Case 6
Radford and Another

v

Frade and Others

[2018] 1 Costs LR 59

Neutral Citation Number: [2018] EWCA Civ 119
Court of Appeal (Civil Division)
7 February 2018

Before:
Sir Geoffrey Vos, Chancellor of the High Court, McCombe LJ and Asplin LJ

Headnote

Rectification of conditional fee agreements (CFAs). In proceedings in which costs orders had been made in the claimants' favour, the costs of work done outside the scope of the CFA after 23 May 2012 were irrecoverable because no retainer had been in place to cover it: accordingly, by operation of the indemnity principle, there were no costs for the paying defendants to indemnify (see [2016] 4 Costs LO 653, Warby J). No co-existence of a conventional retainer could be demonstrated. In ignorance of the doubtful ambit of the CFA, the solicitors had carried on their work on the basis that they were retained on a "no win, no fee" basis. Since this had not been recorded in writing, it was unenforceable under s 58 Courts and Legal Services Act 1990. The conduct of the solicitors had indicated that they had been carrying on as usual after 23 May 2012 and that nothing had changed. It followed that none of the work after that date had been covered by a retainer and there

were no costs payable which the paying party was obliged to indemnify.

No rectification of a CFA undertaken after a costs order had been made which could increase the liability of a paying party could be effective either. *Kellar* v *Williams* [2005] 4 Costs LR 559 followed. Accordingly, where the CFA had not mentioned two of the defendants against whom costs orders had been made, a deed of rectification purporting to be effective *ab initio* could not be enforced against the paying parties, since to do so after that date would have increased their liability under the terms of that order, contrary to the ruling in *Kellar*.

Cases Cited

Adams v *Improved Motor Coach Builders Ltd* [1921] 1 KB 495 (CA)
Forde v *Birmingham City Council* [2009] 1 WLR 2732
Kellar and Carib West Ltd v *Williams* [2005] 4 Costs LR 559; [2004] UKPC 30
R (McCormick) v *Liverpool Justices* [2001] 2 All ER 705
R v *Archbishop of Canterbury* [1903] 1 KB 289
Thornley v *Lang* [2004] 1 Costs LR 91; [2003] EWCA Civ 1484; [2004] 1 WLR 378

Judgment

McCombe LJ:

(A) Introduction

1. This is an appeal from the order of 8 July 2016 of Warby J dismissing the appellants' appeal to him from the orders of Master Haworth (Costs Judge) made on assessments of costs ordered to be paid by the respondents to the appellants following entry of summary judgment against the respondents dismissing their claims in the action brought by them against the appellants. The costs orders in the appellants' favour were made by Deputy Master Eyre, following his

adjudication on the appellants' summary judgment application, by his order of 14 January 2014, a decision which was upheld on appeal by Sir David Eady (as a judge of the High Court) on 28 July 2014.

2. The appellants submitted for assessment a costs bill in the sum of £805,500, made up on the basis that all the work carried out by their solicitors and by leading counsel on the case was done pursuant to conditional fee agreements ("CFAs"). The bill included "success fees" payable under the terms of the CFAs.

3. On 5 November 2015 and 20 January 2016 respectively, Master Haworth delivered rulings deciding that neither the appellants' solicitors nor counsel could recover fees charged for work done in the action after 23 April 2012 because the fees for that work were not within the scope of the CFAs and no other enforceable retainer existed entitling them to charge such fees. In counsel's case it was decided that his CFA was made with the solicitors and the clients had no liability to pay them. Further, in counsel's case, fees could not be recovered from the corporate appellants (who had been the fourth and fifth defendants in the action), who had not been identified as counsel's clients in the CFA made by counsel with the solicitors.

4. As the clients were not liable for the fees of either solicitors or counsel, (on the "indemnity principle") they were not recoverable from the respondents under the costs orders made in the appellants' favour in the action.

5. The appellants appealed to the judge with the permission of Master Haworth granted by his order of 25 May 2016. Their appeals were dismissed by Warby J, by the order already mentioned, and the appellants now bring a second appeal with permission granted, on limited grounds, by Lewison LJ on 24 November 2016 (on consideration of the papers) and extended to include one further ground of appeal by order of Hickinbottom LJ of 14 July 2017 (after a renewed application made orally in court).

6. The combined effect of the orders of Lewison LJ and of Hickinbottom LJ is that the appeal is brought on the following grounds:

> "3. The judges below were wrong to find that no payment was due to the defendants solicitors' for work done after 23 May 2012, that being work which (on the judges' now unappealable findings) was work conducted outside the auspices of the auspices of the defendants'

solicitors' CFA. The judges should have found that the work was subject to an enforceable retainer, either the prior written retainer dated 4 July 2011, or an implied *quantum meruit* retainer resulting from the defendants instructing their solicitors to perform work which was outside the agreed terms of the CFA. The judges should therefore have allowed the recovery of reasonable costs after 23 May 2012 in any event.

4. In particular, Warby J was wrong to find that work done outside the scope of the CFA was subject to a further, implied, CFA retainer, which was unenforceable because not in writing:

4.1. There was no such finding by the costs judge at first instance, and there was no respondent's notice.

4.2. The finding was wrong. In circumstances where the solicitors had (i) stated their conventional terms of business; (ii) but then subsequently agreed to act on a CFA of expressly limited scope, the only logical finding was that work the solicitors were subsequently instructed to perform outside the agreed scope of the CFA was not subject to a CFA, but subject either to the solicitors' conventional terms of business, or alternatively to an implied *quantum meruit* payment obligation. …

5. …

6. As to counsel's CFA, the judges below should have found that the relevant defendants (D4 and D5) were liable thereunder to pay for his professional services after 23 May 2012, such that those fees were recoverable from the claimants. While it was common ground that this was not the effect of counsel's CFA as initially drafted, this liability resulted from a 'deed of rectification' dated 30 July 2015 which extended the CFA to work done by counsel for D4 and D5. Warby J accepted that the deed rendered D4 & D5 liable to pay counsel (and therefore that it dispelled any indemnity principle objection to recovering his fees), but concluded that it fell to be disregarded as a matter of law on *inter partes* assessment, because it post-dated the costs order against the claimants. Warby J was thereby wrong. There is no such rule of law. The only relevant criterion was whether the variation to counsel's CFA was reasonable. Warby J should have concluded that it was reasonable, because it corrected an obvious oversight that the

defendants and their solicitors were entitled to conclude that they should not exploit.

7. Even if the judges below were right to find that work done by counsel after 23 May 2012 was not subject to his CFA, they were nevertheless wrong to find that the work conducted outside the CFA was not subject to a retainer, resulting from the defendants (via their solicitors) instructing counsel to perform work which was outside the agreed terms of his CFA. The judges should have found that such work was subject to the conventional (i.e. non-CFA) terms agreed between the Law Society and the Bar Council, or alternatively payable *quantum meruit*. The judges ought therefore to have ruled that counsel's ordinary fees (for acting for D4 and D5) could be recovered from the claimants in any event, and grounds (3) and (4) above are adopted with necessary modifications."

7. Both Lords Justices refused permission to appeal on the question of the construction of the CFAs as to whether the work done after 23 May 2012 was covered by those agreements. Both Lords Justices decided that those issues did not give rise to any important points of principle or practice and that there was no other compelling reason to permit a second appeal on those issues. On the other hand, the points on which permission to appeal was granted did, in the Lords Justices' view, satisfy the "second appeals" test.

(B) Background Facts

8. Warby J summarised the background events giving rise to the proceedings and the salient stages in the action as follows:

"(1) The claimants and the defendants in this action were all involved in a project to make a Spanish film called *La Mula* (the Mule). The first claimant, a well-known screenplay writer and director, was retained to direct the film. The second claimant is a partnership through which he trades. The defendants were all involved in financing the production. A number of contracts were entered into. The project encountered difficulties. The parties fell out, the first claimant left the shoot and was replaced. The parties have been in dispute ever since.

(2) In July 2010 the claimants sued three individuals and six companies, relying on various causes of action, including defamation and unlawful means conspiracy. In August 2010, on an application

without notice, the claimants obtained injunctions. These were later continued at hearings on notice. The injunctions prohibited the defendants from using or publishing film footage shot by the first claimant, without his authority, and restrained some of the defendants from defaming him in relation to the film in certain specified ways.

(3) From November 2010 onwards the first two defendants ('the individual defendants') and the fourth and fifth defendant companies ('the corporate defendants') were making representations to the court, disputing the jurisdiction of the English court and service of the proceedings. In particular, on 26–27 November 2010 Spanish lawyers acting for these defendants made written representations to the court on their behalf disputing jurisdiction and service. And on 18 February 2011 English solicitors then acting for the corporate defendants filed an application notice, challenging the court's jurisdiction.

(4) By an order of Master Kay QC time for service on the first five defendants was extended until 12 July 2011. Some weeks before that deadline expired the individual defendants instructed Taylor Hampton, solicitors ('TH'). TH instructed Augustus Ullstein QC ('AUQC'), who entered into a conditional fee agreement ('CFA') with TH. In August 2011 TH entered into a CFA with the individual defendants and the corporate defendants, which are companies they owned and controlled. (References to 'the defendants' from here on will be references to these defendants collectively, unless otherwise indicated.)

(5) The first task was to seek to set aside the injunctions, disputing the validity of service and the jurisdiction of the court. In February 2012 TH filed an application for those purposes on behalf of the defendants. The initial objective was substantially achieved by a consent order made by Tugendhat J on 23 May 2012. By that order the judge declared that the claim form had not been served on the individual defendants; but that it had been served on the corporate defendants within the period of its validity; the injunctions were discharged; and the individual and corporate defendants all agreed to make no claim on the cross-undertaking as to damages which the claimants had given.

(6) By this point the substantive proceedings against the individual defendants were over. But they continued against the corporate defendants. A defence and counterclaim was served, and default judgment entered on the counterclaim. Then, in March 2013, TH applied for summary judgment. In February 2014, Master Eyre granted that application, having concluded that the claims were hopeless. An application for permission to appeal against that decision was dismissed by Sir David Eady on 28 July 2014. The defendants became entitled to recover their costs of the claim (a counterclaim continues)."

9. The solicitors were initially instructed in the action by the first and second respondents in June 2011. On 4 July 2011 Mr Daulby of the firm wrote them a letter which the judge called (and which I will call) "the Retainer Letter". It contained the following points material to the present appeal. On the first page, the following was written:

"This client care letter records your initial instructions to us and, together with the attached 'Information for Clients' document, deals with how we charge for our work. I enclose two copies of this letter and two copies of the 'Information for Clients' document; please sign one copy of each and return them to us, keeping the other copies safe.

You should read carefully through the whole of the Information for Clients document. In particular, I would like to draw your attention to the following: …

Information about costs appears on page 6 (and below). It is important to note that whatever the outcome of a case, liability for our costs remains with you."

Omitting parts irrelevant to the appeal, the letter continued on the second page as follows:

"I am instructed to consider and advise you in relation to the defence of the claim against you by Michael Radford and the Michael Radford Partnership.

The 'Information for Clients' document sets out how we charge. Our hourly rate for this matter will be £395.00. Other people's time will be charged at the rates stated in the 'Information for Clients' document. At this early stage it is not possible to give you an estimate of the total

amount of our fees. We have received from you the sum of £3,408.04 which we are holding on client account.

I will give you estimates of our likely charges and disbursements as the matter progresses.

I write separately with my preliminary views on the case and this letter should be read in conjunction with this retainer letter.

I am obliged to consider whether you are justified in defending the claim. You have little choice but to defend the claim though it is too early for me to carry out a full risk/benefit assessment.

I am required to give you my initial assessment of any unusual level of risk for you in this matter. This is a substantial monetary claim and the claimants' costs are likely to be very substantial. You run the risk of bad publicity if the claim is not defeated. I also understand that there are concurrent proceedings in Spain which may be prejudiced by the continuance of these proceedings.

I understand that Mark discussed funding options in brief when he spoke to you about the case. It is sometimes the case that parties can deal with litigation under a conditional fee agreement (CFA). In this case, the facts are simply too complicated to form an early assessment on the merits to allow us to undertake the type of risk assessment that is necessary when entering into a CFA."

10. The "Information for Clients" document, referred to in the Retainer Letter, did not contain much that is needed for our purposes. It provided that the terms were subject to variation only in writing, signed by a partner in the firm. It set out charge rates on a conventional time costing basis. It also said that the firm would "explore with you the availability of alternative ways of funding your case, including conditional fee agreements (no win, no fee)". The same section included these points:

"Payments we have to make to third parties on your behalf in the course of acting for you … such as counsel … are called disbursements and will be included on our invoices.

… We will give you the best information possible about the likely overall costs or a matter, broken down between fees, disbursements and VAT. …

Our usual practice is to request a payment on account of costs and

> disbursements at the outset and to send interim bills on a regular basis. … Also, we reserve the right not to continue to work on your behalf until the invoice is paid."

The document added, "It is important to understand that whatever the outcome of the case the liability for our costs remains with you". It then gave details of the results that might be expected on assessments of costs, if awarded in the clients' favour in the proceedings.

11. Also on 4 July 2011, the solicitors wrote a further letter to their new clients, which the judge called (and which I will call) "the Advice Letter". This letter had the following material passages:

> "I cannot form a view on the overall merits. Further, I understand that you will prefer the proceedings to be contested in the Spanish rather than the English courts.
>
> I have therefore focused on the procedural aspects. There are a number of important reasons for this.
>
> The contractual agreements reveal that both Spanish and English law govern aspects of the dispute.
>
> Under European law, the general rule matters relating to a contract will be dealt with by the courts for the place of performance of the obligation in question.
>
> If proceedings have been commenced in the wrong jurisdiction, the court may stay the proceedings.
>
> I also understand there are concurrent proceedings in Spain."

A little later in the Advice Letter, there was this:

> "This is going to be a very expensive case to fight. …
>
> As I have indicated, this will be hugely costly action to defend. I cannot at this stage give accurate estimates of the likely costs of each stage of the action. However, to mount a defence you must expect to commit very substantial sums in respect of our fees and for counsel."

12. Evidence filed in the costs proceedings by Mr Daulby indicates that the clients were under significant financial pressure and that he did not wish to enter into any commitment to conduct the case to a full trial but that he wished rather, in the first instance, to pursue applications designed to dispose of the proceedings at an interim stage. The judge

also recorded Mr Daulby's evidence that, "It was simply inconceivable that the defendants would be able to afford to fund the trial of an action of all the issues raised in the particulars of claim".

13. It has been common ground throughout between the parties to these costs proceedings that the initial letters of 4 July 2011 from the solicitors to the appellants gave rise to a conventional solicitors' retainer under which the clients were liable for the solicitors' fees, win or lose.

14. About two days after those letters were sent to the appellants, the solicitors entered into a CFA with counsel. The document is undated but it is agreed that the approximate date was 6 July 2011. That CFA stated that it was on Chancery Bar Association standard terms, incorporating the Association's Conditional Fee Conditions 2008. The agreement named the parties to the action, but did not name all the defendants as counsel's clients; the corporate defendants were not included. At this stage the solicitors' retainer (in their case on a conventional basis) was with the individual clients; there was no retainer of the solicitors by the corporate defendants. This first CFA was made between the solicitors and counsel: none of the clients were party to it.

15. About a month later, the solicitors discussed with the clients the possibility of entering into a CFA for their work. The position of the corporate clients arose and the judge records that it was then agreed that all the appellants, individual and corporate, should engage the solicitors on a CFA basis. It seems that a new retainer letter (in the same terms as before) together with the CFA were sent to all four appellants on 8 August 2011.

16. At this stage it was not noticed that the CFA with counsel had not identified the corporate parties as clients. When this omission was actually noticed much later, and only in the course of the costs assessment, the solicitors and counsel entered into a "deed of rectification" to provide for the inclusion of the two companies as clients. The deed recited as follows:

> "(2) The parties to this deed have agreed that the CFA does not accurately set forth the true bargain between them so far as regards the particulars mentioned below, and wish to rectify it so that it accurately sets forth the true bargain between them, *inter alia* so as to avoid contested rectification proceedings between them."

After providing for the addition of the companies, it was stated further as follows:

> "And the parties agree that the CFA shall be so read, construed and performed as if the CFA so provided from the commencement date.
>
> And as so varied the CFA and every clause of it is to continue of full effect and be binding on the parties."

17. The precise date upon which the solicitors and the appellants entered into their CFA is unclear but the date is not of importance for present purposes. It was concluded at some time during August 2011. It is not necessary to say a great deal about the precise terms of that CFA as all the issues of construction were decided against the appellants by the costs judge and by Warby J and, as I have said, permission to appeal was refused in respect of all those issues. It suffices to say that the CFA identified what was and what was not covered by it. Principally, it provided that it covered (inter alia):

> "Your claims against [the respondents] … to have the proceedings against you dismissed, to set aside the interim injunction, any assessment of damages under the cross undertaking and any ancillary applications such as seeking an anti-suit order …"

It did not cover:

> "Any claim against you by your opponent or counterclaim by you to the claim as opposed to a claim for damages under the cross undertaking …"

18. It was decided, at both stages of the costs proceedings below, that the CFA covered only those aspects of the proceedings up to the successful contest to the jurisdiction and to service on the individual appellants and up to the discharge of the injunctions by the order of Tugendhat J of 23 May 2012. However, both Master Haworth and Warby J held that the CFA did not cover the subsequent steps in service of a defence and counterclaim, the successful application for summary judgment in favour of the surviving defendants or the successful resistance of the appeal against that judgment.

19. As it is now conclusively decided that the CFAs did not cover any work done by solicitors or counsel after 23 May 2012, the issue on the appeal is whether fees for subsequent work done by solicitors and/or counsel are payable by the clients, and are thus recoverable by

the appellants from the respondents under the costs orders, on any other basis. That issue has been decided below in favour of the respondents.

(C) The Decisions Below

20. The appellants argued in the High Court that while the solicitors' CFA superseded the original conventional retainer in respect of work that was covered by the CFA there was no basis for concluding that the CFA revoked the original retainer in respect of work which was not covered by it. It was submitted that work outside the scope of the CFA remained covered by the original retainer; this was to be seen further from the fact that the retainer letter was re-issued at the same time as the draft CFA was sent to the clients for acceptance.

21. Master Haworth decided that, upon the making of the CFA, the "reasonable expectations" of the parties would have been that all work done thereafter was to be done on a conditional "no win, no fee" basis and not under a conventional retainer. Of course, if that was the true basis of the supplementary retainer for work outside the terms of the CFA, it was fatal to the appellants' case as that retainer was not in writing so as to be enforceable in law: see Courts and Legal Services Act 1990 s 58. Thus, the fees for the period after 23 May 2012 were held to be irrecoverable from the clients and so irrecoverable under the costs orders.

22. Warby J agreed with this conclusion. The judge's view on this point can be taken from three short passages of his judgment at paras 38, 39–40 and 44. In those passages the judge said this:

> "(1) The judge's reference to the 'reasonable expectations' of the defendants reflected his objective assessment of their state of mind at the time. Importantly, he was not suggesting that they would have expected to get something for nothing, come what may. He was not saying that there was an expectation that services would be provided on a pro bono or other gratuitous basis. There was no evidence that any such arrangement had ever been discussed or contemplated. His conclusion, properly understood, was that the defendants would not expect to have to pay for their lawyers' services win or lose. Put another way, they would not consider that the lawyers were on a conventional retainer.
>
> (2) I accept, however, Mr Hutton's ultimate submission: that in

substance what the judge was saying is that a reasonable person in the position of the defendants would have thought that work outside the scope of the CFA of August 2011 was being done on a conditional fee basis.

That submission is consistent with a point made by Mr Williams in argument on the scope point. He submits that in any other context that issue would be easy to resolve: the court would conclude that the parties had by their conduct agreed to vary their existing CFA by extending its scope; but that this could not be the answer here because the law requires a CFA to be in writing. I see the force of that line of argument, and in my judgment it applies in the present context. It reflects the reality as the costs judge rightly saw it: the conduct of these parties does suggest an implied retainer, but not one of the conventional variety; it clearly indicates an unwritten retainer on a conditional fee basis. A reasonable person with all the knowledge these parties possessed would conclude that the common intention of the parties after 23 May 2012 was that the lawyers should be paid (and entitled to a success fee) if they won, but not otherwise.

(3) On a proper analysis the reason that TH are not entitled to recover for work done after the August 2011 CFA had been exhausted by the 'win' achieved on 23 May 2012 is not that the court has taken an unduly strict approach, and declined to imply an agreement to pay. The reason is that the implied agreement to pay is a CFA, and TH failed to take the precaution of ensuring that this CFA was reduced to writing so as to satisfy s 58(3)(a) of the Courts and Legal Services Act 1990."

23. So far as counsel's fees are concerned Master Haworth decided that counsel had no right to recover from the client for work done after 23 May 2012 and that he had no right in any event to recover in respect of work done for the corporate clients.

24. Warby J held that counsel's CFA did not cover work done after 23 May 2012, as it named only the individuals as clients and the claims against them ended on that date. It could not be construed as covering work done for the corporate parties after that date. As with the solicitors, he found that there was no ground for finding that there was an enforceable conventional retainer and, as with the solicitors,

such implied retainer as there might have been was on implied CFA terms which were unenforceable for want of writing.

25. Warby J also found that even if the deed of rectification was effective between the parties to that deed, it could not impose a greater liability upon the paying parties, the respondents, as it had been made subsequent to the costs order under which payment from the respondents was sought: see the decision of the Privy Council in *Kellar* v *Williams* [2004] UKPC 30.

(D) The Appeal

26. Mr Williams QC for the appellants submits that these conclusions were wrong on the basis of the grounds which I have quoted in para 6 above. It is convenient to address his submissions on the solicitors' fees and counsel's fees separately, as they were so argued before us.

Grounds 3 and 4 – the Solicitors

27. Mr Williams advances two primary submissions in support of these two grounds. First, he argues that "the terms of business stated in the initial retainer letter enured [*sic*] in respect of work conducted outside the CFA" (skeleton argument, para 11). Secondly, "Even if the retainer letter was revoked by the CFA, the question remains as to the effect of [the solicitors] being instructed to perform work outside the CFA … In these circumstances, the ordinary rule of law should apply, stated in the *Adams* case [viz. *Adams* v *Improved Motor Coach Builders Ltd* [1921] 1 KB 495 (CA)] … A client who instructs a solicitor to perform work comes under an obligation to pay for it …" (loc. cit. paras 14 and 15).

28. Mr Williams has also referred us to a number of cases in which the courts have shown no inclination to uphold technical arguments raised to avoid payment of costs on the basis of an over-rigid application of the indemnity principle: see *Thornley* v *Lang* [2004] 1 WLR 378 at [5]–[9] per Lord Phillips of Worth Matravers MR (as he then was) and *R (McCormick)* v *Liverpool Justices* [2001] 2 All ER 705. It is submitted that it is wrong to find, by mere implication, that if work after 23 May 2012 was not covered by the CFA, these solicitors and clients continued their relationship on terms that the contract so implied would be unenforceable.

29. For my part, like the judges below, I find it impossible to accept Mr Williams' first point. I just do not see the facts of this case as spelling out the coexistence of the initial conventional retainer

continuing throughout so as to pick up such items of work by the solicitors as were not covered by the subsequent CFA. As I see it, the judges below were correct in their factual analysis of the documents entered into, in the context of the known facts.

30. This was a complicated, multi-jurisdictional dispute in which the solicitors were instructed in circumstances of urgency when the clients had been made the subject of highly inconvenient interim injunctions. The overall merits were far from clear, but there seemed to be "the makings" (as Mr Daulby put it in his evidence) of an application to contest service, the renewals of the claim form and the continuation of the injunctions in view of the claimants' failures to comply with their own obligations under the orders. The costs were likely to be high and the clients' ability to meet them was at best doubtful.

31. The obvious solution was some form of CFA (although perhaps unusual in the case of defendants to an action), but limited to initial procedural steps without commitment to a full defence of the action. One can well understand why a dispute arose as to whether or not all the steps which followed and which led to the successful disposal of the English proceedings, before trial, by way of interim/summary judgment applications were or were not covered by the wording of the CFA with the solicitors. However, once a CFA was decided upon, at least for some ill-defined preliminary stages of the action, it seems to me to be unrealistic to suppose that the parties were envisaging the continuation of the original retainer on the "off-chance" (which they did not contemplate) that the terms of the CFA might not cover all the work that was actually being done. In my judgment, it only makes sense that the solicitors and clients understood that the CFA superseded the original conventional retainer which had been entered into in circumstances of urgency and before the viability of a CFA could be assessed.

32. In short, I simply can find no room, on the facts of this case, for the two types of express retainer to have subsisted side by side or for the original retainer to spring back into life, when, contrary to all expectations, the CFA did not cover all the steps taken.

33. More realistic, to my mind, is Mr Williams' second point based upon the type of implied retainer which can arise such as in the circumstances of the *Adams* case. That case is the keystone of the appellants' argument on this point.

34. In the *Adams* case, Mr Adams' trade union instructed solicitors to act for him in a claim for wrongful dismissal. He made no express agreement to retain the solicitors, but permitted them to act for him and gave them instructions where necessary. His claim succeeded at the trial and a costs order was made in his favour. The losing defendant resisted the costs claim on the basis that it was the union, and not Mr Adams, that was liable to the solicitors and he could not therefore recover the fees under the costs order.

35. That argument was rejected by Sankey J and by this court. Bankes LJ said:

> "When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to the solicitors for costs, and that liability would not be excluded merely because the Union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the Union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs. In my opinion the evidence falls short of establishing that necessary fact, without which the defendants are not entitled to succeed. On these grounds I think that the learned judge's decision was right."

Atkin LJ, in agreement, said:

> "It appears to me therefore that the learned judge was perfectly correct in saying that the solicitors were in fact acting as solicitors for the plaintiff. If they were so acting, they did so upon the ordinary terms applicable to a person who employs a professional man to do professional work on his behalf – namely, that he shall remunerate him. That is the prima facia obligation which at once emerges when the employment is proved. It is perfectly possible for the agreement of employment to contain a term by which the agent agrees that he will not claim remuneration from his employer, but will either do the work for nothing or claim remuneration from some third party. But in the absence of such a term – which would have to be proved by the party setting it up – the ordinary deduction from the employment of a professional man accepted in this way is that the person accepting the agent's services is bound to remunerate the agent."

Younger LJ would, it seems, have had more doubt as to the result, but for the decision of this court in *R* v *Archbishop of Canterbury* [1903]

1 KB 289, a case in which the Treasury Solicitor had intervened to act on the Archbishop's behalf in proceedings against him for mandamus, but without any express retainer by him. It was held that the Archbishop was potentially liable to the Treasury Solicitor for costs and could therefore recover from the plaintiff the costs of his successful defence of the proceedings, even though he might never have been called upon by the Treasury Solicitor to make the liability good in reality. For Younger LJ, the *Archbishop's* case was decisive in favour of Mr Adams.

36. The decision in *Adams* is clearly determinative of a large number of cases where solicitors may be instructed on a litigant's behalf, without formal retainer by the litigant, by the likes of a trade union, an insurer or a motoring organisation. For the reasons given by Bankes and Atkin LJJ in that case, the facts indicate that, absent any other retainer during the course of the solicitor/client relationship, "the ordinary deduction from the employment of a professional man … is that the person accepting the agent's services is bound to remunerate the agent" (per Atkin LJ [1921] KB at 503, *supra*). But, as Atkin LJ is recorded as observing, on the same page of the report, it is possible for agreement to be reached that the professional person will not look to the client for his remuneration; that depends upon the facts.

37. The facts in the present case are rather different. It is not a case in which there was no express retainer. There were two such retainers. There was initially an express retainer on a conventional basis requiring payment by the client, win or lose. This was superseded by a CFA in writing which, to my mind, the solicitors and client intended should cover all work undertaken thereafter, but short of commitment to work for a full trial. Unfortunately, as has been held, the CFA did not cover all that work, but there was never any renegotiation of the underlying understanding of all concerned that the work was being done on a conditional fee basis. I think Mr Hutton QC for the respondents is correct in his submission that, if the interim applications had been lost, neither the solicitors nor the clients would have expected that the solicitors could recover their fees.

38. In my judgment, the facts of this case militate against a solution such as was reached, on the different circumstances of the retainer, in *Adams'* case. The facts of this case prevent that solution.

39. Mr Hutton deployed a further argument by analogy to cases

where parties to an express contract for a fixed term continue to act after expiry of the term as though the original contract subsisted: in such circumstances, courts may infer a renewal of the express contract on some or all of the old terms. He referred us to the following passage in *Chitty on Contracts*, 32nd Edition, Vol. 1 at 1-104 as follows:

> "Contracts may be either express or implied. The difference is not of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term or the court may infer an implied contract drawing on some of the terms of the earlier contract, but omitting others. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct."

40. I consider that there is force in this analogy. Here, in blissful ignorance of the doubtful ambit of the CFA, the solicitors carried on their work (no doubt with instructions from time to time from the clients) on the basis that they were working on a "no win, no fee" basis. Their conduct never changed. They never reverted to submitting interim bills, as had been envisaged by the original conventional retainer. As my Lord, the Chancellor, pointed out in the course of argument, even after the dispute as to the ambit of the CFA had arisen, the solicitors sought to "rectify" their arrangements with counsel to record a continuing CFA throughout; it is hardly likely that they were conducting themselves on a different basis with regard to their own charges. All their conduct indicated that they were "carrying on as usual" after 23 May 2012 and nothing had changed. The misfortune was that the continuing willingness to work on a conditional basis only was not fully recorded in writing.

41. For these reasons, I would reject grounds 3 and 4 of the grounds of appeal.

Grounds 6 and 7 – Counsel

42. As Mr Williams' helpful skeleton argument indicates, ground 7 is merely a repetition of grounds 3 and 4 as advanced in the appeal in respect of the solicitors' fees. I consider that that ground must fail for the same reasons as I have, with regret, rejected grounds 3 and 4. I agree with Mr Hutton's submission to that effect in para 35 of his skeleton argument.

43. Turning to ground 6, which is based upon the "deed of rectification", the appellants argue that this document corrected *ab initio* the error of the omission from the CFA of the names of the corporate defendants from the list of clients. It is submitted that this document rendered those defendants liable for counsel's fees which are, therefore, recoverable from the respondents.

44. For the respondents it is submitted that there is no evidence that the relevant appellants ever agreed to this course, so as to render themselves liable, in retrospect, for these fees. Further, it is submitted that it is, in any event, not open to the appellants to add to the liabilities of the paying parties, the respondents, after the making of the costs order which it is sought to enforce. Reliance is placed upon the Privy Council decision in *Kellar* v *Williams* (*supra*).

45. The Privy Council decision was made in the context of proceedings in the Turks & Caicos Islands. The respondent to the appeal, Mr Williams, had been successful in protracted litigation against the appellants in the case; costs orders had been made in Mr Williams' favour and a number of issues as to the extent of his entitlement under the orders were decided sequentially by the Registrar, the Chief Justice and in the Court of Appeal. The problems arose largely because the bills submitted for taxation were prepared on the basis of some of the fees on hourly rates, plus in addition a "brief fee" of $40,000. While the taxation was pending, the Chief Justice had decided (in another case) that such bills were not permissible if the result was to produce double-charging for the same work. Following this decision, Mr Williams and his solicitors agreed a varying method of charging (recorded in a letter of 6 October 2000), stripping out the brief fees and charging the entire bill on the basis of revised hourly charges. It seems that this alternative method of preparing the bills

might have produced a larger costs bill than that original presented on the old basis.

46. On this aspect of the case, the opinion of the Privy Council (delivered by Lord Carswell) was this:

> "20. Their Lordships are not satisfied that the arrangement proposed in the letter of 6 October 2000 between the attorneys, if it had been accepted by the respondent and the firm acting for him, constituted any change of substance in the fee paying agreement between them. They consider that it was at most the substitution of one method of calculating fees for preparation for and appearance in court for that which had thitherto been understood to apply, and as such it was quite a rational method of calculation of the respondent's liability for fees. It was quite open to the respondent and his attorneys to vary the fee agreement to an hourly charging arrangement if they so wished and their Lordships consider that there was clearly good consideration for such a variation. When the bills are taxed, they could be prepared, if the respondent's attorneys choose, on the hourly charging basis and then be subject to the normal process of ascertainment of the hours properly to be charged and of the applicable rates or rates to be applied to the work done. If, however, it were likely to produce a larger costs bill than the original framework, an amalgam of hourly rates and brief fees (which appears to be unlikely from the terms of the letter), the appellants' attorneys would be entitled simply to refuse to accept the amended basis and require the respondent to revert to the original framework. They could do so on the ground, as the Chief Justice correctly held, that that amendment had come into existence subsequent to the making of the costs basis and so could be disregarded by the paying party if he wished."

(It seems clear that the word "basis" in the penultimate line must be erroneous and the word "order" should be understood and substituted.)

47. In my judgment, this is clear authority in support of Mr Hutton's submission for the respondents on this point. It is, of course, not binding upon us, but, as with all Privy Council decisions cited in this court, the natural course is to follow it, unless we are persuaded that it is in some way relevantly distinguishable or we are persuaded that it is erroneous. For my part, I am not so persuaded; nor do I find it distinguishable.

48. I do not accept Mr Williams' submission for the appellants to us

that the timing of the variation agreement is not the controlling factor in such cases, but simply reasonableness: see para 24 of his skeleton argument. I think the passage cited from the opinion of the Privy Council is to the contrary.

49. I agree, with respect, with what Warby J said on this point, at para 67 of the judgment under appeal, as follows:

> "67. I accept of course that the key point about the indemnity principle is to ensure that costs awards are no more than compensatory. I agree that the enforcement of such a retrospective agreement would not of itself offend the principle. The costs claimed would remain costs due from the client to the lawyer. The amount payable could still be controlled through the assessment process. But Mr Williams' argument overlooks the question of what it is that a party is entitled to be compensated *for*. That, as I see it, is the point that underlies what the Privy Council said in *Kellar.* The underlying rationale is in my judgment that the effect of a costs order is to create a liability to pay, subject to assessment, those costs which a party has paid or is liable to pay at the time the order is made. The liability to pay costs crystallises at that point and, although its quantum will remain to be worked out, that process must be governed by the liabilities of the receiving party as they stand at that time. To allow enforcement of a retrospective agreement which increases those liabilities would be to alter retrospectively the effect of the court's order."

50. Mr Williams also cited to us the decision of Christopher Clarke J (as he then was) in *Forde* v *Birmingham City Council* [2009] 1 WLR 2732. In that case the validity of a retrospective CFA, made on the eve of a settlement in the knowledge that an existing CFA might be vulnerable to challenge, was upheld. I agree with Mr Hutton's submission to Warby J, with which the judge agreed, that the critical distinction between that case and the present is that the second CFA was made before the point in time at which costs became payable.

51. In my judgment, therefore, I would follow the decision in *Kellar* and would hold that the making of the retrospective variation of counsel's CFA, after the making of the costs order in favour of the appellants, cannot be effective to increase the liability of the respondents as paying parties under that order.

52. Thus, I would reject ground 6 of the grounds of appeal.

(E) Conclusion

53. For these reasons, and not without regret, I consider that this appeal should be dismissed.

54. **Asplin LJ:** I agree.

55. **Sir Geoffrey Vos Chancellor of the High Court:** I also agree.

Benjamin Williams QC (instructed by Taylor Hampton) appeared for the appellants.

Alexander Hutton QC (instructed by Simons Muirhead & Burton) appeared for the respondents.