Case No: 04/P8/340

IN THE HIGH COURT OF JUSTICE
SUPREME COURT COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 7 March 2005

Before :

MASTER SEAGER BERRY, COSTS JUDGE

- -

Between :

ANDREW MILNE	**Claimant**
- and -	
DAVID PRICE SOLICITORS AND ADVOCATES	**Defendant**

- -
- -

Mr A. Post (instructed by **Messrs Andrew Milne & Co**) for the Claimant
Mr J. Rushbrooke (instructed by **Messrs David Price Solicitors and Advocates**) for the Defendant

Hearing dates : 7 October and 10 November 2004

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
Master Seager Berry

Master Seager Berry

1. The Claimant was at the material time a solicitor in private practice. He brought libel proceedings against The Telegraph Group Ltd arising out of an article published on 6 February 2000 that disparaged his involvement in the Filkin Inquiry into Keith Vaz. The proceedings were summarily disposed of by Sir Oliver Popplewell who awarded the Claimant £5,000 damages with costs to be assessed in default of agreement. He also ordered a payment on account of costs of £10,000. Decherts acted for the Telegraph. In 2001 the Claimant commenced proceedings for detailed assessment. He lodged a bill for some £105,000. £70,000 reflected solicitor's time where he acted for himself through his firm, Andrew Milne & Co. £23,000 represented time spent acting for himself and the balance consisted of disbursements for the costs of drawing the bill. On 15 March 2000 he had been declared bankrupt following a long standing dispute with his former partner Mr Zaiwalla and thereafter he was not in a position to practice as a solicitor. His time was then claimed as a litigant in person. He made an application for an interim costs certificate and on 27 September 2001 was granted a certificate for £21,250. That hearing was followed by an order for directions dated 10 October 2001 and on 10 December 2001 the court dealt with the costs of the interim hearing. That hearing was adjourned part heard to 2 pm on 7 February 2002 for half a day. On 16 October 2001 The Telegraph, through Decherts, made a Calderbank offer of £40,000 plus the costs of the detailed assessment.

2. On 10 January 2002 the Claimant spoke by telephone to Mr David Price, the principal of the Defendant firm, seeking his help in relation to the detailed assessment of his costs. On 11 January he sent by courier nine itemised enclosures which included background information, his bill of costs, points of dispute, the order granting the interim certificate, the order for directions and the latest Calderbank offer. He instructed the Defendants because he wished to utilise their fire power in a defamation costs situation. At this stage the detailed assessment for the interim costs certificate was due to resume at 2 pm on 7 February and the detailed assessment of the main costs had been fixed for one week commencing on 11 March 2001. The Claimant also explained in his letter that his Trustee in Bankruptcy had confirmed he did not claim the libel damages nor costs to be paid by the detailed assessment. In his evidence he said that if it was known they were acting under a CFA it would spring an improved offer from Decherts.

3. The Claimant attended a meeting with the Defendants on 29 January 2002 at which Mr Price and Mr Duodu were present. Mr Duodu is an employed barrister. He was called to the Bar in 2000 and has been employed by the Defendants for 4 years. He has candidly explained that while he did not have experience of attending a detailed assessment, he was familiar with detailed assessments up to the point where the papers were referred to a costs draftsman. He does have first hand experience about defamation actions.

4. The Claimant entered into a CFA with the Defendant dated 22 January 2002 to deal with the costs of the detailed assessment. The agreement reflected alterations which the Claimant wished to make to it. It contained a statement at paragraph 3(k) headed "Making a settlement" which reads as follows:

> "Your opponent can at any time make an offer to settle the issue(s) to be determined at the hearing. If you refuse an offer of settlement it can have serious consequences. If by proceeding, you achieve no more than was offered to you by your opponent, the likelihood is that you will be ordered to pay your opponent's costs at the hearing from the date on which the offer of settlement was made. It can also therefore prevent us from recovering our costs from your opponents. It is therefore important that we go into the hearing with an understanding as to what would constitute an acceptable reasonable offer of settlement from your opponent. Please note that under clause 7 that we can cease acting for you if you reject our opinion about making a settlement.
>
> We have agreed that the following would constitute an acceptable offer of settlement:
>
> 1. The payment of £65,000 in respect of the costs of the claim.
>
> 2. The costs of the detailed assessment.
>
> 3. Interest on the costs.
>
> Please note that we are entitled to change our opinion as to what constitutes an acceptable offer of settlement, in the event of a change of circumstances …"

5. There was a misunderstanding on the part of Mr Duodu in relation to an offer made by Decherts on 6 February 2002. They had offered to settle on 16 October 2001 for £40,000 plus the costs of the detailed assessment. On instructions from the Claimant, Mr Duodu made various offers to settle at figures which were not acceptable to the Defendants, for example £50,000 plus the costs of the detailed assessment on 1 February 2002. Mr Post opened his cross-examination on this misunderstanding. Mr Duodu had been under an initial impression that an offer of £42,000 on 6 February 2002 was exclusive of the costs of the detailed assessment. On clarifying the offer at the request of the Claimant he realised that he had been mistaken. Due to the immediacy of the appointment for the resumed hearing of the costs of the interim certificate at 2 pm on 7 February the whole of the Claimant's costs, including costs of the assessment were agreed at £42,000. Mr Duodu's attendance note of 7 February 2002 reads as follows:

> "Telephone conversation with Andrew Milne
>
> Discussing settlement with client, he is happy to accept their offer of £10,750, he wanted to address our costs subsequently.

> Resolved that we would write to the other side in those times (sic), 14 days for payment and that we would inform the court office that the case had settled."

I add here that £10,750 was the sum needed to bring the total up to the agreed figure of £42,000, after taking account of the two interim payments already made. There was no need for all the costs to have been agreed at this stage. The main detailed assessment was not due to take place until 11 March 2002. Nevertheless a final settlement was reached at £42,000 to include the interim certificate. It is common ground that the settlement did not constitute a win for the purposes of the CFA. Following the settlement the Claimant wrote to the Defendant on 11 February instructing them to ask Decherts to send direct to him the balancing cheque for £10,750.

6. Mr Duodu replied on 12 February 2002 as follows:

> "Thank you for your letter of yesterday. As you will be aware, it is normal practice for the solicitor to receive monies on your behalf, and that is how we propose to proceed. We trust that we can agree what deductions should be made in respect of our costs forthwith. If so we shall ensure that payment of the balance shall be made to you as soon as we have received funds from TGL in our account.
>
> With best wishes.
>
> Yours sincerely"

7. The Claimant replied on 12 February expressing astonishment at the response and his disgust at the Defendant's attempt to intercept funds he considered were properly due to him. He dismissed the Defendants as his solicitors. He then embarked upon a course of correspondence which I can only describe as inappropriate and wholly disproportionate to the issue between them. His correspondence with the Office for the Supervision of Solicitors was unnecessary. After extensive correspondence in which the Claimant maintained his combative stance the Defendants submitted their bill to him on 16 January 2003 for £3,933 plus VAT of £688.28, a total of £4,621.28.

8. The issue between the parties is a narrow one, namely whether the Defendant was entitled to claim costs from the Claimant following the termination of the CFA.

9. Mr Rushbrooke has sought to discredit the evidence of the Claimant. During the course of his evidence it emerged that he had been the subject of a previous bankruptcy order in the course of an arrangement with creditors. After persistent questioning the Claimant reluctantly admitted he had been made bankrupt a second time. His evidence was in many respects unsatisfactory. He was evasive on many issues, even the simple issue that he was practising from his own home. In the main he provided responses rather than answers to questions put by Mr Rushbrooke. By contrast Mr Duodu did his level best to assist the court. He readily conceded his

misunderstanding in relation to the offer to which I have already referred. He maintained a quiet dignity throughout his evidence. Issues have arisen on which it is necessary to make findings of fact. They are:

i) Whether it was necessary for Mr Duodu to attend the resumed detailed assessment on 7 February 2002.

ii) Whether Mr Duodu failed to inform the Claimant at an early stage that he did not have personal experience of attending a detailed assessment.

iii) Whether it was agreed that Mr Duodu should obtain after the event insurance for the Claimant.

iv) Whether it was necessary for Mr Duodu to write a letter to the court prior to the resumed detailed assessment hearing on 7 February 2002.

10. I deal with each of these matters now.

1. Whether it was necessary for Mr Duodu to attend the resumed detailed assessment hearing on 7 February 2002

11. I find as a fact that it was agreed between the Claimant and Mr Duodu that it was not necessary for him to attend. That is apparent from numbered paragraph 2 of the attendance note of 30 January and the attendance note of the subsequent telephone conversation with the Claimant on 6 February. They read as follows:

> 30 January 2002
>
> "2. As regards the hearing on the 7 February our costs in attending that hearing will probably not be recoverable."
>
> 6 February 2002
>
> "[client] also told KD that he was mindful of the costs of our attendance tomorrow and that I should not do any more preparation for the hearing."

By this stage (6 February) the Claimant realised that the costs of Mr Duodu attending the detailed assessment would probably not be recoverable and he instructed Mr Duodu not to attend. Furthermore paragraph 6 of the CFA refers to Mr Duodu as the Claimants' advocate. There was no gross misleading or misrepresentation.

2. Whether Mr Duodu failed to inform the Claimant at an early stage that he did not have personal experience of attending a detailed assessment.

12. I find as a fact that the Claimant was informed by Mr Duodu in the conversation on 18 January 2002 that he did not have first hand experience of a detailed assessment hearing. The attendance note refers to the fact that he was going to be the advocate. I prefer the evidence of Mr Duodu on this point and the explanation he gave in evidence about the comments by the Claimant about detailed assessments being straightforward and easy. Mr Duodu had 4 years experience of defamation work and would be in a good position to give advice. His evidence was clear on this point. The Claimant has either mis-recollected the point or deliberately chosen a later date which suits his convenience. I do not accept his evidence that the absence of prior detailed assessment experience was not revealed until 29 or 30 January.

3. Whether it was agreed that Mr Duodu should obtain after the event insurance for the Claimant.

13. There was also an issue about the possibility of Mr Duodu arranging insurance to alleviate the risks that the Claimant might have to pay The Telegraph's costs. This was set out at paragraph 15 of Mr Milne's second witness statement where he said:

> "I asked Mr Duodu to arrange insurance so that there was no risk of me having to pay my opponent's costs of the detailed assessment. Mr Duodu promised to do so, but did not. Mr Duodu told me that if he negotiated a settlement which constituted a "win" the Defendant would charge a fixed fee of £3,000 plus VAT. He never suggested that there would be any charge for a settlement that was not a "win"."

14. I am entirely satisfied that Mr Duodu made the appropriate enquiries of insurance brokers (Litigation Protection Ltd) based on his experience in defamation matters and was unable to secure after the event insurance for the costs of the detailed assessment. I reject the Claimant's allegation that Mr Duodu promised to obtain insurance but did not do so. I am also satisfied on a balance of probabilities that Mr Duodu so informed the Claimant. The point was recorded in paragraph (e) of the other points in the CFA (just above the signatures) the draft of which was considered by, amended by, approved by and signed by the Claimant. It reads:

> "Having considered the matter, we do not believe that there is any insurance policy that would be available to cover the risk of you losing the hearing."

15. I am satisfied that Mr Duodu made the enquiries even though it is not supported by a specific attendance note or an entry on page 1 of his time sheet (page 27 of divider 10).

4. Whether it was necessary for Mr Duodu to write a letter to the court prior to the resumed detailed assessment hearing on 7 February 2002.

16. The Claimant has also raised a modest point as to whether or not Mr Duodu communicated with the court to obtain a longer allowable preparation time for the adjourned detailed assessment of the Claimant's costs for the interim certificate as agreed on 29 January. Mr Duodu explained that it was later agreed with the Claimant that it was not necessary to write that letter, and that the matter could be addressed at the beginning of the hearing. Mr Duodu made the point that many matters raised by or discussed with the Claimant were not recorded. He accepted that the letter was not written.

17. Mr Duodu considered that the points raised by the Claimant were a gross fabrication. He defended his professional standards. I am satisfied from the attendance notes for 29 and 30 January 2002 that it was the Claimant who was in the driving seat on the negotiations and that he was fully aware of the consequences of settling at the figures discussed. Mr Duodu has given evidence which I accept that the Claimant went through the various offers with him and set out his views firmly on the offers to be made. I accept Mr Duodu's evidence that he made it clear to the Claimant that he was vulnerable in the negotiations. It was at this stage on 6 February that the misunderstanding occurred to which I have already referred. I am satisfied that more telephone conversations took place than have been recorded on page 14 of tab 13. The first paragraph may have recorded two telephone conversations or an attendance note may be missing. Mr Duodu realised that something might be amiss and clarified the position with Decherts. Mr Duodu was satisfied that at that stage he was in a position to attend the hearing having carried out his preparation earlier even though it would have been his first detailed assessment. I accept this evidence. A letter to the court was not necessary either earlier or at this stage. Mr Duodu explained to the Claimant that he would be responsible for the Defendant's costs in any event. He was specifically instructed by the Claimant to go back to Decherts to accept the offer. He did not advise the Claimant to accept it. It was not necessary for him to attend court because the Claimant had accepted it was not necessary. I accept this evidence. All the litigation had been resolved.

18. I move on to consider the issue between the parties which I set out in paragraph 8 above. Mr Duodu stated that in the circumstances of the settlement the CFA was at an end. He explained that for a solicitor's firm a CFA was a joint business venture with the client in which the firm takes a risk of hoping a claimant will win at trial or obtain a favourable settlement. If the client wanted to pull out or accept an offer at a figure which was below that which had been agreed as a win the client would have denied the solicitors the opportunity of getting their costs paid under the CFA. That would mean the venture was of no commercial interest to the Defendants. He considered himself bound to act for the Claimant until the conclusion of the detailed assessment hearing and the costs of the costs. Mr Duodu explained that he did not consider pulling out of the CFA prior to its conclusion and telling the client to go elsewhere. It would reflect making a fundamental change in their assessment of the case and deciding the case could no longer be won.

19. Mr Duodu denied saying to the Claimant that £42,000 was a very good settlement. He was disappointed, even dismayed, that the £42,000 did not include costs. £42,000 plus costs would probably have been a sensible resolution. The Claimant never asked him for his advice. Mr Duodu referred to paragraph 3(k) of the conditions attached to the CFA which I have set out above. I note that this was the figure referred to in Mr Milne's letter dated 11 January 2002.

20. Mr Duodu explained that his attendance note for 6 February 2002 was an accurate contemporaneous note for the telephone conversation he had had with Mr Milne. It reads as follows:

> "Subsequent conversation with client
>
> Client said that if their offer of £10,750 is on the table then we should be going back and making an offer of £15,000 to settle it. He also told KD that he was mindful of the costs of our attendance tomorrow and that I should not do any more preparation for the hearing. He said he would be out of contact for the rest of the day. Always refused to leave a contact number and said that he would call me at 10.15 tomorrow morning."

21. He did not accept the Claimant's evidence that the note was inaccurate. He also refuted the evidence of the Claimant that the note had been prepared a few days later after the Claimant had expressed dissatisfaction. He was adamant in his evidence that the instruction had been given not to do any more work. I have accepted his evidence and find as a fact that the note was made contemporaneously.

22. Mr Duodu accepted that in the notes of the telephone conversations on 7 February 2002 there was no discussion of ending the CFA agreement or that the matter would then proceed on a conventional retainer. Mr Duodu was unable to express a view as to whether such matters were important. However the attendance note did contain the sentence "... he wanted to address our costs subsequently". In some urgent circumstances instructions were accepted before a formal retainer was discussed or entered into. Here it was necessary to inform the court quickly and to secure the agreement with Decherts. There was no time on 7 February to enter into a new or private client fee paying retainer. In his view the Claimant was liable for the Defendant's costs. The brevity of his attendance notes reflected the fast moving situation. They reflected the bare bones of what had been discussed.

23. Mr Duodu gave evidence that he expressly said to Mr Milne that if he accepted the £42,000 offer he would be liable for the Defendant's fees. That evidence appeared in the transcript as follows. It reads as follows:

(page 13, lines 23 – 26)

> "(A) The process did go through my mind as to what happened, which was that Mr Milne instructed me to accept an

offer which was below the definition of win, and my analysis or understanding was that, in those circumstances, he would be liable for our costs and I told him so."

24. At page 15, lines 19-33:

"Q. No suggestion was made to Mr Milne that, by settling, he would be in breach of the agreement and would, therefore, have to pay the fees, was there?

A. I didn't use the words "breach of the agreement". I told him that, by accepting the settlement, he would be liable for our fees; those were the words I used.

Q. And did he agree that he would vary the arrangement so that he would be liable for fees?

A. He said to me, on 7 February, "lets deal with the issue of your fees after the weekend". It might well be that, when the offer was made, and prior to that, he said – we discussed the fact that he would be liable for our fees and I can't – that's all I can say. I would not go any further than that because I would be speculating."

25. Page 15, line 42 to page 16 lines 1 – 7:

"A. Well anyway what happened was that he said he wanted to accept the offer, and I said: "You do realise that, in those circumstances, you are liable for our fees?" And then I said: "What are you going to do about those fees? What are we going to agree in relation to those fees?" And his response was: "Lets deal with that after the weekend."

He didn't object at all to the proposition that he was going to be liable for our fees. He never raised any objection or argument that we would not be paid in such circumstances, and the reason he said "Lets deal with this after the weekend" was because he wanted me to settle the case immediately, because we would have to notify the other side, we would have to notify the Supreme Court Costs Office because they had a hearing scheduled to start at 2 pm that day. I had to get on with that. "Get on and settle the case and I will deal with your costs next week" that, I took quite reasonably, as accepting that he would have to pay his costs and we would deal with the amount subsequently, because the question I put to him was: "What are we going to deduct? What are we going to agree or deduct in relation to our fees? Do you realise you are liable for them?""

26. At page 17, lines 29-52:

> "Q. The client could have no idea that you, in your own mind, had changed his retainer from a no-win-no-fee retainer to a conventional retainer.
>
> A. Well that's not entirely right, because I said that he was liable for our fees – "you do realise that you are liable for our fees?" These are the words I used.
>
> Q. And was the client given any choice about this?
>
> A. He didn't – the choice he was given was to make a proposal, knowing full well how much time was spent on this and what kind of costs we were going to be charging – was to say, "ok, look, I have got a problem with this because you have not achieved a win there's a problem with the CFA. I don't think I am liable for your costs. Lets deal with it after the weekend." He could have said that, or he could have said, "Ok, lets agree £3,000/£1,000/£400 in relation to your costs, do the deal". Or he could have said, like he did, "Lets deal with this after the weekend".
>
> Q. In your case he did not agree to pay your fees at that point.
>
> A. He didn't disagree, and I took it as his agreement that fees were due. If I thought otherwise I would have been writing him a letter setting out the situation."

27. Mr Rushbrooke has submitted that the Claimant was liable to pay the Defendant's bill because he had agreed to do so on 7 February 2002. He did not sign a piece of paper or endorse an attendance note prepared for that purpose. Mr Duodu must have taken the view that was not necessary. His letter to the Claimant dated 12 February 2003 was friendly and reflected what he understood to have been agreed. The response was entirely different. There were references to "I am astonished", "I am disgusted", "your disgraceful behaviour leaves me with no alternative but to dismiss you as my solicitors". Mr Duodu's response on 14 February was an important letter. I set it out in full:

> "Dear Andrew
>
> Telegraph Group Ltd (TGL)
>
> I refer to your letter of yesterday.
>
> The conditional fee agreement between us, dated 22 January 2002, stated that an acceptable offer of settlement in your costs claim against TGL would be the following:
>
> 1. The payment of £65,000 in respect of the costs of the claim.

2. The costs of the detailed assessment.

3. Interest on the costs.

Further, at paragraph 3(2) on page 6 of the agreement a definition of a "win" in these proceedings was stated to be that "you beat the Defendant's Calderbank offer dated 16 October 2001 either by virtue of court order or settlement". On the morning of 7 February you instructed me to accept an offer of settlement of £10,750. This represented a global offer of settlement in respect of all parts of your claim for costs against TGL of £42,000 (given that you had already received payments of £31,250 from TGL). That settlement does not constitute a "win" under the conditional fee agreement. The effect of your instructing us to accept such an offer is that there is no need for a hearing; in doing so you have therefore ended the conditional fee agreement before the hearing – see paragraph 7 therein.

As you are aware from paragraph 7, and as was explained to you before you authorised us to accept the offer for £42,000, that you remain liable for our costs having instructed us to accept an offer of settlement that is below the amount agreed as payable in the event of a "win".

In the event, we agreed we would accept the offer of settlement on your behalf and deal with our costs subsequently, given that you wished to accept the offer without having to attend the detailed assessment hearing with regard to part of the costs claimed which was due to take place at 2 pm on 7 February. When I asked you, prior to accepting the offer of settlement, what amount we would agree to deduct from the monies received from TGL for payment of our costs, you stated to me that we would deal with that matter "after the weekend", and that priority must be to secure settlement rather than spend time on that issue, given that the court hearing was imminent. You never gave any indication prior to our acceptance of the TGL offer that you intended not to pay us for the work we had done.

We are not certain whether – as you are a bankrupt – we would obtain any monies from you in a claim against you for our costs, in the event that TGL pay your costs to you directly. We request therefore your consent to an appropriate amount being held over by TGL pending resolution of our costs claim against you. We invite you to consent to such an order. In the event that you do not consent to the above course, we shall seek appropriate relief from the court and seek from you our costs of doing so. I look forward to hearing from you by close of business on Monday, failing which we will refer the matter to court."

28. The Claimant's response dated 19 February 2002 was described by Mr Rushbrooke as unacceptable if it came from any litigant let alone a solicitor and an officer of the court and as utterly deplorable. It reflected views persisted in during the hearing and contained in the Claimant's witness statement, examples were:

i) There was an unsustainable allegation that Mr Duodu had quoted costs at £1,500 and a proposal that instead his firm's costs should be £400. He alleged he had been "grossly misled". In paragraph 15 of his second witness statement the Claimant referred to a fixed charge of £3,000 plus VAT. It was only later in his letter dated 22 February 2002 the Claimant asked to see the time file to support the charge of £3,042.

ii) There was a reckless allegation of misrepresentation that Mr Duodu was an expert in defamation costs.

iii) There was the disgraceful allegation that Mr Duodu had refused to attend the detailed assessment hearing.

The allegations were never made prior to 7 February 2002.

29. Mr Rushbrooke submitted that the Claimant did not correctly characterise what the CFA arrangement was about. It was not a normal joint venture by way of a partnership with a view to sharing profits. It was a joint venture with a special characteristic, namely when the agreement was concluded there was a specific objective or destination (as for a train journey) namely the final resolution of the litigation. One party could only depart from the agreement (or the train) against the wishes of the other on terms. The CFA provided comprehensively various permutations of circumstances that could lead to the "train" being stopped. It set out the circumstances in which each of the lawyer and the client could end the agreement. The lawyer was committed until the end of the line (even to the costs of the costs of the detailed assessment). The risk reflected the reward of the success fee. The client was also committed to the end of the resolution of the dispute. It was not whether or not the CFA stipulated that settlement equals termination. The answer did not lie in the definition of "win" set out in clause 3(n) of the CFA. A settlement which did not amount to a win was not necessarily a loss. It depended upon the settlement and circumstances in which the settlement occurred. That was covered by paragraph 7 of the agreement which reads as follows:

> "**What happens when the agreement ends before the hearing ends?**
>
> *Paying us if you end the agreement*
>
> You can end the agreement at any time. We then have the right to decide whether you must:
>
> (a) pay the basic charges and our disbursements (including any barristers' fees) when we ask for them; or

> (b) pay the basic charges, our disbursements (including any barristers' fees) and success fee if you go on to win your claim for damages.
>
> *Paying us if we end the agreement*
>
> We can end the agreement if you do not keep to your responsibilities in condition 2 and/or refuse to accept an acceptable offer of settlement (see condition 3 above). We then have the right to decide whether you must:
>
> (a) pay the basic charges and other disbursements (including any barristers' fees) when we ask for them; or
>
> (b) pay the basic charges and our disbursements (including any barristers' fees) and success fees if you go on to win the claim."

30. Where the client ended the agreement, the solicitor must then make the election under (a) or (b) of that paragraph. If the lawyer terminated the agreement it also gave rise to a liability on the part of the client. There were the further permutations, namely:

> - "We can end the agreement if we believe you are unlikely to win but you disagree with us. If this happens you will only have to pay our disbursements. These will include barristers' fees if the barrister has no conditional fee agreement with us.
>
> - We can end this agreement if you do not pay any insurance premium when asked to do so.
>
> - This agreement automatically ends if you die before your claim for damages is concluded …"

31. If the lawyer and the client disagreed about the prospects of success, ie whether it was worth continuing, the client had the right to insist that the solicitor remained locked into the agreement (ie, remained on the train). In these circumstances the solicitors would not get their fees, only their disbursements. That did not occur in this case.

32. The situation under which the client could end the agreement was also set out in paragraph 7. Mr Rushbrooke submitted that if the client terminated the agreement ("got off the train") he deprived the lawyer of his opportunity to earn the reward for the risk and commitment and time and profit costs that he had allocated to the matter. He was pulling the plug on the venture. The agreement was terminated by the settlement because the joint venture had come to an end. The joint venture was the attempt to beat the Calderbank offer. Whether or not it was beaten depended on what happened in the court. The Claimant thereby became liable for the basic charges.

It was irrelevant that the agreement did not specifically state that settlement equalled termination. There was no need for it to be included.

33. The purpose of the stipulated figure of £65,000 was to put a cap on any exorbitant expectation on the part of the client. It was higher than the Calderbank offer (£40,000 and the costs and interest). Mr Duodu put the total value of the Calderbank offer at some £42,500, while the Claimant put it considerably higher. In any event the offer was considerably below the stipulated figure of £65,000 plus costs, plus interest. If an offer was on the table at the level of generosity set out in 3 (k) (paragraph 4 above) the lawyer could end the agreement and receive his basic charges because there was a win situation and much more. Here all that was on offer was a much lower Calderbank offer and an all in global figure which did not match it. Here it was the Claimant who wanted to get off the train/terminate the agreement. The Defendant could say he did not agree to the Claimant accepting that offer because it was depriving him of the opportunity to go on and win and get his success fee. Mr Duodu said: "I am happy to go on and try to beat it at the hearing in March". Mr Rushbrooke submitted that the concept of "win" or "lose" was not relevant to the construction question and the definition of "win" in paragraph 3(n), which reads as follows:

> "(n) Win
>
> You beat the Defendant's Calderbank offer dated 16 October 2001 either by virtue of court order or settlement."

A settlement below the Calderbank figure did not necessarily mean a "lose" although a settlement above that figure would constitute a "win".

34. Mr Rushbrooke set out three possibilities relevant to liability under the CFA, namely:

i) [Not relevant.]

ii) If the case is settled on terms which do not amount to a win, this is either on the footing that both the solicitor and the client in effect agree to cut their losses, and the case is treated as lost, or

iii) The client, by insisting on accepting those terms, deprives the solicitor of the opportunity to fight the case and achieve a "win". In such circumstances the client either expressly terminates the agreement before the hearing or (which amounts to the same thing) the parties may agree to treat the agreement as in effect terminated by the client. In either case the client is liable to pay the solicitor's disbursements and basic charges: see the last para under "Paying us" on page 1 of the CFA at [TAB 6], and also, for completeness, Condition 7 on page 8.

He stressed that "in effect" related to the action by the client and did not qualify "terminated". It related back to Clause 7. Here the agreement was terminated, not in effect terminated.

35. Under the alternative (ii) the client and the solicitor could mutually agree to cut their losses. It was not necessary for that situation to be included in the CFA. Parties can always rescind their obligations under an agreement by mutual discharge. The distinction between the two turned on the facts of the case. It was necessary to look at the language which was used in order to resolve any doubt. He submitted that the facts of what occurred on 7 February were as set out by Mr Duodu in his contemporaneous letter of 14 February 2002 and as amplified in his oral evidence.

36. Mr Rushbrooke submitted that the issues of breach of the agreement, or variation of the agreement, were irrelevant, as was the nature of the retainer after the termination of the CFA. He submitted that it was inconceivable that an experienced litigation solicitor like the Claimant would not realise that by his acceptance of the offer he was not agreeing to liability for the Defendant's costs in principle.

37. In response to a question from me Mr Rushbrooke submitted that the basis of the retainer after the CFA had been terminated was not relevant for the present purposes but might be relevant later on. He submitted with a degree of hesitation that it was probably on the basis of an implied private paying retainer. It did not concern the present issue of whether a fee accrued under the CFA.

38. Mr Post submitted that it was not the credibility of Mr Milne as a witness that was in issue but the conversation on 6 February where the misunderstanding occurred as to the scope of the offer. There was a conflict between the witnesses as to whether it ever occurred. Mr Rushbrooke had submitted that there had been an agreement. There was no attendance note to that effect for 7 February. The real issue was whether or not there was any liability to pay these fees. Liability to pay fees could only arise in two ways:

i) If the CFA provided for payment in the circumstances; or

ii) If Mr Milne agreed, notwithstanding the CFA did not provide for payment, that he would nonetheless be liable.

39. Mr Post relied upon the paragraph in the CFA headed "paying us". It was common ground that the second and third paragraphs did not apply. Any obligation must arise under the last paragraph. It reads as follows:

> "If you end the agreement before the hearing, you pay our disbursements and basic charges. If you go on to win, you pay a success fee. Please see Condition 8. If we end the agreement before the hearing, see Condition 7 for full details."

40. The issue was whether a settlement amounted to ending the agreement. There was no provision for that in the agreement. A settlement could not amount to ending the agreement when it was neither a win nor a loss because it did not fall within the definition of "win" in paragraph 3(n). Yet Mr Rushbrooke submitted a settlement could terminate the agreement.

41. Mr Post submitted that, under paragraph 7 of the CFA, where the agreement ended before the hearing the parties were put to an election. Either there were basic costs at that stage or there were basic costs and a success fee at the end of the proceedings. If a decision to settle was an ending of the agreement an election has no place at all. That point was supported by paragraph 8 "what happens after the agreement ends". The provision of serving notice of acting or appointing another solicitor was mandatory on the ending of the agreement. There was no qualification of ending it by agreement. The agreement ending provisions related to certain circumstances where the retainer was terminated but the claim went on. The paragraph (k) "making a settlement" and (n) "win" appeared under the general heading "explanation of words used and other important matters". Making a settlement did not amount to terminating the agreement. The Claimant was not liable to pay the basic fee to the Defendants in these circumstances.

42. Mr Post also submitted that when the CFA was entered into, Mr Duodu did not make it plain to Mr Milne that where there was a settlement the Defendants were entitled to their costs. That was a requirement under the Regulations. All he did was to read out the CFA. It did not specify that the basic costs were payable in those circumstances. If such payment was implied it should be explained to the client. If the CFA did not provide for payment of fees in these circumstances it was necessary to fall back on Mr Rushbrooke's two alternatives; either the case was settled on terms which are treated as a loss or, as here, the client wished to settle and the solicitor wished to continue. In these circumstances the parties may agree to treat the agreement as in effect terminated by the client.

43. Mr Post relied upon the extract from Mr Duodu's evidence which appeared on page 15 of the transcript which preceded the extract which I have set out in paragraph 24. It reads as follows:

> "Mr Post: Mr Duodu, was there an express agreement to terminate the agreement?
>
> A. Was there an express agreement to terminate the agreement? We didn't talk about the agreement, so …
>
> Q. You did not talk about the agreement.
>
> A. We didn't talk about whether the agreement had been terminated or not.
>
> Q. No conversation about that at all.
>
> A. Not about that, no."

44. He submitted there was no discussion about the agreement to pay fees and no agreement to terminate the CFA, or vary its terms. There was no agreement that the CFA was terminated by the client. There was no consideration to support the agreement because the work had already been done. Past consideration was no consideration.

45. On conduct Mr Post invited me to reject Mr Rushbrooke's observations on the Claimant. They were irrelevant to my consideration of whether or not the Claimant was liable to pay costs. It was a no win no fee CFA where the settlement was not a win, yet the Defendants contended that they were entitled to charge the Claimant a fee.

46. Mr Rushbrooke picked up on the new point of lack of consideration for the variation of the agreement. He submitted there was consideration and it was not necessary for the court to enquire into the adequacy of it. Consideration here was the opportunity to earn the success fee as well as the further profit costs that would arise. He also pointed out that at the top of page 16 of the transcript the Claimant agreed to deal with costs the next week. He also took issue with Mr Post's reliance on Clause 8 of the CFA and submitted that it was not obligatory for a party to enforce a right in an agreement. He stressed his submission that the agreement had been terminated, and reminded me that in paragraph 9(3) of the skeleton argument the emphasis was on the termination in effect by the client.

47. In reaching my findings of fact I have taken into account the matters introduced by the Claimant. They include the following:

i) The clear evidence set out in the contemporaneous attendance notes on 29 and 30 January relating to the Claimant's vulnerability on costs if Mr Duodu attended and the specific instruction to do no more preparation; the suggestion by the Claimant, that the attendance note was only prepared after he had challenged the entitlement to costs; the fact that the CFA provided specifically for Mr Duodu to act as the Claimant's advocate.

ii) The allegation that Mr Duodu had misled the Claimant in relation to his experience of attending detailed assessment hearings.

iii) The allegation Mr Duodu had failed to obtain after the event insurance when that issue was clearly contained in the CFA just above the Claimant's signature.

iv) The attempt by the Claimant to conceal the fact that he worked from home and that he had been made bankrupt a second time.

v) His conduct after the issue of fees had arisen.

48. I have set out above my findings of fact on four separate issues which arose in the course of dealing between the Claimant and the Defendants. I have considered the evidence of the Claimant and of Mr Duodu and in particular the evidence I have set out in this judgment. On a balance of probabilities I find as a fact that on 7 February the Claimant accepted he was responsible for the Defendant's costs. By that stage he had agreed to accept a settlement of all his costs at £42,000 and was due to receive the balance of £10,750. I am satisfied that the Claimant said words to the effect that he wanted to address the Defendants' costs subsequently and that Mr Duodu made a contemporaneous note to that effect. Mr Duodu addressed the issue promptly in his letter dated 12 February 2002 where he said "we trust we can agree what deduction can be made in respect of our costs forthwith" (see paragraph 6). He again recorded his understanding in his careful letter dated 14 February 2002 (see paragraph 27).

49. The position which existed on 7 February was that there was neither a win nor a loss situation. The situation which arose was provided for under the fourth paragraph of the conditional fee agreement under the heading "paying us" and under paragraph 7 "what happens when the agreement ends before the hearing" under the sub-heading "paying us if you end the agreement". Mr Duodu did not consider it necessary to ask the Claimant to countersign an attendance note confirming the termination of the agreement. His contemporaneous attendance note was sufficient for the purpose.

50. In his response dated 12 February the Claimant said that he had no alternative but to dismiss the Defendants as his solicitors. However in the circumstances in which the settlement had been reached the CFA had been terminated already. Notwithstanding the evidence which the Claimant has given I am satisfied on a balance of probabilities that the discussion about costs did take place.

51. I have reached the conclusion that the Claimant terminated the CFA and was therefore liable for the Defendant's costs under paragraph 7. The Claimant had considered the terms of the CFA. He had amended it, approved it and signed it. The circumstances of the settlement amounted to neither a "win" or a "loss". The circumstances of the settlement were on all fours with paragraph 9(iii) of Mr Rushbrooke's skeleton argument. The fourth paragraph of the CFA headed "paying us" is wholly consistent with the sub-heading of "paying us if you end the agreement" under paragraph 7 entitled "what happens when the agreement ends before the hearing ends?" I am satisfied on a balance of probabilities that the Claimant was fully aware that under the CFA he was obliged to pay the Defendant's fees. He did not dissent when the matter was discussed on 7 February 2002. I am satisfied that if there had been dissent Mr Duodu would have recorded it in his attendance note. The agreement that the Defendants would write to Decherts confirming acceptance and requesting payment in 14 days was wholly consistent with that agreement. I have rejected the Claimant's evidence that that agreement was not correct.

52. One can only speculate why the Claimant preferred to reach a settlement immediately prior to the resumed hearing on the costs of the detailed assessment for the interim certificate and not utilise the further time available prior to the full detailed assessment hearing in March. It may be that he realised that his personal assessment of an acceptable offer of settlement at £65,000 plus the costs of the detailed

assessment and interest on the costs was over optimistic. It may be that he considered he could pray in aid arguing that a loss had occurred and therefore the Defendants were not entitled to any fee.

53. I do not accept Mr Post's submission that consideration was necessary to amend the CFA. The CFA was not amended. It was terminated. I also reject Mr Post's submission that there were mandatory steps that should be taken after the agreement was ended. I see no reason why it was necessary for the Claimant either to serve notice of acting in person or to appoint another firm of solicitors who would serve a notice of acting. The litigation had been concluded. The Claimant had agreed ("resolved") that the Defendants should write to Decherts to confirm the settlement and ask for a cheque in settlement. I prefer Mr Rushbrooke's submission that it is not compulsory for a party to exercise rights under an agreement.

54. Following the termination of the agreement it is more likely than not that the Defendant was retained by the Claimant on a private fee paying basis. However that is not an issue which falls for determination in the present application.

55. I have not been persuaded on a balance of probabilities that the conduct of the Defendants in any way has been negligent. The Claimant has considerable experience in litigation. I have been able to observe him giving evidence. He made allegations to advance his case which were at times bereft of substance. He was in my judgment fully appraised of the negotiations and of the consequences of accepting the settlement. He must have realised that the amount of costs he was claiming were too high. It emerged that he practised from his home and therefore his charging rate was vulnerable. In the course of his cross-examination questions arose on the amount of work that he had undertaken through his firm before he acted in person. It was the Claimant who set the level of an acceptable offer to settle in the CFA. At that stage Mr Duodu had not been given the 12 lever arch files referred to at the meeting on 29 January 2002 and the papers to support the bill. I reject utterly the suggestion that in any way the Defendants acted negligently thereby forcing the Claimant to settle at a lower sum than he wished. The hearing on 7 February 2002 was a very modest part heard hearing dealing with the balance of his costs for the application for an interim certificate. My impression is that it was, like his full bill of costs, too high. He could easily have deferred the negotiations on the main bill and attended himself to continue the defence of his bill. He chose not to do so.

56. I therefore find that the Claimant has not succeeded and that he must pay the Defendant's costs. I must now hear submissions from the parties in relation to the costs of the application.