IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

No. LM-2022-000060

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 4 April 2023

Before:

HIS HONOUR JUDGE PHILIP KRAMER
(Sitting as a High Court Judge)

B E T W E E N :

(1) CRANE LEGAL LIMITED
(2) SAUNDERS LAW LIMITED — Claimants

- and -

MR MATTI SAKARI HUTTUNEN
(As Administrator of the Estate of Mohamed Bahgat (Deceased)) — Defendant

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MR W McCORMICK KC (instructed by Joseph Hage Aaronson LLP) appeared on behalf of the Claimants.

MS L LACOB and MR A GURR (instructed by Peters & Peters Solicitors LLP) appeared on behalf of the Defendant.

**J U D G M E N T**

(Via Microsoft Teams)

JUDGE KRAMER:

1 This is an application for summary judgment brought by two claimant solicitors who seek to recover their fees for acting for Mr Mohamed Bahgat (now deceased) arising under conditional fee agreements ("CFAs") dated 21 December 2010, as regards the first claimant, and 14 September 2012, as regards the second.

2 The claimants have made a further application, dated 23 March 2023, for the enforcement of the CFAs and the determination of their validity and effect under s.61 of the Solicitors Act 1974.

3 The sums claimed by Balsara are £292,033.50 and by Saunders £605,964. In addition, both solicitors claim contractual or statutory interest. As at 7 June 2022, the contractual interest claimed amounted to £75,303 for Balsara and £91,630 for Saunders, compounding on a monthly basis at 10 per cent per annum for the former and 6 per cent per annum for the latter.

4 Crane Legal conducted its business as Balsara & Company Limited between 19 March 2008 and 11 June 2012 and has been referred to in submissions, and in my judgment, as "Balsara". Saunders Law Limited practised under that name until 20 May 2015, when a successor practice, Saunders & Partners LLP, was incorporated. Both claimants have been represented on this application by William McCormick KC.

5 Mr Bahgat died on 8 October 2022. Mr Huttunen, the defendant, is the administrator of his estate, having been substituted as defendant by an order of the court dated 11 January 2023. The defendant has been represented by Lisa Lacob and Andrew Gurr, both of Counsel.

6 The evidence in this case is to be found in three witness statements from Mr Subir Karmakar, the solicitor acting for acting for Mr Bahgat, both at Balsara and, subsequently, Saunders. There is a statement from Mr Tickner, the solicitor acting for Mr Bahgat and his estate in resisting the claim. In addition, there are several hundreds of pages of exhibits to these statements. There is also a statement from Mr Bahgat.

Background

7 The background to the claim is uncontentious. Mr Bahgat was born in Egypt but became a Finnish national on 12 February 1971. In 1980 and 2004, the Egyptian and Finnish governments entered into bilateral investment treaties. Mr Bahgat was selected by the Egyptian government to develop iron ore deposits near Aswan in Southern Egypt in 1997. Following a change of government in Egypt, the police there arrested Mr Bahgat and froze his assets, along with those of the two companies he had set up to develop that project. His business in Egypt was shut down by the authorities and he spent three years in prison. As a result of these events, he complained that his investments had become worthless and he sought redress from the government of Egypt in investment arbitration proceedings brought under the 2004 and 1980 bilateral investment treaties.

8 In about December 2009, Balsara started acting for Mr Bahgat in his proposed claim. He needed litigation funding to pursue the matter. To this end, Mr Karmakar instructed Legal Expenses Solutions Limited, a litigation finance broker, to look for third party funding. There is an issue as to the respective involvement of Mr Karmakar and Mr Bahgat in arranging the funding, although the latter accepts signing a proposal form from First Class Legal, a broker acting for the proposed funder, Buttonwood, and an ATE insurer, Gable Insurance AG.

9 On 4 August 2010, the completed proposal form was submitted to First Class Legal by Mr Karmakar on Mr Bahgat's behalf. The application was dealt with at the broker by Jane Kelsall, described as a senior underwriter.

10 On 5 October, Ms Kelsall sent Mr Karmakar an email attaching an indication of funding terms and a document referred to in the attachment as "CL Gable policy wording". Mr Bahgat accepted that he received these documents from Mr Karmakar by an email sent on the same day. His email is in the bundle at p.332. The attachments to the email are "Indication of funding terms Bahgat 15.10.10" and "1CL Gable policy wording". The document reads:

> "Privileged.
>
> Dear Mr Bahgat,
>
> Good news. We have at last received the proposal. I have received this. I have not fully considered the terms and will need to read it through. Please consider and we will discuss it on coming Monday. I am sure we will be able to negotiate on terms in due course. Please note that you do not have to pay anything if you do not win the claim. I have not forwarded this document to Paul Towey and suggest you do so. As you know, this is a privileged document and as your lawyer I can only pass it onto Paul once I have taken your clearance. As it is too late now at your end, I have decided not to trouble you with permission in this regard. I think discussing this with Paul will assist us and we should do so in the coming week. Have a great weekend.
>
> Warm regards,
>
> Subir Karmakar."

11 The document referred to as the "1CL Gable policy wording" contained various definitions. Where "conclusion" appears in the policy, it means, among other things, "the conclusion of the proceedings shall be either when a settlement in the proceedings has been agreed between the parties with the insurer's prior consent" or "when the proceedings have been concluded by a judgment or order of the court". "Proceedings" are defined as "those specified in the schedule to the policy". There being no schedule in this document, as it was merely policy wording, that does not appear. Whilst there is evidence suggesting that no policy was ever issued, there is no evidence as to whether a policy schedule was ever produced, even in draft. "Successful conclusion" is defined as follows:

> "A conclusion where the insured is awarded an amount in respect of damages and/or costs and includes a compromise of the proceedings prior to the commencement of the trial by agreement between the insured and the opponent. With the prior written agreement of the insurer, such agreement shall not be unreasonably withheld."

I do not need to read on.

12 Finally, the cover under the policy is described in these terms:

> "The insurer shall be subject to the limited indemnity set out in the schedule providing an indemnity to the insured from the inception date. In respect of opponent's legal costs, premium and own

> disbursements, together with loan interest and any funding fees payable to the funders on any loan and for funding facility effected to fund the premium, own costs and own disbursements or in respect of any money lodged by way of security for costs. Only legal costs limited to the amount funded, if any, and on deficiency of damages provided that if, in the proceedings and also orders made by the court for the payment of costs by the opponent, by the insured, such costs shall be separately computed and set off against the insurer's liability under the policy so that the insurers will only provide an indemnity for the net amount, if any, payable by or to the insured that has been entered into."

Without reciting the other definitions, the effect of the definition of cover was that the holder of the policy, subject to the limit of indemnity, was to be indemnified against any costs they were obliged to pay their opponents, their own legal costs and disbursements, including the premium for the Gable policy.

13 On 20 October 2010, Mr Bahgat replied to the email which he had received on 15 October from Mr Karmakar. He said:

> "I have gone through the indication terms and condirtion (sic) of funding of cade (sic) against ARE and I do accept those (sic) terms and condirions (sic). I believe that we need the funding to be up to the award."

I have read it phonetically, but what he was saying that he had gone through the terms and conditions of funding his case against the Republic of Egypt, and he accepted them and believed that they needed funding up to the award.

14 The same day, Mr Karmakar wrote to Mr Bahgat, responding to 20 October email. He attached a letter he had sent to Ms Kelsall indicating that "Mr Bahgat was, subject to contract, happy to accept your proposal to cover his exposure to costs and disbursements for pursuing the claim as set out in our costs estimate updated 2 August 2010". He did not make specific reference to the Gable ATE policy. In his email to Mr Bahgat, Mr Karmakar said:

> "Please find a copy of a letter I have sent to First Legal today indicating that you are happy to proceed on the basis of the proposal they have sent you."

So that is a reference to the document sent to Ms Kelsall. He went on:

> "In due course, I will send you a draft client care letter in which we will set out our costs agreement with you. As we generally discussed at the UWs have indicated their intention to cover 60 per cent of our costs. We will seek an agreement with you on terms that you agree to pay us the remaining 40 per cent of the costs if only you succeeded in your claim with a 100 per cent uplift. That means to say that if the remaining costs are, say, £40 and you are successful in your claim, then you will pay us £80. The success fee reflects that fact that we are taking on the risk of not being paid at all if you lose the claim and delayed recovery of costs. We will set out the terms of this agreement in due course."

Again, this document does not make specific reference to the ATE policy and the inclusion of the letter to First Class Legal dated 22 October, which was an attachment, also made no specific reference.

15 There seems then to be a gap in communication before the next communication relating to funding and the ATE policy appearing in the exhibits. There is a run of correspondence from 3 to 5 November 2010. Whether there was any communication in between, I do not know. All I have is the exhibits.

16 On 3 November 2010, Mr Karmakar emailed Mr Bahgat with a draft letter setting out his comments on the funding agreement and the ATE policy. As to the latter, he says:

> "The ATE policy is also likely to pay deficiency damages if you are successful and if the amounts awarded to you in the award are insufficient to meet your liability (see the definition in the ATE policy document). We will need to seek some clarity on these concepts from First Legal."

17 On 4 November, Mr Karmakar sent Ms Kelsall the final version of the draft letter he had earlier sent to Mr Bahgat in which he said that "his client was happy to proceed to sign and execute the draft loan agreement for the funding for the commencement of the ATE litigation costs insurance policy", but he asked for alterations to be made to both. In relation to the ATE policy, while he requested a number of changes, he did not make reference to the definition of "successful conclusion", that is to say he did not seek an alteration to that. The following day, Ms Kelsall responded, identifying where alterations would be made and exhibiting a copy of the amended loan agreement.

18 Mr Karmakar of Balsara sent Mr Bahgat a client care letter, which it is said contained the CFA on 21 December 2010. Under the heading "I confirm that I have read and agreed to the above terms and conditions which will govern my relationship with Balsara & Company", Mr Bahgat signed his name and dated the document 21 December 2010. He also signed to confirm his instructions. The letter was signed on behalf of Balsara on 5 January 2011. The letter records that Balsara had been instructed to assist in the action against the Arab Republic of Egypt and to seek third party funding to prosecute the claim. They say they approached a specialist broker, but only received an offer from First Class Legal and the documentation was awaiting signature. Their instructions were to complete the execution of the third party funding contract. They say that though they do not give advice about the third parties funding market, the arrangement seemed to them appropriate.

19 Under the heading "Charges and expenses, third party funding and partial conditional fee agreement" the letter says at subpara.5(2):

> "An after the event litigation costs insurance policy to be issued by Gable Insurance AG, an "ATE policy", insures you against the risk that you may have to pay your opponent's costs once the proceedings are concluded. In the same circumstances and so long as you comply with your obligations, it will cover the costs of the premium and your own costs, as well as the fund protection fee and the funding and administration fee. In addition, it protects you to the extent that these expenses exceed your recovery of compensation and costs (see under "deficiency of damages")."

This last expression is put in inverted commas and could be a reference to the Gable policy wording as deficiency damages do appear as a defined term, albeit that the letter does not say so in terms. The letter also provides that Balsara will charge £450 an hour for Mr Karmakar, and gives rates for other fee earners. It explains that in view of the lender's proposals they had agreed with Mr Bahgat that they would be paid, with funds received from the lenders, 60 per cent of their hourly charge and the remaining 40 per cent was to be postponed, only becoming payable on "the successful conclusion, as defined in the ATE policy, of this matter". The following paragraph after the reference to the ATE policy explains that Balsara will charge a success fee equivalent to 100 per cent uplift on the totality of the remaining 40 per cent of the profit costs receivable by them. They say:

> "Part of our fees, therefore, are conditional on success in the proceedings and for this reason this letter of engagement is a conditional fee agreement within the meaning of the Courts and Legal Services Act 1990 (as amended)."

The funder was left to deal with the inception of the ATE policy, which itself was to be funded from the loan. There is no evidence that it did put a policy in place.

20 Balsara wrote to First Class Legal on 4 January 2011, asking for the status of the policy and, if not signed, when it would be completed. They repeated this request to ATE Insurance, a new funding broker, in April 2012, and the funders, Buttonwood, on 27 July 2012, but all to no avail.

21 Notwithstanding the absence of an ATE policy, on 12 January 2011, Mr Bahgat signed a 2-year fixed loan agreement for funding in the sum of £2.4 million with Argentum Associates Limited, which subsequently became Buttonwood Legal Capital Limited. There is no evidence that Mr Bahgat was aware at the time of signing that he had no ATE insurance.

22 Between 20 December 2010 and 31 May 2010, Balsara issued Mr Bahgat with eight invoices for legal services. Mr Bahgat accepts that he authorised Balsara to recover 60 per cent of those invoices from the funders. There is no dispute that the legal services itemised in those invoices were provided.

23 In July 2012, Mr Karmakar left Balsara to join Saunders Law Limited. Mr Bahgat agreed to follow him. This required the completion of a new CFA. There were alterations sought to the replacement funding agreement. The original had said that it was subject to the Consumer Credit Act 1974. On 15 August 2012, Mr Karmakar, now writing for Saunders, emailed Mr Bahgat to say that the funders were waiting to hear if he was happy to sign a new loan agreement, deleting reference to the 1974 Act. The email states:

> "I now want to have a fully signed funding agreement in place and have said so to Zulfi today. We also need to have a fresh client care letter signed and put in place. I have prepared a client care letter exactly on terms of the previous Balsara client care letter, but deleting long passages on money laundering and generally making it easier to understand."

The email goes on to mention the agreement with Buttonwood, but makes no express reference to the ATE policy. The same day, Mr Karmakar emailed a client care letter to Mr Bahgat, which is said to contain the new CFA between himself and Saunders.

24 Under the heading "Charges and expenses, third party funding and partial conditional fee agreement", there is a summary explanation of the funding agreement proposed by Buttonwood. It says that the funding will cover the funds necessary to meet expenses, including the premium of the litigation costs and insurance policy. In subpara.5(2) of the letter, Mr Karmakar says:

> "We are advised by Buttonwood Legal Capital Limited that it has procured an after the event litigation costs insurance policy from Royal Luxembourg Soparfi SA ("ATE policy") which indemnifies you against the risk that you may have to pay your opponent's costs once the proceedings are concluded. In the same circumstances, and so long as you comply with your obligations, it will also cover the costs of the premium and your own costs, as well as the fund protection fee and funding administration charge. In addition, it protects you to the extent that these expenses exceed your recovery of compensation of costs (see under deficiency of damages)."

This is in identical terms to the Balsara letter, save for the replacement of "by Royal Luxembourg Soparfi" for Gable in the earlier document. As regards what constitutes success, it again repeats that which was in the Balsara document, where it says that:

> "This 40 per cent will only be payable on the successful conclusion (as defined in the ATE policy) on this matter."

25 On 14 September 2012, Mr Bahgat signed the Saunders client care letter, confirming he had read and agreed to the terms of business and it was signed the same day by Mr Karmakar.

26 Royal Luxembourg had previous involvement in relation to funding. In July 2011, it had issued a security pledge and guarantees in favour of Argentum (later Buttonwood), which guaranteed the making of certain payments in consequence of a legal action not being covered by the ATE insurance.

27 On 27 June 2012, Mr Karmakar, still with Balsara, but which was then part of Royds LLP, wrote to Zulfi Khan about the securities pledge and guarantee notes. In the same letter, he asked if it would be possible to have a copy of the ATE insurance policy "if there is one". In his statement dated 7 June 2022, Mr Karmakar identifies the exhibit which is constituted by the securities pledge and guarantee notes, as being the Royal Luxembourg ATE policy, which clearly they are not, and he says that in these documents there is no definition of "successful conclusion".

28 Between July 2012 and December 2016, Saunders provided legal services to Mr Bahgat in relation to the arbitration. Mr Karmakar issued 13 invoices to Mr Bahgat for this work, between 7 August 2012 and 16 January 2017. Mr Bahgat does not dispute Mr Karmakar's assertion that he signed and approved the invoices and that Buttonwood paid the 60 per cent that fell due. There is no dispute in the evidence as to the work that is set out in the invoices having been performed.

29 In December 2016, Mr Bahgat left Saunders and instructed other solicitors, Fietta Law. Mr Bahgat said that the move was prompted by his loss of confidence in the abilities of Mr Karmakar and because he had been left with extreme funding problems. The latter arose from the fact that Buttonwood had refused to pay any further money under the loan agreement after November 2013. It turned out, and this is not disputed, that Buttonwood purported to make a regulated consumer credit agreement under the 1974 Act when it was,

in fact, an unlicensed lender based in the British Virgin Islands. That company was being financed by a Ponzi scheme and the liquidators of the company running the scheme stopped further funding by Buttonwood and took over its running.

30 Mr Bahgat, once with Fietta, was offered funding by Vannin Capital. He says that Buttonwood and the liquidators demanded that he sign a separate deed of settlement recognising their claims in full. The liquidators of the Ponzi scheme have since caused Buttonwood to commence proceedings against Mr Bahgat, claiming £14.9 million under the funding agreement against the £1.4 million advanced. Mr Bahgat says he signed the settlement agreement. In addition, Saunders required security for payment of their fees in order to give up their lien on his case papers. This was followed by the production of two documents; an arbitration funding agreement dated 25 May 2017 between Mr Bahgat, Vannin Capital and Fietta. This agreement defined the agreement to fund the Balsara agreement as that dated 21 December 2010, the Saunders agreement as the one dated 15 August 2012 and the Saunders receivables were said to be the initial amount owing to Saunders Law in its own right and on behalf of Balsara under the Balsara and Saunders agreements. "Saunders success fee" was stated to mean (3.38 of the arbitration funding agreement) "all amounts owing to Saunders Limited in its own right and on behalf of Balsara under the Balsara agreement and the Saunders agreement over the Saunders receivable, including an additional payment of either £649,835.02 or £1,181,560.40, depending upon when the claim concludes".

31 Clause 7 of the funding agreement is entitled "Waterfall" and this contains a provision as to what is to happen if the liabilities in relation to funding and costs exceeded what was recovered. In those circumstances, all monies would be paid to Vannin Capital and thereafter would be distributed in an order of priority set out in cl.7, with the first sum paid pro rata to the then funders and counsel and thereafter to Saunders for their receivables, which would be their base costs, then to Buttonwood, receivables, and fourthly paid pro rata to the claimant. There was to be a penultimate distribution to Saunders for success fee, and, finally, to the claimant the balance. Saunders were not signatories to that funding agreement, but they were signatories to a deed of priority with Mr Bahgat, Vannin Capital, Fietta and Buttonwood, under which the parties agreed that the payments under the waterfall would be distributed as I have just described. Clause 3.2 of the Deed of Priority provides, and I was taken to this by Ms Lacob:

> "Nothing in this deed, including the waterfall, affects the rights of any creditor as between it and the claimant."

32 The merits hearing of the arbitration took place in December 2018 and April 2019. Mr Bahgat was successful. He was awarded damages of US $44 million plus compound interest from 19 February 2000, bringing the total award to a sum in the region of $115 million. Interest continued to accrue at $400,000 a month. The tribunal also ordered Egypt to pay Mr Bahgat's costs. The final award, which was dated 23 December 2019, records that the claimant sought £538,041.60 for Saunders in receivables and 100 per cent uplift for the success fee, a total of £1,076,483.20.

33 At para.567 of the award it is recorded that the claimant submitted that he should be entitled to recover the fees he owed to Saunders which had been incurred but would become only payable on a successful recovery and the success fees to Saunders payable if the claim prevailed. There was an argument, which we see at para.588 of the award, that the success fees were not costs for legal representation under the (inaudible) Rules. The tribunal held, however, that success fees have become common in international litigation and had to be incurred for the claimant to get legal assistance. It assessed the claimant's legal costs as

claimed, but in its award reduced those costs by 10 per cent to reflect the fact that the claimant was not entirely successful on quantum.

34 The Government of Egypt did not seek to meet the award until Mr Bahgat took some enforcement proceedings against rolling stock situated in Spain. This led to a settlement between the government and Mr Bahgat said to be in the sum of US $99.5 million. The precise details of the settlement are not known to the claimants. They are aware, having been informed by Fietta, that there is a positive balance of recoveries over liabilities in relation to funding and costs. In consequence, the waterfall agreement does not come into play.

An Outline of the Contentions

The Claimant

35 Mr McCormick accepts that in order to be a Courts and Legal Services Act compliant CFA and, therefore, enforceable, it must be in writing and that it must include a term which governs the basis upon which the deferred and success fees will be payable. He concedes that this term requires some definition. He does not seek to argue that it would be sufficient to specify that a success fee is payable if the claimant succeeds in the claim. In addition, the percentage of success fee must not exceed 100 per cent. The relevant statutory provisions are to be found in s.58(3) and 4 of the Courts and Legal Services Act 1990.

36 The claimant's case is that the reference to the definition of success fee in the Gable policy wording definition was incorporated into both the Balsara and Saunders CFAs as a matter of construction. If that is not the case in relation to the Saunders CFA, it should be rectified by addition of the word "Gable" between the words "as defined in the" and "ATE policy" in para.5(2) of the CFA. Alternatively, if the claimants do not succeed on the construction point and/or on the rectification point, Mr Bahgat is nonetheless liable to pay under the two CFAs by the application of the doctrine of approbation and reprobation. Mr McCormick says that, having relied on the CFAs as the basis for his claim for costs, he cannot now deny the validity. He accepts, however, that if the claimants have to prove that Mr Bahgat had knowledge that the CFAs were unenforceable and of his options arising from that knowledge in order to prove that he had elected between two inconsistent courses, i.e., relying on the CFAs or treating them as void, there is insufficient evidence before me for the claim to be made out in this way unless I accept an inference, which he asks me to draw, that Fietta must have advised him of that fact before he embarked upon this course of conduct. In that event, this aspect of the claim would have to go off for trial.

37 The defendant's case is not only is the lack of incorporation of the definition of "success" realistically arguable, but that it was unarguably not incorporated, so I should give reverse summary judgment on the point. The term as to success upon which the claimants rely in order to trigger an obligation to pay is not in writing, thus, the CFAs contravene the requirements of the 1990 Act. As regards the claimed rectification, Ms Lacob argues that none of the requirements for rectification are present. In particular, there has been no outward expression of accord that the Gable definition was to apply to the Saunders CFA. The defendant puts two further obstacles to judgment in favour of the claimant. First, the defendant relies upon s.61 of the Solicitors Act 1974, which makes provision for the enforcement of contentious business agreements. On such an application, the court can enforce, set aside and determine every question as to the validity of the agreement and its effect, depending on the court's view as to whether the agreement is fair and reasonable or otherwise.

38 Ms Lacob says that before the claimant has a cause of action to recover its costs the court first has to decide whether the agreement is fair and reasonable. Both Ms Lacob and Mr McCormick agree that the s.61 question is not susceptible to determination on the summary judgment application.

39 The second issue raised by the defendant, and this was argued by Mr Gurr in brief, is that both CFAs do not comply with s.58 of the Courts and Legal Services Act. As the contractual interest provided in both is part of the success fee, it takes the claim to more than 100 per cent of the base costs. Mr McCormick indicated this argument was not anticipated by the claimants and would have to be dealt with on a later occasion.

40 In view of the claimants' stance in relation to these last two defences and that relating to approbation and reprobation, there is not any scope for me to give judgment for the sums claimed, for even if I accept that the CFAs were compliant in relation to the "in writing" requirement, the claimant would have fallen short of discharging the burden of showing that the defendant had no reasonable prospect of defending the claim because of these other matters. The most that I could do would be to rule on the "in writing" issue. Mr McCormick says I should only do so if I rule in his favour. I should not grant reverse summary judgment if I do not, as the claim to reverse summary judgment was first raised in the defendant's skeleton argument and it would only be suitable for the trial of a preliminary issue, where the parties would have the protection of disclosure. That observation seemed to me to be at odds with the submission he made to the effect that the court could safely construe the CFAs in the claimants' favour as the evidence upon this issue was complete and there was not likely to be any more before the court.

The Parties' Contentions

41 The claimants allege that a written provision defining "success" is incorporated into the Balsara CFA because on a proper construction of the client care letter the reference to the Gable ATE policy definition incorporates that provision into the agreement and is in writing. He referred me to the established principles of contractual construction summarised in *Wood v Capita Insurance Services Limited* [2017] UKSC 24 at [10] - [13], where the Supreme Court said – this is a judgment given by Lord Hodge JSC, with whom the other Justices agreed:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 , Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment *in Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the

> past. But Lord Bingham of Cornhill, in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.
>
> 11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in *Rainy Sky* [2011] 1 WLR 2900 at para 21f; in *Arnold* [2015] AC 1619, all of the judgments confirmed the approach in *Rainy Sky* case (Lord Neuberger of Abbotsbury, President of the Supreme Court, paras 13-14; Lord Hodge JSC para 76; and Lord Carnwath JSC para 108). Interpretation is, as Lord Clarke JSC stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause… Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: *Arnold* para 77… To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

At para.13, I am not going to quote this in whole. When interpreting any contract, the lawyer and the judge can use textualism and contextualism as tools to ascertain the objective meaning of the language that the parties have chosen to express the agreement. "The extent to which each tool will assist the court in this task will vary according to the circumstances of the particular agreement or agreements."

42 Mr McCormik argues that, taking all the background information reasonably available to the parties and that which would be expected to be available to them (see Arnold v Britton [2015] UKSC 36 at [21]): The informed objective observer would have concluded that the reference to successful inclusion, as defined in the ATE policy, was a reference to the draft policy wording which Mr Karmakar had emailed to Mr Bahgat on 15 October 2010. He says that, on the evidence, the only ATE terms which were provided to Mr Bahgat were those sent on 15 October and that it is not reasonably arguable that the parties could have thought that any other terms applied. He says that where the CFA says that the ATE policy is one which is to be issued, that must be taken to mean the one which was intended to be issued, containing the policy wording sent on 15 October since it was apparent from the CFA that no ATE policy had been issued at the date of signing.

43 As regards the Saunders CFA, he argues that something must clearly have gone wrong in the drafting and in such circumstances, relying upon what Lord Hoffman said in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at [14]:

> "The law does not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had."

He says there is a reference there to the Royal Luxembourg CFA, but there never was such a document, and certainly not one with a definition of "successful conclusion". Because the CFA was introduced together with the email which indicated that Mr Karmakar had produced a client care letter on the same terms as the previous Balsara letter, not to include the Gable definition would result in the Saunders letter having no definition of "successful conclusion". From those facts, it is clear that the parties were intending to replicate the Balsara CFA and must have intended to retain the Gable definition. That is the only sensible objective view as to the intention of Saunders and Mr Bahgat.

44 If he should fail on the construction point, Mr McCormick relies upon Mr Bahgat's behaviour after execution of the Saunders CFA as supporting the claim to rectify by the addition of the reference to Gable. He says that if rectification is not available this conduct by Mr Bahgat prevents him from relying on arguments as to the invalidity of the CFA because of his election to make claims based on the CFAs in the arbitration and his apparent acknowledgment that the CFAs were valuable and sums due thereunder when securing the s release of his case papers to his new solicitors. Mr Bahgat's behaviour is the basis of the approbation/reprobation argument.

45 The behaviour upon which Mr McCormick relies consists Mr Bahgat's part in arranging the transfer of files from Saunders to Fietta and by his lawyers in the arbitration pursuing the claim for costs in reliance upon the CFAs. As regards the former, in particular, he relies upon a letter written by Greg Fairley of Capital Interchange Limited dated 29 December 2016 in which Mr Fairley said he was writing at the request of Mr Bahgat and, in that letter, asked for confirmation that Saunders is willing to provide its files to the new lawyers. He asked for an invoice for all time incurred to date which has not been paid and for a schedule confirming the amount due to Saunders under the CFA in the event that Mr Bahgat was successful and the form of letter required by Saunders which Mr Bahgat would have to sign to confirm his irrevocable instructions to the funder to obtain payment for Saunders' outstanding invoice and to have the Saunders CFA settled in the event of success.

46 Further, Mr McCormick relies upon Mr Karmakar's evidence that Mr Fairley gave him an oral assurance that he would be paid in full upon success. He says this is not challenged in Mr Bahgat's evidence. He also relies upon Mr Bahgat's entry into the funding agreement with Fietta and the Deed of Priority which defines Saunders' receivables and Saunders' success fees. The Waterfall Agreement contemplates that monies will be paid to Saunders, or may be paid to Saunders, under the waterfall, and Balsara, and the order in which the sums would be paid.

47 He also says, in relation to the arbitral tribunal, that at the time Mr Bahgat had extensive legal representation, but no-one questioned the validity of the CFAs before the tribunal. His lawyers relied upon it to recover not just the base costs but the success fees. Indeed, there was an argument raised by the respondent as to whether success fees should be recovered at all on arbitration, but the tribunal was led to the conclusion that they were and should be recovered. He said that if the lawyers had any doubts as to whether the CFAs were enforceable they were duty bound to adopt a more equivocal approach before the arbitration, indicating that there were CFAs which may or may not be enforceable, but if the tribunal thought they were then they should award the costs.

48 Mr McCormick also says that this behaviour on behalf of Mr Bahgat and his lawyers is evidence that he accepted he was liable to the claimants under CFAs and from that I should readily infer that his intention, and that of Mr Karmakar, was that they would incorporate the same definition of "successful conclusion" into the Saunders CFA as existed in the Balsara CFA. Thus, there is sufficient to grant the remedy of rectification.

49 He says what is present here is that there was a common continuing intention in respect of this matter of the definition of "successful conclusion" and there was an outward expression of accord, that this was incorporated into the contact and that by mistake the common intention was not so included. The outward expression of accord is comprised in Mr Karmakar's email of 15 August concerning the new CFA being on terms the same as the previous CFA, save as to the identified alterations, and what he says is the obvious understanding between Mr Karmakar and Mr Bahgat that the sole reason for the Saunders CFA was that Mr Bahgat was now being represented by new solicitors.

50 As regards the case on approbation, Mr McCormick relies upon the assertion by Mr Bahgat that he conducted his affairs towards the claimant and the world on the basis that the retainers were binding upon him. Having conducted himself in that way, he cannot now adopt an opposite position. He relies upon a statement of the principles of the doctrine of that approbation and I will refer to those when setting out my discussion and conclusions.

51 He says that Mr Bahgat has sought and received the benefits on the basis of the CFAs and therefore he is bound by them, so that he cannot renounce them when called upon to meet his obligations which he relied upon before the arbitral tribunal. He cannot do so because he must have elected between relying upon the agreements and treating them as invalid and, unequivocally, he treated them as enforceable and to say one thing to the tribunal and another to the claimants would be inconsistent and unjust. Furthermore, he has obtained benefit through the tribunal in that he has received a shade over £900,000 in costs and he also managed to secure the release of his papers from Saunders.

52 Ms Lacob reminded me, on the authorities, and she referred me to *Hollins v Russell* [2003] 1 WLR 2487 and *Garrett v Halton BC (sub. nom. Myatt v National Coal Board)* [2007] 1 WLR 554, that it is incumbent upon solicitors wishing to benefit from the enforceability of CFAs to ensure that there is compliance with the statutory requirements. Where there are minor shortcomings (see *Hollins* at [109]) or literal but trivial and immaterial departures from statutory requirements (see *Myatt* at [31]), the CFA may, nevertheless, be enforceable. But that is not the case where an essential definition is missing. She relied upon passages in *Myatt* to the effect that the fact that the finding that the CFA was invalid may have harsh consequences and present something of a windfall to the person who benefits from its invalidity is not a reason for upholding a CFA. She says here there was a failure to define the contingency upon the success fee would be payable and that was a material breach of the writing requirement.

53 As regards the Balsara CFA, she pointed to the fact that the client care letter defined the ATE policy as "an after the event litigation insurance policy to be issued by Gable Assurance AG." She says no such policy was issued and there is no evidence that any such document ever existed. The CFA could have referred to the draft policy wording provided on 15 August if that is what it wanted to refer to, but it did not. The problem here, it is said, is that Mr Karmakar has outsourced the definition of "successful conclusion" to Gable, assuming they issued a policy. As they never did, there was no definition. If the court is to consider the facts known to the informed observer at the time of the contract, in addition to the point concerning the definition being found in a document which it was intended to be issued, a court should take into account the fact that the definition upon which reliance is

placed was provided to Mr Bahgat over two months earlier. It was provided in a different context without any clear attempt by the legal representative to get documents together in a self-contained, general set of terms. She relied upon Mr Bahgat's evidence that, as at 20 October 2010, he had only read the funding agreement and not the draft ATE and his email concerning these documents to Mr Karmakar tends to confirm this, that is that he was only talking about funding.

54 Mr Karmakar's contention that the terms of the Gable ATE policy were adequately explained were drawn to Mr Bahgat's attention by an email of 3 November 2010 is not borne out by what the document actually says. First, there is no explanation or reference to definition of "success"; second, Mr Karmakar informed Mr Bahgat in that email that he needed to seek some clarity on certain concepts from the broker and the matter would be discussed further with Mr Karmakar after the draft letter to Ms Kelsall. It is said that the ATE policy, in the draft letter to Ms Kelsall, should leave room for continuation of cover during time when enforcement proceedings were underway.

55 Ms Lacob argues that in order to reach a conclusion as to the factual matrix surrounding the making of the agreement there would need to disclosure and cross-examination as to Mr Karmakar's response to Mr Bahgat's claim that he was never advised of the terms of the Gable policy, that he trusted Mr Karmakar to negotiate the funding agreement and the ATE policy. Not being a lawyer, he was not in a position to understand the policy wording document without Mr Karmakar's assistance and he was not shown any other version of the policy wording document. Further, he never signed any version of the Gable ATE policy, nor was he referred to the policy wording around the time of signing the Balsara CFA and received no detailed advice on the terms of the Balsara CFA and would not have thought that the earlier draft policy wording he had been sent and contained terms that were material to the construction of the Balsara CFA. She points to an absence of evidence to support Mr Karmakar's reference that Mr Bahgat was referred to the draft ATE policy, not only in October but on other occasions. She says that the court would need to consider the broader funding package, of which the CFA was part, and the significance or absence of the ATE policy within that package in considering whether appropriate levels of protection were afforded to Mr Bahgat at the time the CFA was entered into.

56 As regards the Saunders CFA she says the position is more stark. Mr Karmakar expressly changed the identity of the ATE policy and, therefore, the relevant definition, to the Royal Luxembourg, which Saunders had been told by Buttonwood had been procured. He did this not having seen the policy. He appreciated that the Royal Luxembourg documents he had seen, namely, the guarantee and security, were not an ATE policy as he wrote to Zulfi Khan on 27 June 2012, asking to see a copy of ATE insurance policy and, in his email, he refers quite separately to the security pledges and the two guarantees. She counters the argument that the Saunders CFA should be construed by reference to the Gable ATE policy as contradicting not only the express terms but Mr Karmakar's own evidence that he inserted the wording deliberately to reflect a new insurance policy which he thought had been issued. She rejects the argument that the CFA should be construed to refer to the Gable insurance policy as otherwise the CFA would be ineffective due to the want of a definition of "success". She says that would be circular for otherwise non-compliance with the regulations governing CFAs could be saved by the implication of some missing provision.

57 There is no evidential foundation for the rectification claim for Mr Karmakar has said that the reference to Royal Luxembourg was deliberate drafting, coupled with Mr Bahgat's evidence that he never shared an understanding that the definition clause would be taken from the Gable insurance, not that referred to in the CFA, and the matter was never

discussed with Mr Karmakar. On any view, there was no outward expression of common intention that the Gable insurance definition would apply to the Saunders CFA.

58 The claim based upon approbation/reprobation is one which ought not to be determined summarily anyway as there are issues of inequitable conduct which have to be considered, as well as a factual finding as to knowledge. Ms Lacob referred me to *Lissenden v Bosch* [1940] AC 412 as authority for the proposition that it was essential to the application of the doctrine that a person who is said to have elected had knowledge that there was something to elect between. There is no evidence that Mr Bahgat knew there was a reason to challenge the CFA where he relied upon it, either in transfer of the papers to his new solicitors or entering into the Waterfall Agreement or pursuing costs before the arbitral tribunal. The evidential underpinnings of a case based upon election are not there. She also referred me to *Banques des Marchands de Moscou v Kindersley*, which I will refer to later, where it was said that the doctrine depends upon inequitable conduct and knowledge of having two rights.

59 There is also difficulty in applying the doctrine here because the cases to which I was referred relate to approbation and reprobation between two parties, that is to say Party A gaining a benefit from Party B but later claiming that the burden which gave rise to the benefit in favour of Party B was invalid. Here, however, there is a tripartite situation. Certainly as regards the arbitration, Mr Bahgat has obtained the benefit from the Republic of Egypt by reliance upon the CFA, but I have not seen or been shown authority which prevents him from denying the validity of the agreement as against a third party, such as Saunders. Ms Lacob points out that Saunders and Balsara were not party to the arbitration and it is not a case where they are being vexed by dealing with inconsistent cases. What the claimants are saying is that Mr Bahgat has had the money, so he should pay, but that is not how the doctrine of equitable election works.

60 Where Mr McCormick places reliance upon the Deeds of Priority and the funding agreement, she takes me to clause 3.2 of the Deed of Priority to which I have referred, which makes it clear that the deed only affects priority as between creditors, it does not affect any rights as between the creditor and the claimant.

61 Ms Lacob also argues that the relevance of the claim for costs in the arbitration is misplaced. The particulars of claim does not allege that the reliance upon the CFA in the arbitration followed by a denial of its validity as against the claimants is unconscionable or inequitable conduct or that it prevents the defendant from pursuing the s.58(3) point. The argument at this hearing was that I should draw an inference that Fietta had advised Mr Bahgat on the unenforceability point, but there is evidence the other way, she says. On 21 January 2021, Fietta wrote to Saunders to say that they were not writing on behalf of Mr Bahgat as they did not act for him in connection with the Saunders claim against him or the related agreements. It is not obvious that he had advice on the question of validity until he saw his latest solicitors and this is a matter of fact which would need to be determined at trial.

62 It is also not clear that Mr Bahgat has benefitted from relying on CFAs. Whilst it is said that he has recovered £900,000 more than would otherwise have been the case, he settled his claim for substantially less than the tribunal's award if one includes interest. The claimant could only be saying that he was better off as regards reliance on the CFA if it could be said that the £900,000, or some substantial sum, was added to the settlement as a result of the existence of the CFA and that is a matter which would need to be dealt with in evidence.

Discussion and Conclusion

63 I start with the basics, as it is well not to lose sight of such matters. The power to grant summary judgment is to be found in CPR 24.2. This provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of the claim or on a particular issue if–
>
> (a) it considers that
>
> (i) that claimant has no real prospect of succeeding on the claim or issue or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue and
>
> (b) there is no compelling reason why the case or issue should be disposed of at a trial."

The burden of proving that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial is upon the applicant and the authority for that is *ED & F Man Liquid Products Limited v Patel* [2003] EWCA Civ 472.

64 The question of determining whether there are real prospects of success or otherwise was considered by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. A recitation of this particular paragraph appears in virtually every Part 24 summary judgment application, but lest it subsequently be suggested that by making shorthand reference to it it has not been fully taken into account I shall read it into the judgment. At para.15 the court said:

i. "The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91;

ii. A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii. In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statement before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v. However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that can reasonably be expected to be available at trial: *Royal*

*Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii. On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

65 The claimant's obligation to show that there is no other compelling reason why the case or issue should be disposed of at trial also requires some consideration. In the notes to the **White Book** at 24.2.4 there is a reference to *Iliffe v Feltham Construction Limited* [2015] EWCA Civ 715 and the note reads:

> "Summary judgment for the claimant against the first defendant was held to be inappropriate where similar issues remain to be determined at a trial as between the first defendant and other parties. In all the circumstances, that constituted a compelling reason not to enter a summary judgment."

It is important to note in this context that the rule provides that there has to be a compelling reason, not just some reason for refusing summary judgment.

66 Turning to the validity requirements, it is common ground that at the time of both of the CFAs s.58 of the Courts and Legal Services Act 1990 required that the agreement be in

writing. It is also agreed that in order to be in writing the agreement must include essential terms and there must be a detailed and explicit provision as to the circumstances in which the claimant will be liable for the solicitor's costs. This includes a definition of what "success" means. The sole question on the writing issue is to whether the Balsara and/or Saunders CFAs contain such a provision.

67 Mr McCormick referred me to *Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd* [2012] 1 WLR 3674. There, the Court of Appeal held that a guarantee would comply with s.4 of the Statute of Fraud 1677, which requires that guarantees be in writing and signed by the party charged or some party authorised by them, even if it was contained in more than one document. Tomlinson LJ said at para.21:

> "The Statute of Fraud 1677 contains no express indication that the agreement in writing required to satisfy its terms must be in one or even a limited number of documents. It is no doubt true that in 1677 a signed written agreement would often and perhaps always be contained in a single document, but Mr Kendrick very sensibly did not suggest that that provides a pointer to how the Statute of Fraud should today be construed… Moreover the purpose of the requirement that the agreement must be both in writing and signed by the guarantor is not so much to ensure that the documentation is economical but rather to ensure that a person is not held liable as guarantor on the basis of an oral utterance which is ill-considered, ambiguous or even completely fictitious – see per Lord Hoffmann in *Actionstrength* at page 549 E. A combination of writing and an acknowledgement by signature of the solemnity of the undertaking has been chosen to eliminate that mischief. I see nothing in either the mischief sought to be eliminated or the means adopted to achieve that end which requires a limitation upon the number of documents in which the writing is to be found…"

68 Ms Lacob says that the *Golden Ocean Group* is distinguishable because the preamble to the Statute of Fraud 1677 set out the purpose behind the legislation in that it provides that it is "an Act for the prevention of fraud and perjuries, for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subordination of perjury." In that regard, Lord Hoffman had explained in *Actionstrength* that the Act was precisely to avoid the need to decide which side was telling the truth about whether or not an oral promise had been made. She says the object of s.58 of the Courts and Legal Services Act 1990 is to give some protection to litigants when entering into an agreement which, but for the Act, would be unlawful. It is not concerned with the prevention of fraud and perjury.

69 I am bound to say that I do not see the distinction as helpful in reaching a conclusion in this case. The Courts and Legal Services Act 1990 does not say that the writing has to be in one document and it is not uncommon for terms to be incorporated into a signed agreement by reference to another document. Incorporation will depend upon proper notice of the terms and the construction of the particular contract.

70 This case turns upon whether the wording of the draft ATE policy as to "successful conclusion" was incorporated into the CFA by a reference in para.5(2) of each CFA. That is a matter of construction. The question for me on the construction point is whether it is realistically arguable that the draft Gable definition was not incorporated and if so, I should, nevertheless, decide the construction point as envisaged in para.15 (vii) of the *Easyair* judgment, either in favour of the claimants or defendant.

71 I start with *Arnold v Britton* [2015] AC 1619 in looking at the learning on the subject of construction. There, at para.15, Lord Neuberger PSC said:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"…
>
> 16. For present purposes, I think it is important to emphasise seven factors.
>
> 17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
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> 19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made…
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed…

> 21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.
>
> 22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention…"

I direct myself by reference to what was said there, and also I have already read the extract from Lord Hodge JSC in *Wood* as to construction being a unitary process in which each potential construction is tested to see which makes the most sense.

72 Applying these authorities to the Balsara CFA, the relevant background facts are that Balsara had indicated to Mr Bahgat that it was prepared to act for him under a CFA and that he would require funding and an ATE. On 4 August Mr Bahgat signed an ATE insurance litigation funding proposal form addressed to First Class Legal. On 15 October, Mr Karmakar sent him an email with an indication of funding terms and at attachment described as the "ICL Gable policy wording". In the email that he was sent by Ms Kelsall, she stated that the email included the policy wording for the ATE, but it is not clear from Mr Karmakar's statement whether he forwarded that email to Mr Bahgat. He simply says that on receipt of Ms Kelsall's email he sent a follow-up email to Mr Bahgat and the fact that he attached the policy wording and funding agreement to his own email is some evidence that he did not simply forward Ms Kelsall's email, even though in the bundle it is printed out sequentially over the same page. His email of 15 October does not refer to policy wording. He talks globally about the proposal, which could be a reference to funding or funding and the ATE. He says he will "discuss it on Monday", but there is no evidence if it was discussed, and if it was discussed what was said, although the fact that he said that he would "discuss it on Monday" is some indication that there was a discussion. He also refers to "negotiating terms" so, by virtue of that, what he has presented to Mr Bahgat may or may not be the final version of the documents he was to receive. There is no evidence of any further communication relating to the terms of the ATE policy.

73 The evidence shows, save for the exchange between 3 and 5 November, that Mr Karmakar had anticipated that an ATE policy would be issued, as must Mr Bahgat, as this was stated in the CFA letter. Looking at the words of the CFA, this refers to an ATE which is to be issued. By that stage, none had been issued and, as it was to be financed out of the Argentum/Buttonwood funding, which was also to be entered into, it is realistically arguable that the objective observer would conclude that the common intention was that an ATE policy was to be issued in future which included the definition of "successful conclusion".

74 Whether Mr Bahgat could be taken to know that the terms would be the same as that of the draft policy wording likely depends on what more he had been told about the policy following the 15 October email. He said he did not read it and it was not explained to him. If that is right and he was not informed that the policy wording sent to him on 20 October was that which applied, it is realistically arguable that he had insufficient notice of which term as to "successful conclusion" applied for that provision to have been incorporated in the CFA. Up to that point, it seems to me there is a realistically arguable defence that Mr

Bahgat can mount as to what he was to conclude from the reference to the definition in the policy "to be issued."

75 I will add this. Looking at the iterative approach, where the question is whether there has been the omission of information in an agreement which may cause it to fall foul of a regulatory requirement I take Ms Lacob's point that one has to be careful in cases where there is ambiguity which has an effect upon the construction. One has to be careful in looking at what makes the most business sense or to engage upon the process of comparing and contrasting meanings for this creates a risk that regulatory protection is lost.

76 Whilst it is recognised that the parties intend their agreements to have meaning and the court will, thus, be slow to find them absent of meaning, when it comes to regulatory compliance, particularly in a case such as this where the protection is for the benefit of the client, the focus is on whether there has been compliance rather than on whether the parties can be taken to have intended that the agreement would be compliant. In this case, the solicitor was obliged to draft a compliant agreement. The business sense to consider in such a situation is not the transaction upon which they were both engaged, i.e., to pursue an arbitration as a solicitor and client, but the requirements of the regulation for the protection of the client.

77 This observation is particularly apposite in the light of the sixth point made in para.22 of *Arnold* as to the relevance of subsequent events. There may be circumstances where there is an unexpected event. In this case, the unexpected event would be the non-issue of the policy. The court cannot, however, in those circumstances, give effect to what the parties intended because without the policy there is no definition of "successful conclusion". It is clear from the CFA that the parties intended that the CFA should have a definition of this term, but on the evidence the fact that post-agreement the policy was not issued does not admit of a construction that the intended definition must therefore have been draft wording provided earlier. If there is further evidence that could be relied upon to show that the parties intended, even when no policy was issued, that the draft policy wording was to be incorporated that would be another matter, but the current evidence does not take the claimant that far.

78 Ms Lacob says I should grant reverse summary judgment in view of the fact that Mr Karmakar says that the policy terms were explained on several occasions and there is some support for the suggestion that there was a meeting on the Monday following the sending the email of 20 October. I agree with Mr McCormick that it would be premature to decide the issue as a preliminary point without the opportunity for disclosure and further evidence. Furthermore, there is a yet further reason for not granting judgment on this to which I will refer when I come to the defence based on s.62 of the Solicitors Act 1974.

79 As regards Saunders, I agree with Ms Lacob that the case of the Saunders CFA is even more stark. Firstly, once it is recognised that Mr McCormick's premise that it is unarguable but that the Gable definition applied to the Balsara CFA, therefore, it must have applied to the Saunders CFA is regarded as a premise which can be defended with a realistic prospect of success that really is the end of the Saunders CFA summary judgment claim.

80 The facts relevant to the Saunders CFA are that Mr Karmakar thought there was to be a new ATE policy and said as much in the CFA. The common intention on the wording of a document was that the definition would be as per that policy. Mr McCormick says that the reference to a policy which does not contain a definition shows that something has gone wrong in the drafting. However, there is no evidence that had a policy been issued it would not have contained such a definition. This is not a case, on the face of it, of the drafting

being wrong. It is arguable that the error arises from the inability to prove the existence of the policy and from that whether there was the necessary definition. The fact that Saunders cannot produce the policies to which reference was made does not lead to the inference that the parties must have intended that if Saunders could not produce the policy they would revert to the Gable policy if it was discovered that the Royal Luxembourg policy did not exist. Even if the Gable policy had applied to the Balsara CFA, the email which accompanied the CFA which indicated that the new client conditions letters were to be on the same terms as the old would not, arguably, be sufficient to suggest that Gable applied where there is specific reference made to an alternative ATE policy.

81 Mr Karmakar's subjective reason for not setting out the defined term but doing so by reference to the policy is not admissible as an aid to construction, though it is relevant to the rectification argument. The argument that the email of 15 August explained that the new letter of engagement was close to the Balsara CFA as could be, but with simplification, loses force, as I have indicated, when there is specific reference to a new ATE policy and therefore there is a realistic prospect of success in challenging the validity of the Saunders CFA.

82 The defence to the case for rectification is also realistically arguable. The law on a case such as this was recently summarised in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2020] (Ch) 6365 at [176], where Leggatt LJ (as he then was) said under the heading "Conclusion on the law". Without going into too much detail, there was a statement in that case about when a court is restricted to looking at the parties' objective intention, which applies to contracts where there has been a concluded agreement which is not reflected in the written document, and cases where subjective intention is admissible, namely where there is no antecedent agreement but the court is looking at a continuing intention which leads to an agreement. At 176 Leggatt LJ said:

> "For all these reasons, we are unable to accept that the objective test of rectification is a common mistake articulated in Lord Hoffman's *obiter* remarks in *Chartbrook* correctly states the law."

He had *obiter* suggested that the objective test applied even where there was no antecedent agreement:

> "We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."

83 The Saunders CFA comes into the second category because there was no antecedent contract with Saunders which was then formalised in a written document. In order to make out the claim on rectification, Saunders must prove that the parties had a continuing common intention, a subjective continuing common intention, that the Gable ATE policy wording definition as attached to the 20 October email, was to be incorporated into the

Saunders CFA and from the communication between them the court could conclude that there was an outward expression of accord on that issue. The court can look at their subjective intention, not what an objective observer would make of their exchanges. Without citing it, the further authority on that point is to be found in para.150 to 151 of *FSHC Group Holdings.*

84 The Saunders rectification point immediately runs into the difficulty posed by Mr Karmakar's evidence. He made a conscious decision to refer to the definition in the Royal Luxembourg policy as he wanted to ensure that the CFA and the policy definition of "successful conclusion" were identical. At the time he formed that intention he had been informed by Buttonwood that there was such a policy in existence. Whether or not he was misled as to the existence of the policy, the evidence does not point to an intention on his part that the Gable definition should continue to apply, if ever it did.

85 There are also difficulties in proving the outward accord. Mr Bahgat was informed that the definition was to be that in Royal Luxembourg policy. At the time he signed the CFA, he had no reason to think that the policy did not exist, certainly on the evidence. There is no reason why one should conclude from that that the fact of his signing the CFA he had the definition of the Gable policy in mind or that he had in mind Gable would apply by default if it turned out there was no Royal Luxembourg policy. The fact that the email accompanying the client care letter said it was prepared on the terms of the Balsara letter, with various deletions and simplifications, and Mr Bahgat's acceptance that he signed the CFA on the basis of that letter does not get over that hurdle, certainly for the purpose of summary judgment, i.e that it is realistically arguable that CFA does not incorporate a definition of "successful conclusion" in a different ATE policy. Once can test that by asking the question as to whether rectification would have been available if the alleged Royal Luxembourg policy had been produced but contained a different definition. How could it then be argued that the new definition was to be ignored in favour of the Gable definition, particularly when Mr Karmakar actively sought to rely upon the definition, by reference to another document to ensure that the CFA and ATE were in step.

86 It is highly arguable that Mr Bahgat's conduct, subject to signing the Saunders CFA, does not evidence that it was his intention to be bound by the Gable policy wording. All it demonstrates is that as a lay person he thought there was a valid CFA in place, having signed the documents proved to him by his solicitors for that purpose. Thus, the rectification claim cannot succeed at the summary judgment stage because the defence to that particular claim is also realistically arguable.

87 I turn to approbation and reprobation claim where I was referred to *Lissenden v Bosch*. The headnote reads:

> "The mere fact that a workman who has obtained an award of compensation under the Workmen's Compensation Act has accepted weekly sums payable thereunder does not preclude an appeal by him on the ground that the compensation should have been of a larger sum than awarded."

This is reported at [1940] AC 412. There, Viscount Maugham said, at p.417 – I was taken to this by Ms Lacob:

> "My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the

> Tweed and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries and he treats the Scottish doctrine of approbate and reprobate as approaching nearly to that of election in English jurisprudence. It is, I think, now settled by decisions in this house there is no difference as at all between the two doctrines and I will cite three cases. First is the case of *Ker v Wauchope*, where Lord Eldon explained the doctrine in these terms: 'It is equally settled in the law of Scotland, as of England, that no person can accept and reject the same instrument. The Court will not permit him to take that which cannot be his but by virtue of the disposition of the will; and at the same time to keep what by the same will is given, or intended to be given, to another person.'"

I shall just leave it there, because the other cases just amplification.

Then at 419, Viscount Maugham said, referring to *In re Vardon's Trusts*:

> "In the third place the doctrine proceeds upon the principle not of forfeiture but of compensation. The beneficiary electing against an instrument is required to do no more than to compensate the disappointed beneficiaries. The balance of the property coming to him under the instrument he may keep for himself. In the fourth place no person is taken to have made an election until he has had an opportunity of ascertaining his rights, and is aware of their nature and extent. Election, in other words, being an equitable doctrine, is a question of intention based on knowledge."

At p.429, Lord Atkin said:

> "But I also share the difficulty which I think all your Lordships feel as to the application of what has been called the doctrine of 'approbation and reprobation.' The noble Lord on the Woolsack has to my mind clearly shown the limitations of that doctrine as defined in the law of Scotland from which it comes. In this country I do not think it expresses any formal legal concept: I regard it as a descriptive phrase equivalent to 'blowing hot and cold'. I find great difficulty in placing such phrases in any legal category: though they may be applied correctly in defining what is meant by election whether at common law or in equity. In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other. Election between the liability of principal and agent is perhaps the most usual instance in common law."

88 I was also referred to *Banques des Marchands de Moscou v Kindersley*. In that case, the fact that the defendants had not taken the benefit as a result of their conduct, which was seeking to prove as creditors in liquidation, was held not to prevent them by the operation of the doctrine of approbation and reprobation from arguing that there was no valid winding-up.

89 Mr McCormick referred me to a summary of the doctrine of approbation and reprobation which appears in the judgment given by Veronique Buehrlen QC, sitting as a Deputy Judge

of the High Court, in the Technology and Construction Court in the case of *MPB v LGK* [2000] EWHC 90 (TCC). There, having reviewed the two authorities to which I have referred, she also made reference to *Express Newspapers Plc v News UK Limited & Ors* [1990] 1 WLR 1320 and there, Sir Nicholas Browne-Wilkinson VC, referring to the doctrine, put it in this way:

> "A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

He said the principle was one of general application.

90 At para.58 of the judgment in *MPB* Ms Buehrlen said:

> "All the same, certain principles arise from the case law taken as a whole:
>
> i) The first is that the approbating party must have elected, that is made his choice, clearly and unequivocally;
>
> ii) The second is that it is usual but not necessary for the electing party to have taken a benefit from his election such as where he has taken a benefit under an instrument such as a will;
>
> iii) Thirdly, the electing party's subsequent conduct must be inconsistent with his earlier election or approbation. In essence, the doctrine is about preventing inconsistent conduct and ensuring a just outcome."

91 There are two issues which arise from these authorities; one is a point of principle. The first is that the election or choice must be made with knowledge. The person making the election has to be aware of their rights and the nature and extent in order to make the election. The second is not a matter that I take from the authorities, but there is a question as to whether the doctrine applies in a tripartite situation. All the cases to which I have been referred, save possibly for *Banques des Marchands de Moscou v Kindersley* where, on the facts the doctrine had no application, are cases in which the approbation and reprobation involves just two actors. There is the reference in *Express Newspapers*, to which I have just referred, where the then Vice Chancellor referred to adopting inconsistent attitudes towards another. As the doctrine seeks to ensure a just outcome, it may be that it is limited to inconsistency between two parties, so that one cannot "blow hot and cold" to someone who has given you a benefit and later say that some burden that you have accepted towards them is not owed. It is less easy to see why by A obtaining a benefit from B on the basis of an agreement with C that renders it unjust as between A and B that he should deny the validity of the agreement, unless third parties may be affected by the election such as in the case of a liquidation where other creditors may be affected or in the case of a distribution under a will where other beneficiaries. At all events, I had not been referred to authority on the ambit of reprobation and approbation where there are more than two parties involved.

92 There is also a further issue which, in my view, makes the approbation and reprobation argument one which is clearly defensible to the standard required for summary judgment and that is the question as to whether a party can elect to treat as valid an agreement which the law says is invalid. If the agreement is not in writing, it is not valid under s.58 of the

Courts and Legal Services Act 1990. I have not been referred to authority on this particular subject save that I note that in *Diag Human SE and Another v Volterra Fietta (a Firm)*, to which I was referred, where it was held, in the context of a non-complaint CFA, that if the retainer is invalid, that is the end of the matter and there is no basis for a *quantum meruit* for the solicitor for the work that they had done or severing the offending parts of the CFA to render it compliant.

93 It is the case, however, that in every case in which there is a CFA which is struck down, for example, *Myatt*, the claimant had the benefit under the CFA in the sense that they have had the legal services which had resulted in a judgment in their favour. It would seem to me contrary to principle, certainly arguably contrary to principle, given the policy behind the regulation of CFAs, that an invalid CFA could be treated as valid if the claimant had nevertheless obtained some benefit under it. There is some support in that conclusion in the effect of the decision in *Diag Human & Anor v Volterra Fietta* [2022] EWHC 2054 QB that the solicitor's entitlement to costs stands or falls on the validity of the CFA.

94 In the present case, the entry into the Deed of Priority and reliance placed upon the CFA to recover costs in the arbitration is evidence that Mr Bahgat thought that he had an enforceable CFA, but it is arguable that is its total significance. It is highly arguable, however, that, without more, it does not evidence that he had knowledge that the CFA did not comply with s.58 of the 1998 Act and was, thus, liable to be treated as invalid. This would require a factual inquiry as to state of knowledge, which is not capable of determination at this stage. In that event, there is no purpose at this stage in deciding as a matter of law whether the claimants can rely upon the approbation and reprobation without having a complete set of facts upon which to base it.

95 Whilst I have not been asked to determine the s.61 point, it is of some relevance to the question as to whether, having come to the conclusion that there is a realistically arguable defence to the question of incorporation, I should nevertheless decide the construction points on the CFA, had I not reached the conclusion that not only are the defences arguable, but a final determination of the factual background which enables the court to construe the agreements should have the protection of disclosure and that there appears to be further evidence which could be available to resolve that.

96 Section 61 of the Solicitors Act 1974 provides at subsection 1:

> "No action shall be brought on any contentious business agreement but on the application of any person who –
>
> > (a) is a party to the agreement or the representative of such a party or
> >
> > (b) is or is alleged to be a liable party or claims to be entitled to paid to costs due or alleged to be due in respect of the business to which the agreement relates
>
> the court may enforce or set aside the agreement and determine every question as to its validity or effect."

Subsection 2:

> "On any application under subsection (1), the court —

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;

(c) in any case, may make such order as to the costs of the application as it thinks fit."

97 The effect of s.61 was considered in *Healys LLP v Partridge* [2019] Costs LR 1515 by Kelyn Bacon QC, sitting as a Judge of the High Court, where it was said at para.26 to para.32:

"26. Mr Edwards, representing the Partridges [the clients], said that the effect of this section [s.61] is that where the agreement is a contentious business agreement a solicitor cannot sue for his costs by bringing a CPR Part 7 claim. Instead, the court has jurisdiction under an application brought under Part 8 or Part 23 , to determine whether the agreement is fair and reasonable. If it is, it may be enforced by the court; if not, then the agreement is to be set aside and the costs are simply to be assessed as if the agreement was not made.

27. Mr Edwards also relied on CPR Part 67.3(2) , which provides that: 'A claim for an order under Part III of the [Solicitors Act 1974] must be made [s.61 is within Part 3] – (a) by Part 8 claim form; or (b) if the claim is made in existing proceedings, by application notice in accordance with Part 23 .'

28. Mr Manley, representing Healys, disputed this construction of s.61 . While he accepted that a Part 8 or Part 23 application was the correct procedural route for proceedings that only concerned the assessment of costs, where there was no dispute as to liability to pay the costs at all, he contended that neither s.61 nor CPR Part 67 precluded the commencement of a Part 7 claim where there was a dispute as to whether there was any liability to pay the solicitors' costs under the agreement at all.

29. I consider that Mr Edwards' construction of s.61 is correct. The opening words of s.61(1) are quite specific: 'No action shall be brought on any contentious business agreement …' It is necessary to give some meaning to those words. The correct interpretation, I consider, is that a contentious business agreement does not, in itself, give rise to a cause of action on the basis of which a claim for costs may be brought. Rather, the agreement must first be submitted for the determination of whether it is fair and reasonable. Only once that determination has been made can the court enforce the agreement (if it is found to be fair and reasonable) or simply proceed to an assessment of costs (if the agreement is not found to be fair and reasonable).

> 30. Section 61 provides in both subsections (1) and (2) that in order to obtain a determination of whether the agreement is fair and reasonable an application to the court must be made. Such an application is in my view a claim for an order under Part III of the 1974 Act, which pursuant to CPR Part 67.3(2) must be made either under Part 8 or (if made in existing proceedings) under Part 23."

She then refers to **Cooke on Costs**, which says that a solicitor can sue for their fees using a Part 7 claim form. The judge goes on:

> "… the position for a contentious business agreement is different. In relation to the latter:"

Then, again, referring to **Cooke on Costs**:

> "The agreement itself does not give a cause of action and before a solicitor can rely on it, he must apply to the court for leave to enforce the agreement. Equally, the client may apply to the court to set it aside. Both applications are made under CPR Part 8 . The outcome will depend on whether or not the court is of the opinion that the agreement is fair and reasonable …"

And at para.32:

> "At first blush this might appear to be an arcane procedural technicality. In fact, however, the particular procedural route reflects a point of some substance, namely that s.61 provides for a specific layer of protection for the client in relation to a contentious business agreement, in that no cause of action will arise under the agreement unless and until the court has determined that the agreement is fair and reasonable."

98 How does the court determine whether the agreement is fair and reasonable? That was dealt with in *Bolt Burdon Solicitors v Tariq* [2016] 2 Costs LR 39. There, Spencer J, who heard oral evidence on the subject in a hearing which, together with submissions, lasted three days, directed himself by reference to what was said by Lord Esher MR in the case of *In re Stuart ex parte Cathcart* [1893] 2 QB 201. He said at para. 147:

> "… in the course of his judgment, Lord Esher MR gave the following guidance on the proper approach under those statutory provisions…"

Which was a similar statutory provision, albeit in the Attorney and Solicitors Act 1870:

> "By s.9 the court may enforce an agreement if it appears that it is in all respects fair and reasonable. With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression 'fair' cannot be reintroduced. As to this part of the requirements of the statute, I am of

> opinion that the meaning is that when an agreement is challenged the solicitor must not only satisfy the court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the court that the terms of that agreement are reasonable. If in the opinion of the court they are not reasonable having regard to the kind of work the solicitor has to do under the agreement, the court are bound to say that the solicitor, and an officer of the court, has no right to an unreasonable payment for the work he has done and ought not to have made an agreement for remuneration in such a manner…"

Spencer J said at 149:

> "I find the analysis in that case helpful to the extent of identifying that the issues of fairness and reasonableness must be considered separately. Fairness relates principally to the manner in which the agreement came to be made."

99 In the present case, both sides accept that there will need to be a further hearing to decide whether the agreement is enforceable under s.61. That will require a full investigation of the way in which the agreement was obtained, that is to say what passed between the parties up to the making of each of the agreements. In the course of that, there is likely to be more evidence than is before me as to what passed between Mr Karmakar and his client, given the reference to a proposed meeting in the email of 20 October and Mr Karmakar's assertion that the Gable ATE policy was explained to Mr Bahgat, apparently on more than one occasion. I would expect that would result in the production of attendance notes of any such meetings. It would not be consistent with the fact that such an investigation is to take place for the court to reach a final position on the construction of the CFA agreement, and thus to determine that matter at the summary judgment stage as *Easyair* contemplates, before it has an opportunity to consider what further proceedings reveal.

100 Finally, it is accepted the interest point will need to be dealt with at a later date. In any event, as that goes to the question of whether the CFAs are enforceable and there has already been one hearing to deal with the enforceability issue on construction, subject to any further submissions, it would seem to me that the overriding objective would dictate that all further issues are all dealt with in one trial, rather than by piecemeal applications.

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