



Neutral Citation Number: [2019] EWCA Civ 527

Case No: A2/2018/0828

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
SHEFFIELD DISTRICT REGISTRY

Soole J

[2018] EWHC 580 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LINDBLOM

and

LADY JUSTICE ASPLIN

Between :

Nicky HERBERT

Appellant

- and -

H H LAW LIMITED

Respondent

Nicholas Bacon QC and Andrew Hogan (instructed by Hampton Hughes Solicitors) for the
Appellant

P J Kirby QC and Robin Dunne (instructed by J G Solicitors) for the Respondent

Hearing date : 20 March 2019

Approved Judgment

Sir Terence Etherton MR :

1. This appeal raises two principal issues of general importance in relation to a detailed assessment of solicitor and client costs pursuant to the Solicitors Act 1984 s.70 and CPR 46.9. The first issue concerns the proper meaning and application of CPR 46.9(3) as regards a success fee of 100% under a Conditional Fee Agreement (“the CFA”), which has been fixed at that level without any regard to the risk of failure of the claim. The second issue is whether the cost of the premium for an After The Event (“ATE”) insurance policy was properly to be treated as a solicitor’s disbursement or merely an entry in the client account.
2. The appeal is from the order of Mr Justice Soole of 21 March 2018 dismissing the appeal of the appellant, HH Law Limited, which trades as Hampson Hughes (“HH”), from (1) the decision of District Judge Bellamy of 28 April 2017 in which he held, among other things, that the presumptions in CPR 46.9(3)(a) and (b) were rebutted and the appropriate percentage increase should be reduced to 15%, and (2) the decision of District Judge Bellamy of 1 June 2017 in which he held, among other things, that the ATE insurance premium should have been included in the bill as a disbursement and should not have been included in the cash account as an item of client expenditure.

CPR 46.9

3. CPR 46.9 is headed “Basis of detailed assessment of solicitor and client costs”. CPR 46.9(3) is as follows:
 - “(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed
 - (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
 - (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
 - (c) to have been unreasonably incurred if
 - (i) they are of an unusual nature or amount; and
 - (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.
 - (4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.”
4. 46PD.6 concerns the assessment of solicitor and client costs and relates to, among other things, CPR 46.9. It provides, so far as relevant to this appeal, as follows:

“6.1 A client and a solicitor may agree whatever terms they consider appropriate about the payment of the solicitor’s charges. If, however, the costs are of an unusual nature, either in amount or the type of costs incurred, those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that the client was informed that they were unusual and that they might not be allowed on an assessment of costs between the parties. That information must have been given to the client before the costs were incurred.

6.2 Costs as between a solicitor and client are assessed on the indemnity basis. The presumptions in rule 46.9(3) are rebuttable.”

The background

5. On 15 October 2015 Ms Herbert was involved in a road traffic accident when the car she was driving was struck from behind by a bus. On 17 March 2016 she entered into a CFA with HH, which specialises in personal injury claims. The CFA included the following provisions:

“If you win your claim, you pay our basic charges, our disbursements, success fee and ATE premium. You are entitled to seek recovery from your opponent of part or all of our basic charges and our disbursements as set out in the document “Hampson Hughes Funding Agreements: What you need to know”. We will use our best endeavours to recover maximum costs from the Defendant and their insurers.”

“The Success Fee

- (1) The success fee is set at 100% of basic charges.
- (2) The success fee cannot be more than 100% of basic charges.
- (3) There is a maximum limit on the amount of the success fee which we can recover from you.
- (4) The maximum limit is 25% of the total amount of any
 - (i) General damages for pain, suffering and loss of amenity; and
 - (ii) Damages for pecuniary loss, other than future pecuniary loss;

Which are awarded to you in in the proceedings covered by this Agreement. The maximum limit is applicable to these damages net of any sums recoverable by the Compensation Recovery Unit of the Department of Work and Pensions. The maximum limit is inclusive of any VAT which is chargeable.

(5) The maximum limit includes any success fee payable to a barrister who has a CFA with us.”

6. HH wrote a letter on the same day to Ms Herbert (“the retainer letter”). It enclosed an “Insurance Information Fact Sheet” which, among other things, said the following under the heading “After the Event Insurance”:

“If you do not have suitable alternative funding ... then we will take out an insurance policy with Centron Insurance...

The insurance policy costs £349 and will be deducted from your damages at the conclusion of the claim as well as up to 25% of your damages. If you do not inform us otherwise, a policy will be taken out if you do not have suitable alternative legal funding to protect you against having to pay the other side’s costs.”

“We only deal with Centron Insurance for Legal Expense Insurance Policies but we are not contractually obliged to conduct business in this way. You are free not to take out an insurance policy with Centron or choose your own insurance policy however we must advise that not having an insurance policy in place will expose you to the risk that you may have to pay costs and disbursements from your own pocket.”

“You are taking this insurance policy out without the firm having conducted a fair analysis of the market. We have researched legal protection insurance policies generally and found Centron policies to be reasonably priced given their high level of protection. You also do not have to pay for the policy unless your claim is successful, which we believe is a benefit for our clients. Please note that the firm does not have an interest in recommending this policy and the firm will not receive a commission from the Insurer.”

“... We believe that a contract of insurance with Centron Insurance is appropriate because [in addition to a number of specified factors] -The premium reflects the category of risk.”

7. Earlier in that document, above Ms Herbert’s signature, there is the following statement:

“I confirm I ... am happy for Hampson Hughes to waive the investigation into alternative forms of funding and proceed to take out an insurance policy with Centron at a cost of £349 to protect me. I am aware that the cost of the policy and a deduction of damages, up to a maximum of 25% will be taken upon successful conclusion of my claim.”

8. The document also contains the following statement under the heading Damages Deduction:

“The deduction of damages if you proceed with the Hampson Hughes CFA & ATE premium, are in respect of a success fee which is no longer recoverable from the Defendant due to a change in the law since April 2013. The deduction of your damages will never be more than 25% and will only be made if your case is successful and you do not have the requisite BTE cover as detailed above.”

9. An internal HH review note dated 26 April 2016 considered Ms Herbert’s prospects of success, concluding that the claim:

“...enjoys reasonable prospects of success given it is a rear end shunt and liability has been admitted on the linked files. I am a little wary that the client may have slammed on rather than slowed to a stop given the earlier altercation with the Defendant driver, however I am of the opinion that she would not have done considering she had young children in the back of the vehicle.”

10. HH, acting on behalf of Ms Herbert, took out ATE insurance with Centron Insurance (“Centron”). The premium was £349.

11. Having originally submitted her claim through the RTA portal in accordance with the pre-action protocol for low value personal injury claims in road traffic accidents, Ms Herbert issued proceedings in the County Court on 23 August 2016, claiming damages for a whiplash injury and consequential loss.

12. By letter dated 3 September 2016 the defendant’s insurers made a CPR Part 36 offer of £3400, together with costs as agreed or assessed, in full and final settlement of the claim.

13. By letter to Ms Herbert dated 6 September 2016 HH advised that she should accept the offer; and continued:

“The total deductions that we must make from your damages is therefore £1178.21. This figure is broken down as follows

Contribution towards our Costs (25% of damages)	£829.21
ATE insurance policy	£349

To clarify; if you were to accept this offer you will receive £2,221.79 and a balance of £1,178.21 will be paid towards our legal costs.”

14. Details of the costs incurred were contained in an invoice dated 6 September 2016. This was in the total amount of £6175.84, comprising £4795.40 (22.10 hours at £118) in respect of “costs”, £959.40 for VAT, and £421 for “Disbursements (expenses incurred on your behalf by the firm)” comprising a medical report (£216) and Court fee (£205).

15. On 19 September 2016 Ms Herbert accepted the offer. By letter dated 3 October 2016 she received the net sum of £2221.79. HH Law subsequently delivered two bills, namely the previous invoice of 6 September 2016 totalling £6175.84 and invoice no. 173761 dated 26 September 2016 in the sum of £691 plus VAT, totalling £829.20, which was for the success fee.
16. Ms Herbert subsequently instructed her present solicitors, JG Solicitors Ltd (“JG”). On 10 November 2016 HH supplied JG with its file of papers. By letter to HH dated 30 November 2016 JG challenged HH’s costs, in particular contending that HH had failed to conduct a litigation risk assessment justifying the level of the success fee; and that the 100% uplift was out of step with the fixed success fee of 12.5% under the previous costs regime for road traffic accident claims which settled before trial.

The assessment

17. By a claim form issued on 1 December 2006 Ms Herbert commenced proceedings against HH under CPR Part 8 for an assessment of the two invoices pursuant to the Solicitors Act 1974 s. 70.
18. It was ordered on 14 February 2017 that the assessment be limited to the success fee claimed in the sum of £691.00 plus VAT.
19. Points of Dispute and Replies were exchanged.
20. Craig Ralph, a director of HH, made a witness statement dated 20 March 2017 setting out the reasons why a success fee of 100% was charged to clients of HH pursuing personal injury claims. He said that, following the reforms made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), HH structured its fees so as to impose on a client a success fee which the client would pay out of damages recovered from the defendant, which would be subject to the statutory cap of 25% of damages. I interpose -that was, presumably, a reference to The Courts and Legal Services Act 1990 s.58 and The Conditional Fee Agreements Order 2013. SI 2013 No. 680 (“the 2013 Order”), which imposed a cap of 25% on a success fee under a CFA in respect of proceedings at first instance (the permitted percentage rising to 100% for appeals). Mr Ralph said that it was necessary to structure the fees in that way in order to enable HH to cover overheads and maintain a reasonable level of profit and so carry on in business. He also said that it is routine for solicitors now to make a solicitor client charge in the form of a success fee, and that the charging model HH had adopted was that opted for by most of HH’s competitors, many of whom charge success fees in the same way as HH. He said that HH’s policy on success fees and their amount “therefore reflects the “market rate” for a person who wishes to instruct a solicitor will pay (sic)”.
21. No evidence was filed on behalf of Ms Herbert.
22. With the parties’ agreement the assessment was made on the papers, that is to say without any oral hearing, by DJ Bellamy in the Sheffield District Registry of the Queen’s Bench Division.

Judgment of DJ Bellamy

23. The District Judge gave a careful judgment dated 28 April 2017, in which he held that the presumption in CPR 46.9(3) was rebutted and that, pursuant to CPR 46.9(4), the appropriate percentage increase should be reduced to 15%. It is not necessary, for the purpose of this appeal, to set out his detailed and careful reasoning. It is sufficient to say that he found (at [12]) that there was no clear evidence that Ms Herbert approved either expressly or impliedly, with full knowledge, the cost to be incurred; and that, more particularly, a success fee of 100% could easily be said to be unusual both in nature and amount, given the circumstances of the claim that were known to the solicitors at the time. He observed that there was no risk assessment on the file to justify a success fee of 100% as being reasonable. He said at ([14]) that he did not accept as a starting point that a defendant has to charge clients fees simply to ensure overheads and a reasonable level of profit are made. He said (at [15]) that it was difficult to see, in the circumstances of the case known to the solicitors at the time the CFA was entered into, that an uplift of much more than 12.5% could ever be justified as the facts of the case were straightforward, the nature of the injury was minor soft tissue damage and whiplash, there was no time off work, and it was likely that the case would be settled for a modest amount in a short period of time. He said (at [16]) that, taking into account the disbursements were funded by the solicitors, a slight increase to 15% would be permissible.
24. The consequence of the bill being reduced by more than 20% was that HH became liable for the costs of the assessment, in respect of which the District Judge ordered them to pay £4,500.00.
25. In relation to the ATE insurance premium, HH provided in the assessment a cash account, drawn from HH's office account and client account, showing the ATE insurance premium as an expense and an overall balance of nil, the ATE insurance premium having been forwarded to Centron out of the damages recovered by Ms Herbert. In a written judgment of 1 June 2017 the District Judge said the following (at [15]) about the ATE Insurance premium in the context of the cash account:

“Finally the Claimants have asked that I deal with the cash account as the final step in the assessment process. I agree that the ATE should be shown (and indeed treated as) a disbursement (see Cook on Costs 2017 paragraph 2.12), but of course I also note that there has been no challenge to that item as being unreasonable in amount nor did it form part of this assessment. Nonetheless the revised cash account exhibited to the Claimants' submissions would appear to be correct.”
26. The District Judge, therefore, approved Ms Herbert's version of the cash account, which excluded the ATE insurance premium, on the basis that the District Judge had held that it was a solicitor's disbursement which should have been included in the bill. The consequence of the District Judge's ruling was to increase the balance on Ms Herbert's cash account by £349.
27. HH appealed with the permission of the District Judge.

Judgment of Mr Justice Soole

28. The Judge gave a careful and comprehensive judgment but, again and with no disrespect, it is sufficient for the purpose of determining this appeal to summarise briefly his essential reasoning. On the issue of the presumptions in CPR 46.9(3)(a) and (b), he said (at [41]) that “approval” was not satisfied by the mere fact of the client’s consent to the relevant type or amount of costs to be incurred but, in agreement with Holland J in *Macdougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118, it required an informed consent. He said (at [42]) that he did not accept that the requirement of approval is directed only at cases where the client has been misled by the solicitor. He further said (at [43] –[47]) that risk was likely to be a primary factor on an application under CPR 46.9(4) for a reduction of the success fee percentage increase on a solicitor and own client assessment; risk assessment is also relevant to approval for the purpose of the presumptions under CPR 46.9(3); CPR 46.9(4) is not free-standing and CPR 46.9 must be read as a whole; and informed approval required it to be clearly explained to the client before she entered into the CFA that HH took no account of the risk in the individual case and provided for a 100% uplift (subject to the 25% cap) in all cases by reason of HH’s particular post-LASPO business model. The Judge concluded, on this aspect of the case (at [49] – [50]) that, in the absence of any such informed approval by Ms Herbert, there was no basis for the application of the presumption in either CPR 46.9(3)(a) or (b); the presumption in CPR 46.9(3)(c) did not arise since Ms Herbert was advised that the uplift would not be recoverable from the other party; and, there being no challenge to the District Judge’s assessment of the risk factor at 15%, the appeal had to be dismissed on that issue.
29. Turning to the question whether the ATE insurance premium was to be classified as a “solicitor’s disbursement”, the Judge referred to *Friston on Costs: Law and Practice* (2nd ed), *Re Remnant* (1849) 11 Beav. 603, *Re Buckwell & Berkeley* [1902] 2 Ch 596, *Re Blair & Girling* [1906] 2 KB 131, the Access to Justice Act 1999 s.29, *Hollins v Russell* [2003] 1 WLR 2487, *Rogers v Merthyr Tydfil CBC* EWCA Civ 1134, The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No. 2.) Regulations 2013, and the County Court decision in *Martin v Queen Victoria Hospital NHS Foundation Trust* 13.5.2016. The Judge then said (at [69]) that the purchase of ATE insurance cover is an inextricable part of the package which the solicitor provides to the client in “such litigation”, and that the fact that there was a contract between the insured client and the insurer is not decisive. He said that the reality is that the insurance cover is offered and provided as part of one overall package presented by the solicitor to the prospective client; and then, pursuant to the terms of the retainer, the solicitor pays the premium to the insurers from the gross settlement sum received from the third party. The Judge concluded (at [72]) that the payment of the premium falls within the first rule in *Re Remnant*, namely in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform. The Judge also concluded (at [73]) that the evidence and the case law demonstrated a clear and established custom that the payment of the premium is to be treated as a solicitor’s disbursement.
30. The Judge then turned to a third ground of appeal, namely that the classification of the ATE insurance premium as a solicitor’s disbursement did not have the consequence that the item should be removed from the cash account. HH’s argument was that a cash account is simply a matter of arithmetic and no more than a record of the

solicitor's payments in and out, and was not a record of what it ought to show. Having referred to *Re Remnant*, Cook on Costs 2017, Hurst on Costs (5th ed), PD46.6 para. 6.6(b), the Solicitors Act 1974 s.68 and *Parvez v Mooney Everett* [2018] EWHC 62 (QB), the Judge held that the District Judge was right to approve the cash account in the version which excluded the ATE premium, a solicitor's disbursement.

31. Finally, the Judge dismissed the fourth ground of appeal, which was that the District Judge erred in the way that he dealt with HH's argument that JG's claim for the costs of the success fee issue was vitiated by illegality relating to the formation of JG's retainer from Ms Herbert. There is no need to say anything further about that matter it as it does not form part of the appeal to this Court.

Grounds of Appeal

32. The grounds of appeal to this Court are that the Judge:
- (1) was wrong in law in his construction and application of CPR 46.9(3), in particular misconstruing and misapplying the presumptions in CPR 46.9(3);
 - (2) was wrong in law in his construction and application of CPR 46.9(4), in particular as permitting the court to reduce an agreed success fee on a solicitor and client basis by the court's own assessment of the degree of risk present in the case;
 - (3) was wrong in law in characterising an ATE insurance premium as a solicitor's disbursement liable to assessment under the Solicitors Act 1974 s.70; and
 - (4) was wrong in law in holding that PD 46.6 para. 6.6(b) permitted a merits based review of the cash account instead of its arithmetic subsequent to an assessment.

Discussion

The success fee

33. It is common ground that CPR 46.9(3) and (4) must be read together.
34. CPR 46.9(3) gives rise to presumptions about the reasonableness or unreasonableness of costs on a detailed assessment of solicitor client costs in the three circumstances specified in CPR 46.9(3)(a), (b) and (c). In the case of (a) and (b) the presumption is that the costs were reasonably incurred and reasonable in amount. In the case of (c) the presumption is that the costs were unreasonably incurred.
35. There is no longer any dispute between the parties in relation to CPR 46.9(3)(c). The Judge recorded (at [27]) that Mr Andrew Hogan, counsel for HH before him and junior counsel for HH before us, accepted that an irrecoverable success fee could be regarded as a cost of an "unusual nature or amount" but had submitted that, as the retainer made it clear that the success fee could not be recovered from the other party, the condition in CPR 46.9(3) (c)(ii) was not satisfied, and so there was no presumption under CPR 46.9(3)(c) that it was unreasonably incurred. The Judge agreed with that submission (at [47]). There is no respondent's notice challenging that decision.

36. Accordingly, so far as concerns the success fee, the only issue is whether or not Ms Herbert expressly or impliedly approved the imposition of the success fee and its amount so as to give rise to the presumption in CPR 46.9(3)(a) that it was reasonably incurred and the presumption in CPR 46.9(3)(b) that it was reasonable in amount.
37. Counsel were agreed before us that the Judge was correct to hold that “approval” in CPR 46.9(3)(a) and (b) means informed approval in the sense that the approval was given following a full and fair explanation to the client (although there was dispute between them as to the reasoning and significance of the *Macdougall* case cited by the Judge). We agree.
38. There was some debate before us as to whether it is the client who bears the burden of satisfying the court that express or implied approval was not given or it is the solicitor who bears the burden of satisfying the court that it was given. We consider that where, as here, the client brings proceedings under the Solicitors Act 1974 s.70(1), it is for the client to state the point of dispute and the grounds for it. If the solicitor wishes to rebut the challenge by relying on the presumption in CPR 46.9(3)(a) or (b), the burden lies on the solicitor to show that the pre-condition of the presumption, informed approval, is satisfied. Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor.
39. So, in the present case, HH relies on the retainer letter, the CFA, and the “What You Need To Know” document as having provided Ms Herbert with full and sufficient information about the success fee, and the fact that Ms Herbert signed the CFA as evidence of her informed consent. There was an initial telephone conversation between Ms Sinead McGrath of HH and Ms Herbert on 17 March 2016 but HH does not rely on any oral advice or information given to Ms Herbert. HH says that what Ms Herbert was clearly informed by, and understood from, the documentation supplied to her by HH was that she would be charged up to 25% of recovered damages and VAT plus the ATE insurance premium.
40. Mr Nicholas Bacon QC, for HH, submitted that, in the absence of evidence from Ms Herbert that she was, despite the documentation provided to her, misled or mistaken or that for some other reason she did not understand material matters relating to the success fee, she was to be conclusively regarded as having given her informed consent. We do not agree. It was open to her to seek to show that the documentation relied upon by HH was inaccurate or misleading or, in some other respect, insufficiently comprehensive in an aspect material to her understanding of the nature or amount of the success fee.
41. Mr P.J.Kirby QC, for Ms Herbert, made oral submissions that the documentation relied upon by HH was inaccurate or misleading because it did not accord with the reality of the way the success fee was in fact calculated and that it was in a number of other respects inaccurate, contradictory or otherwise lacking in clarity. Further, as appears from the skeleton argument for Ms Herbert, she continues to maintain that, as found by the Judge, the information supplied to her was deficient in a material respect

in that it failed to explain that the success fee was fixed without taking account of any risk that her personal injury claim might fail. I shall consider those arguments in turn.

42. Mr Kirby submitted that the CFA was inaccurate or misleading because it stated that “(t)he success fee is set at 100% of basic charges” but, he said, she was never charged 100% of basic charges. She was only ever charged 25% of damages and the ATE insurance premium because, Mr Kirby submitted, that was the business model adopted by HH which, in reality, fixed the success fee at 25% of relevant damages (viz general damages for pain, suffering and loss of amenity and damages for pecuniary loss other than future pecuniary loss) irrespective of risk as a sum to meet overheads and produce a reasonable profit for the firm. In further detail, the point is as follows.
43. The “What you Need to Know” document described the basic charges as follows:

“Basic charges

These are for all the work we do on your claim, from the date you first instructed us. These are subject to review.

How we calculate our basic charges

These are calculated for each hour engaged on your matter. Routine letters and telephone calls will be charged as units of one tenth of an hour. Other letters and telephone calls will be charged on a time basis.

The hourly rate charged is £240 per hour.

If your claim is allocated to the Multi Track the hourly rate will increase to £400 regardless of the status of the fee earner conducting the work.

We review the hourly rate on 31st March each year and we will notify you of any change in the rate in writing.

The above are our basic charging rates however in the event of an Order for costs made by the Court on an indemnity basis, out [sic] charging rate will be £400 per hour.

Value added tax (VAT)

We add VAT, at the rate (now 20%) that applies when the work is done, to the total of the basic charges and success fee.”

44. Ms Herbert, however, never received an invoice which set out how many hours had been spent and the rate charged. She was provided with a written summary dated 6 September 2016 giving those details and also details of disbursements made by HH but that summary, which showed a total of £6,75.84, stated that it was for information and not a request for payment. The only invoice which she received, dated 26 September 2016, and which was expressed to be for “Disbursements”, was for

£691.00 and £138.20 VAT, totalling £829.20. That represented 25% of the general damages paid pursuant to the CPR Part 36 settlement.

45. Looking at HH's position broadly, it received (1) from the defendant (or, more accurately, the defendant's insurers) £2,629.00 in respect of HH's litigation costs and disbursements, comprising court fees and a medical report fee, and (2) from Ms Herbert, deducted from the settlement sum, £829.21 success fee, being the cap of 25% of relevant damages, and £349.00, being the ATE insurance premium. That outcome reflected and implemented HH's business model for small personal injury claims but it is correct to say it was not broken down in any comprehensive bill to Ms Herbert by reference to the total of HH's basic charges. That, however, is a different issue to the one on the appeal, which is concerned with the accuracy, clarity and comprehensiveness of what was said about the success fee in the documentation supplied to her on 17 March 2017.
46. Indeed, I had difficulty in following some of the submissions of Mr Kirby on this part of Ms Herbert's case because of a series of other points that he appeared to throw into the mix. They were criticisms of the clarity or accuracy of the documentation supplied to Ms Herbert as to the costs she would be charged which were either not raised before Mr Justice Soole or were unrelated to the Grounds of Appeal even though there has been no respondent's notice. Nor were they foreshadowed in Ms Herbert's skeleton argument on this appeal. As I understood him, for example, he submitted that the retainer letter gave the impression that Ms Herbert would have to pay the costs of the defendant if she lost her personal injury claim although he then accepted that it was made clear in the CFA that, if she lost the proceedings, she would not be responsible for the defendant's costs unless the court specifically ordered otherwise. That was not an argument mentioned in the Judge's judgment and, so far as I am aware, was not a point argued before the Judge. It is unrelated to what I understood to be the central argument for HH on the appeal that the Judge was wrong to hold that, in order for HH to be able to rely on the presumption in CPR 46.9(3)(a) and (b), it was necessary for HH to make clear to Ms Herbert that the 100% uplift of the success fee (subject to the 25% cap) was unrelated to litigation risk and applied in all cases as part of HH's business model. The same was also true of two further contentions advanced by Mr Kirby. One of those was that the documentation supplied to Ms Herbert was defective insofar as it did not make clear whether the 25% cap of relevant damages would include or exclude the cost of the ATE insurance policy, although Mr Kirby accepted that at one point in the Insurance Information Fact Sheet, it was made clear that the ATE insurance premium would be payable by Ms Herbert in addition to 25% of relevant damages recovered. The other contention, as I understood it, which was equally irrelevant in the absence of a respondent's notice, was that the documentation supplied to Ms Herbert did not make clear that, as in fact occurred, HH would, in effect, charge her and credit her with 100% of the costs recovered from the defendant, which would have been fixed costs, and would waive the difference between the fixed costs recovered from the defendant and HH's "basic charges", that is to say its profit costs. That contention has the additional, strange twist that the complaint is in substance that, far from Ms Herbert being misled to her actual or potential detriment, Ms Herbert should have been told by HH that she would actually be charged less than the documentation might otherwise indicate and that she could have been charged more than she actually was.

47. I do not consider that there is any merit in any of those arguments for the reasons I have briefly indicated when describing them but, in any event, as I have said, they are irrelevant to this appeal in the absence of a respondent's notice. So far as I have been able to understand and confine Ms Herbert's complaint on this aspect of the appeal to what it is open to her to argue in this court (aside from the relevance of litigation risk assessment in fixing the success fee), it is no more than that she should have been told at the outset that the success fee would be 25% of the relevant damages she received since this would inevitably be less than 25% of HH's basic charges (save in very rare circumstances). I do not agree that this meant that the documentation provided to her by HH at the outset of the retainer was inaccurate or misleading. The CFA stated expressly that the success fee could not be more than 100% of basic charges; there was a maximum limit on the amount of the success fee which HH could recover from her; and the maximum limit was 25% of the total amount of general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss, awarded to her in the proceedings covered by the CFA. The amount of the success fee she was charged was consistent with a success fee calculated in accordance with that description. While it is true that the invoice she was sent did not set out the basic charges and then apply the cap of 25% of damages, the retainer letter stated that her contribution towards costs would always be limited to 25% or less of her relevant recovered damages. The "What You Need to Know" document said the same. There was, accordingly, nothing for her to pay by way of HH's charges other than the success fee capped at 25% of the general damages recovered from the defendant (in addition to the costs recovered from the defendant).
48. It is important to bear in mind that the complaint of Ms Herbert on this issue is not that she should have been sent a more detailed invoice or further invoices but that she did not give her informed consent to the charging of the success fee and its amount. There is no merit in that complaint (subject to the risk point addressed below) because all the information relating to its imposition and calculation and to her exposure to HH's fees generally, in the circumstances which occurred, was clearly set out in the documentation with which she was provided before agreeing HH's retainer. The retainer letter said that any contribution by her towards HH's costs under the CFA would be limited to 25% or less of her recovered damages. It told her who, within HH, would have the initial responsibility for dealing with her claim and the person having overall supervision for the claim. The CFA said that, if she won the claim, she would pay HH's basic charges, their disbursements, the success fee and the ATE premium. It said that HH would use their best endeavours to recover maximum costs from the defendant and their insurers. It set out the way the success fee would be calculated, and specified that there would be a cap of 25% of the elements of damages described. The "What you Need to Know" document also stated that, if HH won her claim, she would be liable to pay HH's basic charges, their disbursements, the ATE insurance premium and a success fee, and that her contribution towards her costs liability would be limited to up to 25% of the damages she obtained. That document also set out how the basic charges were calculated, and the hourly rate to be charged, and the imposition of VAT. Subject to the point on litigation risk and the success fee, the totality of that information provided a clear and comprehensive account of her exposure to the success fee and HH's fees generally.
49. The District Judge was of the view that a success fee of 100% was unusual, both in nature and amount, given the circumstances of the claim that were known to HH at

the time. Soole J said (at [43] and [44]) that risk assessment was likely to be a primary factor when considering the success fee percentage increase on a solicitor client assessment; and (at [47]) that informed approval would require that HH clearly explained to Ms Herbert before she retained HH that, in providing for a 100% uplift (subject to the 25% cap), HH took no account of the risk in any individual case but charged that as standard in all cases. I agree with the Judge on that point.

50. The fixing of a success fee uplift in the context of a conditional fee agreement has traditionally been related in this country to an assessment of the risk of the proceedings being lost. Soole J set out in his judgment (at [29]-[30]) a clear and detailed account of the difference between the way that an uplift under a conditional fee agreement was treated on an assessment of costs as between the parties and an assessment as between solicitor and client before and after LASPO. It is sufficient, for the purposes of this appeal, to say the following. Prior to April 2013, in deciding whether a success fee was recoverable between the parties as a reasonable cost, the CPR stated that the relevant factors to be taken into account included “the risk that the circumstances in which the costs, fees or expenses would be payable might or might not occur”, judging the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement: see the then 44PD.5 paras. 11.7 and 11.8(1)(a). The same consideration applied, on a solicitor and client assessment, where the client had entered into a conditional fee agreement: see the then 48PD.6 paras. 54.5(1)-54.8. LASPO abolished the right of recovery of a success fee as between the parties. Those provisions in the former Practice Directions, and the corresponding provisions in the CPR, have been revoked. They are not reproduced in the current CPR 46.9 or in PD 46. As Soole J observed, however, and Mr Kirby submitted, the wording of CPR 46.9(4) shows that it was envisaged that a success fee would be related to risk: the reference to the perception of the solicitor or counsel when the conditional fee agreement was entered into or varied closely reflects the language in the former 44PD para. 5 11.7 and 48PD.6 para. 54.5(2).
51. Mr Ralph’s evidence in his witness statement was that HH’s charging model was the same as that of many of its competitors. He said as follows:

“I can say that the model we have adopted, is that opted for by most of our competitors. It is routine that solicitors now make a solicitor client charge in the form of a success fee: I also know that many of our competitors charge success fees in the same way that we do. Our policy on success fees and the amount therefore reflects the “market rate” for a person who wishes to instruct a solicitor will pay. Equally of course, clients are free to “shop around” for a better rate, or lower success fee.”
52. HH’s point on the business model is that it is a perfectly fair and reasonable way of addressing the limited recovery of costs, generally fixed costs, in small personal injury claims, and the abolition in such claims of the right to recover from the losing party a success fee payable under a CFA, and so enables solicitors to handle those types of claim, bearing in mind that the client does not pay under the CFA if the claim is lost, the solicitor is effectively funding the litigation as it progresses and the effect of the 100% standard uplift is to spread the risk across the range of cases handled by

the solicitor. HH says that consumer protection is provided in these types of claim by the statutory cap of 25% of relevant damages.

53. Leaving aside that there is a substantial dispute between the parties as to the practical implications of the 25% cap on different amounts of damages and profit costs, I do not consider that either HH's justification for its charging model or the 25% cap answer the point that in this country, in the context of a conditional fee agreement, the amount of a success fee is traditionally related to litigation risk, as reasonably perceived by the solicitor or counsel at the time the agreement was made. Across the broad range of litigation, it would be unusual for it not to be. It continues to be the case in those limited areas, such as publication and privacy proceedings and mesothelioma claims, where success fees are still recoverable from the losing party. Even taking the sub-set of low value personal injury claims, Mr Ralph's evidence goes no further than that "most" of HH's competitors have adopted the same business model and "many" of HH's competitors charge success fees in the same way. That is insufficient to avoid the need, for the purposes of informed consent of the client under CPR 46.9(3)(a) and (b), to have told the client that the success fee of 100% took no account of the risk in any individual case but was charged as standard in all cases.
54. Nor was the 100% uplift in the present case any less unusual in nature and amount just because it was capped, as required by LASPO and the 2013 Order, at 25% of general damages for pain, suffering and loss of amenity and damages for pecuniary loss, other than future pecuniary loss. While the level of the contractual cap was not unusual, and its practical effect may have been to reduce the success fee to an amount that was not in all the circumstances exorbitant, it nevertheless remains the case that the starting point of a 100% uplift, irrespective of litigation risk, was and is unusual.
55. It is not a ground of appeal that, if the presumption in CPR 46.9(3)(a) and (b) does not apply, DJ Bellamy was wrong to assess the appropriate percentage increase under CPR 49.3(4) at 15%.
56. For all those reasons, I would dismiss the appeal in relation to the success fee.

The ATE insurance premium

57. HH contends that both DJ Bellamy and Soole J were wrong to treat the ATE insurance premium as a solicitor's disbursement rather than an item incurred on behalf of, and as agent for the client, which was properly shown in the cash account as a cash payment
58. I would allow the appeal on this point.
59. In *Re Remnant* (1849) 11 Beav 603 the issue was whether a particular payment made by a solicitor on behalf of the client was "a professional disbursement in the bill of costs" or "a mere cash payment". The payment in question was the sum of £64 18s 6d, which the client owed to a third party and which the solicitor paid to the third party in the course of compromise negotiations. The solicitor included that sum in his bill of costs as a professional disbursement. On taxation, the Master disallowed it, and the question was whether that disallowance was right. The point was of importance in view of the law that, if the bill of costs was reduced by more than one sixth on taxation, the solicitor would pay the costs but not otherwise.

60. Lord Langdale upheld the decision of the Taxing Master. He referred to the certificate of the Taxing Masters, which they had given to him in answer to a request by him that they state their opinion as to the principle on which the practice of the solicitors' profession rested. In that certificate the Taxing Masters stated the principle as follows:

“That such payments as the solicitor, in the due discharge of the duty he has undertaken, is bound to make, so long as he continues to act as solicitor, whether his client furnishes him with money for the purpose, or with money on account, or not: as, for instance, fees of the officers of the Court, fees of counsel, expense of witnesses, &c., and also such payments in general business, not in suits, as the solicitor is looked upon as the person bound, by custom, to make, as for instance, counsel's fees on abstracts and conveyances, payments for registers in proving pedigree, stamp duty on conveyances and mortgages, charges of agents, stationers, or printers employed by him, &c., are, by practice and we think properly, introduced into the solicitor's bill of fees and disbursements.

But that payments which the solicitor is not either by law bound to make, or, by custom, looked upon as the person to make, as for instance, purchase-moneys or interest thereon, moneys paid into Court, damages or costs paid to opponent parties, bills due to the solicitors of trustees, mortgagees, or other parties, legacy or residuary duties, or other payments of a like description, which the solicitor makes as agent, on the order of the client, and not in discharge of his own duty or liability as solicitor, are, by practice and we think properly, charged in the cash account.

We think also, that the question whether such payments are professional disbursements or otherwise, is not affected by the state of the cash account between the solicitor and the client; and that (for instance) counsel's fees would not the less properly be introduced into the bill of costs as a professional disbursement, because the client may have given money expressly for paying them; and that the purchase-money or damages would not be properly so introduced, notwithstanding the solicitor may have advanced the money out of his own funds.”

61. Lord Langdale MR said the following at 612-613:

“From this certificate, and from the inquiries which I have made, it appears to me, that it is the practice of solicitors, who may have to pay or advance money on behalf of their clients, carefully to distinguish such professional disbursements as ought to be entered in their bills of costs, from such other advances or payments, as ought to be entered only in their cash accounts, as cash payments or advances. And it seems to me to be a very reasonable and proper rule, that those payments only,

which are made in pursuance of the professional duty undertaken by the solicitor, and which he is bound to perform, or which are sanctioned as professional payments, by the general and established custom and practice of the profession, ought to be entered or allowed as professional disbursements in the bill of costs. And, considering that the sum of £64, 18s. 6d. now in question, was not a sum which it was incumbent on the solicitor to pay in the discharge [614] of his professional duty, and that it is not the practice or custom of the profession to consider such a payment as a professional disbursement, but only as a cash payment, I have come to the conclusion (not in accordance with my first impression) that the Taxing Masters' certificate is right, and that the petition must be dismissed."

62. *Re Remnant* was followed and applied by a two judge Court of Appeal (Vaughan Williams and Romer LJ) in *Re Buckwell & Berkeley* [1902] 2 Ch 596. It was also approved in *Re Blair & Girling* [1906] 2 KB 131. In that case the question was whether a payment by a solicitor, who was instructed in relation to the formation and registration of a company, of the stamp duty payable on the registration of the company was properly included in the bill of costs as a "disbursement" within the meaning of the Solicitors Act 1843 or should be transferred to the cash account. The Court of Appeal held that the payment in question was not such a disbursement. Vaughan Williams LJ characterised the question as being:

"whether this large payment in cash has been made by the solicitors in their professional character as solicitors, or whether it has been made by them as agents independently of that character, just as a banker or any other agent might make disbursements for a client."

63. He said (at 138) that it did not seem to him to be a disbursement which prima facie was a professional disbursement made by the solicitors. He rejected the suggestion that the custom and practice of solicitors treated the particular disbursement in question as a professional disbursement as between solicitor and client. He said that, although the affidavit as to the practice of solicitors showed that very often solicitors put that payment into their bill of costs as distinguished from their cash account, it had to be recollected that in all those cases where the bill of costs was not submitted to taxation it made no difference to the client whether the payment appeared in the bill of costs or in the cash account since he had to pay it in any case. He said that, on the other hand, if a particular disbursement appeared in bills of costs which went to taxation, and the disbursement had been habitually treated upon taxation as an item properly introduced into the bill of costs, then that would go far to establish such a custom. No such custom had been proved.
64. Vaughan Williams LJ did not expressly cite *Re Remnant* although he had done so in the earlier case of *Re Buckwell & Berkeley*. The other two members of the Court of Appeal (Stirling and Fletcher Mouton LJ) did, however, cite *Re Remnant* as setting out the rule which they should follow.

65. Accordingly, we must apply the principle as articulated in *Re Remnant*. It is apparent that Lord Langdale in that case was endorsing the opinion the Taxing Master in their certificate and his summary of the principle was not intending to qualify or deviate from what the Taxing Masters had said. Indeed, Vaughan Williams LJ in *Re Buckwell & Berkeley* expressly referred to and applied the Taxing Master's certificate in *Re Remnant*.
66. It follows that a disbursement qualifies as a solicitors' disbursement if either (1) it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees, and witnesses' expenses, or (2) there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement.
67. That would appear to be reflected in the distinction between the definition of "disbursement" and "professional disbursement" in the Solicitors Regulation Authority Handbook Glossary 2012. The expression "disbursement" is there defined as meaning:

"in respect of those activities for which the practice is regulated by the SRA, any sum spent or to be spent on behalf of the client or trust (including any VAT element)"

The expression "professional disbursement" is defined as meaning:

"in respect of those activities for which the practice is regulated by the SRA, the fees of Counsel or other lawyer, or of a professional or other agent or expert instructed by you, including the fees of interpreters, translators, process service, surveyors and estate agents but not travel agents' charges.

68. The ATE insurance premium does not fall within either of those categories of solicitor's disbursements I have mentioned. It is a premium on a policy of insurance under which the client is the insured, pursuant to a contract of insurance made between the insurer and the client, in order to provide the client with funds to discharge costs which are not recovered from the opposing party and the client is liable to pay, whether those are costs of the other party or of the client's own solicitors. As the Court of Appeal observed in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 1 WLR 2487 at [114], "the client's liability to pay the [ATE] insurance premium arises from the contract of insurance, not from her contract with the legal representative". In the present case, it was an insurance contract effected by HH as Ms Herbert's disclosed agent, and it specified Ms Herbert as "the Policyholder". An ATE insurance premium is not a payment which a solicitor is obliged, as such, to make irrespective of whether or not put in funds by the client, comparable to court fees and counsel's fees. It is not, technically speaking, a litigation expense at all: see *BNM v MGN Limited* [2017] EWCA Civ 1767 at [73]. Nor does the evidence establish that there is a custom of the solicitors' profession that an ATE insurance premium is to be treated as a solicitors' disbursement to be included in the bill submitted to the client. Ms Herbert relies on the practice of including the ATE insurance premium as a disbursement in the bill presented by the successful party to the losing party when success fees were recoverable before LASPO. I agree with Mr Bacon that this does not assist at all in establishing a custom that such a premium has customarily been

treated as a solicitor's disbursement on solicitor and client assessments. There is no evidence at all before us as to such a custom. Nor did District Judge Bellamy refer to any such custom. He referred to Cook on Costs 2017 para. 2.12. We have not been shown that passage and it is not in our bundle of authorities. There is in the bundle an extract from para. 2.13 of Cook on Costs 2018, although we were not referred to it. I assume it is the same as the paragraph in the earlier edition of Cook, to which the District Judge referred. It describes the principle in *Re Remnant* and gives examples of what are and are not solicitor's disbursements consistent with that case. An ATE insurance premium is not one of them.

69. Mr Kirby relied upon the terms of the particular retainer between HH and Ms Herbert and sought to argue that the Insurance Information Fact Sheet, which she signed, required her to take out ATE insurance cover unless she had "Before The Event Insurance" or some other means of funding any adverse order for costs and HH's disbursements. Even if that is the correct interpretation of the document, it misses the point as the test for what is a solicitor's disbursement to be included in the bill on assessment. The test is not what is agreed between an individual solicitor and the client but what every solicitor, as such, is obliged to pay irrespective of funding by the client or what is properly included in a bill of costs on assessment as a matter of general custom of the profession.
70. For those reasons I would allow the appeal on the ATE insurance point.
71. This decision is based on the evidence before the District Judge. I appreciate that the consequence is that the client will not be able to challenge the amount of an ATE insurance premium through the convenient mechanism of an assessment under the Solicitors Act 1974 s. 70. That is not, however, a good reason to decline to apply the principle which is clearly binding on us, in the light of the limited evidence before us, and so create a precedent which both undermines the coherence of the principle and may have unforeseen implications in other and different cases. No doubt, if this outcome is considered unsatisfactory within the profession, the Solicitors Regulation Authority and the Law Society can consider what could be done to bring an ATE insurance premium within the principle as to what is a solicitor's disbursement.
72. In the circumstances, it is not necessary to address the fourth ground of appeal, upon which, in any event, we received no oral submissions.

Lady Justice Asplin :

73. I agree

Lord Justice Lindblom :

74. I also agree.