Case No: JR 1501717

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 26/07/2017

Before:

MASTER ROWLEY

- -

Between:

(1) Breyer Group Plc	**Claimants**
(2) E-Tricity Limited	
(4) FreetricityLimited	
(5) Viscount Solar Limited	
(6) Visolar Limited	
(7) Solar Power PV Limited	
(8) Solarlec PV Solutions Limited	
(9) Monitor My Solar Limited	
(10) The Green Home Company (South) Limited	
(11) Cleaner Air Solutions UK Limited	
(12) EVGH (Formerly Ecovision Group Limited)	
(13) Ecovision Systems Limited	
(14) Evoenergy Limited	
(15) New Energy Solutions Limited	
- and -	
Prospect Law Limited	**Defendant**

- -

Benjamin Williams QC (instructed by **Asserson Law Offices**) for the **Claimants**
Nicholas Bacon QC (instructed by **Prospect Law Limited**) for the **Defendant**

Hearing dates: 21 – 22 June 2017

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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.

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MASTER ROWLEY

Master Rowley:

1. This is my reserved judgment on a number of preliminary issues raised in the course of Solicitors Act 1974 proceedings brought by the claimants against their former solicitors, the defendant. There were eight preliminary issues identified by the parties and this judgment deals with seven of them, the eighth having been left to the detailed assessment following some preliminary submissions from the parties upon it. The remaining seven issues essentially break down into three categories:

    (1) – Whether any of the work claimed under various headings should not be recoverable in principle?

    (2) – How the costs provision in section 70(9) of the Solicitors Act should be applied in principle in this case?

    (3) – Should the amount payable by the claimants to the defendant be capped to any extent as a result of estimates given by the defendant during the course of its instruction?

2. I have had the benefit of two days of submissions from Benjamin Williams QC and Nicholas Bacon QC. No quarter was given by either in putting forward their clients' case in vehement terms. I record my appreciation of the clarity of the exposition of their clients' positions. Most of the hearing was devoted to the third issue. The other issues, though undoubtedly important, did not require lengthy submissions in addition to the written arguments in the skeleton arguments.

The Retainer

3. The defendant was one of several firms who successfully brought judicial review proceedings on behalf of their clients against the Secretary of State for the Department of Energy and Climate Change ("DECC").

4. In April 2012 the defendant produced a forty page document setting out advice on the potential for a damages claim against DECC under the Human Rights Act 1998 for breach of Article 1 of the first Protocol of the European Convention on Human Rights. Such claims would be brought by members of the solar photovoltaic industry and the advice was provided to various members of that industry with a view to bringing a multi-party claim against DECC. It would appear that five claimant companies were identified at the outset and a further thirteen subsequently became involved. I was told that there was no material difference between the retainer documentation produced for the initial five claimants and for those who followed.

5. The contract of retainer between each claimant and the solicitor was set out in a letter ("the client care letter") and accompanying terms and conditions of business. In the client care letter, under the heading of "Fees and Expenses", the solicitors stated that their charges were based on the time spent on the client's behalf as outlined in the accompanying terms and conditions. Standard provisions regarding the payment of expenses were also set out. The central provisions regarding fees and expenses in the letter are as follows:

> "We have agreed that the cost of the written Advice we have discussed will be £2,000 plus VAT as your firm's contribution (the same as most other contributors). The further costs which are being incurred for the work of drafting and lodging any substantive Claim Form and the accompanying documentation will be borne equally by all parties and are estimated at between £7,500 and £12,500 plus VAT for legal fees to the date of issuing the claim. If it transpires that our invoiced amounts at the end of a matter are less than the sums that we are holding on account, we shall refund the balance to you on a pro rata basis with other contributors.
>
> Please note there will be other disbursements which contributors are paying towards equally including the costs of forensic accountancy (each claimant is paying approximately £900 plus VAT for expert accountancy help compiling figures to go into the letter before claim) and further work will be required for the accountants to prepare a comprehensive expert's report as part of the main claim; and public relations advice and assistance (each contributor has paid approximately £800 plus VAT for this so far). As claimant firms join the case it is expected that legal costs and other expenses will be diluted and each claimant has signed a Costs Sharing and Litigation Agreement (CSLA) to govern the way fair contributions towards the general and individual costs of the action are to be made.
>
> Please also note that we are doing everything we can to pare legal costs and other disbursements down to a minimum at this stage and prior to the claim's issue. Once the claim is issued directions will be given for the further conduct of the case including the preparation of witness and expert witness evidence, the documentation in support of the claims and other material. There will also be correspondence with the court and with DECC/TSOL and possibly applications to the court to deal with. The case will, in other words, require managing and further legal fees and other costs will be incurred. Clearly these will be shared either equally or proportionately between the parties as per the CSLA."

6. In the accompanying terms and conditions, under the heading "Charges and Expenses" the following points are made:

> "Our charges…will be calculated mainly by reference to the time actually spent by the solicitors and other staff in respect of any work, which they do on your behalf. This may include meetings with you and perhaps others; reading, preparing and working on papers; making and receiving telephone calls, emails, faxes and text messages; preparation of any detailed costs estimates and bills; and time necessarily spent travelling away from the office (which will be charged at the full hourly rate unless agreed otherwise in writing); regulatory compliance; and administration. From time to time we may arrange some of this work to be carried out by persons not directly employed by us; such work will be charged to you at

> the hourly rate, which would be charged if we had done the work ourselves. If you do not want aspects of your file to be outsourced please tell us as soon as possible."
>
> Routine letters, emails and texts that we send and receive and routine telephone calls that we make and receive are charged at one sixth of the hourly rate. Other letters, emails and calls are charged on a time spent basis.

7. Under the heading "Payment Arrangements" the terms recite that:

> "Where we are instructed on the same matter by more than one client, in the event that one or more of the clients fails to pay their share of our invoice(s) the other client or clients will be jointly and severally liable to pay the defaulting client(s) invoice(s)."

8. Under the heading "Other Parties' Charges and Expenses" the first bullet point reads:

> "In some cases and transactions a client may be entitled to payment of costs by some other person. It is important that you understand that in such circumstances, the other person may not be required to pay all charges and expenses, which you incur with us. You have to pay our charges and expenses in the first place and any amounts which can be recovered will be a contribution towards them. If the other party is in receipt of legal aid no costs are likely to be recovered. You should also be aware that there are sometimes difficulties and/or delays in assessing and recovering these costs."

9. As can be seen from the client care letter quoted above, there was also a Costs Sharing and Litigation Agreement ("CSLA") signed by the claimants. In the CSLA, the costs of the proceedings were categorised so that costs which related to an individual claimant in respect of its own claim were described as "individual costs" and essentially any other costs were to be "common costs." Whilst each claimant was to be entirely liable for its individual costs, the common costs were to be shared equally between the claimants. If the opponent's costs had to be paid, then they too would be met equally by the claimants. The CSLA set out provisions for members who joined and left part way through the proceedings. It also provided that if any individual claimant did not satisfy its liability for a share of the common costs, then the remaining claimants would have that liability divided between them. Consequently, as it was put to me, where there was a risk of a claimant defaulting on its liability, the risk as to common costs was borne by the other claimants and the risk as to individual costs was borne by the defendant.

Category 1 – various items of "unusual" work

10. The claimants take issue with a number of items ultimately charged to them under these terms and conditions. Some of the challenges are of a contractual nature and relate to whether the solicitors can charge those items at all. Some of the challenges relate to whether the items charged are sufficiently unusual for it to be the case that they needed to be brought to the claimants' attention in order to recover them. Some of the challenges have both aspects to them and so before getting to the challenges themselves,

I need to set out the provisions of the Civil Procedure Rules which are said to be relevant to these points.

11. The assessment of solicitor and client costs is governed by CPR 46.9. In particular, 46.9(3) states:

> "(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –"
>
> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
>
> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
>
> (c) to have been unreasonably incurred if –
>
> (i) they are of an unusual nature or amount; and
>
> (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

12. This provision is supplemented by paragraph 6 of the Practice Direction to Part 46 and which includes the following paragraph:

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

13. The claimant says that a provision in the between-the-parties' assessment procedure is also relevant. In the Practice Direction to Part 47 at Paragraph 5, directions are given as to the drafting of a bill of costs. Within those directions is the following:

> "**5.22** The following provisions relate to work done by legal representatives —"
>
> (1) Routine letters out, routine e-mails out and routine telephone calls will in general be allowed on a unit basis of 6 minutes each, the charge being calculated by reference to the appropriate hourly rate. The unit charge for letters out and e-mails out will include perusing and considering the routine letters in or e-mails in.

(a) 10 minute units

14. The second bullet point quoted at paragraph [6] above refers to routine communications being charged at one sixth of the hourly rate. A routine item is defined in the CPR as

being a communication of such simplicity that it should not be considered to be a communication of substance which would amount to a personal attendance. The provision from PD 47 referred to in paragraph [13] above expects the charging of a standard time for such items. It refers to 6 minutes, or in other words one tenth of an hour. By charging routine items at one sixth of an hour the defendant here has charged 10 minutes for each item.

15. The claimants say that this approach is extremely unusual and that is particularly so in contentious business. As a result of the practice direction, the prospects of recovering 10 minute units between the parties is non-existent and as such the claimants ought to have been warned specifically before such costs were incurred that they were unlikely to be recovered in accordance with CPR 46.9(3)(c). That has not taken place and as such the costs of the routine items should not be recoverable as they stand. The claimants say that each 10 minute item should be reduced to 6 minutes.

16. I should say at this point that Mr Williams' skeleton goes on to say that all timed items should also be reduced. Whilst he did not repeat that point at the hearing, I appreciate he was also relying on the written arguments. The terms of the client care letter indicated that timed items have been claimed with reference to the time actually spent. Whilst I can see that times might have been rounded up to the next 10 minute unit so that a 34 minute attendance would become 40 minutes rather than 36 minutes if 6 minute units had been used, but I am not convinced that the problem goes any further than that. In any event, that is a matter for the detailed assessment in my view. I am treating the preliminary issue as solely being in relation to routine items claiming individual units.

17. The defendant's argument is that it was a time period expressly agreed by the claimants and as such ought to be presumed to be reasonable. In Mr Bacon's submissions, claiming 10 minutes rather than 6 minutes could not be described as unusual in amount. The concept of claiming a proportion of an hour for routine items could not be considered to be unusual in nature. His skeleton describes this approach as being entirely common and reasonable and makes reference to a brief article by Professor Penny Cooper of the City Law School which suggests that units of either 6 or 10 minutes are typical.

18. Mr Bacon also relied upon what he said was the low hourly rate claimed by the defendant to justify the 10 minute routine items. The lengthy time period simply brought a routine communication up to the sort of fee that a firm charging a higher hourly rate would charge for the same communication based on a 6 minute unit.

19. If I were against him on these points, Mr Bacon's position regarding warning the client was covered, in any event, by his submission that an indication had been given to the clients on several occasions that costs recoverable on a between-the-parties' assessment would probably be around 70% of the costs claimed.

20. I am aware that some firms of solicitors, and not just the defendant, charge their clients on the basis of 10 minute units. My understanding is that this tends generally to be in transactional, non-contentious work. I certainly do not have any doubt that this is an uncommon practice in contentious work and do not recall having seen any bill, whether solicitor and client or between-the-parties, claiming 10 minutes for routine items. The invariable practice is for bills to claim routine items at 6 minutes. Occasionally, bills

are produced that do not have routine items as such because every communication is specifically timed. I have little doubt that the expectations of the CPR have a large part to play in shaping the nature of arrangements between solicitors and their clients.

21. Given that this is an uncommon practice, it seems to me that the express agreement of the claimants to the terms of the client care letter is not the end of the matter. The claimants needed to be told that routine items claimed at 10 minutes were unlikely to be recovered on that basis. Whilst a routine letter could hardly be described as being unusual in nature, it seems to me that charging a 10 minute unit for such a communication could quite properly be described as being unusual in nature. It is beyond doubt that it is unusual in amount.

22. The warning given by the defendant to the claimants about recoverability is couched in the general terms given by solicitors in their client communications. It reflects the process of detailed assessment where almost every bill is reduced from the sum claimed and a factor of 30% envisaged by the defendant's warning is a common percentage used. But it does not seem to me to cater for the use of the 10 minute unit for two reasons.

23. The first is that in order to come within 46.9(3)(c), it seems to me that the defendant must specifically point to the unusual aspect and give specific advice upon it. The warning relied upon is entirely general and I do not see that it can provide any assistance to the defendant in this case.

24. Secondly, a reduction of 30% of the costs claimed might be explained to the client by saying that if 100 letters were written, only 70 of them had been allowed as being payable by the opponent. But those 70 would be paid in full. Here, if the 70 were allowed, only 60% of those 70 items would be recovered because they would be allowed at one tenth of the hourly rate rather than the one sixth claimed in the bill. In practice, therefore, the value of only 42 letters would be allowed of the original 100.

25. Consequently, I accept the claimants' challenge to the use of 10 minute units on routine items and at the detailed assessment they will be reduced to 6 minute units where they are allowed as recoverable.

26. I have taken this item first because it seems to me to illustrate the situation where costs expressly agreed can nevertheless be disallowed to some extent because of the provision at 46.9(3(c) regarding their unusual nature. This argument was Mr Williams' fall-back position on almost all of the following items in this category, such as client care letters and invoicing and credit control.

27. Mr Williams' arguments on these other items were grounded in the position the court usually takes on between-the-parties' assessments. Sometimes that position follows from case law such as Motto (see later). For other items, it is simply common practice in the SCCO which becomes more widely accepted from experience and from legal commentaries. The overall effect of Mr Williams' submissions on these points seems to me to reduce markedly the ability of solicitors to charge their clients any more than can be recovered on a between-the-parties' assessment. That renders the indemnity basis assessment expected in a solicitor and client assessment to be of limited value.

28. It might be said that the remedy is in the solicitors' own hands by making sure that the client is aware of the possible non-recovery of costs from the opponent. But it seems to me that it is quite possible to take that approach well beyond what is practicable or reasonable. The length of the client care documentation already provided tests many clients' endurance in considering their contents. If each item were to be separately considered in the client care documentation in the manner that underlies Mr Williams' submissions on these points, then the documentation would grow considerably further.

29. The starting point of both Rule 46.9 and the accompanying Practice Direction is that the solicitor and client are free to agree such terms as they see fit. That approach, in my view, includes enabling clients to instruct solicitors to carry out work that they would wish the solicitor to do rather than someone else who might alternatively do it. An example in this case would be the wish for the solicitors to be involved in the collection of potential claimants rather than the PR consultant who was engaged to do some work or, arguably, the clients themselves. It cannot be right that such work is not recoverable between the solicitor and client on the basis that the costs of collecting clients and sorting out the terms of retainer are unlikely to be recovered at a between-the-parties' assessment.

30. It seems to me to be unrealistic in such circumstances that the client is given a warning before every instruction that such work may not be recoverable from the opponent. In my view, the client safeguard in 46.9(3)(c) operates at a higher threshold than this. It is designed to protect the client from, as I have found, matters such as 10 minute units being claimed which could not possibly be recovered from the opponent on a between-the-parties' assessment. It is not a method of importing all of the expectations of a standard basis between-the-parties' assessment into a solicitor and client relationship.

31. I have dealt with this argument in one place to avoid unnecessary repetition under the headings that follow. Consequently, I have expressed my view as to whether or not Mr Williams' fall-back applies under each heading but the essential reasoning can be found in the paragraphs I have just set out.

(b) Incoming correspondence

32. As with the 10 minute units, the claimant says that the Practice Direction allows for routine letters out and routine emails out but does not allow for considering routine letters in or emails in. Given this clear indication in the Practice Direction, the decision of the defendant to charge for such items, which will not be recoverable on a detailed assessment against the opponent, needs to be explained to the client before such costs are incurred.

33. The defendant refers to the fact that this was agreed expressly by the claimants. The charging of incoming correspondence on a solicitor and client basis is not at all uncommon and as such there is no reason for holding it to be otherwise. Nor is there any need to warn the clients before incurring those charges.

34. Perhaps unlike any of the other items challenged by the claimants, the charging for incoming correspondence is a practice of long-standing. As Mr Williams pointed out, where it occurs it has traditionally been charged at half of the outgoing letter rate. In practice this represents 3 minutes or one twentieth of an hour.

35. It is a practice that still survives where clients have the benefit of Legal Aid representation and since claims on the Legal Aid Fund are only made where costs cannot be recovered from another party, they are a clear demonstration of costs that might be allowed on a solicitor and client basis.

36. In my view, it is not an uncommon or unusual practice for solicitors to charge their clients for such communications. Where the client is particularly prolific in communicating with his solicitor, it is something of a safeguard to be able to point out to the client that such communications come at a cost. I do not therefore consider that they are unusual in nature such that they would need to be notified to the client beforehand.

37. I do think, however, that claiming the full rate is unusual and that is exacerbated in this case by the fact that the applicable rate equates to one sixth of the hourly rate and not one tenth. I consider that this aspect of the incoming correspondence ought to have been notified to the claimants as being unusual.

38. CPR 46.9(3)(c) consists of two parts. Not only must items be of an unusual nature or amount but they must also be potentially irrecoverable from the other party. The wording of the Practice Direction regarding incoming correspondence is often taken to be an absolute prohibition and it was advanced in such terms by Mr Williams before me. But I do not accept that it is quite so black and white. As it is reflective of long-standing practice, the traditional scene can be pictured of a routine letter being received by a solicitor who then dictates a response to his secretary and for which a charge is made to the client for the letter that is sent out. Whilst in modern times the solicitor may well now be doing all of this work, and doing it electronically, the approach has not altered. A period of 6 minutes is considered on average to be sufficient both for the consideration of the incoming letter and the preparation of a brief letter in response.

39. If the incoming letter needs to be considered but, for whatever reason, no immediate response is required or the action to be taken does not involve a routine communication out, then that time can be recorded as perusal and form part of the documents item as with any other time spent by the solicitor in considering documents. Such an approach occurs all the time where the perusal is at all lengthy.

40. But what is to happen where the consideration is brief and there is no need for any letter in response? On Mr Williams' argument no time can be claimed for the solicitor reading (and briefly considering) the communication that has been received. That is not in my view an attractive argument. I do not see why the solicitor should not be remunerated for working on his client's behalf in considering incoming correspondence.

41. In my view, the practice of incoming letters being charged at one twentieth of the rate rather than one tenth reflects the mixed nature of incoming correspondence such that some would be so brief as to require no charge to be made and others would justify a full routine communication in themselves. Many would be between the two ends and be covered by a single 6 minute unit claimed for a letter in reply. The test in 46.9(3)(c) appears to assume that costs of an unusual nature or amount can be dealt with in a unitary way. I think that is right in relation to the other items in this category but I do not see that it can apply in that way in respect of incoming correspondence short of examining each and every incoming letter or email.

42. The subparagraphs of rule 46.9(3)(c) are all rebuttable presumptions. My answer to this particular issue is that, owing to the unusual amount claimed for the incoming correspondence, it would be unreasonable for the solicitors to claim for such correspondence at the full rate sought in the absence of any specific warning given to the client before those costs were incurred. It would be likely that some of the incoming correspondence would be recoverable from the opponent where it could be demonstrated that such time claimed was in essence a short perusal of the document where no routine letter in response had been sent. Consequently, to disallow all of the incoming correspondence would be inappropriate just as allowing the full rate would be. On a broad brush basis, I would therefore be minded to allow incoming correspondence at half the rate of the outgoing correspondence i.e. allowing them at one twentieth of the hourly rate. I accept that this is a broad brush approach and would be prepared to reconsider this matter at the detailed assessment hearing if the parties wished me to do so. I have given the indication that I have in case that assists the parties in narrowing the issues.

(c) Potential claimants

43. Work has been claimed by the solicitors for communicating with and attending upon solar photovoltaic companies who became aware of the proceedings and who contemplated becoming additional claimants. The work has been charged to all of the claimants on the basis that it forms part of the common costs. The claimants say that this work is not recoverable against them for two reasons.

44. The first is that the work done by solicitors in gathering new clients is essentially work done on the solicitors' own behalf. At the time that the retainer is entered into between a solicitor and his client, the solicitor is acting on his own behalf rather than on the client's. Consequently where the putative client decides not to engage the solicitor, then that is simply a cost of doing business which falls upon the solicitor. Mr Williams relied upon passages from Motto & Ors v Trafigura Limited & Anor [2011] EWCA Civ 1150 on this point.

45. The second argument is that the costs relating to claimants who did sign up to the claim would have such costs ascribed entirely to them as being individual costs and not common costs. There would be no logic in the costs of unsuccessful putative clients being paid by all of the actual clients via common costs where the actual clients own costs for being signed up were sought as individual costs. As such, none of the costs should be sought as common costs.

46. At paragraph 62 of his skeleton argument, Mr Williams describes this as a short contractual point. Time spent with potential clients can only be charged to the pool of actual clients if they agree to pay for this as part of the defendant's terms of retainer.

47. Mr Bacon's argument is that the actual claimants had instructed the defendant to garner as many clients as possible. By recruiting more clients, the overall cost to each client would be reduced. The services of a Public Relations professional formed part of this drive to gather claimants.

48. Mr Bacon developed his argument at rather more length than I have described but I do not need to set it out any further because I agree entirely with the defendant's position on this point. This is a multi-party action where the existing clients have expressly

instructed the solicitors to seek to obtain further clients. To my mind that is entirely different from a group action such as Motto where it is the solicitors who are advertising for potential clients for their own benefit and it makes no realistic difference to the existing clients as to whether or not any more clients are obtained.

49. In my judgment this is a simple case of solicitors being expressly authorised to carry out work under the terms of their retainer and is in principle no different to being instructed to engage a PR consultant or other expert. It seems to me to be looking at the position from the wrong end to consider the relationship between the solicitor and the putative client since it is the actual clients to whom the solicitor should properly look for the costs of this work.

50. For the reasons given above, particularly at paragraph [29], I do not accept that these costs are unusual in nature or amount.

(d) Preparing and providing client care letters

51. The claimants say that none of these costs are recoverable and rely on a passage from Motto as follows:

> "The time, expertise and effort devoted by solicitors to identifying a potential claimant, and negotiating the terms on which they are to be engaged by the claimant, in connection with litigation, cannot, in my view, be properly described as an item incurred by the client for the purposes of the litigation. Until the CFA is signed, the potential claimant is not merely not a claimant: he is not a client. When advising a potential claimant on the terms and effect of the CFA, the solicitors are acting for themselves, not for the potential claimant: the solicitors are negotiating with him as a prospective client, not with him as an actual client.
>
> One would not expect a prospective contractual provider of services or goods to charge a client or customer for advising on the terms of the contract under which the goods or services are to be provided…
>
> It seems to me that the expenses of getting business, whether advertising to the public as potential clients, making a presentation to a potential client, or discussing a possible instruction with the potential client, should not normally be treated as attributable to, and payable by, the ultimate client or clients. Rather, such expenses should generally be treated as part of the solicitor's general overheads or expenses, which can be taken into account when assessing appropriate levels of charging, such as hourly rates."

52. Mr Williams relied on the above passage in relation to his argument regarding potential claimants. I have no doubt that it correctly reflects the position where the solicitors are driving the litigation and seeking to gather clients to make the prospect of bringing a claim worthwhile. Such work is usually described as being an "acquisition cost" and as such would normally be treated as part of the solicitor's overheads. But as I have set out above, I do not think that is the position here. The existing clients have sought the benefit of greater numbers and have instructed their solicitors to seek to achieve this.

Where the solicitor is successful in recruiting the new client on his existing clients' behalf, the costs of providing the client care letter et cetera seem in my judgment to fall most appropriately as common costs flowing from the instruction received from the existing clients.

53. For the same reasons as apply to the previous heading, I do not accept that these costs are unusual in nature or amount.

(e) Invoicing and credit control

54. The claimants say that work under this heading is administrative and not fee earner work. To the extent that there is any solicitor involvement, then that work should be attributed to the individual client and should not form part of the common costs.

55. The defendant says that "bills" and "administration" were both specifically set out in the retainer and as such this work is covered by the terms expressly agreed with the client. Moreover, the clients were very keen to make sure that all of the other clients kept up with their financial commitments since if there was a shortfall it would fall upon the remaining clients, at least as far as common costs were concerned.

56. In my view invoicing and credit control is generally speaking an administrative matter which ought to be covered by the solicitor's overheads. Where disputes regarding the level of the invoice and the promptitude of payment are such that the conducting solicitor is required to broach matters with his client, then on a solicitor and client basis it seems to me that such items may be recoverable. Such matters would naturally fall within the individual costs rather than the common costs because the financial status of the client and any laxity in the client's own administration should fall to be paid by that client rather than the claimants in general.

57. Here there is a direct interest of each client in the ability of the other clients to fund the claim. Does that mean that all of the costs in chasing claimants for payment should become common costs? In my view the answer is no. To the extent that time was spent in drafting what was described as "naming and shaming" information upon late payers in the regular advice circulars provided by the defendant, that time would be common costs. But it would appear to involve little more than considering the up-to-date position of individual client's files and repeating any relevant information in the advice. All of the work in pursuing the individual claimant for payment of invoices rendered seems to me to fall properly within the individual claimant category.

58. This does not seem to me to be a type of work that would ever be recoverable from an opponent. It flows squarely from the contractual terms between the solicitor and client and is a matter solely for those parties. I do not consider that s46.9(3)(c) has any application here.

Category 2 – the application of s70(9) Solicitors Act 1974

59. During the period of its retainer, the defendant rendered numerous invoices to the claimants. These were in the nature of requests for payment on account rather than being bills that complied with the Solicitors Act. As a result, when the claimants wished to challenge the sums that they had been charged, they required the defendant to serve statute bills so that these proceedings could be commenced. A statute bill for each client

dated 28 July 2015 was produced. For four of the claimants, the bill contained both common costs and individual costs. For the others, only common costs were claimed.

60. The brief narrative under the heading "professional charges" states:

> "Professional charges for our services as detailed in the bill of costs/breakdown of charges accompanying this invoice rendered to you in connection with the claim against DECC to 28 January 2015."

61. Underneath the narrative are four parts relating to the common costs which reflect the different number of claimants at different points and the total of those parts is then set out as follows:

(Professional Charges)	(exc VAT)	VAT	Total
Subtotal (1)	£99,804.91	£19,960.98	£119,765.90
Limited to amount previously billed	*-£26,084.91*	*-£5,216.98*	*-£31,301.89*
Subtotal (2)	£73,720.00	£14,744.00	£88,464.01
…..			

62. Where individual costs are claimed, they follow on from Subtotal (2) and then all bills have disbursements which are set out in a similar fashion. For the purposes of the point in issue here, I do not need to set out those parts of the bill.

63. The defendant, who obviously drew the bills, say that the figures in Subtotal (1) reflect the work set out in the breakdown accompanying the invoice and which has been drafted by a costs draftsman, Murray Heining. Unusually, he has produced a witness statement in this case to explain some of the background to events. He says that there is considerably more work recorded on the defendant's time recording system than has been billed to the claimants. Some of this time has been included in the breakdown produced to support the bill. There is yet further time recorded which Mr Heining did not feel should appropriately be included in the breakdown of costs.

64. The sums set out in the four parts which culminate in Subtotal (1) have been calculated by dividing the breakdown equally between the claimants. The defendant says that it could quite properly have claimed the £99,804.91 demonstrated by the breakdown against each client in the final statute bill having taken account of the interim payments made. However, the defendant says that it has decided not to claim any more than was

previously invoiced and as such only seeks £73,720 plus VAT in respect of the professional charges.

65. If upon assessment of the breakdown, the sums allowed amount to a figure somewhere between £99,804.91 and £73,720 per claimant, then the defendant says that it will be entitled to the sum of £73,720 but no more. In support of this argument Mr Bacon relies upon two 19th Century cases.

66. The first in time is Re Tilleard 32 Beav. 476 where Messrs Tilleard delivered two invoices to their client, each for £525. Subsequently, they provided a breakdown of the sums claimed which was described as being a rider. That breakdown amounted to £1,246 altogether of which £789 related to the first invoice and £457 to the second. When considering the first invoice, the Master of the Rolls said:

> "I have always taken the same view in similar cases that such a sum by itself and unexplained must be simply disallowed on taxation; but, I think, it is open to the solicitor who charges such an item to give evidence of what did really occur and how it is made up, but the evidence must be limited to what he really has done to earn the amount of that item. In addition to that, I am also of the opinion that, before taking in such a bill for taxation, if it has not been previously explained, the client is entitled to have such an item explained, and it must be given to him for that purpose. If a solicitor puts a series of items amounting to £1,000 in his bill, and, in brackets says I only charge £500, he cannot afterwards be allowed to charge more; but the client is entitled to have the items vouched for the purpose of shewing the items properly chargeable amount to £500 in the aggregate. I concur that this rider is not part of the bill of costs; but yet it was properly before the Master. Before the taxation, the client says, I do not understand one of the items, and the solicitor gives him a letter of explanation; both parties are entitled to make use of that explanation before the Taxing Master. If it had formed part of the bill it was delivered in time. It appears that, on a former occasion, when taxation of the bill was asked, I held that these riders formed no part of the bill, and I am still of that opinion. If the question before the Taxing Master had been whether the solicitor was entitled to augment the 500 guineas to £789, I think he was not at liberty so to do. The solicitor says, "I claim in respect of this item 500 guineas. You ask for an explanation: you are entitled to one, and this charge of 500 guineas is made up of items in respect of which I insist I was entitled to charge £790, but I only charge £525." He does not alter the bill; the charge is still £525, and he cannot claim any more than that sum but he is entitled to take all these items in and have them taxed for the purpose of shewing how he makes out that the 500 guineas is due to him. It was the reason why I directed the taxation of the bill, and, if the Taxing Master had allowed more than 500 guineas upon it, I should have held that it was an improper allowance, and I should have disallowed the excess beyond the 500 guineas."

67. In the second case, In re Hellard & Bewes 1896 2 Ch. 229, the circumstances can be gleaned from this passage from North J's judgment:

> "I think the taxing master was right. The 7*l.* 11*s.* was sent as the amount of the solicitors' charge. When items were asked for,

> shewing how the charge was made out, items were sent to justify the amount. In the list of items which was sent the total as added up made 10*l.* 10*s.* 8*d.* and immediately below that total was written "Say 7*l.* 11*s.*" I understand that note when expanded to mean, "Our charge if made by items would amount to 10*l.* 10*s.* 8*d.*, and that is more than the 7*l.* 11*s.* which we have already stated to be the whole claim in respect of the business comprised in this bill." I think, therefore, that the Taxing Master was justified in saying that the 7*l.* 11*s.* was the bill actually claimed; and, although the mistake of treating the other document as the bill is perfectly intelligible now, yet it was a mistake, because the letter of December 24 was the bill. That being so, *Re Tilleard* (1) and *Re Russell, Son and Scott* (2) exactly apply, and I think the Taxing Master was right in following those cases."

68. Mr Bacon says that these two cases support the defendant's position that the invoices rendered on account and the statute bill finally rendered amount to £73,720 in respect of profit costs. The breakdown provided with the statute bill by way of explanation of the charges amounts to £99,804.91 but that simply provides an explanation to the claimants to show the work that was done. The invoice being assessed is the £73,720 and the breakdown must be reduced below that figure for the claimants to obtain any reduction in the amounts already paid for the solicitors' costs.

69. The claimant says that a different 19th Century case is in fact apposite and that the two cited by the defendant are not on all fours. Mr Williams relied on the case of *In re* Paull 1884 27 Ch. D. 485 which was a case conjoined with *In re* Carthew in the Court of Appeal. The head note to *In re* Paull records:

> "P., a solicitor, delivered a bill for £362, but stated that he would only claim £320, and the £320 only was entered in the cash account which he delivered to his clients. The clients obtained an order for taxation. The Taxing Master taxed the bill at £280, being more than five-sixths of £320, but less than five-sixths of £362, and certified that he had allowed the solicitor the costs of the reference, as he considered that since he had never claimed more than £320, the difference of £42 between this sum and the amount of the whole bill, ought to be deducted from the sums taxed off, thus reducing them to £40 which was less than a sixth of the sum he had claimed…
>
> …special circumstances were certified, so as to give the Court a discretion as to the costs of the reference, but that the special circumstances were not such as to induce the Court to depart from the general rule that the costs of the reference should follow the event of the taxation, and that in this case also, more than one-sixth having been taxed off the £362, the solicitor must pay the costs of the reference."

70. Mr Williams says that the facts in this case mirror those of *In re* Paull. Interim invoices had been delivered in the sum of £73,720 and the solicitors had indicated they would settle for that sum. When the claimants required an assessment of those costs, a bill for £99,804.91 was produced but was limited in an equivalent fashion to the "but say"

approach of *In re* Paull to £73,720. Consequently, in line with the Court of Appeal's decision of *In re* Paull, this court should treat the £99,804.91 figure as the bill and not the £73,720 contended for by the defendant. When determining whether or not the bill has been reduced by a fifth, it is the £99,804.91 figure that should be used.

71. In his decision in *In re* Paull, Baggallay LJ describes the facts as being that:

> "The bills as delivered amounted to £361 19*s.* 2*d.* but the solicitor stated that he claimed only £320 16*s.* 6*d.*, which was £41 2*s.* 8*d.* less than the amount of the bills."

That comment appears to flow from a deposition made by the solicitor recorded in the court report. Upon going through the cash account with the executors, he produced a bill of costs for the probate and a bill of costs for general work. Whilst the bill in respect of the probate remained the same as in the cash account the general work bill increased and represented the difference between £320 and (almost) £362.

72. At a superficial level the facts in this case can be brought more or less within the terms of In Re Paull. But in my view, that is only as a result of some unfortunate timing. The common practice in Solicitors Act assessments is that proceedings are brought in respect of a statute bill that has already been delivered. As part of the standard directions, a breakdown is then ordered and which often comes to a higher figure than the bill itself. In such circumstances there is no debate between the parties as to the starting point for the application of the one fifth rule in s70(9): it is clearly the bill that is to be used.

73. In some circumstances, proceedings are brought to force the solicitor to produce a statute bill so that a Solicitors Act assessment can be sought. Even then, the bill usually precedes the breakdown. But in this case, the solicitors have decided to produce the bill(s) and the breakdown at the same time and then cross refer to them on the face of the bill.

74. As a result the statute bill produced during the course of these proceedings by the defendant is not happily worded in my view. There was no benefit in recording the higher figure from the accompanying breakdown and then stating "but limited to" the figure previously billed and which, on the defendant's case, is the only sum ever requested from the claimants.

75. In the case of *In re* Paull the invoice is delivered for one sum but the client is told that he only has to pay a lower sum. That appears on the face of it to be similar to the "but limited to" wording in this case. The difference to my mind is that in In re Paull, the invoice appears to be the first indication of the amount to be charged and which has been discounted to the client and the discounted sum recorded in the cash account. Here the lower sum has previously been invoiced to the claimants by means of the interim invoices and the solicitors have never indicated that an additional fee is going to be payable. The breakdown figure should not have been included in the bill but that does not mean that the bill itself is for a larger sum in my view. As I have said, if the breakdown had been provided subsequently, the temptation to include all of the figures in the bill would not have been present.

76. Mr Williams, using Baggallay LJ's phrase in *In re* Paull, described as pernicious the approach of solicitors discounting their bill as an attempt to deter their clients from assessment. It does not seem to me to be an approach which ought to be criticised. The solicitors are either providing a genuine discount to the client in the hope of avoiding a Solicitors Act assessment which, since litigation is meant to be the last resort, is a welcome attempt to settle without litigation. Alternatively, a bill rendered at a figure which can amply be justified by the amount of work actually undertaken ought to demonstrate the reasonableness of the sum claimed. In either event, and to some extent they are two sides of the same coin, they seem to me to be a perfectly proper approach to dealing with the issue of costs.

77. Consequently, when I come to determine the costs as required of me by section 70(9) the profit costs figure from which I will need to consider whether one fifth has been reduced is £73,720. The same approach applies to the individual costs where they have been claimed and the disbursements.

Category 3 - Estimates

78. The first estimate given to the claimants was for a fixed figure of £2,000 for access to the forty page advice that I referred to at the beginning of this decision.

79. This advice is dated 5 April 2012. For simplicity, I will generally describe this as the "April 2012 estimate" because in that document there is also an estimate in paragraph 11 of the amount of time expected to prepare the claim. Paragraph 11 sets out the figures in some detail and then states that:

> "On the basis of 5 claimants suing together, we suggest that a prudent budget for the commencement of action would be between £35,000 and £50,000. Clearly, if more claimants come on board, a further economy of scale will be achieved and the cost per client will be less. We also advise that the budget should include from the outset a sizeable initial contingency of at least 20% of the estimates set out above in order to cater for additional time that may be required for as yet unforeseen work i.e. £7,000-£10,000."

80. Paragraph 13 of the April 2012 estimate gives a general warning about costs estimates needing to change from time to time in the event that the original estimates underplay the amount of work required. This warning was potentially not required in respect of the particular estimate given in April 2012 because it related solely to the commencement of proceedings. There was a dispute between Mr Bacon and Mr Williams as to how the estimate should be considered, particularly having regard to additional claimants joining the claim, but subject to that disagreement, which I describe below, the April 2012 estimate was for a discrete aspect of the work and built upon the initial fixed figure of £2,000.

81. On 1 June 2012, Edmund Robb, the employed barrister with conduct of the case at the defendant, emailed a number of the clients in respect of the costs for commencing the claim and the costs thereafter. In respect of the former, he referred to the estimate of £35,000 to £50,000 for five firms to issue the claim. He said that those costs would increase where there were additional firms involved but there was potentially a reduction in the fees for each individual participant as a result.

82. The purpose of the email appears to have been to address the exposure of the claimants to future costs. Having set out a number of variables Mr Robb's email sets out the following paragraph in bold:

> **"Since you wish me to make a prediction and bearing in mind that I cannot do more than give my best estimate considering the numerous uncertainties inherent in such a process, some of which I list above, then I would say claimants should expect legal costs of between £50k and £100k post issue (to be divided between the claimants). Usually the safest thing is to work on the basis that the other side's costs will be similar."**

83. On 27 November 2012 Mr Robb sent an email to all of the claimants at the time which referred to the fees and disbursements incurred in the following terms:

> "I do not expect legal fees to the point we have fully particularised the claim will exceed the top limit on my initial quote of £12,500 per claimant. But we may well go close to this level."

84. This comment was repeated in the circular produced by the defendant dated March 2013 (and which I will refer to as the "March 2013 estimate"). At paragraph 76 the defendant states:

> "To issue the particulars of claim, each claimant firm was charged just short of £12,500 in legal fees. Disbursement costs have been split equally and five claimant firms are owed a small amount of around £1,000 with which sum they will be reimbursed when we next invoice."

That paragraph (paragraph 84) continued:

> "We can only do our best at this stage to give as close an idea as we can to what we think the legal fees may eventually be for the High Court challenge. I consider that each claimant firm will need to budget for between £15,000 and £20,000 plus VAT in legal fees between now and the end of the hearing."

85. The advice continued with information regarding the appointment of leading counsel to head the challenge. Whilst the identity of the leading counsel to be instructed had not yet been finalised, for the sake of a budget the figure of £125,000 was put forward as a "sensible" estimate to cover work up to and including attendance at *"a hearing lasting up to two weeks in the High Court."*

86. So at this point proceedings had been commenced and the claimants were waiting for the defence to be served prior to producing any reply and then going to the first case management conference. That first CMC was originally listed for July but was subsequently postponed until November 2013. The claimants say that the course of this action changed markedly following the CMC and that should have had a similarly marked effect on the estimates.

87. It is true to say that the original advice and the advice circulated in March 2013 assumed that the High Court proceedings would be unitary in the sense of dealing with all aspects of the claim at the same time. By the time advice was being given in June 2013 to the claimants, however, the assumption was that a preliminary issues trial would take place. The explanation for this is set out in greater detail in the August 2013 advice.

88. On 14 October 2013, i.e. roughly a fortnight before the CMC, the defendant circulated an advice containing a "Costs Estimate update". A good deal was made of the contents of paragraphs 48 to 50 in particular of that advice and consequently I set them out in full:

> "48. We summarise costs incurred to end August per claimant:
>
> a. PLL legal fees:
>
> £2,000 plus VAT (advice)
>
> £26,613.28 plus VAT (general legal fees including just under £12,500 for legal fees to issue the claim)
>
> b. Counsel's fees:
>
> £543.75 plus VAT (Simon Murray)
>
> £637.15 plus VAT (Lord Faulks QC)
>
> c. Other disbursements:
>
> TOTAL ON OTHER DISBURSEMENTS (Per Claimant) = £2,352.01 excluding VAT
>
> We are currently preparing the figures for September.
>
> 49. We also seek to estimate fees to the conclusion of the preliminary hearing. As it is assumed that a preliminary hearing is very likely to take place, and there is a very good chance that the preliminary hearing will in a large measure prove determinative of the Consolidated Claim, this would seem to be a sensible point to which to attempt a costs prediction.
>
> 50. Our conclusions are that, as we remain comfortably within the £20,000 per client upper limit estimated contribution to fees (excluding Counsel's Fees) as set out in March, and we can be confident the total fee contributions, if they exceed this estimate, will not do so dramatically. With the CMC scheduled for November and a currently anticipated trial window of January to March 2014 for the preliminary hearing, we have to accept that some degree of delay and complexity has arisen and this is bound to affect costs at this stage. Our present, prudent, estimate is that client contributions required for our fees are unlikely to exceed a maximum of £26,000 per client, though, of course, this may be less."

89. The advice goes on to point out that matters such as disclosure will remain a variable until the CMC but that the preliminary hearing route has the potential to minimise costs further:

> "Even relative to the smaller claims, the costs of bringing the matter to a decision are likely to be a fraction of a stand-alone claim, with a conventional trial and on full commercial law firm rates."

90. At the conclusion of the letter the final paragraph comments that:

> "So far as can be predicted at this stage, the claim is, and is likely to remain, reasonably close to budget, which is not to say that litigation funding would not be welcomed."

91. Following the CMC on 1 November 2013, a further advice was sent out a fortnight thereafter. Having reviewed the issues and outcome of the CMC the defendant advised that Master Leslie was content that it was possible and appropriate to proceed to a preliminary issues hearing on the basis of assumed facts. The claimants had, by the time of the advice, agreed a single document setting out the agreed facts and issues which had then been sent to the defendant.

92. The advice describes the outcome as being an extremely positive development. It would enable the claimants to obtain a decision in principle on the legal issues that would determine the future of the claims. It then goes on to say that

> "We can have this hearing at a fraction of the cost of a full trial. Our clients will be spared at this stage and, quite probably completely, the significant costs and disruption the full-scale disclosure exercise."

Under the heading "Costs Estimates" the defendant provided the following advice:

> "In March, we advised that the costs were likely to be some £20,000 plus disbursements, including counsel's fees, per client. We have had a number of clients drop out of the claim this figure now looks like £26,000, plus disbursements, including counsel's fees, for each client. We confirm that this estimate is up to the conclusion of the trial of preliminary issues. Of this sum, each client has been billed in the region of £16,000 so far.

(I will refer to the figures here as being the November 2013 estimate).

93. Whilst the defendant continued to provide advice to the claimants at regular intervals, the next costs estimate was not until March 2014. By this time Lord Faulks had left the case and had been replaced by Michael Fordham QC and his fees proved to be more expensive than the defendant had anticipated. Nevertheless, it was the defendant's advice that Mr Fordham's expertise justified his cost. Under the heading "Fees and Disbursements" the following paragraph was set out:

> "9. To date we have invoiced the following:
>
> Our fees: £766,126.27

Disbursements: £61,374.56"

94. The advice continues by requiring further funding from the claimants in order to pursue the matter to the conclusion of the preliminary hearing. Four payments of £5,000 are required from each claimant. Half of those fees are to be on account of the defendant's fees and half are in respect of counsel. The solicitors stressed that these figures were based on an estimate of the cost for each client to meet and concludes with the phrase "*We must stress that we cannot continue work on the claim unless the whole of the sums received in respect of each of the claimants we presently represent by the end of April.*" The advice then goes on to set out a number of clients who are in arrears in respect of fees already invoiced.

95. The next advice was circulated on 25 April 2014 and, as a result of the further invoices raised, the invoiced figures had by that point become £804,626.27 for profit costs and £63,105.52 for disbursements. There is a similar advice on 3 May 2014 which, amongst other things, records the invoiced figures and by that point they had reached £855,276.31 for profit costs and £63,285.42 for disbursements.

96. Given that the number of claimants fluctuated throughout the course of the period in which the invoices were raised, it is impossible simply to divide the aggregate figures circulated at this point by any particular number of claimants so as to establish a meaningful figure. The method of invoicing the claimants was by regular, relatively small amounts and it was only once the defendant's retainer had concluded and Solicitors Act proceedings were contemplated that the composite invoices were produced and which have been considered above. The statute bills have reflected the various stages where different numbers of claimants were involved by the four parts in the invoice which cumulatively reach the figure of £73,720 profit costs net of VAT in respect of the generic costs.

97. The claimants' case is that the invoiced figure bears no resemblance to the estimated costs set out throughout the case. There were no unexpected turns in the litigation which would falsify the estimates given such that they had to be revised upwards. Indeed, given the case management decision of Master Leslie to order a preliminary issues hearing rather than a full-scale trial, the costs should have come down rather than gone up.

98. The defendant's case is that the clients were kept abreast of the figures by the regularly circulated advice emails. At no stage did the claimants query the figures and instead simply paid the invoices as they were rendered. The early invoices in particular were caveated to reflect the uncertainties in litigation and it would be inappropriate to hold the solicitors to figures which they clearly set out as being provisional. Consequently, although the figures ultimately invoiced to the claimants do not directly tally with the estimates given, they do not justify any form of restriction being placed upon the sums payable by the claimants to their former solicitors.

99. The claimants rely upon witness statements from Timothy Breyer, a director of the first claimant, and Philip Mansfield, a director of the fifteenth claimant. Both statements say that the makers have produced the statements on behalf of all the claimants. Mr Bacon submitted that in order for the statements to carry weight in this respect, it was to be expected that brief witness statements from other claimants confirming their agreement to the contents of the witness statements of Messrs Breyer and Mansfield should also

have been served. Whilst that might have been done, its absence does not seem to me to be fatal in respect of the evidence provided. Mr Breyer is from a large company and Mr Mansfield is from a small company: I was told they had been chosen specifically to represent the varying size and sophistication of the claimant firms and I accept that to be a sensible approach.

100. The evidence of Mr Breyer in respect of costs estimates is contained at paragraphs 11 and 12 of his statement as follows:

> "The costs estimates which Prospect Law provided to Breyer Group and the other Claimants were dramatically exceeded, as is set out in the Points of Dispute. Ultimately Prospect Law charged Breyer Group £94,521.27 (plus VAT of £18,660.02 and shared costs of non-paying claimants of £3,953.58) merely to reach the end of the High Court element of the preliminary issues stage of the claim. I am told that each of the other claimants was billed a similar sum.
>
> Had Prospect Law told me at the outset that their costs just for that very first minor stage would be c. £100,000, as set out above, and had they explained that this was just the first stage of the claim, with disclosure, witness statements, expert evidence and trial still to come, I am almost certain that I would have either engaged different solicitors at a lower cost or not commenced the claim."

101. Mr Mansfield's evidence on estimates is set out in paragraphs 15 to 19 of his statement. The first of these paragraphs sets out a table of collated information regarding the various estimates given.

102. Paragraph 16 of the statement is as follows:

> "I had no previous experience of litigation above the level of the Small Claims Court, let alone complex commercial litigation of the kind of the damages claim against DECC. I relied completely upon Prospect Law's costs estimates to assess what the cost of pursuing a damages claim against DECC might be. It seemed like a lot of money to spend on a claim worth only c.£233,000, as NESL's claim was, but I was convinced that the claim had a good chance of succeeding and that the costs would ultimately be recovered, and were in any event somewhat proportionate to the size of the claim."

103. Mr Mansfield then goes on to set out the amount in the final invoice but to query whether or not that is in fact correct. He then states in paragraph 18 that the costs estimates through to the end of trial were completely wrong and states that he had "little doubt" that if the claimant had continued to instruct the defendant through to the final trial:

> "Prospect Law would have charged the claimants at least 4 or 5 times what was charged for the High Court part of the preliminary issues stage. I make that assessment based on the relatively more expensive and complex work (compared to the preliminary issues

> High Court stage) which had to be carried out after the preliminary issues were determined in the High Court."

104. Mr Mansfield then sets out six bullet points to amplify that comment. At paragraph 19 he states:

> "I am certain that had Prospect Law given me an accurate estimate at the outset of the claim, I would not have caused NESL to commence proceedings. I would not have felt it justified to spend the £86,086 plus VAT charged simply to get through the first part of the preliminary issues stage. I would certainly not have embarked upon the claim had I known that the costs of reaching the end of a final trial would be potentially hundreds of thousands of pounds. NESL's claim was worth at best £233,000 and involved arguing novel points of law which made it risky. If the preliminary issues alone were likely to cost well over £100,000 after the appeal on preliminary issues, then the full trial was unlikely to be less than a further £100,000, and very likely far higher. Thus the legal costs would be in the region of the top value of the claim, and possibly more. That, combined with the risk of adverse costs, would have persuaded me to drop the claim."

105. Mr Robb gave evidence on behalf of the defendant in two witness statements. The first contains twenty paragraphs relating to costs estimates: the second is almost entirely devoted to the question of estimates and in particular the evidence given by Messrs Breyer and Mansfield about them.

106. Mr Robb's evidence is essentially that he provided regular updates to all of the claimants which dealt with the issue of costs right from the outset. He provided the best information that he could and made it clear to the claimants that, particularly at the outset, he could not be particularly precise about the ultimate figures. He invoiced the clients regularly and at no time was any complaint received from any of the claimants let alone Mr Breyer or Mr Mansfield. As such he did not think that it was fair or reasonable for the clients to be challenging the costs at this late date. Mr Bacon understandably did not pursue any estoppel type argument based on that evidence given the clear wording of the Solicitors Act 1974.

107. Mr Robb did not accept that the estimates were "dramatically exceeded" as stated by Mr Breyer. They changed as the case developed and were recorded in the regular updates. Mr Robb refers to instructions seemly given to other City solicitors by the First Claimant and as such seeks to cast doubt upon Mr Breyer's comment regarding whether or not he would have engaged Prospect Law if he had known the extent of the costs to the preliminary issues stage. He also did not accept Mr Breyer's categorisation of the stage reached as being merely the "very first minor stage."

108. Mr Robb also disagreed with the evidence of Mr Mansfield. In particular, he disputed the advice Mr Mansfield says he was given after Coulson J's judgment and the subsequent appeal to the Court of Appeal. Mr Robb says that he pointed out the difficulties in the continued claim being brought by NESL and that it might well want to discontinue. Furthermore, he records that Mr Mansfield instructed Prospect Law in a separate matter but on the same terms of retainer as in this case. That did not suggest

Mr Mansfield was dissatisfied with Prospect Law, or its terms and conditions, in any way.

109. None of the witnesses gave evidence at the hearing. The parties were content to make submissions based upon the statements produced. There is no direct conflict of evidence between the witnesses on any matters of fact. The divergence of views is really a matter of opinion by the witnesses and does not add a great deal to the documents themselves. I have addressed particular points raised by the witnesses below.

110. Both counsel were economical in their submissions on the Law as there was nothing between the parties. There is no Court of Appeal authority in this area and the High Court authority flows from the two decisions of Morgan J in Mastercigars Direct Ltd v Withers LLP [2007] EWHC 2733 (Ch). The suggested methodology for a costs judge in considering whether or not a client has relied upon costs estimates given to him by his solicitor is described in paragraph 54 of the first judgment as follows:

- The court shall determine whether the client did rely on the estimate.
- The court should determine how the client relied on the estimate.

  (The court should try to determine the above without conducting an elaborate and detailed investigation.)
- The court should decide whether the costs claim should be reduced by reason of its findings as to reliance and, if so, in what way and by how much.

111. Morgan J then goes on to say that:

> "Whether there should be a reduction, and if so to what extent, is a matter of judgment. Specific deductions can be made from the costs otherwise recoverable to reflect the impact which an erroneous and uncorrected estimate had on the conduct of the client. Such an approach requires the court to form an assessment of the impact of the estimate on the conduct of the client. The court should consider the deductions which are needed in order to do justice between the parties. It is not the proper function of the court to punish the solicitor for providing a wrong estimate or failing to keep it up-to-date as events unfolded. In terms of the sequence of the decisions to be made by the court, it has been suggested that the court should determine whether, and if so how, it will reflect the estimate and the detailed assessment before carrying out the detailed assessment. The suggestion as to the sequence of decision-making may not always be appropriate. The suggestion is put forward as practical guidance rather than as a legal imperative. The ultimate question is as to the sum which it is reasonable for the client to pay, having regard to the estimate and any other relevant matter."

112. Morgan J then returns to this ultimate question of what it is reasonable for the client to pay later in the judgment as follows:

> "Thus, even if the solicitor has spent a reasonable time on reasonable items of work and the charging rate is reasonable, the resulting figure may exceed what it is reasonable in all the circumstances to expect the client to pay and, to the extent that the figure does exceed what is reasonable to expect the client to pay, the excess is not recoverable…"

113. If the court decides that the sum claimed is not the reasonable figure for the client to pay then it must exercise its judgment to decide on an appropriate figure which ought not to be exceeded.

Submissions

114. Mr Williams' primary position is that the defendant should be limited to the aggregate sum of a number of the estimates put forward to the claimants as the case progressed. The constituent parts of that aggregate sum are the £2,000 for the initial advice; a maximum of £5,556 for work done in commencing proceedings; and £20,000 from then until the end of the preliminary issues trial, making a total of £27,556. Mr Williams' fall-back position is for the sum of £33,556 which represents a variation of the later work from £20,000 to £26,000.

115. The figure of £5,556 for commencing the claim arises from taking the original estimate of £35,000 to £50,000 and adding the 20% contingency referred to at the time (i.e. £42,000 to £60,000). This coincides with the upper end of the bracket of £7,500 to £12,500 estimated for each of the 5 claimants initially involved and which became "just short of £12,500" subsequently. Added to this is a notional further £40,000 in respect of the work done for the additional 13 claimants so as to reach £100,000 divided by 18 claimants, which makes the figure of £5,556.

116. Mr Williams' argument for the additional 13 claimants to have their claims commenced at roughly £3,000 per claim rather than the original £12,000 per claim is based on the fact that much of the work for producing the documents to commence the various claims that were commenced had already been drafted. Consequently, the only work that needed to be done related to the individual circumstances of the schemes run by the individual claimants and which had to be particularised to some extent in the documentation. Mr Williams took his figures largely from paragraph 11 of the April 2012 estimate. That paragraph, uniquely in this case, set out the estimated time to be spent on various activities and which it was at least arguable would fluctuate depending on the individual claimant's case in respect of some of those activities. It seems to me that this argument was well-founded based upon the work that was said to be done and indeed it chimes with the quotation referred to at paragraph [79] above when Mr Robb indicated to the claimants in the April 2012 advice that although the overall costs would increase, the cost per claimant ought to reduce. That comment can only mean that some of the work already done for the first 5 claimants could be recycled in respect of the later claimants' claims.

117. Mr Williams' argument that the figure of £20,000 from the March 2013 estimate should be used is based squarely upon the outcome of the CMC before Master Leslie. The estimates provided in June 2012 and March 2013 (prior to the CMC) were predicated on the assumption that a full-scale trial of up to two weeks would be required. Once Master Leslie ordered a preliminary issues hearing based upon assumed facts, then the

time estimate for the hearing reduced and the workload would also reduce significantly. There were numerous entries in the documentation referring to the costs of the preliminary issues hearing being a fraction of the costs of a full-scale trial.

118. In Mr Williams' submission, this turn of events outweighed any allegedly unforeseen work that needed to be done in the course of litigation, or the dropping out of any of the other claimants so as to increase the common costs between the remaining claimants. Consequently, there was no reason whatsoever for the costs ultimately sought from the claimants to exceed the figure of £20,000. Indeed the claimants could legitimately have argued that the figure should be less than that sum given Master Leslie's Order but, in Mr Williams' submission, the claimants had decided to take a measured approach and limit the scope of this argument to the estimates provided by the defendant.

119. If I were not with Mr Williams on that argument, his fall-back position took into account the prudent estimate maximum figure of £26,000 referred to in November 2013 and which was subsequently said to be required as a result of other claimants dropping out of the litigation.

120. In relation to the witness evidence, Mr Williams pointed to the absence of any cross-examination of his clients' witnesses. They gave evidence about reliance upon the estimates which was unchallenged. The estimates had clearly been produced with some care and as a result it was entirely appropriate for the claimants to rely upon the estimates as being accurate. In the absence of any unforeseen events which would falsify the estimates made, there was no reason in this case for the court to allow the solicitors to claim more than they had estimated the costs would be to their clients. It would be unreasonable for the claimants to pay any higher sums than those estimated in the circumstances.

121. Mr Bacon's argument was that his clients had done exactly what lawyers were supposed to do. They were meant to give their clients the best estimate of the costs to be incurred. They were to couch their estimates in careful language where uncertainties lay ahead. As and when the estimates started to diverge from the actual costs involved, the estimates needed to be revised. This is exactly what the defendant had done in this case and it had resulted in the claimants appearing to be entirely satisfied with the outcome of the case and the costs incurred. Morgan J referred to the impact on clients of erroneous and uncorrected estimates in Mastercigars. Here the solicitors had corrected estimates as the case progressed so that anything that could be said to be erroneous was promptly corrected before it could have any effect on the conduct of the claimants. As such, it was not surprising that no complaints had been received at any point from any of the claimants about the costs involved.

122. Although the claimants were businesses of varying sizes, they were all sophisticated clients in the sense of being businessmen running their own businesses. Some of the claims were absolutely massive but all of the claimants were well able to take up issues in respect of the costs if they had wanted to do so. The only communications referred to by Mr Williams outside of the advice generated by the defendant itself on the question of costs were from claimants in the underlying litigation who were not claimants in these proceedings.

123. Mr Bacon referred to the variation between the figure of £17,000 put forward by the claimants in their points of dispute with the figures put forward in the Note and Revised

Note produced by Mr Williams at the hearing itself. The number of different figures suggested by the claimants as being the ones with which the defendant's costs should be capped suggested that there was no merit in any of them.

124. Mr Bacon referred to the claimants' witness statements and supported the comments made by Mr Robb in his witness statement in respect of the evidence of Messrs Breyer and Mansfield. So, Mr Bacon did not accept that the estimates had been dramatically exceeded or that the preliminary issues hearing represented a very minor first stage. Since Mr Breyer's company was still a claimant in the ongoing proceedings, it could not be correct for him to say that he would not have commenced the claim if he had been given a different estimate by the defendant. Mr Breyer does not say what figure he would have expected the costs to be, other than simply a lower one. Similarly, Mr Mansfield says that he would not have spent approximately £86,000 on his costs but does not say what lesser figure he would have been prepared to spend. He does not even say which estimate he relied upon. It could be the March 2014 estimate as much as the earlier ones. The claimants' case does not rely on the March 2014 estimate on the basis that it was too late to be relevant but that was not so in Mr Bacon's submission. Mr Bacon picked on the instruction of the defendant by Mr Mansfield in other proceedings as being an example of the claimants' satisfaction with the defendant's work.

125. The only time when the claimants became dissatisfied with the costs they had been charged was when the Treasury solicitors disputed the costs claimed on a between-the-parties' basis. Then the claimants sought to challenge the fees involved. The arguments put forward by the claimants were, according to Mr Bacon, an after the fact construction by the claimants' lawyers of events rather than anything contemporaneous involving the claimants. In Mr Bacon's submission, where claimants are concerned about the costs involved and are genuinely relying upon the estimates put forward, the clients give evidence about specific events that had happened and complained contemporaneously, particularly complaints about the costs being incurred. That did not happen here.

Discussion and Decision

126. The fixed fee of £2,000 charged by the defendant for the initial advice causes no problem on either side in this case. The costs of commencing proceedings can logically be analysed in the manner of Mr Williams such that the follow-on claimants' costs ought to have reduced the cost per claimant overall. But it is clear from the subsequent communications that I have quoted above, that the upper limit of £12,500 per claimant for this stage was charged to all of the claimants and that there was no dissension in respect of that charge at the time that work had been completed by March 2013. This was at an early stage and as such there was plenty of opportunity for any concern to be expressed. The absence of any expressed concern to this discrete element makes it impossible in my view to suggest that it was not the figure relied upon by the claimants when considering their further conduct of the claim.

127. The figure contended for by Mr Williams in comparison is undoubtedly an ex post facto construct. There is no mention in any contemporaneous document of a similar figure nor any mention of it in the witnesses' statements. It requires an assumption regarding the reasonable costs that might be used for later claimants. Whilst there is some logic to Mr Williams' analysis, there is not the slightest evidence to suggest that any of the claimants relied upon any calculation of that sort. It certainly seems to me that the

figure of £12,500 should be used for the second stage rather than the figure of £5,536 put forward by Mr Williams.

128. In March 2013, the estimate of £15 to £20,000 per claimant plus VAT (and it would appear disbursements) was put forward as being the costs involved from that point until the end of the hearing. By October 2013 the defendant was sufficiently confident to state that it remained comfortably within that the figure of £20,000 as being the upper estimate. Nevertheless, a further 15% contingency (to £26,000) was suggested as being a sufficient cushion against unlikely events. As Mr Williams pointed out, there was nothing put forward by the defendant to suggest that the case had turned markedly for the worse and as such required much more in the way of legal spend that had been estimated. The only turn of events, and which indeed had been anticipated by October 2013, was the potential for a preliminary issues hearing to reduce the costs outlay to the claimants.

129. In my view, the various pieces of advice given to the claimants regarding the expected costs to the preliminary issues trial are entirely consistent with the figure of £20,000 (or subsequently £26,000) being for work from the commencement of proceedings until the preliminary issues trial. Of that sum, monies were paid on account in relatively small payments as well as further interim payments in respect of disbursements and, in particular, counsel's fees.

130. Although Mr Bacon struggled manfully to increase the figures involved, it seems to me that Mr Williams' analysis of the wording given by the solicitors in their communications to the clients is correct. The only point on which I would differ is that it seems to me that the figure should be £26,000 i.e. Mr Williams' fall-back position rather than £20,000, given the exit of several claimants and for whom the remaining claimants would need to pick up the proportionate share.

131. But the test that I am to apply is not simply an analysis of the communications passing between the solicitors and their clients. There are no doubt many cases where clients simply ignore any estimates put forward by their solicitors and wish to proceed in the case regardless. For this reason there needs to be reliance by the clients on the solicitor's estimates to persuade the court to put a ceiling on the costs recoverable by the solicitors for work that was otherwise reasonably done.

132. At paragraph [110] above, I have set out as bullet points the suggested methodology provided by Morgan J in Mastercigars. First, the court needs to determine whether the clients did in fact rely upon (any of) the estimate(s). If they did, how did they rely upon the estimate(s)? Based upon those findings, should the costs claimed be reduced and if so in what way and by how much?

133. Morgan J says that the court should try to determine the existence and manner of the reliance without conducting an elaborate and detailed investigation. Here I have been given witness evidence by two directors of the claimant companies and some evidence from the conducting barrister. There is nothing, as I understand it, in the form of contemporaneous emails or other documentation which goes to this question.

134. At the hearing, I queried Mr Breyer's description of the point at which the case had reached. He described it as the "very first minor stage" and contrasts that with the sum of approximately £100,000 which has been billed to each claimant.

135. Mr Williams, partly on instruction, indicated to me that although Coulson J's decisions on the assumed facts were very helpful to the claimants, those facts still had to be proved because the defendant did not accept that the facts were as had been stated. Furthermore, the various claimants' claims had to be proved by witness evidence and documentation and as such a trial lasting three days for preliminary issues did not compare very significantly with the ten week trial that has been listed for hearing of the remaining issues including the assessment of quantum.

136. I did not find that to be a convincing explanation for the description of the point reached in the litigation by Mr Breyer. The decision of Coulson J was summarised in the advice circulated by the defendant following the handing down of the judgment. In the conclusion section, it rehearsed paragraph 160 of the judgment, the answer to the final question being:

> "Although the entitlement to damages will ultimately depend on the facts, as a matter of general principle, the claimants have demonstrated an entitlement to damages assessed by reference to the loss of those possessions for which recovery is permissible, namely signed/concluded contracts and/or marketable goodwill preferable to such contracts."

137. There were no contemporaneous emails, or similar, shown to me to suggest Mr Breyer (or any of the other claimants) disagreed with the defendant's view expressed in the advice that as a result of this judgment, *"each and every claimant is likely, we believe, to have significant, and in many cases, very substantial losses relating to contracts and goodwill of the type that the Court held were possessions protected by A1P1."*

138. Nor was there anything to suggest that Mr Breyer felt that the preliminary issues were no more than the beginning of the beginning. In fact the preliminary issues hearing was described to me as being to deal with DECC's allegedly knockout blows. Successfully weathering those blows must incontrovertibly have been of some considerable benefit to the claimants. It is unlikely that the defendant would have troubled to appeal the decision to the Court of Appeal otherwise.

139. Within the judgment, Coulson J deals with a reluctance on the part of DECC to engage with the preliminary issues process. At paragraph 37 he states:

> "As we shall see from time to time in this Judgment, there are important matters here which can only be decided on the facts. That said, I consider that this is a much more promising candidate for the hearing of preliminary issues than many other similar cases. Unlike in Woodland, the preliminary issues set out in paragraph 34 above go to the heart of the matters in dispute. If I found no 'possessions' or no interference with their quiet enjoyment within the meaning of A1P1 then these claims would fail at the outset. On the other hand, if I found against the defendant on possessions, interference and justification, then it is highly likely that some, perhaps even significant, financial recompense would follow."

140. It is clear from comments such as this, in my view, that Coulson J considered that the answers he gave to the issues he was being asked to deal with, would move the case along to a conclusion, one way or another. Where there is no dispute about the evidence and the time in court is spent entirely on legal submissions, a lot of ground can be covered in a relatively short time. The nature of the hearing is completely different from a hearing to prove the facts of each individual company's case. The fact that the preliminary issues hearing lasted three days and the future hearing has been listed for ten weeks is no more than superficially attractive as a contrast between their relative importance. Given the difference in the issues, i.e. matters of law and then (largely) matters of fact, the length of each hearing is no real guide in my view as to its importance in the overall litigation.

141. It seems to me that Mr Breyer felt obliged to minimise the stage at which the case had reached in order to seek to maximise the impact of the two paragraphs in which he deals with the question of costs estimates. But even then he has felt unable to go any further than to say "I am almost certain" that he would either have engaged different solicitors or not commenced the claim. I agree with Mr Bacon's submission that the idea of Mr Breyer not pursuing the claim at all lacks cogency given that he has continued with the claim up to this point in any event. The suggestion of using other solicitors is vitiated by the absence of anything other than the bland description of doing so "at a lower cost." It is not compelling evidence in my view regardless of any cross-examination.

142. Mr Mansfield's evidence is also blighted by some unfortunate wording. I have set out paragraph 16 of his statement at paragraph [102] above. Mr Mansfield appears to be confident of the prospects of success and as such was prepared to spend what seemed like a lot of money to him on the claim on the basis that the costs would ultimately be recovered but, in any event, were "somewhat proportionate to the size of the claim." It would appear that this comment relates to the estimated costs rather than the costs ultimately set out in the bill which is the subject of these proceedings. But the last estimate that he quotes (March 2014) is not so far from the figures set out in the bill. If the intention of Mr Mansfield's evidence is to draw a distinction between the estimated costs as being high but still "somewhat proportionate" with the ultimately invoiced costs, then it is a far from clearly drawn distinction.

143. Mr Mansfield's evidence was also diminished in my judgment by the contrast between his lack of experience of litigation other than in the small claims track and his lengthy recitation of why the costs after the preliminary issues hearing would involve more expensive and complex work. At best it would seem that such evidence was assisted by the input of Mr Mansfield's solicitors.

144. The central paragraph of Mr Mansfield evidence on this subject is paragraph 19, which I have quoted at paragraph [104] above. He states that he is certain that he would not have caused his company to commence proceedings if he had known that costs and disbursements of £86,086 plus VAT would have been charged up to the preliminary issues stage. The comment that the further costs would have been four or five times higher suffers from the lack of experience I have described above. In any event, Mr Mansfield's company's claim foundered on the Court of Appeal's judgment and as such its case had to be brought to an end. Like Mr Breyer, he does not give any indication of the costs that he would have felt appropriate to get to the end of the preliminary issues hearing. The reference to the risk of adverse costs seems to me to be irrelevant to the

question of estimates but might well be relevant to Mr Mansfield's decision to conclude his company's claim.

145. Mr Breyer's company is a substantial undertaking with a very significant claim and I do not find anything in his evidence which suggests that his company actually relied upon the estimates put forward by the defendant. As such his evidence on behalf of the claimants falls at the first hurdle.

146. Whilst Mr Mansfield's evidence is by no means compelling, I accept that for a company of much more limited means with a comparatively modest claim, he would be more likely to rely upon the estimates provided. However, as Mr Bacon submitted, it is not clear from Mr Mansfield's evidence which, if any, estimates he relied upon. He simply states that the estimates were wrong and bases all of his complaints upon the final invoice that was rendered. This is no basis in my view on which to demonstrate the fact of reliance upon an estimate such as to consider capping the defendant's costs by reference to any of the estimates that I have set out. I find that Mr Mansfield's evidence is also insufficient to demonstrate any reliance upon the estimates given.

147. Mr Williams challenged the entitlement of Mr Bacon to make submissions about the inadequacy of the claimants' evidence in the absence of any cross-examination of them. It seems to me that that objection is not well founded. Mr Bacon simply pointed to the absence of evidence in the witnesses' statements and it would not be for the defendant to ask questions which might augment the evidence that was otherwise absent.

148. Therefore, whilst I understand the claimants' concern that the estimated figures fall short of the sums ultimately billed, I find that the overall figure is not an unreasonable amount to pay in principle simply because it exceeds the prior estimates, based upon the test in MasterCigars, since no, or no sufficient, reliance was placed upon the estimates to justify limiting the costs as a result.

Next steps

149. Given the further hearing of this case in September, I have handed this decision down speedily and without taking into account counsel's availability. If there are consequential matters to be dealt with, I will hear the parties at the beginning of the detailed assessment hearing. The time for seeking any permission to appeal is extended until the first day of the detailed assessment hearing.