess of the rates and fees set by paragraph 7(2).

The Indemnity Principle and the Fourth Defendant's costs: the Claimant's Submissions

117. The fourth Defendant has been awarded his costs of the committal proceedings against the Claimant on the standard basis. They fall to be assessed that basis, by reference to the principles set out at parts 44-47 of the CPR. Recovery of costs under the CPR is subject to the indemnity principle.

118. An immediate and obvious indemnity principle problem arises in legal aid cases. Solicitors cannot be privately paid. In accordance with long standing provisions over many years, now to be found in sections 23 and 28 of LASPO, an individual in receipt of services funded by legal aid is not to be required to make any payment, and a provider must not take any payment in connection with the provision of those services except where regulations expressly so permit.

119. In short, a solicitor cannot charge a client for legal aid funded services. Except in certain limited circumstances, the client has no liability for costs. It follows that, where an order for costs is made under the CPR against a litigation opponent, there is nothing for the opponent to indemnify.

120. In civil cases, long-standing provisions exist to ensure that a funded party can recover costs ordered against an opponent without breaching the indemnity principle. The current version is to be found in Regulation 21 of the Civil Costs Regulations.

121. Mr Mallalieu emphasises the importance of the constituent parts of Regulation 21, particularly when comparison comes to be made to criminal legal aid.

122. Regulation 21(2) is, he submits, intended to reflect s.28(2) of LASPO in preventing a service provider taking any payment for funded services except as permitted by the "arrangements" (defined in the Civil Regulations as arrangements made by the Lord Chancellor under section 2 of LASPO) or authorised by the Lord Chancellor.

123. Such authorisation is provided by paragraph 1.39 of the Standard Civil Contract Specification in general civil cases. The LAA, on behalf of the Lord Chancellor, authorises the solicitor to take payment other than from the LAA (though not from the funded party).

124. Paragraph 1.39, Regulation 21(2) and any authorisation given by reference to them do not themselves disapply the indemnity principle. They simply set the circumstances in which the solicitor will be entitled to take payment if the indemnity principle is lifted.

125. If there was no further provision providing for the lifting of the indemnity principle, Regulation 21(2) would, submits Mr Mallalieu, take matters nowhere. The solicitor would be entitled to take payment other than from the LAA, but the client would have no liability and therefore there would be nothing (beyond LAA costs) to recover.

126. This, he says, is where Regulations 21(1) and 21(3) come in. Together, they lift the indemnity principle, but only (as Regulation 21(2) provides) to the extent that the Lord Chancellor has given authorisation for the provider to take payment. Regulation 21(2) is a condition on the lifting of the indemnity principle by Regulation21(3), not a lifting of the indemnity principle itself.

127. The three provisions work together. Regulations 21(1) and 21(3) alone would not help the solicitor. They would lift the indemnity principle, but s.28 would still prevent the solicitor taking payment for funded services other than from the LAA. Regulation 21(2) alone would not help. It would allow the solicitor to take payment, but there would be no additional payment to be taken without lifting the indemnity principle. It is the operation of all three together that allow routine recovery and retention, under orders for costs in legally aided civil proceedings, of costs in excess of those the LAA is liable to pay, despite the absence of any client liability.

128. The fourth Defendant's legal aid was provided under section 16 of LASPO, so he is not a "legally aided party" as defined in Regulation 2 of the Civil Costs Regulations. The legal services provided to the fourth Defendant do not fall within section 8(3) of LASPO, which excludes representation under section 16. It follows that the fourth Defendant is not within the compass of Regulation 21 of the Civil Costs Regulations. He cannot rely on Regulation 21(1) and 21(3) to disapply the indemnity principle. He needs to find such disapplication elsewhere, and it is the Claimant's case that it is not to be found.

129. It is not in dispute that the relevant regulations for the purposes of the fourth Defendant's funding are the Criminal Legal Aid (General) Regulations 2013 ("the Criminal General Regulations") and the Criminal Remuneration Regulations.

130. There is nothing in the Criminal General Regulations, says Mr Mallalieu, that addresses the indemnity principle. The closest equivalent provision is Regulation 9 in the Criminal Remuneration Regulations. However, its terms are starkly different and do not, submits Mr Mallalieu, assist the fourth Defendant. It permits the legal

representative to receive payment from the Lord Chancellor, and in addition any expenses or fees incurred in preparing, obtaining or considering any report, opinion or further evidence, or obtaining any transcripts or recordings. The point, says Mr Mallalieu, is to provide that the legal aid representative can be party to payment in respect of costs incurred as a result of the client agreeing to pay privately for aspects of the case (essentially, expenses) following an express refusal by the LAA of authorisation for that cost.

131. There is no provision at Regulation 9 for costs recoverable from a third party as a result of any disapplication of the indemnity principle. Nor is there any equivalent in the Criminal Remuneration Regulations to Regulation 21(1) and (3) in the Civil Costs Regulations.

132. This is consistent with the Criminal Specification, in which there is no wholesale disapplication of the indemnity principle, nor any related lifting of the prohibition on taking payment other than from the LAA.

133. The different approach and effect are flagged up by the differing terms used in the Civil and Criminal specifications. Paragraph 8.10 of the Criminal Specification simply indicates that the solicitor is entitled to retain any costs received which exceed the amount paid by the LAA. It satisfies the core basic purpose of authorisation. Paragraph 1.39 of the Civil Specification again satisfies the purpose of authorisation, but further reflects the understanding that in civil legal aid cases, by virtue of express statutory provision in Civil Costs Regulations 21(1) and (3), the solicitor has also been permitted to "recover those costs at rates in excess of those provided for in this Contract".

134. The purpose of paragraph 8.10 of the Criminal Specification is to work alongside Regulation 9 of the Criminal Remuneration Regulations. Otherwise, a solicitor is totally barred from taking any payment other than from the LAA in respect of the entirety of the criminal proceedings. Without Regulation 9 and paragraph 8.10, if there was an expense in respect of the proceedings which the LAA refused to fund, but the client funded privately (perhaps on terms that the solicitor would pay it as a disbursement pending conclusion of the case) and the case was won, section 28 of LASPO would prevent the solicitor from recovering that cost from the opponent under a costs order.

135. By virtue of Regulation 9 and Clause 8.10, the solicitor is empowered to recover that expense. This is consistent with the most common form of costs order made in criminal proceedings: Defendant Costs Orders under section 16 of the Prosecution of Offences Act. The words 'properly incurred' in section 16(6) are consistent with the continued application of the indemnity principle, not its disapplication.

136. Further confirmation of this may, says Mr Mallalieu, be seen from paragraphs 8.50 to 8.53 of the Criminal Specification. Under paragraph 8.50 a solicitor in a criminal legal aid funded case is again prohibited from charging his client privately for any services or disbursements in respect of the whole proceedings, subject only to 8.52, which disapplies paragraph 8.50 in respect of payment expressly authorised by the Client on a private basis for specified, limited kinds of work and expenses. That echoes the provisions of Regulation 9.

137. The whole intention of the Criminal Remuneration Regulations and the Criminal Specification, submits Mr Mallalieu, is not to disapply the indemnity principle. There

is no provision for doing so and no indication of an intention to do so. On the contrary, it is effectively an affirmation of the indemnity principle. The solicitor may not be paid, save by the LAA or, where the LAA has refused to fund an expense and the client has authorised the solicitor to incur that expense, by recovering that expense, including from an opponent under a costs order.

138. That is why some authorisation to accept funds beyond funded sums is provided for. It is however only that limited authorisation, and not any provision lifting the indemnity principle, which is provided for.

139. Mr Mallalieu submits further that the continued operation of the indemnity principle and the lack of abrogation of it in criminal cases is entirely logical. It would be highly surprising if there was any legislative intention to disapply it. The majority of prosecutions are state prosecutions. The majority of failed prosecutions where a costs order is made result in an order for costs out of central funds. A general disapplication of the indemnity principle in criminal legal aid would mean the government was intentionally creating a situation where it would fund the defence at legal aid rates, but if it lost the case would expose itself to paying the same solicitors at full (reasonable) commercial rates. This would be entirely contrary to the whole legislative thrust of government criminal legal aid policy over many years.

140. The indemnity principle point here is a point of general application to all criminal legal aid cases. It is not limited to the oddity created in contempt cases where civil proceedings receive criminal legal aid. In criminal cases generally (which is what this legal aid legislation is directed at) any concept of solicitors being paid higher fees if they win than if they lose would be contrary to the public policy embodied in 58A of the Courts and Legal Services Act 1990 (discussed in more detail below, in the context of the Claimant's retainer agreement with its solicitors). That would be the effect of the disapplication of the indemnity principle in criminal cases.

141. Mr Mallalieu makes the further point that it is not in fact entirely clear if the fourth Defendant is entitled to recoup anything on behalf of the LAA. The criminal legal aid regime does not appear to be set up on the assumption that there will be routine state recoupment of legal aid from third party opponents. Third party opponents are rare and allowing for legal aid recoupment under Defendant Costs Orders would simply result in a costly process of one arm of the state paying another. However, for present purposes, the Claimant is prepared to concede what he describes as "the legal fiction" that payment by the LAA satisfies the indemnity principle in criminal legal aid cases.

The Indemnity Principle Point: The Fourth Defendant's Submissions

142. Mr Newman submits that Mr Justice Garnham's order of 5 October 2018 was for the Claimant to pay the Fourth Defendant's costs of defending the proceedings against him, to be assessed on the standard basis in default of agreement, and so pursuant to the relevant provisions of the CPR. The Claimant did not argue before Garnham J for costs to be assessed by reference to the LAA rates or on any other basis. If the Claimant disagreed with that order, it should have sought to vary the order or sought leave to appeal. It did neither.

143. He observes that the "Units of Work" listed at paragraph 1.5 of the Criminal Specification do not include representation in Prescribed Proceedings in the High

Court. The Unit of Work for "Representation in the High Court or County Court", according to paragraph 10.153, covers proceedings which are incidental to criminal proceedings. That would not include committal proceedings.

144. It follows that on a strict interpretation of clause 1.4 it is difficult to comprehend what, if any, sections of the Criminal Specification are applicable to the committal proceedings against the fourth Defendant. However, he says, the LAA's "Criminal Bills Assessment Manual" refers to the Criminal Specification ("Representation and claiming Civil Contempt of Court matters") so, evidently, it does.

145. Mr Newman suggests that the 2010 Criminal Specification was not drafted with High Court committal proceedings in mind: it was not until 2019 that the High Court confirmed that Criminal Legal Aid was available as of right in committal proceedings.

146. Mr Newman agrees with Mr Mallalieu that if the fourth Defendant had been in receipt of civil legal aid, paragraph 1.39 of the 2013 Standard Civil Contract would have authorised the receipt by him of costs in excess of whatever would be payable by the LAA.

147. He submits however that paragraph 8.10 of the Criminal Specification enables the provider of the legally aided legal services to retain the element of any costs recovered under the relevant agreement or court order, which exceeds the amount paid or payable under the contract. Although the words used are different, both paragraph 1.39 of the Civil Specification and paragraph 8.10 of the Criminal Specification have the same effect. In either case, the indemnity principle is being disapplied.

148. The difference in wording may he suggests be accounted for by the difference between civil and criminal matters. Criminal matters generally involve the state, with the state paying for both prosecution and defence costs, whereas civil matters generally involve private parties. In criminal matters, most of the inter partes costs orders result in costs being awarded from state-funded central funds, and the manuals and specifications are drafted with that in mind. The difference in this case is that the committal proceedings which are funded by criminal legal aid took place in the civil jurisdiction, where the usual inter partes costs rules apply.

149. If this were a Unit of Work to which "Representation in the High Court or County Court" applied, under paragraph 10.156 the procedures for making claims under this Unit of Work would be the same as those in section 6 of the Civil Specification, which (being subject to paragraph 1.39) does not prevent a recipient of Legal Aid from recovering more than the Legal Aid rates.

150. There is no obvious or rational reason or explanation why committal proceedings funded by Criminal Legal Aid should operate differently to Civil Legal Aid when an inter partes costs order is made in favour of a legally aided party in a civil court. The potential effect of limiting the cost recoverable by a successful defendant, such as the fourth Defendant, to criminal legal aid rates, would be to create an inequality of arms, particularly as against (as in this case) a well-funded claimant.

151. In the alternative Mr Newman argues that if there is no express term within the Criminal Specification to disapply in the indemnity principle where a costs order is made in the

civil jurisdiction, against a privately paying party and in favour of a party in receipt of Criminal Legal Aid, such a term should be implied.

152. The proposed term, he submits, satisfies the principles necessary for the implication of a term, as set out by Lord Neuberger at paragraph 18 of his judgment in *Marks & Spencer plc v BNP Paribas* [2015] UKSC 72:

> "In the Privy Council case *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (19770 180 CLR 266, 283, Lord Simon of Glaisdale (speaking for the majority which included Viscount Dilhorne and Lord Keith of Kinkel) said:
>
> "for a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so no term will be implied if the contract is effective without it; (3) it must be so obvious that it "goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

The Indemnity Principle and the Fourth Defendant's costs: Conclusions

153. I cannot find anything in the point that the Claimant did not ask Mr Justice Garnham to make an order on some basis other than the standard or indemnity basis. It is common ground that the parties' costs in these proceedings are to be assessed under the CPR. Costs can only be assessed under the CPR either on the standard basis or the indemnity basis (CPR 44.3(1)). There is no other basis upon which they can be assessed. That is why CPR 43.3(4)(b) provides that if the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis, the costs will be assessed on the standard basis.

154. For that reason, it would not have been open to the Claimant to ask Garnham J to make an order for assessment other than on the standard or the indemnity basis. Even had such an order been made, by virtue of CPR 43.3 (4)(b) it would in effect have been an order for costs to be assessed on the standard basis, and as I have observed, costs awarded on the standard basis (or for that matter on the indemnity basis) are subject to the operation of the indemnity principle.

155. That takes me to whether the indemnity principle limits the fourth Defendant's recoverable costs in the way contended for by the Claimant.

156. The fourth Defendant's replies to the Claimant's Points of Dispute on the indemnity principle argue that recovery of costs from an opponent is consistent with one of the purposes of the Legal Aid scheme, which is to reduce the burden on the public purse. The point might have more force if the Claimant were arguing that the fourth Defendant should not recover any costs at all, as opposed to conceding costs up to the limit payable by the LAA. It would follow that the LAA will be reimbursed for most if not all of its outlay, whatever the outcome of this detailed assessment.

157. In any event the "policy" point seems to me to be of limited assistance. Both parties argue that their case is consistent in one way or another with the policies underpinning

the legal aid scheme. They may well be right, but it seems to me that the indemnity principle issue must turn upon established principles of law and construction.

158. It seems to me that Mr Mallalieu's very thorough and careful analysis of the statutory and contractual provisions governing the recovery of costs in civil and criminal work leads to the correct conclusion.

159. The fundamental problem for the fourth Defendant is that he is not able to rely upon any primary or secondary legislation disapplying the indemnity principle for a party in receipt of criminal legal aid. He has to rely upon the provisions of the Criminal Specification, and the Criminal Specification cannot have that effect.

160. Section 28(2) of LASPO provides for the Lord Chancellor to authorise the receipt of payments other than by the LAA, but it does not authorise him to disapply the indemnity principle. Even assuming that it is possible to contract out of the indemnity principle, two parties could not enter into a contractual arrangement which would operate to deprive a third party of the benefit of the principle. Even if the provider of legal services funded by criminal legal aid is contracting with the Lord Chancellor through the LAA, the Lord Chancellor would have no more power to do so than any other contracting party.

161. The second difficulty is that I do not accept that the provisions of the Criminal Specification can be construed so as to purport to disapply the indemnity principle in the way contended for by the fourth Defendant.

162. Mr Newman argues that on an appropriately purposive construction, paragraph 8.10 of the Criminal Specification provides authorisation for retention by the fourth Defendant of any costs recovered from the Claimant in the standard basis without breaching section 28 of LASPO.

163. I accept that paragraph 8.10 of the Criminal Specification can be compared to the authorisation provided by paragraph 1.39 of the Civil Specification, but it is not an equivalent. Unlike paragraph 1.39, it is not backed by the statutory disapplication of the indemnity principle. It is also, of necessity, subject to secondary legislation in the form of regulation 9 of the Criminal Remuneration regulations. Logically, as Mr Mallalieu says, it must be read in conjunction with Regulation 9 and operate within the limits set by Regulation 9. Between them, the two provisions represent the Lord Chancellor's authority, as envisaged by section 28(2) of LASPO, to recover costs other than through the LAA, but in a limited and specific way which does not breach the indemnity principle and does not assist the fourth Defendant.

164. As a matter of construction, it seems to me that it must be wrong to interpret paragraph 8.10 in any other way. If the Criminal Specification purported to disapply Regulation 9 so as to represent a complete disapplication of the indemnity principle, one would expect to say so in plain terms. It does not, presumably for the very good reason that it could not have that effect. A contractual arrangement could not override the mandatory provisions of the Criminal Remuneration Regulations.

165. Similarly, the fact that paragraph 10.156 of the Criminal Specification provides for the same procedures to be used as when claiming payment under the civil contract could not operate to disapply the indemnity principle (nor for that matter would it have any

bearing on the amount to be paid, which will be governed by the Criminal Remuneration Regulations).

166. I am unable to accept Mr Newman's argument for implying into the Criminal Specification a term disapplying the indemnity principle. Even if a contractual term could have that effect, it is not necessary to give business efficacy to a contract between the LAA and a solicitor, and it is not so obvious that it "goes without saying".

Enhancement or "Non-Standard" payment

167. Mr Verma has exhibited to his witness statement correspondence with the Legal Aid Agency supporting the proposition that the hourly rates payable to the fourth Defendant's solicitors under paragraph 3(2) of Schedule 4 to the Criminal Remuneration Regulations can, at the discretion of the LAA, be enhanced by up to 200%, anything in excess of 100% being reserved for "serious or complex fraud".

168. Apart from the potential improvement that this proposition would offer to the fourth Defendant's position on the application of the indemnity principle, Mr Newman argues that the enhancement provisions indicate that the indemnity principle should not apply because, for example, a costs judge could not know what the LAA would decide to do as regards enhancement.

169. In principle that cannot be an obstacle to the application of the indemnity principle. Either it applies or it does not, regardless of any practical difficulties created by its application. In fact, it is a feature of the indemnity principle in practice it can be difficult to apply. It might be, for example, that it would not be possible to assess the costs of a party in receipt of criminal legal aid until the LAA has made a determination of the amount payable.

170. I cannot accept Mr Newman's argument that the operation of the indemnity principle would render the detailed assessment process between parties "irregular" because the LAA's decision-making making process might be affected by the knowledge that the costs recoverable by the recipient of criminal legal aid would be limited by the indemnity principle, or because the opponent would not be able to challenge the LAA's decision. There is no reason to suppose that the LAA's decision-making process would be influenced in any way, and the indemnity principle applies only to ensure that the paying party's liability for costs is limited to the amounts payable by the receiving party. It does not confer upon the paying party a role in determining what that limit should be.

171. All that however seems to me to be beside the point, because in my view it is not open to the LAA to add any enhancement to the rates and fees specified at paragraph 7(2) of Schedule 4. I believe that the person with whom Mr Verma corresponded must have been mistaken.

172. Mr Newman accepts that the Remuneration Regulations make no provision for any increase or enhancement of the rates and fees payable under paragraph 7(2). He has however taken me to various provisions in the Criminal Specification that, he says, support the proposition that the Criminal Specification has effectively imported into Schedule 4 a provision for enhanced or "non-standard" payment.

173. There are in my view three fatal obstacles to that. The first is that (as with the proposition that the Criminal Specification disapplies the indemnity principle) if it were the intention of the Criminal Specification to override the provisions of any part of the Remuneration Regulations one would expect to see that spelt out in very clear terms, and it is not.

174. The second is that even if it were spelt out in clear terms, a contractual provision could not override the mandatory provisions of Regulation 8 of the Criminal Remuneration Regulations. Regulation 8 confirms that claims for fees must be made and determined in accordance with "the 2010 Standard Crime Contract" (the Criminal Specification) but it also states in plain terms that the claim must be paid in accordance with the rates set out in Schedule 4.

175. The third is that, as Mr Newman has very properly pointed out, the Criminal Specification really does not address Prescribed Proceedings, much less purport to vary or override the provisions of paragraph 7(2). None of the provisions to which he has carefully and methodically referred me refer to Prescribed Proceedings. Even the unit of work for representation in the High Court or County Court does not cover committal proceedings. The Criminal Bills Assessment Manual is not a source of law and is of no real assistance.

176. There is certainly some poor drafting in the Criminal Specification, as in the use of the phrase "Except where proceedings relate to serious or complex fraud, the relevant Hourly Rate will not be enhanced by more than 100 per cent" in a part of the specification expressly applicable to work in the Magistrates' Court, but that is of no assistance to the fourth Defendant. Similarly, the fact that form CRMCLAIM11 ("Claim for representation in contempt proceedings") provides for payment of a "non-standard fee" cannot support the conclusion that the Criminal Remuneration Regulations are to be overwritten or ignored. It seems to me to be just another example of loose drafting.

177. Mr Mallalieu has made the point that the fourth Defendant's solicitors have evidently not claimed from the LAA any sort of enhancement, and he suggests that on *Radford v Frade* [2018] 1 Costs LR 59 principles they could not do so now, to the detriment of the Claimant.

178. I am not at all sure that *Radford v Frade* could have any bearing where a final assessment by the LAA of the amount due to the fourth Defendant's solicitors would be unlikely to be undertaken until after the inter partes costs order had been made. The real point however is that (as Mr Mallalieu has also pointed out) the amount that the LAA can pay is governed by statutory provisions. It can pay only those amounts provided for by the Criminal Remuneration Regulations. It has no discretion to enhance the rates and fees set by paragraph 7(b) of Schedule 4. If as Mr Newman argues it has contracted to do so (although I have concluded that it has not), that would be a matter between the contracting solicitors and the LAA. It cannot have any bearing upon the amount properly recoverable from the Claimant by the fourth Defendant.

Summary

179. For all the above reasons, it is my conclusion that the indemnity principle is not disapplied for a party in receipt of Criminal Legal Aid in Prescribed Proceedings. The

costs recoverable by the fourth Defendant from the Claimant under the order of Garnham J of 5 October 2018 are limited to those payable under paragraph 7(b) of Schedule 4 to the Criminal Remuneration Regulations.

Whether the Claimant's Contract of Retainer is Enforceable

180. The Claimant, in July 2021, disclosed the CCFA. It is dated 22 March 2011. It sets base fees (at the SCCO's 2010 Guideline Hourly Rates) with provision for those base fees to paid, along with the success fee, in the event of success (defined to include an order for the recovery of costs). If the definition of success is not met, discounted fees are to be paid.

181. The challenge to the enforceability of the Claimant's contract of retainer comes back to the indemnity principle. The second and fourth Defendants' case is that because the retainer is unenforceable, the Claimant has no liability to pay its solicitors' fees. It follows, on their case, that there is in that respect nothing for which the defendants must indemnify the Claimant, and so nothing to pay under the orders for costs.

182. I should make it clear that this judgment addresses only the enforceability of the Claimant's contract of retainer with its solicitors. Both Mr Newman and Mr Naik, for the second Defendant, in their skeleton arguments for the hearing of the issue, referred to wording in the CCFA that (they say) support the conclusion that even if the CCFA is enforceable, it does not cover the committal proceedings. Alternatively, the amount payable by the Claimant under the CCFA is no more than the small discounted fee payable for cases that do not fall within the definition of "success".

183. Mr Mallalieu made the point that no point about the construction of the CCFA has been raised in any of the Defendants' Points of Dispute, although it was disclosed about five months before the hearing. The Claimant has had no proper opportunity to address any argument based on the construction of the CCFA.

184. It was accepted before me that any submissions regarding the wording of the CCFA would be made only with reference to the issue of enforceability. The Defendant's point in that respect is that the agreement is designed for motor claims and no thought seems to have gone into whether it was suitable for committal proceedings.

185. If any of the Defendants now wish to argue that the CCFA, properly construed, does not support the Claimant's claim for costs, it will be necessary to amend their Points of Dispute.

Statutory Provisions and the CPR

186. I have been referred to the following statutory provisions.

187. Section 14 of LASPO:

> "In this Part *'criminal proceedings'* means…
>
> … (g) proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court, and
>
> (h) such other proceedings, before any court, tribunal or other person, as may

be prescribed."

188. Regulation 9 of the Criminal Legal Aid (General) Regulations 2013:

> "The following proceedings are criminal proceedings for the purposes of section 14(h) of the Act (criminal proceedings) …
> … (v) any other proceedings that involve the determination of a criminal charge for the purposes of Article 6(1) of the European Convention on Human Rights."

189. Section 58 of the Courts & Legal Services Act 1990 ("The CLSA"):

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

190. Section 58A(1) of the CLSA:

> "The proceedings which cannot be the subject of an enforceable conditional fee agreement are—
>
> (a) criminal proceedings, apart from proceedings under section 82 of the Environmental Protection Act 1990; and
>
> (b) family proceedings."

191. Section 58A was inserted into the CLSA by the Access to Justice Act 1999, but as Mr Mallalieu points out, similar provision has been included in the CLSA since its genesis. The statutory regime has always prohibited the use of conditional fee agreements ("CFAs") in criminal proceedings generally.

192. Section 111 of the CLSA added section 19A to the Prosecution of Offences Act 1985:

> "In any criminal proceedings—
>
> (a) the Court of Appeal;
>
> (b) the Crown Court; or
>
> (c) a magistrates' court,
>
> may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with regulations…"

193. Paragraph 5(3) of Schedule 14 to the CLSA sets out the circumstances in which the regulatory authority may intervene in the practice of a registered foreign lawyers, including, at (e), where:

> "… he has been committed to prison in any civil or criminal proceedings."

194. The Prosecution of Offences Act 1985, also provides, at section 16(5):

> "Where…any proceedings in a criminal cause or matter are determined before a Divisional Court of the Queen's Bench Division…the court may make a defendant's costs order in favour of the accused."

195. I have also been referred to the relevant provisions of CPR 81.11, CPR 81.12 and CPR 81.14, as in force before 1 October 2020. CPR 81.11 concerned committal proceedings based upon breaches of solicitors' undertakings. CPR 81.12 and CPR 81.14 concerned committals based on an allegation that there has been an interference with the due administration of justice.

196. CPR 81.11:

> "(1) The applicant must obtain permission from the court before making a committal application under this rule…
>
> (6) Unless the applicant makes the committal application within 14 days after permission has been granted under this rule, the permission will lapse."

197. CPR 81.12:

> "(1) This Section regulates committal applications in relation to interference with the due administration of justice in connection with proceedings… in an inferior court (which includes the County Court) …
>
> (3) A committal application under this Section may not be made without the permission of the court.
> (The procedure for applying for permission to make a committal application is set out in rule 81.14.)"

198. CPR 81.14:

> "(1) The Application for permission to make a committal application must be made by a Part 8 claim form which must include or be accompanied by –
>
> (a) a detailed statement of the applicant's grounds for bringing the committal application;
>
> (b) an affidavit setting out the facts exhibiting all documents relied upon…
>
> (6) Where permission to proceed is given, the court may give such directions as it thinks fit and may –
>
> (a) transfer the proceedings to another court; or
>
> (b) direct that the application be listed for hearing before a single judge or a Divisional Court."

199. Also relevant is CPR 32.14:

> "Proceedings for contempt of court may be brought against a person who makes or causes to be made a false statement in a document, prepared in anticipation of or during proceedings and verified by a statement of truth, without an honest belief in its truth."

The Observations of Mr Justice Garnham

200. In observations appended to his order of 4 December 2018, Garnham J explained the reasoning behind it. Rejecting the contention that the first Defendant (against whom he had already made an order for costs) was entitled to the statutory protection of section 26 of LASPO, he said:

> "As to the issue of principle:
>
> a. the Claimants submit that that the "First defendant's legal aid was criminal legal aid and that accordingly s26 of Legal Aid Sentencing and Punishment of Offenders Act 2012 does not apply". It is submitted that, in consequence, orders for costs against the first defendant may be enforced to their full extent.

b. Mr Tehrani QC for the First Defendant acknowledges that Mr Khan was granted representation pursuant to the criminal legal aid regulations but submits that nonetheless these proceedings were for civil contempt and accordingly were "relevant civil proceedings" for the purposes of LASPO.

4. Section 8(3) LASPO defines "civil legal services" as "any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16 (criminal legal aid)".

5. Section 26 of LASPO provides that:

> (1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—
>
> (a) the financial resources of all of the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate.
>
> (2) In subsection (1) "relevant civil proceedings", in relation to an individual, means—
>
> (a) proceedings for the purposes of which civil legal services are made available to the individual under this Part, or
>
> (b) if such services are made available to the individual under this Part for the purposes of only pail of proceedings, that part of the proceedings.

6. The question whether contempt proceedings were civil or criminal proceedings for the purposes of the Legal Aid Sentencing and Punishment of Offenders Act 2012 was considered by Blake J in *King's Lynn, West Norfolk Council v Michelle Paula Bunning v Legal Aid Agency* [2013] EWHC 339. In paragraph 31 of his judgment, Blake J set out his conclusions:

> "Accordingly I am satisfied: —
>
> i) The proceedings for which legal representation is sought are criminal proceedings within the meaning of the current legislation: see s. 14 (h) of the Act and regulation 9 (v) of the General Regulations.
>
> ii) The defendant is a specified individual within the meaning of s. 16 (1) of the Act and 'representation is to be available'.
>
> iii) The relevant authority for determining whether representation is to be granted is the High Court..."

7. I agree with Blake J's analysis. Although these were civil contempt proceedings they were not "relevant civil proceedings", but instead were criminal proceedings, for the purposes of LASPO. Although the terminology

> may make for confusion, this is a perfectly sensible reading of the Act since it recognises the "criminal" characteristics of contempt proceedings, even in civil cases, and the "criminal proceedings" nature of the sentence that may follow.
>
> 8. That conclusion is, as Blake J observed, consistent with the decision of the Court of Appeal in *Hammerton v Hammerton* [2007 J EWCA Civ 248 (per Lord Justice Moses at 19 1) to the effect that committal proceedings (in that case in the Family Division for breach of an injunction granted in the course of family proceedings) are proceedings that involve the determination of a criminal charge within the meaning of the jurisprudence of the European Court of Human Rights.
>
> 9. It follows that s26 LASPO has no application."

The Addendum to the Claimant's Bill

201. The addendum produced by the Claimant in response to my order of 9 February 2021 sets out the Claimant's case on the CCFA in this way (I paraphrase to some extent).

202. Different statutes categorise proceedings as criminal or civil for differing purposes, depending upon a range of criteria. It is incorrect to say that because proceedings are criminal in nature for the purpose of one statute then they must also be criminal in nature for every other statute.

203. LASPO deals principally with the categorisation of proceedings as civil and criminal within the context of legal aid. It is a mistake to transplant the analysis of that statute to any other. It is not properly arguable that applications for permission to commence committal proceedings are criminal proceedings within the meaning of section 58A of the CLSA. Substantive committal proceedings are also not criminal proceedings within the meaning of section 58A.

204. In *Daltel Europe Limited v. Makki & Others* [2006] EWCA Civ 94 the defendant had been committed to prison for 12 months based, in part, upon hearsay evidence that had been admitted into evidence under the Civil Evidence Act 1995. He appealed on the basis that the committal proceedings were criminal proceedings, so that the decision as to whether to admit hearsay evidence should have been measured against the stricter criteria in the Criminal Justice Act 1988.

205. The court found that committal applications are civil proceedings to which the Civil Evidence Act 1995 applies for the purposes of the admissibility of hearsay evidence, although categorised as criminal for the purposes of Schedule 1, Part 1, Article 6 of the Human Rights Act 1998. The addendum refers to paragraph 39, 40 and 45 from the judgment of Lloyd LJ:

> "39. So far as procedure goes, proceedings for contempt are governed by RSC Ord 52, as adapted and appended to the CPR Schedule 1, and by the Practice Direction supplementing those rules. Undoubtedly many aspects of the CPR apply to proceedings for contempt, whether civil or criminal, and some rules have been specially adapted or disapplied because of the special considerations relevant to committal proceedings. So far as CPR r 32.14 is

> concerned, a creation of the rules themselves, proceedings may be brought by the Attorney General, but otherwise they may only be brought with the permission of the court. In the latter case they are likely to be brought by another party to the litigation in which the false statements are said to have been made. In that case they will be brought in those proceedings. It would seem odd for an application within what are undoubtedly civil proceedings to be found not to be civil proceedings, but Mr Page is entitled to say that a committal application is a distinct proceeding, governed in some respects by special rules, and that it would not be impossible to have one proceeding which is not civil brought within another which is civil…
>
> 40. I dare say that it would not be impossible to conclude that proceedings in the Chancery Division, governed by the CPR and in particular by RSC Ord 52 as adapted and set out in the Schedule to the Civil Procedure Rules, are not civil but criminal proceedings, but it would certainly be odd and surprising. Sir Richard Scott V-C in *Malgar Ltd v R E Leach (Engineering) Ltd* [2000] FSR 393 noted that proceedings under rule 32.14 were brought in the public interest, not for the furtherance of private interests, and that they were in some respects like criminal proceedings. He held that they were civil proceedings but it does not seem that the contrary was argued before him…
>
> 45. The making of a false statement on oath would be perjury, which plainly is a crime, and proceedings for which would be a prosecution, plainly criminal proceedings. When the new rules were devised, with the emphasis on verification of statements by a statement of truth, which is not made on oath, it was necessary to consider what should be the sanction for non-compliance. An offence could have been created, but it was not. Instead recourse was had to the established concept of contempt, which is not the subject of a prosecution or a trial before a jury, but rather of either proceedings within an existing action or separate proceedings before the Divisional Court brought by a part 8 claim form."

206. In *Liverpool Victoria Insurance Company Ltd v Yavuz and others* [2017] EWHC 3088 (QB), Warby J applied the same principles.

207. Paragraph 3(e) of Schedule 14 to the CLSA demonstrates that it was written on the basis that it is possible for a person to be committed to prison in civil proceedings. It follows that the availability of imprisonment as an outcome does not lead inevitably to the conclusion that the proceedings are criminal proceedings for the purposes of the CLSA. On the contrary, the wording of section 111 strongly indicates that criminal proceedings, within the meaning of CLSA, take place only in the Court of Appeal, Crown Court or magistrates' court.

208. Garnham J, in the observations appended to his order 4 December 2018, was addressing the question of whether the first Defendant had received "civil legal services" and, if he had not, then whether he had received criminal legal aid. The resolution of those issues is collateral to the issue that the Court is being asked to consider. It depends upon the construction of a different statute.

209. That submission becomes even stronger when considering the status of the permission proceedings, which act as a filter on potential committal applications. No-one can be

sent to prison at the conclusion of permission proceedings. The subject's liberty is not at stake. None of the form of the proceedings, the process, the substance or the sanction is criminal in nature. The permission proceedings (under two claim numbers, distinct from the claim number of the committal proceedings) cannot be criminal proceedings for the purposes of the CLSA.

210. In the event that the committal proceedings are found to be criminal proceedings for the purposes of the CLSA, the Claimant relies upon a severance clause within the CCFA to the effect that "if any part of this agreement is found to be unenforceable, the remainder of it shall continue in full force and effect". If the part of the CCFA that provides for a success fee is unenforceable then the remainder of the CCFA is not a Conditional Fee Agreement at all. It is a legitimate discounted costs agreement of the type identified in *Gloucestershire County Council v Evans (Law Society intervening)* [2008] 1 WLR 1883, the applicable hourly rate being £217.

211. In the alternative, costs are claimed on a quantum meruit basis.

The Second Defendant's Case

212. The second Defendant's arguments in relation to the CCFA, as set out in his Points of Dispute, were repeated in Mr Naik's submissions. I would summarise them as follows.

213. Section 58 of the Courts and Legal Services Act 1990 prohibits the use of a CCFA in criminal proceedings. The Claimant's solicitors had a financial interest in a successful outcome, namely the committal of the Defendants. This is repugnant to public policy, given the clear conflict with the Claimant's obligation to prosecute fairly and objectively. The public nature of the proceedings is further confirmed by the requirement at the committal stage for the court to be satisfied that it is in the public interest to give permission.

214. Committal proceedings are criminal proceedings for the purpose of Schedule 1, Part 1, Article 6, paragraph 1 of the Human Rights Act. (*Hammerton –v- Hammerton* and *Kings Lynn and West Norfolk Council –v Bunning*).

215. Contempt of court has traditionally been classified as being either criminal or civil. In England, the general approach has been that a criminal contempt is an act which so threatens the administration of justice that it requires punishment from the public point of view; whereas, by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation. In these cases, the purpose of the imposition of the contempt sanction has been seen as primarily coercive or "remedial".

216. The distinction was reaffirmed and explained by the Supreme Court in R. v O'Brien [2014] UKSC 23. In the words of Lord Toulson JSC at paragraphs 39 and 42 of his judgment:

> "A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice. Examples include physically interfering with the course of a trial, threatening witnesses or publishing material likely to prejudice a fair trial…

> The question whether a contempt is a criminal contempt does not depend on the nature of the court to which the contempt was displayed; it depends on the nature of the conduct. To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. 'Civil contempt' is not confined to contempt of a civil court. It simply denotes a contempt which is not itself a crime."

217. In order to determine the nature of the contempt the court should look at the substance of the proceedings. In the instant case the necessary ingredients of the offence are set out in the grounds, which allege interference with the administration of justice and specific intent to interfere with due administration of justice. The Second Defendant faced four grounds requiring deliberate acts of a dishonest nature with intent to interfere with the course of justice: see the comments of Sir James Munby in *Egeneonu -v- Egeneonu* [2017] EWHC 43 (Fam).

218. These proceedings have all the indicia of criminal proceedings, including procedural safeguards where the liberty of the person is involved; the requirement for permission to begin proceedings; the standard of proof; the availability of criminal legal aid; the right to be told that a Defendant does not have to give evidence; the express right of appeal; and the jurisdiction (save for some limited jurisdiction in the county court) reserved to the High Court.

219. Following the successful committal of the First and Third Defendant, the Claimant argued before Mr Justice Garnham that these proceedings were not "relevant civil proceedings" but criminal proceedings. It did so, so that the First Defendant could not take advantage of the protection afforded to him by virtue of section 26 of LASPO. If the proceedings were deemed to be "relevant civil proceedings" then the First Defendant's financial resources would have been taken into account when deciding the amount, if any, of the costs payable by the first Defendant to the Claimant.

220. Mr Justice Garnham agreed with the Claimant's argument. These proceedings have been deemed to be "criminal proceedings" and section 58(A)(1) of the CLSA provides that criminal proceedings cannot be subject to an enforceable CFA.

221. The correct interpretation of CPR 81.12 and CPR 81.14 (as in force between 1 October 2020) is that the permission stage and the committal stage are two steps within the same set of proceedings. If that is correct, then Garnham J has already ruled found that the proceedings were criminal proceedings, so that the Claimant's argument is subject to the rule in *Henderson v Henderson*.

222. If they are separate proceedings, then they are each criminal proceedings. If they are criminal proceedings, then the severance clause relied on by the Claimant cannot save the CFA. Quantum meruit is not available where an express retainer is agreed, but that retainer is unenforceable.

223. The Claimant and their solicitors failed to arrange a different retainer for the purposes of the committal proceedings. They proceeded under the terms of the pre-existing CCFA when it was wholly wrong to do so. Section 58(A)(1)(a) renders the CCFA unenforceable as between the Claimant and its solicitors and by reason of the indemnity principle, the Claimant is not entitled to recover any costs incurred under the CCFA from the Defendants.

The Fourth Defendant's Case

224. The Fourth Defendant's submissions are adopted in Mr Newman's skeleton. I would summarise them as follows.

225. Once the Claimant was aware that it was pursuing the Committal of the Defendants then the proceedings should have been conducted by way of a retainer which was not contrary to legislation and professional rules. The Claimant has successfully argued that these proceedings are criminal proceedings, as reflected in the Order of Garnham J dated 4th December 2018 declaring these proceedings as criminal proceedings. It follows that all costs claimed on the basis of a CCFA must be disallowed in full, in accordance with *Rees v Gateley Wareing* [2014] EWCA Civ 1351.

226. There are very clear public policy reasons why CFAs are not suitable for criminal proceedings, namely that the legal representatives (whether that be solicitors or counsel) should not have a financial interest in the outcome of such proceedings.

227. In this instance the financial interests for Horwich Farrelly were clear. In the event of a successful outcome, namely the successful committal of the Fourth Defendant, Horwich Farrelly was entitled to an uplift on its base rate, as well as recovering a success fee. Although the Claimant has conceded that the success fee element is not recoverable, it is still seeking (despite being ultimately unsuccessful against the Fourth Defendant) to recover its uplift. The success fee originally claimed (and subsequently conceded) was substantial, namely £190,939.05 plus interest.

228. As these proceedings involved the consideration of a "criminal charge" that could lead to a sentence of imprisonment, it would fly in the face of public policy for the reasons set out above if the Claimant were able to fund its case by way of a CFA.

229. In *Pirtek (UK) Limited v Robert Jackson* [2018] EWHC 3284 at paragraph 19(i), Nicklin J described the role of the party seeking punishment of the contemnor as, "similar to the role of the prosecution in a criminal court." The role of the prosecution in a criminal court is to present the evidence and make decisions that are "fair and objective" and "always act in the interests of justice and not solely for the purpose of obtaining a conviction" (Paragraph 2.7 of The Code of Crown Prosecutors). If a claimant's legal representative knows that a successful outcome will lead to an increase in its costs by at least £190,939.05, it is not difficult to see how the obligation to act fairly and objectively might conflict with the terms of a CFA. To remove any risk of such a conflict, a CFA is clearly not an appropriate way of funding committal proceedings which, if the claimant were "successful", could lead to the imprisonment of the defendants.

230. The permission proceedings and the committal proceedings are not separate. The pre-October 2020 CPR 81.14(6) refers to the extant proceedings being transferred after

permission has been granted. It does not refer to separate proceedings (or a further application) having to be initiated after permission has been granted. In that respect the procedure under CPR 81.12 and 81.14 (contempt) can be contrasted with the procedure set out in the pre-October 2020 CPR 81.11(1) and (6) (breach of undertakings). Commentary in the "White Book" at paragraph 81.12.4 recognises the distinction between a procedural rule stating that proceedings may not be started by the issuing of originating process unless, on application to the court (made by separate process), permission to do so has been granted (as in CPR 81.11) and a rule stating that, where proceedings have been started by way chains of originating process, the permission of the court is required to proceed (as in CPR 81.12 and 81.14).

231. This is consistent with the fourth Defendant's position, which is that the permission stage and the committal stage are two steps within the same set of proceedings.

232. It is also consistent with the claim numbers that were given to the proceedings. The underlying proceedings were transferred from the County Court to the Queen's Bench Division of the High Court by an order dated 9 December 2015 and given the case number HQ15P05372. The Part 8 claim form applying for permission to take committal proceedings was issued on 7 January 2016 and given the Case Number HQ16X00032. The Judgement of HHJ Walden-Smith dated 14 October 2016 granting permission referred to Case Numbers HQ16X00032 and HQ15P05372. The Orders of Mr Garnham J dated 5 October 2018 and 4 December 2018 identify the claim number as HQ16X00032. The same claim number HQ16X00032 has been used throughout the permission stage and committal stage of the proceedings. It is therefore plain that they were the same set of proceedings.

233. Following permission being granted the Claimant also issued a further Part 8 claim on 19 May 2017 under claim number HQ17X01645. However, on the correct understanding of how CPR 81.12 and 81.14 operate, this was an unnecessary step and the claim number does not appear on any orders following the granting of permission.

234. The Fourth Defendant's interpretation is also consistent with how the Claimant argued that the proceedings were not "relevant civil proceedings" for the purposes of section 26 of LASPO. Within its Skeleton Argument the Claimant did not distinguish (as it now seeks to do) between the permission stage and the committal stage. It sought a declaration that the "order for costs against legally aided defendants may be enforced to their full extent". That is how Mr Justice Garnham treated the submissions. He did not distinguish between the permission stage or the committal stage. He treated them as one. Were the learned Judge asked if he thought the Claimant's submissions or his judgement only applied to the costs incurred during the currency of the committal stage, the answer would surely be "No".

235. If the Claimant is correct and there are two sets of proceedings, the first for permission and the second for committal, the decision of Mr Justice Garnham can only apply to the stage which he ruled upon, namely the committal proceedings. It therefore follows that the Defendants who were ordered to pay the costs of the permission stage (which include the Fourth Defendant) are not bound by Mr Justice Garnham's decision and can potentially rely upon section 26 of LASPO. This is a somewhat perverse position for the Claimant to take and reveals the fallacy of its argument.

236. The conclusion that must be drawn from this is that there was a single set of committal proceedings. If the court agrees with that submission, the Claimant is prevented from arguing that these were not criminal proceedings by the rule in *Henderson v Henderson*.

237. The Claimant's argument is that Mr Justice Garnham's decision that the proceedings were criminal proceedings was made under LASPO and that decision does not impact upon the enforceability of the CCFA because the CCFA is governed by the CLSA and the definitions for each Act are different.

238. It is accepted that when considering whether a case is criminal or civil the court must look at the issue in context. The two main cases that Mr Justice Garnham was referred to were *Hammerton v Hammerton* and *King's Lynn, West Norfolk Council v Michelle Paula Banning v Legal Aid Agency*.

239. In *Hammerton* an unrepresented Defendant in Family Proceedings was committed to prison for three months for breaching a number of undertakings. The issue for the Court of Appeal was whether there were serious procedural irregularities during the course of the committal hearing. As part of its consideration the Court of Appeal set out a number of "well settled" principles in relation to committal hearings. The principles are set out at paragraph 9 of the Judgment:

> (i) "By virtue of s.6 of the Human Rights Act 1998, it is unlawful for a court, as a public authority for the purposes of s.6(3) of the 1998 Act, to act in a way incompatible with the defendant's rights enshrined in article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention");
>
> (ii) "Proceedings for committal are a criminal charge for the purposes of article 6. . ."
>
> (iii) "Since committal proceedings involve a criminal charge against a defendant, the burden of proving guilt lies on the person seeking committal."
>
> (iv) "A defendant to committal proceedings is not obliged to give evidence."
>
> (v) "In the event that the fact constituting contempt are proved, the seriousness has to be marked by reference not merely to the intrinsic gravity of the conduct, but also to secure compliance in the future."

240. In *King's Lynn* the Court had to decide whether committal proceedings for the breach of an injunction granted by the High Court were proceedings involving the "determination of a criminal charge" within the meaning of regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 and are prescribed proceedings within section 14(h) of LASPO and thus identified as criminal proceedings for the purposes of section 16(1) of that Act. Blake J found that such proceedings would fall within the definition of criminal proceedings.

241. At paragraph 14 of *King's Lynn*, Blake J stated that:

> "Mr Rimer refers me to a decision of the Court of Appeal in Hammerton v Hammerton. . .para 9, per Moses LJ to the effect that committal proceedings

> (in that case in the Family Division for breach of an injunction granted in the course of family proceedings) are proceedings that involve the determination of a criminal charge within the meaning of the jurisprudence of the European Court of Human Rights."

242. At paragraph 16 of *King's Lynn*, Blake J was satisfied that:

> "… regulation 9(v) refers to the jurisprudence discussed in *Hammerton v Hammerton* and there is no material difference between committal proceedings for breach of a court order in the Family and Queen's Bench Divisions."

243. In the case of *King's Lynn* the factor that pointed heavily towards the case being considered criminal proceedings was that it involved the determination of a criminal charge.

244. In this case, the Fourth Defendant (who was a trainee solicitor) was charged along with the other Defendants of interfering with the administration of justice. The specific charge against the Fourth Defendant was that he "advised and/or instructed the Claimant to lie on oath at his civil trial and give false evidence that his symptoms persisted for 6-8 months when the truth was that they had settled in a small number of days." This was plainly a very serious charge to be levelled against an officer of the court and had the Fourth Defendant been convicted it would have certainly resulted in a sentence of imprisonment.

245. Garnham J was therefore plainly correct to find that the committal proceedings were criminal proceedings. Although this finding was made in the context of LASPO, the Fourth Defendant contends that his decision applies equally to section 58(1)(A) of the CLSA.

246. LASPO and the CLSA are themselves extrinsically linked. Part 2 of LASPO fundamentally changed the provisions relating to conditional fee agreements within section 58 and 58A of the CLSA. Unlike section 14 of LASPO, the CLSA does not contain a definition for criminal proceedings within its interpretation section at 119. It would lead to unusual decisions in the context of funding, if the definition of criminal proceedings within section 14 of LASPO and section 58 of CLSA were to be interpreted differently. Both section 14 and section 58 concern the funding of proceedings, whether civil or criminal. It would be a perverse situation if these committal proceedings were criminal proceedings for the purposes of the Fourth Defendant's funding but were not criminal proceedings for the purposes of the Claimant's funding.

247. *Daltel Europe Limited v Makki* and *Liverpool Victoria Insurance Company Ltd v Yavuz* touch upon the potential application of criminal evidential rules concerning hearsay to committal proceedings. Neither case relates to the funding of criminal or civil proceedings and they are therefore of limited relevance.

248. The Claimant's references to section 111 and paragraph 5(3)(e) of Schedule 14 of CLSA are also of little or no relevance, given their specific purpose.

249. If the permission proceedings and committal proceedings were separate proceedings, then the permission stage was still criminal proceedings within section 58(A)(1)(a) of CLSA for the following reasons.

250. There is no rational justification for the CCFA to be enforceable at the permission but not at the committal stage. Both stages involve the same subject matter, namely the consideration of a criminal charge. The allegations made against the Fourth Defendant within the two stages were identical. The evidence relied upon by the Claimant against the Fourth Defendant within the two stages was identical.

251. As for the severance clause, if a CFA does not comply with the requirements of section 58 of the CLSA it will be unenforceable as a direct result of the operation of the statute. The Fourth Defendant's primary position is that when a contract is made contrary to statute, the contract is void and of no legal effect. Paragraph 16-236 of Chitty on Contract (33rd Edition) summarises the principle:

> "Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract."

252. The terms that render the CFA unenforceable are fundamental to the CFA and render the whole CFA unenforceable. It is the Fourth Defendant's position that the CFA cannot be saved by reliance upon the severance clause. If the Claimant wishes to rely upon the severance clause to "save" the CFA it must satisfy the "Blue Pencil Test" endorsed in *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, and it cannot.

253. The CCFA, if unenforceable, cannot be saved by the Severance Clause because the recovery of a Success Fee and the recovery of Basic Charges as opposed to Discounted Rates are integral to how the CCFA operates. The Claimant and Horwich Farrelly thought the success fee was available when they were conducting the litigation and that offends public policy. That harm cannot be removed retrospectively by attempting to sever the offending clauses.

254. *Gloucestershire County Council v Evans* fails to assist the Claimant. It merely confirms that the CCFA is a CFA for the purposes of section 58(2)(a) and would therefore be unenforceable if the proceedings are criminal proceedings.

255. As for Quantum Meruit, it is trite law that a claim in quantum meruit cannot arise if there is an existing and enforceable contract to pay an agreed sum (*The Olanda* [1919] 2 KB 728) If the retainer is a contract that has been found to be unenforceable by reason of it being contrary to public policy, then no claim can be made in quantum meruit.

256. This was made clear by Schiemann LJ in *Awwad v Geraghty & Co* [2001] QB 570 at 596:

> "If the court, for reasons of public policy refuses to enforce an agreement that a solicitor should be paid it must follow that he cannot claim on a quantum meruit. . .In the present case, what public policy seeks to prevent is a solicitor continuing to act for a client under a conditional normal fee

> arrangement. That is what [the solicitor] did. That is what she wishes to be paid for. Public Policy decrees that she should not be paid."

257. Christopher Clarke J (as he then was) made similar comments in the context of an unenforceable CFA in *Forde v Birmingham City Council* [2009] EWHC 12 (QB). In essence, he found that a client who does not have to pay as a result of a CFA being unenforceable is not unjustly enriched in circumstances in which the enrichment has been as a result of the operation of statute.

258. In the circumstances, the Claimant is unable to claim a quantum meruit payment. In so far as it is suggested that an "implied retainer" existed between the Claimant and its solicitor, the same arguments would apply.

The Claimant's Submissions

259. Mr Mallalieu submits that the prohibition on CFAs in criminal proceedings has nothing to do with any issues such as recoverability of success fees, nor any changes made by LASPO. It is simply that there are certain types of proceedings which the legislature considers are not suitable for CFAs.

260. The CLSA proceeds on the basis that CFAs are permissible in all proceedings save those specific types of proceedings which are expressly excluded. There is not a closed list of permissible proceedings, with all else being excluded. CFAs are generally permitted, save where expressly excluded. It is not, therefore, for the Claimant to show that the CCFA relates to permissible proceedings, but rather for the Defendants to show that relates to proceedings which are in an impermissible class.

261. This is a matter of fact and law. The questions that then arise are what section 58 means when it refers to "criminal proceedings", and whether these proceedings are "criminal proceedings" within the meaning of section 58.

262. The CLSA has never defined "criminal proceedings" for these purposes. There are, however, sections of the CLSA which assist in identifying the scope of the prohibition in section 58A. It is a core principle of statutory interpretation that an Act must be construed as a whole, save where this would conflict with a specific provision of the Act, so that internal inconsistencies are avoided. That principle was restated in *Lacheux v Independent Print Ltd & Another* [2019] UKSC 27. In *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] 2 AC Lord Nicholls at 397C recognised that, in interpreting statutory provisions:

> "… the courts employ… internal aids. Other provisions in the same statute may shed light on the meaning of the words under consideration."

263. That is the significance of section 111 of the CLSA, which was in force at the time s.58 came into force. Section 111 amended the Prosecution of Offences Act 1985 ('POCA') to provide a power to award costs against legal representatives 'in criminal proceedings' to, and only to, the Court of Appeal, the Crown Court and the Magistrates Court. In other words, the use of criminal proceedings here only encompassed proceedings in one of those three courts (the Court of Appeal having a criminal division). This indicates that when referring generally to 'criminal proceedings', the drafters of the CLSA had in mind a limited scope of the type stated.

264. The Act itself specifically recognises that proceedings for contempt do not fit in automatically within any specific category of civil or criminal proceedings but may be in either category. Schedule 14, Part II paragraph 5(3)(e), recognises that a registered foreign lawyers may have been committed to prison in either civil or criminal proceedings. The relevance is that in so far as the drafters had in mind at any point contempt proceedings, they did not regard it as something which was definitively in the camp of criminal proceedings.

265. The specific language used in sections 58 and 58A of the CLSA is important. The Act prohibits CFAs where they relate to 'proceedings' of a specific type. Section 58A then specifies "criminal proceedings". The Act does not use looser language. It does not, for example, say that CFAs are prohibited "if the proceedings include any allegation of a criminal nature" or "in any proceedings which might involve allegations of a certain type" or "'in any proceedings where the Court's powers might include an ability to sentence a person to imprisonment". The CLSA does not use any term which would prohibit the use of a CFA in proceedings which are civil, but which are in some way said to be 'akin' to criminal (such as the term "criminal proceedings or quasi-criminal proceedings"). This is in contrast to the prohibition on CFAs in family proceedings, which extends to a list of proceedings that might otherwise not readily be identified as family proceedings.

266. The Act could have said any of these things. It does not. It is very specific – no doubt for sound reasons of certainty. It is a further principle of statutory construction that "Expressio unius est exclusio alterius" ("the express mention of one thing excludes all others": *Murphy & Linnett v HMRC* [2021] EWHC 1914 (Admin)). The starting presumption is that the use of the term "criminal proceedings" is intended to be exclusive and does not permit the inclusion by implication of matters other than those to which it expressly refers.

267. The CLSA is intended to specify the circumstances in which parties can, and more importantly the circumstances they cannot, enter into CFAs. In such circumstances, parties are entitled to and are expected to be able to rely on the presumption that the words of limitation or prohibition it contains mean what they say and no more.

268. A CFA is only prohibited where it relates to a specific category of prohibited proceedings. That is consistent with principles of statutory construction, particularly when applied to express definitions of the scope of a prohibition. There is nothing in the Act to indicate that the rule makers intended contempt proceedings to fall within the definition of criminal proceedings, particularly where such proceedings arose out of civil litigation and are conducted in the civil courts in accordance with civil rules of procedure. Such a construction would be fundamentally inconsistent with the plain words of section 58A and the express nature of the prohibition.

269. There is no legitimate legal or factual basis for implying into the CLSA a wider definition of "criminal proceedings". To do so would be not only to rewrite the statute but to do so retrospectively, something even Parliament would not usually do.

270. CFAs are only prohibited where the "proceedings" are "criminal". Accordingly, what matters is to identify the nature of the proceedings.

271. Contempt proceedings may be civil or criminal. Garnham J in this case, and Blake J in *King's Lynn*, were considering a specific issue, namely whether the contempt proceedings were criminal proceedings for the purposes of Part 1 of LASPO. That is not the same issue as to whether the proceedings are criminal or civil proceedings for any other purpose and in particular for the purposes of section 58 of the CLSA.

272. In fact it could not possibly be the same question. There is no permissible rule of statutory construction which would allow the drafting of a later act (LASPO) to be used to construe an earlier act (the CLSA). Such would be the case even if one was to put aside the fact that the relevant definitions in LASPO are, expressly, only for the purpose of the specific issue of legal aid and therefore, in their own terms, can have no application for determining any other issue.

273. Nor was that what the Courts were considering. Both *King's Lynn* and Garnham J's costs judgment in this case only came about because the Court had before it civil proceedings and had to wrestle with the difficult question of whether, for the purposes of legal aid only, they could also be considered to be criminal proceedings. If the proceedings themselves had been criminal proceedings generally, neither *King's Lynn* nor Garnham J's costs judgment would have been necessary. The answer to the question "are these criminal proceedings for the purposes of legal aid" would have been obvious. The difficulty only arose because the proceedings were civil proceedings.

274. Garnham J's judgment makes the key point that there is a distinction between the specific treatment of contempt proceedings in the context of legal aid (where an express statutory provision treats them as criminal proceedings for that purpose only) and the treatment of contempt proceedings for all other purposes. He stated in plain terms that although the proceedings before him were civil contempt proceedings they were not "relevant civil proceedings", but were instead criminal proceedings, for the purposes of LASPO.

275. This is as clear as it possibly could be. An unappealed, High Court, judicial determination that these contempt proceedings are 'civil' proceedings, but that for the specific purposes of Part 1 of LASPO (only) and therefore the question of which form of legal aid is available (and other relevant legal aid matters), the proceedings fall within the definition of criminal proceedings.

276. Even without that clear decision, that these proceedings were civil proceedings is, in any event, obvious and cannot be in doubt. They arose as a result of a contempt in civil proceedings. The procedure was commenced by an application for permission to bring contempt proceedings, issued in accordance with Civil Procedure Rules, and pursued in accordance with CPR 81, in extant civil proceedings in the High Court, Queen's Bench Division.

277. Even if made outside existing civil proceedings, the application would have been made under Part 8 of the CPR and the matter would be heard by the High Court, Queen's Bench Division (not the Divisional Court).

278. The default position is overwhelmingly that contempt proceedings are usually civil proceedings, both at the permission and committal stage, even if they may result in a criminal or quasi criminal sanction.

279. The judgment in the permission proceedings was given by a Circuit Judge sitting as a High Court judge in the Queen's Bench Division. The order of HHJ Walden-Smith of 2 March 2017 provided for the committal proceedings to be issued in "the High Court, Queen's Bench Division". The proceedings were ordered to be issued and were issued by Part 8 Claim forms, as civil proceedings pursuant to the Civil PR, in the Queen's Bench Division.

280. They were thereafter pursued in accordance with CPR 81, which expressly covers both application and proceedings in relation to contempt of court, and the CPR generally. All the remaining rules of the Civil PR continued to apply (except insofar as disapplied by CPR 8 itself) including the rules of evidence (including admissibility of hearsay evidence, which would not be admissible in criminal proceedings), rules as to expert evidence and witness evidence, and rules as to applications under Part 23.

281. An appeal by the Claimant against the sentence imposed on the third Defendant was heard in the Court of Appeal (Civil Division), led by the Master of the Rolls (head of civil procedure), not in the Court of Appeal (Criminal Division), where the Lord Chief Justice might have been expected to preside. It would be absurd to suggest that the Master of the Rolls did not realise that he and his fellow judges were in fact adjudicating in criminal proceedings.

282. If these were criminal proceedings, it is highly doubtful whether the High Court, as opposed to the Divisional Court (in which Garnham J was not sitting) would have had jurisdiction to make the costs orders it did. The costs orders made in this case (both High Court and Court of Appeal) have been made in the exercise of the civil courts' exercise of what has been judicially described as the 'civil' costs jurisdiction under s.51 Senior Courts Act 1981 (*Murphy v Media Protection Services Ltd* [2012] EWHC 529, [2013] 1 Costs LR 16, at paragraph 3) and not in the exercise of any criminal costs jurisdiction.

283. *Murphy* concerned a prosecution under the Copyright, Design and Patents Act 1998 s.297(1) and subsequent successful appeal, on the ground that an essential element of the offence was incompatible with EU law. Given the exceptional circumstances the Divisional Court found that it was appropriate to apply the civil costs regime to a criminal case. There is nothing exceptional about proceedings for contempt generally so as to warrant a court having to wrestle with the sort of interesting legal arguments in Murphy. If these were criminal proceedings, brought in a criminal court, that court would have exercised its criminal jurisdiction in respect of costs.

284. Proceedings in the High Court would, if criminal in nature, have been in the Divisional Court. The Divisional Court has both civil and criminal jurisdiction, and specific jurisdiction pursuant to s.16(5) of the Prosecution of Offences Act 1985 (not available to any other branch of the High Court or part of the Queen's Bench Division) to make a "defendant's costs order" in favour of an accused in criminal proceedings.

285. There are specific steps to be taken in making a s.16 order (at section16(6) and (6A) – (6D)). No such order was made, and no such steps followed, because these proceedings were issued as, heard as and determined as civil proceedings, under the CPR, in a civil court, heard on appeal by the civil division of the Court of Appeal and subject to costs orders made pursuant to an exercise of the respective Courts' civil jurisdiction.

286. It would be nonsensical and entirely without legal justification if, in such circumstances, the proceedings were then held to be criminal proceedings for the purposes of one party recovering costs under a CCFA.

287. As for any distinction between the permission proceedings and the committal proceedings themselves, the Claimant's primary case is that both individually and collectively they are plainly civil proceedings, generally and for the purpose of the CLSA. If the Court were to determine that one limb of the proceedings was criminal proceedings, the Claimant would contend that the other is not.

288. The fact that the fourth Defendant was awarded criminal legal aid has no relevance to the question of whether these proceedings were criminal proceedings for the purpose of section 58A of the CLSA.

289. The anomaly is not that these civil contempt proceedings are civil, not criminal proceedings, both generally and for the purposes of sections 58 /and 58A of LASPO, but rather that defendants such as the fourth Defendant are able to get criminal legal aid for civil proceedings.

290. That is a rare exception to the usual approach that any legal aid available for civil cases is through the civil scheme. Indeed, civil proceedings for contempt are the paradigm situation where proceedings, which are civil for all other purposes, are deemed criminal for the specific and sole purpose of access to funding for legal representation.

291. This arises because of the specific statutory treatment of contempt in the context of legal aid which, since 2013, has made civil contempt the subject of criminal legal aid. The fact that it has only arisen since 2013 underlines the point that it cannot remotely be material to the construction of an Act which received royal assent 23 years earlier.

292. LASPO is a wide-ranging statute. It is expressly split into three main and expressly discrete parts. Part 1 deals with legal aid. Part 2 deals with litigation funding and costs. Part 3 deals with sentencing and the punishment of offenders.

293. Within Part 1, Sections 1-7 deal with the basic statutory provisions for a legal aid service. Sections 8-12 then deal with the mechanics and criteria for the provision of civil legal aid and sections 13-30 deal with the mechanics and criteria for the provision of criminal legal aid. The circumstances in which legal aid is available are tightly defined. In particular, legal aid is only available for specific services in respect of specific proceedings.

294. The default position is that legal aid is generally civil. "Civil legal services", as provided for by section 8 of LASPO, means any legal services other than those which expressly are required to be made available under the criminal legal aid sections.

295. Section15 provides for criminal legal aid, which is available to individuals if the prescribed conditions are met (section 15(1)(a) of LASPO) and those conditions essentially require the individual to be subject of actual or anticipated "criminal proceedings" (section 15(2) of LASPO).

296. 'Criminal proceedings' are then expressly defined for those purposes by section 14. Importantly, the Act expressly makes clear that the definition is only for the purposes of Part 1 of LASPO.

297. Section 14(g) expressly provides that contempt 'in the face of the court' is included in the definition of criminal proceedings for the purposes of Part 1. Contempt not in the face of the court became a problem when LASPO was introduced. LASPO was unclear and parties did not know if applications for legal aid in such matters should be for criminal legal aid or civil legal aid (an uncertainty referred to in the introductory paragraphs of Blake J's judgment in *King's Lynn*).

298. There were important differences, and not merely in terms of procedure. criminal legal aid is not means tested, and by virtue of regulation 21 of the Criminal Legal Aid (General) Regulations 2013 the interest of justice test is deemed to be met.

299. Prior to April 2013, the position was clear. Any application for legal aid in such a contempt case would have been for civil legal aid and would have been determined in accordance with paragraphs 3A-048 and 3C-026 of the then Funding Code Manual (again referred to by Blake J in *King's Lynn* at paragraph 6). This hammers home the point that the nature of legal aid for contempt proceedings cannot possibly determine the meaning of section 58A of the CLSA. If it did, the meaning of the CLSA would have been retrospectively changed by the change in the type of legal aid provided, without consultation, notice, consideration or amendment to either section 58 or section 58A.

300. The LAA's view by the time of the hearing in *King's Lynn* was that matters in respect of legal aid had changed, courtesy of section 14 of LASPO, which evidenced an intention in LASPO, made clear in non-statutory guidance from the Lord Chancellor, from that point onwards to treat "quasi-criminal" contempt proceedings as criminal proceedings for the purposes of legal aid (see paragraph 8 of Blake J's judgment).

301. Mr Justice Blake (at paragraph 31) reached the conclusion, in light of the Lord Chancellor's guidance, that section14(h) of LASPO was sufficiently broad to encompass civil contempt not in the fact of the court.

302. Accordingly, as with contempt in the face of the court, all other contempt, including civil contempt is to be treated as "criminal proceedings" for the purposes of Part 1 of LASPO: that is to say solely for the purposes of determining the availability of legal aid. Prior to April 2013, when section 14 came into force, the position was to the contrary.

303. Section 14 of LASPO expressly only applies for the purposes of Part 1. It does not apply to any other part of LASPO. Importantly, it does not apply to those Part 2, which deals with CFAs and funding. The premise that because contempt is treated under LASPO as a criminal proceeding for legal aid purposes and LASPO also deals with CFAs, it follows that section 58A of the CLSA must now be read as prohibiting a CFA which covers civil contempt proceedings is simply wrong.

304. If *King's Lynn* had any relevance to the meaning of section 58A, the logical corollary would be that before April 2013, the fact that legal aid in contempt proceedings was generally civil legal aid meant that section 58A did permit a CFA in civil contempt

proceedings, but that the government has chosen to effect a fundamental change to the primary statute on CFAs not through Part 2 of LASPO, which it was considering at the very same time, but through an obscure provision on legal aid in Part 1 of LASPO. That is an absurd proposition.

305. It is impossible to see how legally a specific statutory provision introduced in 2012 for a specific statutory purpose can be said to be material in any event to construction of a 1990 statute.

306. LASPO can evidence a 2013 decision to change the classification of contempt proceedings to criminal proceedings only if that is what LASPO expressly provides. The fact that LASPO expressly limits the definition which has that effect to Part 1 proves the contrary. There was no intention to effect any change or to prescribe contempt proceedings as criminal proceedings for any other purpose other than to ensure criminal legal aid was available.

307. If, as the Defendants contend, contempt proceedings were generally to be treated as criminal proceedings, including when considering CFAs and the funding of litigation, then the definition in s.14 LASPO would not be limited to Part 1. The legislature would have expressly applied that definition to Part 2.

308. The anomaly that in such civil proceedings a party is entitled to criminal legal aid is probably (given its readier availability) overall beneficial to Defendants. What matters however is that none of this does or could legally affect the plain position that for the purposes of s section 58A, civil contempt proceedings are civil proceedings.

309. If Court was to conclude that the CCFA was unenforceable, the effect would be limited. Firstly, the CFA has a severance clause. Severance clauses are sometimes ineffective with CFAs, because it is said that they fundamentally alter the nature of the entire bargain under the contract.

310. However, here that point could not apply. To the contrary, it was always part of this bargain that disbursements and discounted fees would be payable in any event. The contingency element related only to the difference between normal and discounted fees and any success fee.

311. If the Court severs the offending, contingent clauses, the Claimant and its solicitors are left with the simple position – as was always the case – of payment of an irreducible element of fees and disbursements. There is no reason why such a severance would offend public policy.

312. There is, however, a second and even more fundamental point. Even if no severance occurs, the uncontested evidence of Mr McCann is that the Claimant has paid the discounted fees and disbursements, some considerable time ago.

313. As such, the Claimant is not merely liable for, but has paid (in return for services rendered) and would therefore be unable to recover from its solicitor the disbursements and discounted fees in the principles outlined by Garland J at 709-710 of his judgment in *Aratra Potato Co v Taylor Joynson Garrett* [1995] 4 All ER 695):

> "Can it be said that the plaintiffs are entitled to recover their money because the consideration has wholly failed, being a consideration contrary to public policy or rendered under a contract which was void? If so, should such recovery only be on terms allowing TJG some remuneration including disbursements and profit? Can the concept non in pari delicto apply and, if so, what remedy would be open to the plaintiffs? I freely admit to finding these matters of the greatest difficulty. There is no clear guidance to be found in the authorities or in the textbooks. To allow the plaintiffs to recover but on terms would in effect be to allow TJG to recover on a quantum meruit if not to enforce the agreement. This cannot be right. Conversely, can it be a correct approach to take the view that the agreement is unenforceable and that the parties must therefore be left in the position in which they find themselves? This would enable TJG to take advantage of the champertous agreement dependent upon the plaintiffs' discovery of its true nature. Conversely, is justice done by allowing the plaintiffs to take advantage of the services rendered by TJG without having to pay for them? One aspect of the law is tolerably clear, and that is, where property or goods are transferred under an illegal transaction or a lease granted for an illegal or an immoral purpose, the property will pass and an estate be created…
>
> At the end of the day I take the view that, subject to any question of severance , where services have been rendered and paid for under an unenforceable contract in circumstances where it cannot be suggested that the payee has, apart from entering into the agreement, acted unconscionably towards the payer or been unjustly enriched at his expense, it is unreal to hold that the consideration, albeit one contrary to public policy, has wholly failed and that the plaintiff is entitled to recover the price of those services while retaining the benefit of them. The better rationale is that the champertous agreement is unenforceable rather than void or voidable...
>
> … I therefore conclude as follows: (1) the plaintiffs are not liable for unpaid bills; (2) where bills have been paid, the parties must remain where they find themselves."

314. Garland J went on to reject a severance argument, because it would have fundamentally changed the nature of the contract in that case, but despite doing so and despite the agreement therefore being unenforceable in its entirety, held for the reasons he had given that the paid bills were not repayable to the client.

315. In *Sobrany v UAB Transtira* [2016] EWCA Civ 28, [2016] RTR 18 (see Christopher Clarke LJ at paragraph 5) the Court of Appeal applied the same principle to hold that sums paid under an unenforceable credit hire agreement (in fact sums paid by the insurer, but deemed to be paid by the customer) remained a liability which could be recouped from a third party despite the unenforceability of the agreement.

316. Even if the CCFA were unenforceable, and regardless of any issue as to severance, on binding authority the indemnity principle is not breached in respect of the paid discounted fees and disbursements which the Claimant is entitled to recover (subject to assessment). This would apply if the CCFA was unenforceable for any reason whatsoever: for example even if it was an unwritten CFA.

Whether The Claimant's Contract of Retainer is Enforceable: Conclusions

317. Addressing first the question of whether the permission proceedings were separate from the committal proceedings (as opposed to two stages of the same proceedings), the Defendants say that by virtue of the rule against *Henderson* abuse, it is to open to the Claimant to raise that argument. I do not believe that the rule against *Henderson* abuse would be the pertinent principle, but I understand the underlying point to be that the Claimant, having persuaded Garnham J to come to the decision he made on 4 December 2018 without drawing any distinction between the permission proceedings and the committal proceedings, cannot draw such a distinction now.

318. Whatever the principle relied upon, I do not think that that can be right. Garnham J was addressing the question (raised, presumably, on behalf of the first Defendant) of whether the order for costs he had made against the first Defendant on 5 October 2018 was subject to section 26 of LASPO. That order had been made in respect only of the committal proceedings, so by definition Garnham J was considering only the committal proceedings. That is the context in which the Claimant, rightly, argued that section 26 had no application. There would have been no reason to draw any distinction between the permission proceedings and the committal proceedings. It could not have been an issue.

319. The question of whether any of the Defendants might have had the protection of section 26 in relation to the permission proceedings does not seem to have been raised by anyone until now. As the relevant order was made by HHJ Walden-Smith on 2 March 2017 and her order for the costs of the permission proceedings to be paid by all four Defendants was not qualified by reference to section 26 of LASPO, it would follow that any application to amend her order to that effect would have had to been made to her, not to Garnham J. It would have been incumbent upon one of the Defendants, not the Claimant, to persuade her that they had the protection of section 26. They did not, and none of that has any bearing on anything the Claimant has to say now.

320. I think that it would be right, in general terms, to treat the permission proceedings as separate from the committal proceedings, because the order of HHJ Walden-Smith of 2 March 2017 (at paragraph 1) directed the Claimant to file and serve a new claim form for the committal proceedings. That was claim number HQ17X01675, issued on 12 May 2017. It does not seem to me to be open to the Defendants to characterise the issue of a fresh claim form as redundant or as a procedural error, given that HHJ Walden-Smith ordered that the Claimant do so.

321. It seems to me to follow from the terms of HHJ Walden-Smith's order of 2 March 2018 that the permission proceedings ended with that order and the committal proceedings started with the issue of claim form HQ17X01675. I do not believe that the claim numbers have any real significance. They are used in judgements, orders and other documents to help identify the relevant proceedings, but that is an administrative matter which cannot in itself be determinative of whether we are dealing with one set of proceedings or two. In fact, claim numbers in related actions are often confused in court documents.

322. Having said that, given the other conclusions that I have reached and which I shall now set out, I do not think that it is necessary to draw any distinction between the permission proceedings and the committal proceedings.

323. It is common ground that contempt may be civil or criminal contempt, and that committal proceedings may be civil or criminal proceedings. If it is not common ground, it seems to me to be clear from the authorities and the legislation to which I have been referred that proceedings otherwise properly categorised as civil proceedings may be designated as criminal proceedings for the specific purposes of particular statutory provisions, among them section 14 of LASPO and regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013.

324. Because of that, it seems to me that I should take this approach. First I should address the question of whether these contempt proceedings were (other than for the specific purposes of any statutory provision) civil or criminal proceedings. If they were civil proceedings, I need then to consider a second question: whether they should nonetheless be characterised as "criminal proceedings" for the purposes of section 58A of the CLSA.

325. The Defendants have said that Garnham J found the proceedings before him to be criminal proceedings and that, having persuaded him of that, the Claimant is prevented by the rule against *Henderson* abuse from now arguing that they were civil proceedings. Again, I do not think that the rule against *Henderson* abuse can be the relevant principle but whatever the principle relied on, it is not in my view an argument with any real foundation.

326. In the observations appended to his order of 2 December 2018, Garnham J stated in plain terms that although the committal proceedings before him were civil contempt proceedings, they were criminal proceedings for the purposes of LASPO (by which he clearly meant section 26 of LASPO).

327. This unequivocal statement is consistent with a number of passages in his substantive judgment of 5 October 2018 that make it clear that he was conducting the proceedings as civil proceedings, with due provision for the fact that they were civil contempt proceedings. For example, paragraphs 12 and 13:

> "The jurisdiction of the High Court in civil contempt cases is an unusual one. The burden of proof is on the party alleging the contempt but the standard of proof is the criminal standard… The sanctions available to the court in the event that contempt is proven are imprisonment (for a period up to two years), a suspended sentence of imprisonment or a fine, sanctions more familiar to a criminal than a civil court. The obligations to ensure a fair hearing are the equivalent of those applicable in criminal proceedings …"

328. Mr Newman submits that Garnham J should be understood to have concluded on 2 December 2018 only that the contempt proceedings were conducted within a civil jurisdiction, but that is not what he said, and it is not consistent with his judgment of 5 October 2018.

329. Garnham J found the civil proceedings before him to have been designated as criminal proceedings for (and only for) the purposes of Legal Aid funding under LASPO. He was not called upon to address the question of whether either the committal proceedings or the permission proceedings were criminal proceedings for the purposes of section 58A of the CLSA, which is the issue before me. There is nothing to prevent the Claimant from putting its full case to me in that respect.

330. As I have said, in determining whether the CCFA is unenforceable I must first decide whether the proceedings against the Defendants were (other than for the specific purposes of section 58A of the CLSA) civil or criminal proceedings. Mr Mallalieu, in oral submissions, accepted that Garnham J's unequivocal conclusion, on 5 December 2018, that they were civil proceedings is not determinative of the point for present purposes. I am inclined to the view that it is, but assuming that it is not, my own conclusion is that both the permission proceedings and the committal proceedings were civil proceedings.

331. This case has a great deal in common with *Daltel Europe Limited v Makki*, which addressed not just the application of the Civil Evidence Act to contempt proceedings but, more fundamentally, whether contempt proceedings in the civil courts should be characterised as civil or criminal proceedings.

332. The Defendants rely upon the proposition that at least some of the contempts alleged in this case are criminal contempts, but as Mr Mallalieu has said one must not confuse the nature of the contempt with the nature of the proceedings. *Daltel Europe Limited v Makki* itself concerned both civil and criminal contempt (paragraph 27 of the judgment of Lloyd LJ refers). The conclusion of the Court of Appeal was, nonetheless, that for the purposes of domestic law (as opposed to Article 6 of the European Convention of Human Rights), "quasi-criminal" (Lloyd LJ at paragraph 39) contempt proceedings brought in the civil courts and governed by the CPR are civil, not criminal, proceedings.

333. Mr Newman has invited me to conclude that the proceedings in this case were criminal proceedings in a civil jurisdiction, but the same argument was rejected by the court in *Daltel Europe Limited v Makki*, and there is no reason to distinguish this case.

334. One of the Defendants' key submissions is the proposition that any contempt proceedings brought with the purpose of imposing a penalty, in particular imprisonment, upon a contemnor must be criminal proceedings, the more so when the contempt is properly characterised as criminal contempt. That seems to me to run directly contrary to the authority of *Daltel Europe Limited v Makki*.

335. As Mr Mallalieu has pointed out, these proceedings were, from issue to appeal, issued and conducted as civil proceedings governed by the CPR. I can find no reason to characterise them as anything other than civil proceedings.

336. Given that it is the nature of the proceedings, not the nature of the contempt, that matters it is not a decisive point, but it is worth mentioning that (as Garnham J observed at paragraph 9 of his judgment of 5 October 2018) the majority of the grounds alleged against the Defendants were for civil contempt falling within CPR 32.14. That includes all the grounds against the second Defendant, which do not appear to include the words "specific intent to interfere with due administration of justice" (deployed in the second Defendant's Points of Dispute to characterise the contempt alleged against him as criminal in nature, rather than civil).

337. The ground alleged against the fourth Defendant (of advising a client to lie on oath) might well be capable of being characterised as criminal contempt, as might some of the additional grounds raised against the first Defendant, but (as in *Daltel Europe Limited v Makki*) they were brought into the same civil proceedings as the majority of the grounds of (indisputably civil) contempt.

338. The answer to the first question is, then, is that these permission and committal proceedings were civil proceedings. As to the second question of whether, although civil proceedings, either the permission or the committal proceedings were "criminal proceedings" for the purposes of section 58A of the CLSA, again I accept the analysis offered by Mr Mallalieu.

339. Blake J in *King's Lynn* accepted submissions by the LAA to the effect that (applying *Hammerton*) committal proceedings, involving as they do "the determination of a criminal charge for the purposes of article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms", fall within regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 and are accordingly designated as criminal proceedings for the purposes of legal aid by section 14(h) of LASPO (which, he noted at paragraph 11 of his judgment, adopted a wider definition of criminal proceedings "than is ordinarily the case"). Garnham J accepted the same analysis.

340. Whether they are "criminal proceedings" for the purposes of section 58A of the CLSA is an entirely different question. The Defendants cannot point to any statutory provision or to any authority that supports that conclusion. References to the fact that part 1 of LASPO (which, as Mr Mallalieu points out, has no application to the CLSA) and the CLSA itself both deal with litigation funding, does not have any bearing on the point. Nor does any argument to the effect that there ought to be some sort of equivalence between the fourth Defendant's position and the Claimant's.

341. The Defendants have offered a list of indicia which they say, justify the conclusion that contempt proceedings should be characterised as criminal proceedings. Again, I think that that argument must fall foul of *Daltel Europe Limited v Makki*, but as regards the specific question of the proper interpretation of section 58A of the CLSA, there is much force in Mr Mallalieu's point that it cannot have been the intention of those drafting the CLSA that in judging whether they could enter into a valid and enforceable CFA, parties should have to have regard to some or all of a broad list of indicia some of which are not, in fact, exclusive to criminal proceedings and none of which are to be found in any statutory provision or any other authority.

342. The obvious interpretation would rather be that the "criminal proceedings" referred to in section 58A are proceedings in courts with criminal jurisdiction, governed by the Criminal Procedure Rules. If it had been intended to extend section 58A's prohibition on CFAs to proceedings which are, as a matter of law, civil proceedings then section 58A would say so.

343. As for public policy, I understand the concerns raised by the proposition that any legal representatives should stand to benefit financially in the event that they succeed on behalf of their client in committing a person to prison, but it is not for me to determine public policy.

344. Nor, for the reasons given by Mr Mallalieu, can I impose upon section 58A, (either on the basis of public policy or the "mischief rule" of interpretation relied upon by Mr Newman in oral submissions) some additional or implied wording extending to civil proceedings a prohibition which is expressly limited to criminal proceedings.

345. I would take that view even if the other provisions of the CLSA relied upon by the Claimant (which I accept can be of assistance in interpreting section 58A) did not

recognise that a person could be committed to prison in either civil or criminal proceedings and did not offer an indication that references in the CLSA to criminal proceedings are limited to proceedings in courts with criminal jurisdiction. Mr Naik has pointed out that section 111 of the CLSA echoes similar but separate provisions for civil courts at section 4, but that does not seem to me to weaken the point: rather the contrary.

346. As the contempt proceedings were not "criminal proceedings" for the purposes of section 58A of the CLSA, the CCFA is not unenforceable.

347. If it were, I very much doubt that the severance clause relied upon by the Claimant could save it, for the reasons given by Mr Newman. Whilst it is incorrect to say that the Claimant continues to seek anything in excess of Horwich Farrelly's base fees, it is equally incorrect to say (an argument not pressed by Mr Mallalieu) that without the success fee, the CCFA is no longer a CFA. An agreement under which base fees are payable in the event of success, and reduced fees payable in any other event, is still a CFA within the definition provided by section 58 of the CLSA.

348. It is not a question of severing everything but the CCFA's provisions for payment of reduced fees and disbursements. The conditional character of the CCFA seems to me to be fundamental to it. *Gloucestershire County Council v Evans* is not to the point, whereas *Awwad v Geraghty & Co* and *Forde v Birmingham City Council* seem to me to be very much so. I also agree with the Defendants that if the CCFA were unenforceable it would not be open to the Claimant (for the reasons given by Mr Newman) to fall back on quantum meruit.

349. There is however much force in Mr Mallalieu's submission that the indemnity principle cannot operate to prevent the Claimant from recovering costs which it has actually paid and which, by virtue of *Aratra Potato Co v Taylor Joynson Garrett* and *Sobrany v UAB Transtira*, would not be repayable even if the CCFA were unenforceable.

350. Mr Newman argues that *Aratra Potato Co v Taylor Joynson* was a solicitor/client case, with no bearing upon whether the Claimant the right to recover costs under an unenforceable agreement. I cannot entirely agree. It is one thing to say that a party cannot recover unpaid costs for which that party has no legal liability: it is another to say that a party cannot recover sums actually paid for legal services, particularly where there is authority for the proposition that they cannot be recovered from the solicitors to whom they have been paid. It seems to me that on balance Mr Mallalieu must be right, but given the other conclusions I have reached the point is somewhat academic.

Summary of Conclusions

351. Whether by reference to issue estoppel, the rule against *Henderson* abuse or the authorities on the appropriate exercise of the court's jurisdiction to amend an order under CPR 3.1(7), it is right in the circumstances of this case (and notwithstanding the terms of my order of 9 February 21) to hear the Claimant's argument that the indemnity principle prevents the recovery by the fourth Defendant from the Claimant of anything in excess of the amounts allowed by paragraph 7(2) of Schedule 4 to the Criminal Legal Aid (Remuneration) Regulations 2013.

352. I accept the Claimant's submissions in that respect. The indemnity principle is not disapplied for a party in receipt of Criminal Legal Aid for the purposes of proceedings that are prescribed as criminal proceedings by regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 and section 14(h) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

353. The costs recoverable by the fourth Defendant from the Claimant under the order of Garnham J of 5 October 2018 are, accordingly, limited to the rates and fees payable under paragraph 7(b) of Schedule 4 to the Criminal Legal Aid (Remuneration) Regulations 2013.

354. There are no provisions in those regulations that would allow those rates and fees to be enhanced, even had the fourth Defendant's solicitors applied for that. Indications to the contrary by the LAA in correspondence appear to me to be incorrect.

355. Both the permission proceedings and the committal proceedings were civil proceedings, albeit having the character of criminal proceedings for legal aid purposes. There is no basis for concluding that they were "criminal proceedings" for the purposes of section 58A of the Courts & Legal Services Act 1990; or that the Claimant's retainer is, in consequence, unenforceable; or that the indemnity principle operates to prevent the Claimant recovering any of the costs that would otherwise be payable under the orders of HHJ Walden-Smith of 2 March 2017 or Garnham J of 5 October 2018 and 2 December 2018.