Appeal REF: BM5/007/A

Claim No. A04YM127

IN THE COUNTY COURT AT BIRMINGHAM

Before His Honour Judge Lopez sitting on the 16th June 2016 sitting at Walsall

BETWEEN:

RAYMOND PRICE

Appellant / Claimant

and

EGBERT H TAYLOR & COMPANY LIMITED

Respondent / Defendant

Mr Aaron Walder of counsel instructed by Prescott Solicitors, the solicitors for the Appellant / Claimant.
Mr Matthew White of counsel instructed by DAC Beachcroft Solicitors on behalf of the Respondent / Defendant.

FINAL APPROVED JUDGMENT ON COSTS

THE COUNTY COURT

The Introduction

1. This is a judgment to determine (a) the issue of costs in respect of the unsuccessful appeal by Mr Raymond Price, the Appellant, against the order of District Judge Talog-Davies on the 9th April 2015 (i) dismissing the Appellant's application for an extension of time for serving the Claim Form, the Particulars of Claim, the Schedule of Special Damages and supporting medical evidence in an action for personal injury against his former employer Egbert H Taylor & Company Limited, the Respondent; and (ii) striking out the Appellant's claim; and (b) whether the Claimant's solicitor should have a "*wasted costs*" order made against it in respect of the hearing of the 27th November 2015.

2. Mr Price was, of course, the Claimant and Egbert H Taylor & Company Limited the Defendant in the main action. I propose to use those terms in this judgment as the appeal has already been dismissed.

The Summary of Background Facts

3. I do not intend to set out the history of this case or even to summarise the same since I did so within paragraphs 2-17 of my judgment dismissing the appeal, dated the 9th October 2015, which should be read in conjunction with

this judgment as to costs. Save to say that the decision of this Court and the reasoning for the same are to be found at paragraphs 65-86 of the judgment.

4. It is sufficient to indicate that Claimant's solicitor issued a claim form in a personal injury claim on the 26th April 2014, some seven days before the expiration of the primary limitation period of three years provided by the Limitation Act 1980. The same was not served on the Defendant or its solicitors. The Claimant's solicitors made three applications to extend the time for service. The first on the 20th August 2014. The second on the 17th November 2014. The third on the 5th March 2015. His claim was struck out by Deputy District Judge Talog-Davies on the 9th April 2015 on the basis that the third application was not filed with a fee, the fee only being paid after expiry of time such that CPR 7.6(3) applied and the Claimant could not show that he had taken all reasonable steps to serve the same, having taken none.

5. The Claimant's appeal against that decision was refused by this Court on the grounds that (a) the absence of a fee meant there was not a properly constituted application; and, in any event, (b) even if the easier CPR 7.6(2) test applied - if the application had been properly made in time, the application would have been refused in any event.

6. On the 27th November 2015 the issue of costs came on for determination before this Court. The primary issue was that the Claimant asserted that there was no old-style Conditional Fee Agreement - "CFA" in place such that Qualified One-Way Costs Shifting - (QOCS) applied. The Defendant's position was that (a) it did not accept that there was no old-style CFA in place, because the letter before action had said that there was, alternatively (b) the Claimant was estopped from asserting that QOCS applied – the Defendant having relied on the Claimant's assertion that it was an old-style CFA case. In the further alternative, the Defendant's position was that the claim was in reality struck out as an abuse of process, or the court ought to supplement its judgment to strike out as an abuse of process, such that QOCS would not apply.

7. The Claimant instructed new counsel for that hearing relating to costs, Mr Timothy White. There were three problems, namely (a) the Claimant's solicitor had not responded to repeated requests for disclosure by the Defendant's solicitors; (b) the Claimant's counsel was unable properly to represent the interests of his lay client; and (c) Mr Timothy White felt there was a conflict of interest between the Claimant and his solicitor.

8. Therefore, this Court had no option other than to adjourn the question of enforceability of the costs order. However, the Court used the time available to summarily assess the costs should that be necessary at a later stage. Further, the Claimant's solicitor was ordered to show cause as to why he should not pay the costs of the hearing of the 27th November 2015, which were summarily assessed. The Court also ordered (i) disclosure of documents relevant to funding, such as the client care letter, any other funding communications; and (ii) a statement supporting the assertion that there was no pre-commencement funding arrangement.

9. The Court ordered, inter alia, that (a) the matter be listed for the determination of the issue of enforceability of costs orders against the Claimant before this Court on a date to be fixed taking account of counsel's availability; (b) copies of any documents filed, save for the trial bundle, were to be copied to my judicial email address – which I gave; and (c) the trial bundle was to be lodged 7 days before the hearing and skeleton arguments were to be lodged 3 days before the hearing.

10. The Claimant's solicitor filed (i) a statement, dated the 23rd November 2015 at pages 124-125 of the bundle; (ii) a statement, dated the 11th December 2015, at pages 126-129 to show cause; and (iii) a statement, dated the 18th December 2015 at pages 130-132 with an attached bundle of documents at pages 133-182, in relation to there being no pre-commencement funding agreement. The statements are both dated on the last date for their filing and service.

The Claimant's Case

11. The Claimant's solicitor is Mr Richard Charles Prescott. He is a Solicitor of the Senior Court and the Principal of Prescott Solicitors of 4 Church Street, Kidderminster, Worcestershire. In his statement, dated the 23rd November 2015 he stated that on the 28th October 2015 the Defendant's solicitors wrote requesting a response to points raised in their letter of the 19th October 2015. He responded on the 29th October 2015 indicating that:-

> *"our letter of claim, dated the 30th October 2013 contained an error. Copies of that letter and our letter of claim are attached marked 'RCP 5 7 6'. I also confirmed that I would be prepared to voluntarily serve a witness statement in respect of finding* [he meant "funding"] *arrangements.*
>
> *The penultimate paragraph of our letter dated 30th October 2012 states:- 'Please be advised that our client's claim is being funded by way of a conditional fee agreement which provides for a success fee'.*
>
> *I confirm that this paragraph was included in the letter in error and no pre-commencement funding arrangement has been entered into".*

12. In his statement, dated the 11th December 2015 the Claimant's solicitor stated *"In Ridehalgh v Horsefield [1994] CH 205 ...a three stage test was formulated which was incorporated in the Brante? Direction to CPR Part 48. An applicant must show (i) improper, unreasonable or negligent conduct on the art of the Solicitors firm which constitutes a breach of that firms duty to the Court; (ii) that the conduct caused the incurrence of costs which would not otherwise have been incurred; (iii) that the circumstances of the case render it just to impose a costs liability on the legal representative by making a wasted costs order on respect of all or part of the costs sought".*

13. Mr Prescott stated that the Claimant's claim in relation to causation *"is complex and specialist medical evidence is required from a stroke physician".* Two applications for extensions of time had succeeded and the third did not. He indicated that *"every attempt has been made to pursue what is a complex and unusual claim for damages, it is believed that the Claimant is likely to have suffered significant and permanent injuries which are on his case due to*

the defendant's negligence". Mr Prescott observed that Deputy District Judge Talog- Davies indicated that the Claimant's solicitors had good reason to make the application for an extension of time but declined to grant the same as the claim form had not been served. Mr Prescott stated that that decision was then appealed and all substantive "*Directors*" – which I take to mean directions, were complied with. He noted that litigation is uncertain and the appeal was dismissed.

14. Mr Prescott submitted that the conduct of the Claimant's solicitor was not in breach of its duty to the Court as the hearing of the 27th November 2015 was "*necessary in any event*". He contended that no additional costs have been caused by the Claimant's representatives conduct and, "*as the Claimant's solicitor confirmed in open correspondence and subsequently in a witness statement that no pre-commencement funding agreement had been entered into.*" Mr Prescott submitted that in the circumstances it would not be just to make a wasted costs order against the Claimants legal representative "*at this stage or at all*".

15. In his final statement, dated the 18th December 2015, Mr Prescott repeated that notwithstanding what was said in the letter of the 30th October 2102 there was no pre-commencement funding arrangement. He indicated "*that was true when I made that statement and remains the case. As a matter of fact there was no such agreement*". Mr Prescott stated that it is a matter of embarrassment for him that the letter of claim stated that there was a conditional fee agreement which provided for a success fee when there was, in fact, no such agreement in place. He also indicated that "*it is also a matter of deep regret to me that there is a lack of proper information in relation to costs on my file*".

16. As to disclosure of the documents required by paragraph 4 of the order of this Court of the 27th November 2015, Mr Prescott stated that (a) there is no client care letter on file; (b) there are no letters on file dealing with the issue of funding; (c) he acted for the Claimant in a previous claim against the Defendant but there is no client care letter on that file in relation to that matter; (d) there are no letters on file dealing with funding and, for the avoidance of doubt, he does not believe that any were sent, although he "*accepts such letters should have been sent*"; (e) the copies of counsel's fee notes provided do not provide for "*any uplift or indicate that counsel was instructed on a CFA basis*" – the reason being that there was no such agreement in place either with the Claimant or counsel; (f) the copies of instructions to counsel, which have been redacted, do not refer to funding. Mr Prescott observed that examination of counsel's fees notes and his communication with counsel's clerk indicates that counsel was instructed "*on an ordinary private client basis and as solicitor I would have been responsible for the payment of counsel's fees*".

17. Mr Prescott submitted that it is a question of fact whether or not there was a pre-commencement funding arrangement "*as defined*". He stated that there was no CFA and / or no ATE policy before the relevant date or at all. He indicates that although he apologises for his failure to have a "*proper client*

care letter on file detailing how the matter was funded there simply was no pre-commencement funding arrangement as defined".

The Position of the Claimant's Solicitors

18. In a skeleton argument, dated the 16th June 2016, Mr Aaron Walder set out the position and submission in respect of the Claimant's solicitors, Prescotts. The skeleton argument was sent to this Court by electronic mail at 07.44 on the 16th June 2016 – the morning of the hearing. In the accompanying email Mr Walder apologised to the Court that the skeleton argument was not sent three days before the hearing as directed by the order of the 27th November 2016 but points out that he was only instructed on the 15th June 2016. No criticism, therefore, rests on him.

19. Mr Walder stressed that his skeleton argument is served on behalf of Prescott Solicitors, who thereafter he refers to as "Prescotts". He reminded the Court that by the order of the 27th November 2015, Prescotts were ordered to show cause as to why they should not pay the "*wasted*" costs of the hearing of 27th November. In short, Mr Walder submitted that in all the circumstances it would be inappropriate for the Claimant's solicitors to pay the costs of the hearing on 27th November 2015.

20. As to the relevant law, Mr Walder observed that the power of the Court to award wasted costs against a legal representative arises from section 4(1) the Courts and Legal Services Act 1990, which enacted a new section 51 in the Supreme Court - now Senior Courts Act 1981, which relates to both the High Court and County Court. Section 51(6) of the Senior Courts Act 1981 defines the concept of "*wasted costs*" as being costs incurred by a party resulting from the improper, unreasonable or negligent act or omission of any legal or other representative or anyone employed by the representative, or costs which, in the light of any such act or omission occurring after the costs were incurred, the court considers it is unreasonable to expect that party to pay.

21. Mr Walder noted that where the Court is considering making a wasted costs order under that section the rule which applies is Part 48 rule 7 of the Civil Procedure Rules which provides that:-

    "(1) This rule applies where the court is considering whether to make an order under s 51(6) of the SCA 1981 (court's power to disallow or (as the case may be) order a legal representative to meet, 'wasted costs').

    (2) The court must give the legal representative a reasonable opportunity to attend a hearing to give reasons why it should not make such an order.

    (3) [Repealed].

    (4) When the court makes a wasted costs order, it must–

        (a) specify the amount to be disallowed or paid;

        (b) direct a Costs Judge or a District Judge to decide the amount of costs to be disallowed or paid.

    (5) The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct–

        (a) of any proceedings under this rule; or

(b) of any order made under it against his legal representative.

(6) Before making a wasted costs order, the court may direct a costs judge or a district judge to inquire into the matter and report to the court.

(7) The court may refer the question of wasted costs to a costs judge or a district judge, instead of making a wasted costs order. "

22. Mr Walder drew the Court's attention to he leading authority and guide to wasted costs namely the case of **Ridehalgh v Horsefield [1994] Ch 205**, in which the Master of the Rolls gave guidance, and confirmed a three-stage test to be adopted when considering a costs order as set out in the case of **Re a Barrister (wasted costs order) (No 1 of 1991) [1993] QB 293**, namely (a) has there been an improper, unreasonable or negligent act or omission? ; (b) as a result, had any costs been incurred by a party?; and (c) should the court exercise its discretion to order the lawyer to meet the whole or any part of the relevant costs?

23. Mr Walder stressed that "*improper*" covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It also covered conduct which according to the consensus of professional, including judicial, opinion could be fairly stigmatised as being improper whether it violated the letter of a professional code or not. "*Unreasonable*" included conduct which was vexatious, designed to harass the other side rather than advance the resolution of the case: it made no real difference that the conduct was the product of excessive zeal and not improper motive. Further, "*negligent*" does not mean conduct which was actionable as a breach of the legal representative's duty to his own client. In **Persaud v Persaud [2003] EWCA Civ 394**, the Court of Appeal held that there had to be something more than negligence, more akin to abuse of process or breach of duty to the court, to make a legal representative subject to jurisdiction for a wasted costs order.

24. Mr Walder contended that the Court of Appeal has emphasised that judges should approach their task with caution and, where possible, consider the applicability of other sanctions of a disciplinary nature, as in the case of **Gill v Humanware Europe plc [2010] EWCA Civ 799** where the Court of Appeal stated that on the facts of that case the Employment Appeal Tribunal should have referred the matter to the Bar Standards Board, rather than make a wasted costs order, and pointed out that the appropriate disciplinary body had power to order compensation.

25. He observed that more recently with the introduction of the Qualified One-Way Cost Shifting regime, the matter of wasted costs has been revisited with more regularity by the Courts. In **Flatman v Germany : Weddle v Barchester Health Care Ltd [2013] EWCA Civ 265** the following discussion the it was held that:

> "*Third Party Costs*
>
> *24 The starting point is s. 51 of the Senior Courts Act 1981 which provides a power to determine to what extent the costs of litigation should be paid whether by one of the legal representatives or a third party (see Aiden Shipping Ltd v Interbulk Ltd [1986] 1 AC 965). The*

circumstances in which an order could be made against a solicitor were the subject of some elaboration in Tolstoy-Miloslavsky v Aldington [1996] 1 WLR 736, in these terms (per Rose LJ at 745):

"...there are only three categories of conduct which can give rise to an order for costs against a solicitor: (i) if it is within the wasted costs jurisdiction of section 51(6) and (7); (ii) if it is otherwise a breach of duty to the court, such as, even before the Judicature Acts, could found an order, e.g. if he acts, even unwittingly, without authority or in breach of an undertaking; (iii) if he acts outside the role of solicitor, e.g. in a private capacity or as a true third party funder for someone else."

25 *These principles were expanded in Dymocks v Franchise Systems (NSW) Pty Ltd v Todd [2004] UKPC 39, [2004]1 WLR 2807 by Lord Brown of Eaton under Heywood in these terms (at para. 25):*

"(1) Although costs orders against non-parties are to be regarded as 'exceptional', exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction ....

(2) Generally speaking the discretion will not be exercised against 'pure funders', described in para 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175 , 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". ...

(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation... Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation in the sense explained in the Knight case [Knight v FP Special Assets Ltd (1992) 174 CLR 178] provided that he is 'a real party in ... very important and critical respects'."

26 *In the Knight case, the High Court of Australia dealt with the issue in this way (per Mason CJ and Deane J at page 192):*

"For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of

justice require that it be made."
27 Applying these observations to the position of a solicitor, in Myatt v National Coal Board (No 2) [2007] 1 WLR 1559, Dyson LJ explained the current position at [8]-[9]:
"In my judgment, the third category described by Rose LJ in the Tolstoy-Miloslavsky case should be understood as including a solicitor who, to use the words of Lord Brown in Dymocks Franchise Systems (NSW) Pty Ltd v Todd, is 'a real party ... in very important and critical respects' and who 'not merely funds the proceedings but substantially also controls or at any rate is to benefit from them'. I do not accept that the mere fact that a solicitor is on the record prosecuting proceedings for his or her client is fatal to an application by the successful opposing party, under s.51(1) and (3) of [the Senior Courts Act 1981] , that the solicitor should pay some or all of the costs. Suppose that the claimants had no financial interest in the outcome of the appeal at all because the solicitors had assumed liability for all the disbursements with no right of recourse against the clients. In that event, the only party with an interest in the appeal would be the solicitors. In my judgment, they would undoubtedly be acting outside the role of solicitor, to use the language of Rose LJ."

26. As to the application of the law to this case, Mr Walder submitted that from the express terms of the order of the 27th November 2015, it is unclear what specific facts led to the default that Prescotts were presumed to have committed. Clearly the hearing did not go ahead at the time. Further, the correspondence suggests that the reason that the hearing did not go ahead was because the Court did not feel it was in a position to properly assess whether or not the Claimant could rely upon Part 44 rule 14 of the CPR because the provisions of Part 44 rule 17 thereof.

27. Therefore, Mr Walder contended that the issue at the heart of that dispute is whether or not the Claimant benefits from a pre-commencement funding arrangement as defined in Part 48 rule 2. He speculated, since no transcript is available and no attendance notes have been provided to him, that the Court considered it could not deal with the costs issue because (i) the counsel present Mr Timothy White considered there may be a conflict of interests between the solicitors and the Claimant, and thus felt some difficulty in acting; and/or (ii) the Court did not consider it had sufficient evidence to determine the issue set out above. Mr Walder observed that since the Court has specifically listed this matter to consider the wasted costs issue, it is important to consider the issues in light of the guidance given in the cases concerning wasted costs.

28. Mr Walder submitted that there is no basis for arguing that the conduct of the Claimant's solicitors has been "*improper*" given the necessity to show some kind of conduct which could be stigmatised, or give rise to any professional sanction. Further, he submitted that, in all the circumstances of the case, the conduct cannot be considered "*unreasonable*" or "*negligent*". He relied on seven matters in support of his contention.

29. First, there was no requirement on the Claimant, or his representatives, to

provide any evidence at all for the hearing on 27th November. There was no order of the Court, or direction, or rule, or indication in the judgment of this Court that the Claimant, or his representatives, would be required to give or provide evidence. Secondly, the Defendant's representatives wrote to the Claimant's solicitors inviting them to provide evidence on certain matters. By a letter of the 29th October 2015 Prescotts replied stating that "*the writer*" would willingly provide a witness statement setting out "*the funding arrangement*". Thirdly, the Claimant's solicitor provided a statement – verified by a statement of truth, that there was no pre commencement funding arrangement in place, and that was provided before the hearing of 27th November. Fourthly, as the Defendant's representatives put it in their correspondence, it is for the Claimant to advance a position that the Defendant should not be entitled to enforce a costs order. The manner in which the Claimant advances that position is not a matter for the Defendant to concern itself with, nor is it a matter for the Court. Fifthly, in the event that the evidence before the Court is deemed to be insufficient, then it is properly open for the Court to determine the matter on the basis of that evidence or indeed on the basis of a lack of evidence. That is the reason for the burden of proof. Should the evidence be inadequate to make out the Claimant's contentions, then the Court should simply find against it. Mr Walder submits that it seems contrary to the adversarial system upon which Common Law systems of justice are based for the Court to "*demand*" further evidence which will put the party ordered to provide further evidence to significant further expense, since that is inquisitorial. If, after the event, the party whom the Court finds against considers his representatives were in breach of any duty they owed him, then it is open to him to bring an action for negligence. Sixthly, the Defendant's representatives have consistently demanded that the Claimant himself provide a witness statement, and present for cross examination. It is not open to a Defendant to demand what evidence a Claimant calls in his own case. Indeed, even the order of the 27th November 2015 fell short of compelling the Claimant to give evidence. Seventhly, the Claimant's solicitors at all times act in accordance with their instructions, provided by the Claimant. In the event that the Claimant takes issue with that, it is a matter for him, not for the Defendant.

30. Mr Walder submitted that, therefore, it is clear that the Claimant's solicitors cannot be liable for wasted costs, when one considers what the implications of paragraph 4 of the order of 27 November would be. He contended that, logically, if the order is not complied with, or if the Court does not accept the evidence provided by the Claimant, then the Court will simply not accept the evidence and deem that costs are enforceable against the Claimant.

31. He contended that, therefore, the question is why should the Claimant's solicitors be liable personally for wasted costs if the outcome is that the evidence supplied on behalf of the Claimant is not accepted? Mr Walder submitted that the Claimant's solicitors have not been "*unreasonable*" He stresses that legal representatives should not lend assistance to proceedings which are an abuse of process and they are not entitled to use litigious procedures for purposes for which they were not intended, as by issuing or pursuing proceedings for purposes unconnected with success in the litigation,

or pursuing a case known to be dishonest. Nor are they entitled to evade rules intended to safeguard the interests of justice as by knowingly failing to make full disclosure on an ex parte application or knowingly conniving in incomplete disclosure of documents.

32. However, Mr Walder stressed that conduct is not unreasonable simply because it led to an unsuccessful result or because other legal representatives would have acted differently. The "*acid test*", he submitted, is whether the conduct permitted a reasonable explanation. It is not unreasonable to be optimistic, nor is it unreasonable to assume that a witness statement from a solicitor as to a matter within his own knowledge is sufficient evidence of that matter. In only providing a short statement regarding funding from its principal the Claimant's solicitors cannot be said to have been "*unreasonable*" given the fact that there were no actual requirements to serve any evidence. Furthermore, Mr Walder submitted the given the "*extended*" definition of negligence as set out in the case of **Persaud**, it cannot be said that simply serving evidence that is, or appears to be, deemed inadequate by the Court is "*negligent*" for the purposes of making a wasted costs order.

33. Mr Walder contended that the subsequent evidence disclosed pursuant to the order of the 27th November 2015 is worthy of note. He observed that it appears there is no further evidence to support the contention that there was no pre-commencement funding arrangement. There are simply fee notes from counsel which make no reference to a CFA, the implication being, he submits, that in the event there were a CFA, only counsel who would accept such an arrangement would have been instructed.

34. Mr Walder indicated that the allegation that counsel who appeared on the last occasion was somehow conflicted is not entirely understood. I pause to observe that in contrast to Mr Timothy White who appeared on the 27th November 2015, Mr Walder has made it very clear that he only appears before this Court on behalf of the Claimant's solicitors. Mr Walder accepted that if the Claimant' solicitors had not properly instructed counsel, or if counsel had been instructed in such a way that professionally embarrassed him then it may be that Prescotts would have to answer for that. However, he stressed that the issue of wasted costs was only raised at the last hearing at not before. Mr Walder submitted that it is difficult to see why any conflict could have arisen. Counsel was simply there to make submissions on costs using the evidence at his disposal. He contended that in the event an application is made without notice to seek costs personally against a solicitor, then it is correct for the solicitor to be put on notice and obtain separate representation. However, that was not the position as at the hearing on the 27th November 2015. Mr Walder submitted it is difficult to see where the fault is suggested to lay with Prescotts for the view taken by counsel on the last occasion.

35. Mr Walder contended that the Defendant is attempting, considering it may not be able to enforce any costs award made against the Claimant, to seek to recover costs against an insured party, namely the Claimant's solicitors. He observed that while there may be a "superficial neatness in that view", to make such an order would blur the lines between the duty of a solicitor to his client,

and the duty to a solicitor to the court. Mr Walder submitted that it is simply not open to the Court to conduct an inquisitorial review of the matter and sanction the Claimant's solicitor for how the case is presented. That is especially so in this case, he asserts, where, after an order for disclosure was made, no further evidence is forthcoming. Mr Walder submits that no wasted costs order should be made against Prescotts.

The Defendant's Case

36. Mr Matthew White on behalf of the Defendant set out its position and his submissions as to costs in his skeleton argument, dated the 9th June 2016. That skeleton argument was sent by electronic mail to this Court in accordance with direction 10 of the order of the 27th November 2015.

37. In summary, Mr White submitted that there two main outstanding issues for the court to determine. First, the wasted costs of the 27th November 2015 hearing, which were summarily assessed at £5,533.56. Secondly, (i) enforceability of the costs of the original hearing, which were summarily assessed at £4,750; and (ii) the appeal, summarily assessed at £8,806.96.

38. As to the issue of wasted costs in respect of the hearing of the 27th November 2015, Mr White accepted that the Claimant's solicitor filed a statement, dated the 11th December 2015 in a bid to show cause as to why he ought not to pay the wasted costs of the hearing of the 27th November 2015. However, Mr White submitted that the contents of the statement appear to show a lack of understanding why there was a need to show cause. He drew attention to the fact that the Claimant's solicitor asserts that the hearing of the 27th November 2015 was required in any event; observing that that entirely misses the point. Mr White stressed that the only reason that the Court is having this hearing is because the hearing of the 27th November 2015 was a waste

39. As to enforceability and Qualified One Way Costs Shifting, counsel for the Defendant acknowledged the thrust of the Claimant solicitor's evidence in relation to the non-existence of a written old-style CFA. However, Mr White put it more bluntly. He submitted that "*through the negligence and breach of professional rules of the Appellant's solicitor there was no written communication with the Appellant as to the method of funding his claim*".

40. The Defendant advanced three arguments as to why costs should be paid by the Claimant or his solicitor in any event. First, retainer. Mr White invited the Court to find that there was probably an oral, or implied, retainer on an "old-style" CFA basis. He submitted that whilst such an oral or implied CFA would be unenforceable, that does not mean that QOCS applies. In the alternative, he submitted that if there was no retainer, the Claimant's solicitor was in breach of warranty of authority and should pay the costs. Secondly, estoppel. Mr White contended that the Claimant is estopped from asserting that there is no pre-commencement funding arrangement – the Defendant having relied on the Claimant's earlier assertion that there was a pre-commencement funding arrangement. Thirdly, abuse of process. Further, or alternatively, Mr White submitted that (a) the claim was, in reality, struck out as an abuse of process,

so QOCS does not apply; or (b) the Court should supplement its judgment to strike out the claim as an abuse of process, with the effect that QOCS will not apply, in the circumstances of the case.

41. Mr White submitted that the Court is concerned with Part 44 rules 13 to 17 of the Civil Procedures Rules – to be found at pages 1276-1278 of Volume 1 of the Civil Procedure 2016, "the White Book". In summary, he contended:-
    (a) This was a personal injury claim so qualified one-way costs shifting applies unless there is a "*pre-commencement funding arrangement*" – that is an old-style pre 1st April 2013, a CFA agreement which provides for a success fee, or an ATE insurance policy was obtained before the 1st April 2013, or there was a union, or similar, agreement to meet costs before the 1st April 2013;
    (b) That means that if there was a pre-commencement funding agreement in place, such as a pre 1st April 2013 CFA, the position is clear, namely the Defendant gets an order for costs in its favour and can enforce that order.
    (c) If, however, there was no pre-commencement funding agreement in place then whilst the Defendant gets an order of costs in its favour, on a narrow reading of CPR 44.14 to 44.16 that order may only be enforced:-
        (i) Without permission if the 44.15 (1) criteria are met, that is, the claim has been struck out for (a) the Claimant having disclosed no reasonable grounds for bringing the proceedings; (b) the proceedings are an abuse of process; or (c) the conduct of the Claimant or a person acting on the Claimant's behalf and with their knowledge of such conduct, is likely to obstruct the just disposal of the proceedings;
        (ii) With permission if the claim is fundamentally dishonest, which the Defendant does not contend applies in this case.

42. Mr White drew attention to the fact that on the 30th October 2012, before QOCS existed, the Claimant sent a letter before action to the Defendant stating, inter alia, "*Please be advised that our Client's claim is being funded by way of a Conditional Fee Agreement which provides for a success fee.*" He pointed out here was no written CFA, no client care letter, or written retainer.

43. He noted that on the 9th April 2015 Deputy District Judge Talog-Davies struck out the claim and ordered the Claimant to pay the Defendant's costs assessed at £4,750 within 21 days but the Claimant did not raise QOCS either at that hearing or afterwards. The Claimant simply breached the order of Deputy District Judge Talog-Davies and did not pay the costs. Mr White stressed that the first time that the assertion that QOCS applied was made was in an email from the Claimant's counsel to the Defendant's counsel after promulgation of the draft decision of His Honour Judge Lopez.

44. Further, counsel for the Defendant contended that the lack of any written retainer is bizarre. He hypothesised that the reality of the position is that there probably was an oral retainer, rather than there being no retainer. Alternatively, although it is submitted that it is less likely, there was

conceivably an implied retainer. Mr White submitted that either way it would be expected to be on a CFA basis.

45. Mr White submitted that there is no basis upon which to conclude that the Claimant was told anything other than "*no win no fee*", and contends that there are good reasons to assume that that is probably what was indicated to him, orally – not in writing, namely:-
    (i) That is how personal injury litigation was typically run for a long time.
    (ii) Examination of the current website of the Claimant's solicitor reveals the usual assertions to prospective clients, namely "*we process all claims under our completely free 'no win no fee' policy*". Whilst Mr White acknowledges that website might have been different in 2012, he asserts it would have been unlikely in that vital respect.
    (iii) If there was no CFA, such that the solicitor was expecting to recover costs from the Claimant personally, it is far more likely that he would have prepared a written retainer. The likely explanation for there being no written retainer provided to the Claimant is that his solicitor never expected him to pay. Counsel for the Defendant observes that the Claimant had instructed the same solicitor to bring a claim against the same Defendant previously. His letter of claim in that earlier case provided that that claim was on a CFA basis, such that the Claimant and his solicitor had a history of working together on that basis. The Claimant's earlier claim was struck out on 6th November 2013 - after the QOCS regime had begun, for non-compliance with a court order. Costs were awarded against the Claimant in that case and were enforced against him personally without QOCS being raised as a defence to the costs – indicative of an old-style CFA.
    (iv) On the 16th February 2016 the Defendant's solicitor wrote to the Claimant's solicitor stating:- "*We have obviously received Mr Prescott's statement indicating that you have no client care letter or other documentary evidence in relation to funding of this claim.*
    We would have thought that a CFA must have at least been discussed with the Claimant (if for no other reason than to reassume him that he was not going to be liable for your firm's costs if the claim was unsuccessful). Is that point accepted (i.e. that there was discussion about the claim being funded on a CFA)? Alternatively is your case that there was no communication about funding whether written **or** *oral? It would be helpful to see please your attendance note/notes with the Claimant, redacted where appropriate, but highlighting any part of the attendance note which deals with funding issues.*
    If you assert that there was no communication about funding, whether written or oral, then it seems to us that you ought prepare a statement from your client to that effect, and we put you on notice that we will want to cross-examine him on the issue. We would find it hard to accept that there was no communication whatsoever with a client about funding."
    No reply was received.

46. Mr White submitted that if there was an oral retainer, or implied retainer, featuring the words "*no win, no fee*" that would be an unenforceable

agreement as between solicitor and client because such agreements have to be in writing. The fact that the CFA would be unenforceable as between solicitor and client does not mean that it did not exist. In that situation there would be an unenforceable pre-commencement funding arrangement. He contended that for QOCS not to apply there merely has to be a pre-commencement funding arrangement. The rules say nothing, Mr White submitted, about it needing to be an enforceable pre-commencement funding arrangement as between solicitor and Claimant. Mr White contended that that is not surprising as otherwise it would produce the odd result that the neglect of a Claimant's solicitor could be used as a shield against an order of costs in favour of the Defendant.

47. Counsel for the Defendant submitted that if, contrary to his submission, there was no retainer in place at all, then the Claimant's solicitor would be in breach of warranty of authority and the solicitor ought to be liable for the costs in the usual way. Mr White submitted that it would only be in the extraordinary circumstance that there was an oral retainer on a privately paying basis that the enquiry needs to proceed past this point. Put simply. If there was an oral CFA retainer, or implied CFA retainer, QOCS is disapplied because there was a pre-commencement funding arrangement and the order of costs should be made against the Claimant, regardless of the fact that the CFA would be unenforceable by the Claimant's solicitor against the Claimant. If there was no retainer, the Claimant's solicitor was in breach of warranty of authority and the order for costs should be made against the Claimant's solicitor. If there was an oral retainer on a privately-paying basis, it is necessary to go on to consider the issues of estoppel and abuse of process.

48. The Defendant submitted that having asserted "*pre-action*" that there was a pre-commencement funding agreement in place, namely that QOCS does not apply, the Claimant is now estopped from asserting otherwise.

49. Mr White submitted that the Claimant made a representation to the Defendant that there was a pre-commencement funding agreement in place - that QOCS does not apply. Put bluntly, the Defendant relied upon that representation. Further, Mr White contended that:-
    (a) The Defendant did not contemplate the type of economic compromise of a claim which is more palatable to a Defendant who knows that it might fight, win, and still be more out of pocket than if it had bought the claim off early for a small sum;
    (b) The Defendant did not advance its position in relation to strike out of the claim in the way that it would have done if it had been told that the Claimant contended that this was a QOCS case. In summary, if the Claimant had "revealed" its assertion that this was a QOCS case at any time before receipt of judgment, the Defendant would have sought to have the claim struck out expressly as an abuse of process so to avoid application of QOCS.

50. In order to assist the Court Mr White set out the definition of estoppel by representation at Halsbury's Laws at 47[307] which states:-

> *"Where a person has by words or conduct made a clear and unequivocal representation of fact to another, either knowing of its falsehood or with the intention that it should be acted upon, or having conducted himself so that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position, an estoppel arises against the party who made the representation, and he is not allowed to state that the fact is otherwise than he represented it to be."*

51. That, it Mr White submitted, is exactly what happened in this case. The Claimant asserted that there was a pre-commencement funding arrangement in place. The Defendant, as a reasonable person, understood that to be a representation to be acted upon and, inevitably, altered its position based on the representation. Therefore, Mr White submits the Claimant cannot now assert that QOCS does not apply. Mr White observes that the purpose of QOCS is to reduce the costs of litigating personal injury claims, not to protect negligent solicitors or their clients from the consequences of that negligence.

52. Counsel for the Defendant asserted that there is a simple point which resolves the issue in the costs application. He submits that claim was struck out as an abuse of process and, therefore, by virtue Part 44 rule 15(b) of the Civil Procedure Rules the order for costs against the Claimant may be enforced without permission.

53. Mr White acknowledged that Deputy District Judge Talog-Davies' order did not state that the claim was struck out *"as an abuse of process"*. It simply indicated that the claim was struck out. However, Counsel for the Defendant reminded the Court as to the bases upon which a claim may be struck out in accordance with part 3 rule 4(2)(a)-(c) of the Civil Procedures Rules.

54. He stressed that it was not struck out for the claim form disclosing no reasonable ground for bringing the claim – Part 3 rule 4(2)(a). Nor, he submitted, was it struck out for failure to comply with a rule, practice direction or court order – Part 3 rule 4(2)(c). It was not struck out under the second limb of Part 3 rule 4(2)(b) - likely to obstruct the just disposal of proceedings. Therefore, Mr White submitted the remaining option is that it was struck out as an abuse of the court's process the first limb of Part 3 rule4(2)(b). He contended that is not a surprising result. The Court's process depends on parties acting expeditiously. To fail to do so, to fail to pay a fee on time, to fail to send the application to the right place are all properly described as an abuse of process.

55. Mr White submitted that it was not appreciated by Deputy District Judge Talog-Davies, the Defendant or this Court, that there was any need to spell out that the claim form was struck out as an abuse of process because of the Claimant's misleading correspondence asserting that there was a pre-commencement funding arrangement. Nonetheless, Mr White contended, that the claim was struck out of an abuse of process and the Court ought to declare

that the order for costs against the Claimant may be enforced without the permission of the Court.

56. In the alternative, Mr White submitted that if Deputy District Judge Talog-Davies did not strike out the claim form as an abuse of process, he could and should have done, and this Court should to add to its judgment in the appeal to strike the claim form out as an abuse of process.

57. In conclusion, Mr White submitted in his written submissions on behalf of the Defendant that the Court should order that:-
    (a) The Claimant's solicitor having failed to show cause as to why he should not pay the wasted costs of the hearing on the 27th November 2015, those costs - as previously summarily assessed in the sum of £5,533.56, are to be paid by the Claimant's solicitor.
    (b) The Claimant's solicitor shall pay interest on those costs in the sum of £270 (From the 27th November 2015 to the 7th July 2016, 21days after this hearing)
    (c) The Claimant shall pay the Defendant's costs of the appeal as summarily assessed in the sum of £8,806.96. Alternatively, if there was a breach of warranty of retainer, the Claimant's solicitor shall pay those costs.
    (d) The Claimant, alternatively the Claimant's solicitor, shall pay interest on those costs in the sum of £479. (From the date of the order namely the 3rd November 2015 to the 7th July 2016)
    (e) If necessary, in the event that there is a breach of warranty of retainer:- The order of Deputy District Judge Talog-Davies dated 9th April 2015 is varied to provide that the costs sum shall be paid by the Claimant's solicitor, rather than by the Claimant.
    (f) The Claimant, alternatively the Claimant's solicitor, shall pay interest on the costs order of Deputy District Judge Talog-Davies dated 9th April 2015 in the sum of £452.20. (£4,750 was ordered to be paid by the 30th April 2015 and remains unpaid, so from the 30th April 2015 to the 7th July 2016).
    (g) The sums set out in the above paragraphs shall be paid by the 7th July 2016.
    (h) The Claimant shall pay the Defendant's costs of this hearing, to be summarily assessed. Alternatively, if there was a breach of warranty of retainer, the Claimant's solicitor shall pay those costs.
    (i) It is declared that the Defendant may enforce the costs orders in this case against the Claimant and / or the Claimant's solicitor without the permission of the court.

The Hearing

58. At the start of the hearing Mr Walder made it clear that he was instructed by and only appeared for the Claimant's solicitors – Prescotts, on the application for "*wasted costs*". Indeed, he had asked for and received written instructions to confirm that position. Mr Prescott was not present at the hearing and neither was the Claimant.

59. Both Mr White and Mr Walder agreed the order in which the matters before the Court should be determined. First, the issue of whether or not there was a retainer between the Claimant and his solicitor. Then, the question of "*wasted costs*" should be considered. Finally, the remaining issues as to costs should be determined.

The Analysis

Retainer

60. As to the issue whether there was or was not a retainer. In short, Mr White submitted that if there was no retainer between the Claimant and his solicitor then the Claimant's solicitor was in breach of warranty of authority and should pay the costs. He submitted that the Court should not be satisfied, on the balance of probabilities, that there was a retainer given that the Claimant's solicitors had not provided evidence of a written retainer and there was no evidence from either the Claimant or his solicitors that there was an oral retainer.

61. Mr Walder made the point that a retainer is nothing more than a contract between the solicitor and client and so it can be written or oral, it can be express or implied. He stressed that the Claimant's solicitor had paid Court fees in respect of the case, attended numerous hearings and undertaken a significant quantity of work upon the case including making representations to the Defendant and its solicitors. Mr Walder submitted that those actions, involving as they did considerable time, effort and expense, were "*more than enough*" to imply that there was a contractual relationship between the Claimant and his solicitor. In short, that there was a retainer. In support of his proposition Mr Welder relied on the case of **Whelton-Sinclair v Hyland (1992) 2 EGLR 158** where the Court of Appeal held than a telephone call between a solicitor and "*client*" brought a retainer into place.

62. In light of that submission, Mr White – with his usual fairness, accepted on behalf of the Defendant that the actions of the Claimant's solicitor had been sufficient to bring into being an implied retainer between the Claimant and Prescotts. For the avoidance of doubt, I make it clear that had Mr White not made that concession this Court would, in any event, have accepted the submissions by Mr Walder on the point. I find that there was, therefore, an implied retainer between the Claimant and Prescotts. It follows that the Claimant's solicitor were not acting in breach of warranty of authority.

"Wasted Costs"

63. Mr Walder submitted that the real issue before the Court on the 27th November 2015 was the effect of Qualified One-Way Costs shifting as provided for by Part 44 rules 13 – 17 of the Civil Procedure Rules. He indicated that where, as in this case, the Court was considering whether to make an order under section 51(6) of the Senior Courts Act 1981 to order a legal representative to meet "*wasted costs*" then by virtue of Part 46 rule 8(2) Court must "*give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order*". In short, once the possibility of making a "*wasted costs*" order – more accurately described as personal liability of a legal representative for costs,

was considered by the Court then a further hearing was inevitable and, therefore, the costs thereof were necessary.

64. Mr Walder submitted that at the hearing on the 27th November 2015 the Court had the benefit of Mr Prescott's statement, dated the 23rd November 2015, in which Mr Prescott had made it clear that the penultimate paragraph of his letter, dated the 30th October 2012 namely "*Please be advised that out Client's claim is being funded by way of a conditional fee agreement which provides for a success fee*" was "*an error*" and "*no-pre commencement funding arrangement has been entered into*". Mr Walder contended that there was no pre-commencement conditional fee agreement in place and Mr Prescott was duty bound to indicate that was the case. It is merely that the Defendant's solicitors did not accept Mr Prescott's assurances.

65. Mr Walder reminded the Court of the guidance by the Court of Appeal when considering the making of a "*wasted costs*" order, namely to ask (a) has there been (i) improper; (ii) unreasonable; or (iii) a negligent act or omission?; (b) as a result, has any costs been incurred by a party?; (c) should the Court exercise its discretion to order the lawyer to meet the whole or any part of the costs?.

66. He stressed that "*improper*" conduct in this context covers that which would be held to justify being disbarred, struck off, suspended from practice or other serious professional penalty or that which would be considered "*improper*" by the legal profession or the judiciary. He submitted that whilst Prescotts "*may have made errors*" in their conduct of the case those errors or omissions were not "improper" as defined and envisaged in the guidance. Further, Mr Walder indicated that "*unreasonable*" conduct as envisaged by the guidance included that which was vexatious and designed to harass the other side as opposed to advancing the case. He submitted that any act or omission on the part of the Claimant's solicitor could not be characterised as such. In short, the Court could not find that the Claimant's solicitor's conduct was either "*improper*" or "*unreasonable*" so as to justify the making of a wasted costs order.

67. Mr Walder submitted that "*negligent*" in this context does not mean conduct which is actionable as a breach of a legal representative's duty to his own client but, as the Court of Appeal emphasised in the case of **Persaud**. Rather what was required was something more than negligence, in reality something more like an abuse of process or breach of duty to the Court. In summary, Mr Walder submitted that the threshold for making a "*wasted costs*" order was high and "*mere negligence*" was not enough upon which to base making such an order. He contended that the acts or omissions of the Claimant's solicitor simply did not amount to an abuse of process or breach of duty to the Court such as to justify making a "*wasted costs*" order against it.

68. In addition, Mr Walder reminded the Court of the comments of Lord Brown in the case of **Dymocks**, which I set out earlier within this judgment, that cost orders against non-parties are to be regarded as "*exceptional*", which means no more the ordinary cases where parties pursue or defend claims for their own benefit and at their own expenses, the ultimate question in such a case is

whether, in all the circumstances, it is just to make the order? He submitted that it would not be just to make such an order in this case.

69. Mr Walder submitted that counsel instructed for the Claimant at the earlier hearing should not have been concerned about the "*issue of conflict*" but instead should have merely have advanced the case on the evidence available at that time and left it to the Court to make whatever decisions if felt appropriate on the evidence then before it. Further, Mr Walder contended that if after such a finding a dispute arose between the Claimant and his solicitor that was for them to resolve and not the Court.

70. In response, Mr White indicated that the law was essentially agreed. However, he submitted that the Claimant's solicitor had failed or fallen short in a number of respects. First, the Claimant's solicitor had failed to adequately instruct counsel who appeared on the last occasion adequately and / or to give him adequate instructions so as to avoid a conflict between its interests and those of the Claimant. Mr Matthew White submitted that the conduct of the Claimant's solicitor in this case, for all the reasons he set out in his detailed written submissions, was sufficient to surmount the "*hurdle*" or threshold required to make a "*wasted costs*" order in respect of the hearing of the 27th November 2015. Further, he submitted that the question set by Lord Brown in the case of *Dymocks*, namely is it, in all the circumstances of the case, "*just*" to make the order was a resounding "*yes*". Mr White reminded the Court of the overriding object of the Civil Procedures Rules found at Part 1, namely that the overriding objective of the rules is to deal with cases justly and at proportionate cost. In summary, a "*wasted costs*" order against the Claimant's solicitor would be a "*just outcome*" in view of its inadequate disclosure and inadequate instructions to counsel who appeared on the 27th November 2015.

71. The law is clear. If the Court is to make a "*wasted costs*" order it must be established that there has been conduct which is improper and / or unreasonable or there has been a negligent act or omission. I accept Mr Walder's submissions that the conduct of the Claimant's solicitors was not "*improper*" in accordance with the guidance given in the case of **Ridehalgh**. Further, I accept Mr Walder's submissions that the conduct of the Claimant's solicitor could not be said to be "*unreasonable*" within the meaning given in the leading cases.

72. The real issue is, therefore, whether there was a negligent act or omission on the part of the Claimant's solicitor within the guidance set out in the authorities? It is clear that "*negligent*" in this context does not mean that which is actionable as a breach of the duty of the solicitor to his client. It must be something more than that – "*mere negligence*", it must be an act or omission akin to an abuse of process or breach of duty to the Court. I accept Mr Walder's submissions that whilst the Claimant's solicitor may be criticised for a number of "*errors*" in the way in which it managed and recorded its relationship with the Claimant, its acts and omissions fall short of the failures required to form the basis of a "*wasted costs*" order in respect of the hearing of the 27th November 2015 or at all. Therefore, I do not make a "*wasted costs*"

order against the Claimant's solicitor in respect of the hearing of the 27th November 2015.

Compliance with Paragraph 6(i) of the Order of the 27th November 2015

73. Mr White drew the Court's attention to paragraph 6 of the order of the 27th November 2015 which provided, inter alia, that the Claimant's solicitor "*shall show cause as to why they should not pay the costs of the hearing of 27 November 2015 which are summarily assessed in the sum of £5,533.56. (i) The Claimant's solicitor is to file any statement settling out his case as to why he should not pay those costs as summarily assessed on a wasted costs basis by 4 pm on the 11th December 2015 in default of which those costs shall be paid on a wasted costs basis by 4 pm on the 18/12/15 (and in default of both the requirement to file a statement by 11th December 2015 and the requirement to pay wasted costs by 6/1/16 in default of a statement) then the Claimant's solicitor shall pay the defendant's costs as ordered by DDJ Talog-Davies and as set out set out in paragraph 5 hereof*".

74. Despite an extensive search of the Court file it was not possible to ascertain when the statement of Mr Prescott, dated the 11th December 2015 - and therefore the last day for filing and service of the same, was filed. In order to avoid even further delay and additional expense while that matter was "*investigated*" further I gave relief from the sanction in the event that the Claimant's solicitor had not filed on time. Such a course reflects the merits and justice of the case given my earlier findings and decision on the issue of "*wasted costs*".

The Issue of Costs of the Appeal

75. During the course of this hearing White volunteered that there was an "*error*" in paragraph 26 of his written submissions. He had asserted that although Deputy District Judge Talog-Davies had not indicated why he had struck out the claim it had to have been for abuse of process as it was not because (i) the claim for failed to disclose reasonable ground for bringing the claim; or (ii) failure to comply with a "*rule etc*". Mr White, quite properly, accepted in oral submissions that the action could have been struck out by the Deputy District Judge for failure to comply with a rule, namely incorrectly sending the application for an extension to the wrong Court and without the appropriate fee. Mr White acknowledged that, therefore, it could not be argued, as he had sought to do in his written submissions, that the claim had to have been struck out for an abuse of process with the consequences of that for the operation of Part 44 rule 15 (b), namely that an order for costs against the Claimant would be enforceable without permission of the Court.

76. Further, Mr White also accepted that a "*mere negligent*" failure to serve the claim form on time did not amount to an abuse of process. As a result, Mr White acknowledged that it was more difficult to argue that the case was struck out for an abuse of process that he had intimated in his written submissions. Instead, he submitted that to find an abuse of process in such a situation there had to be either (i) an inordinate and inexcusable delay; or (ii) a wholesale disregard of the rules. However, Mr White still contended that the Court could be satisfied that both there had been both in this case by the

Claimant's solicitor so as to constitute an abuse of process with the consequences thereof to the issue of the enforceability of costs.

77. There was clearly significant delay in this case. However, I do not accept Mr White's submission that the same was such that, in all the circumstances of the case, it was, or should have been, struck out for an abuse of process and so, by operation of Part 44 rule 15(b) of the Civil Procedure Rules an order for costs against the Claimant may be enforced without permission. As Mr White was forced to accept in his oral submissions the claim could have been struck out for the failure to comply with a rule of the Court.

78. As to the issue of estoppel. Mr White submitted that having represented by the letter of the 30th October 2012 that there was a pre-commencement funding agreement in place – which would have the effect that Qualified One-way Costs Shifting, would not apply, the Claimant is now estopped from asserting otherwise. In short, Mr White submitted that the Claimant made a representation to the Defendant that there was a pre-commencement funding agreement in place and the Defendant relied upon that representation as set out in paragraphs 20 - 24 of his written submissions.

79. Mr Walder made no submissions on the issue of estoppel save to remind the Court that for estoppel to apply there must be a clear and unequivocal "*representation of fact*" – either by words or conduct, to another either knowing of its falsehood or with the intention that it would be acted upon. He reminded the Court that at the time the Claimant's solicitor informed the Defendant that there was a conditional fee agreement in place the regime of Qualified One-Way Costs shifting was not in place. I am grateful to him for his assistance given that he was not instructed on behalf of the Claimant so as to make submissions on the point.

80. I accept the submissions made by Mr White in respect of the issue of estoppel. It is, I find, clear that by the letter of the 30th October 2012 the Claimant's solicitor made a clear and unequivocal representation to the Defendant and its solicitors that the Claimant had the benefit of a conditional fee agreement, even giving the additional detail in the letter that the agreement provided for a success fee. Further, it is clear that the Defendant and his solicitors relied upon that representation. Therefore, I find that the Claimant is now estopped from asserting that Qualified One-Way Costs Shifting does not apply.

81. I find accordingly.

82. Therefore, the Court makes the following orders and declaration:-
    (a) The Claimant shall pay the costs of the hearing on the 27th November 2015, those costs - as previously summarily assessed in the sum of £5,533.56;
    (b) The Claimant shall pay interest on those costs in the sum of £270 (From the 27th November 2015 to the 7th July 2016, 21days after this hearing);
    (c) The Claimant shall pay the Defendant's costs of the appeal as summarily assessed in the sum of £8,806.96;

(d) The Claimant shall pay interest on those costs in the sum of £479. (From the date of the order namely the 3rd November 2015 to the 7th July 2016)

(f) The Claimant shall pay interest on the costs order of Deputy District Judge Talog-Davies dated 9th April 2015 in the sum of £452.20. (£4,750 was ordered to be paid by the 30th April 2015 and remains unpaid, so from the 30th April 2015 to the 7th July 2016).

(g) The sums set out in the above paragraphs shall be paid by the 7th July 2016.

(h) The Claimant shall pay the Defendant's costs of this hearing, to be assessed if not agreed; and

(i) It is declared that the Claimant having represented that there was a pre-commencement funding agreement in place and the Defendant having relied upon that representation, the Claimant is now estopped from asserting that no such agreement was in place and/or that qualified one-way costs shifting applies. Accordingly the above costs orders may be enforced against the Claimant.

83. I wish to thank Mr Walder and Mr White for their considerable assistance and helpful submissions, both written and oral, in this case.

The County Court at Birmingham sitting at Walsall.
16th June 2016.

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