

JUDGMENT : HIS HONOUR JUDGE RICHARD HAVERY : 17th March 2005

1. The claimant is a firm of architects. The claim was a claim for outstanding fees in the sum of £53,424.36 for architectural services carried out by the claimant for the defendant ("Mr. Harold") at Mr. Harold's property at 54, Chester Square, London and at Montrose Place. In addition, there was a claim in respect of time spent in connection with the proceedings. Mr. Harold denied the claim (save for a small amount claimed in relation to Montrose Place) and counterclaimed for damages for professional negligence. The case was due to be heard on Monday, 7th March 2005 with an estimated hearing length of 5 days. Shortly before 7th March, the claim and counterclaim were settled on terms that required resolution by the court of some outstanding issues. Those terms were set out in a draft consent order. Under the settlement, the claims succeeded in relation to the whole of the fees claimed and the counterclaim was dismissed. The claim in respect of time remained for consideration.
2. Paragraph 6 of the draft consent order reads as follows:

6. *The following remaining issues shall be determined by the court at a hearing on 7th March 2005:*

 - (1) *Whether the claimant is entitled to be paid a reasonable sum in respect of its time spent in connection with such proceedings as pleaded in paragraph 15 of the Amended Particulars of Claim, and if so, what sum it is entitled to;*
 - (2) *Whether interest should be awarded at a rate higher than 8% and if so at what rate (whether contractual or under the CPR);*
 - (3) *Whether the costs of the claim and counterclaim should be assessed on the standard or indemnity basis (whether contractual or under the CPR);*
 - (4) *Whether the defendant should make a payment on account of costs.*
3. The proceedings were issued on 5th January 2004. Issue (1) that I have to decide was first raised by way of amendment on 7th May 2004. It arises out of a provision in the claimant's letter of appointment dated 3rd October 2001 to the following effect:

Our appointment would be as architect/lead consultant for design through practical completion stages E through K as defined by the RIBA SFA/99 which would define the terms and conditions not otherwise covered in correspondence.

SFA/99 provides by clause 9.6

The Client shall indemnify the Architect in respect of his legal and other costs in any action or proceedings, together with a reasonable sum in respect of his time spent in connection with such action or proceedings or any part thereof, if:

 - .1 the Architect obtains a judgement of the court or an Arbitrator's award in his favour for the recovery of fees and/or expenses under the Agreement; or*
 - .2 the Client fails to obtain a judgement of the court or an Arbitrator's award in the Client's favour for any claim or any part of any claim against the Architect.*

I have heard argument on the enforceability against Mr. Harold of clause 9.6 of SFA/99. I revert to that question below, but at this point it is unnecessary for me to consider it.
4. Mr. Alfred Munkenbeck was a founding partner of the claimant firm, and was the partner concerned with the work for Mr. Harold at Chester Square. He gave evidence before me as to the time that he had spent working on these proceedings. He produced a schedule which was a print-out of a computer spreadsheet. It consisted of two pages. Each line stated a date, gave brief particulars of an item, stated an integral number of half-hours (expressed as a number divisible by 0.5), and stated a cumulative total calculated at £100 an hour. At the end of the second page was a short list set out in a similar way with the figures calculated at £70 an hour for a member of the claimant's staff. The total amount claimed in the schedule was £15,950. The first entry in the schedule was dated 21st January 2003. There were four entries dated before June 2003. Mr. Munkenbeck said that he started preparing the table in June 2003. He entered the times in the schedule as the approximate times that he had spent working on the various items. He would enter 20 or 40 minutes as half an hour. Periods of 10 minutes he would ignore. He was able to estimate the times for the four entries before June 2003 by reference to contemporary documents. No time sheets or other documents were put before me in connection with this evidence of Mr. Munkenbeck.

5. I find Mr. Munkenbeck's evidence on this matter to be wholly unreliable. At best, it is guesswork. I am by no means satisfied that Mr. Munkenbeck started work on the schedule in June 2003. When he gave his evidence that he started in June 2003, he began by saying December, then immediately corrected himself. Such a slip of the tongue may be of no significance, but I mention it since it was later put to him in cross-examination that he had in fact started to prepare the schedule in December 2004. The reason for the question was an entry "23-Dec-04 prepare hours 3.0", apparently meaning that three hours had been spent preparing the document. Mr. Munkenbeck denied that that was so, or that that was the meaning of the entry. He accepted that it would take only a matter of seconds to print out the existing information in the computer. Whilst I am unable to determine what the entry in question meant, the proposition put to Mr. Munkenbeck I find more plausible than his denial. The absence of any claim in relation to the hours spent by Mr. Munkenbeck working on these proceedings until it was raised by way of amendment in May 2004 suggests that it was not in Mr. Munkenbeck's mind at the time when the proceedings were issued in January 2004. There is no obvious reason why he should have started preparing the list in June 2003. If it was not prepared until December 2004, then most of it was not prepared until long after the events it records.
6. I do not doubt that Mr. Munkenbeck spent time working on these proceedings. But I am unable to make any finding, even an approximate finding, as to the amount of time that he spent. Accordingly, this claim fails on its facts. In this context it is unnecessary to consider the further arguments put forward as to the enforceability of the term in question.
7. I shall consider next the contractual aspects of the next two issues, issues (2) and (3). As to issue (3), the question of costs is covered by clause 9.6 of SFA/99, which I have quoted above. As to issue (2), the question of interest is covered by clause 5.13 of SFA/99, as follows:

Any sums due and remaining unpaid at the expiry of 30 days after the date of issue of an account from the Architect shall bear interest. Interest shall be payable at 8% over Bank of England base rate current at the date of issue of the account.
8. It is common ground that at the time the contract was made, the claimant did not provide Mr. Harold with a copy of SFA/99 or draw his attention to clause 5.13 or clause 9.6. Those terms were not the subject of negotiation between the parties. I accept evidence of Mr. Harold that he was unaware of those terms at the time the contract was made.
9. Mr. Roberts relied on the following passage in Chitty on Contracts, 29th edition, paragraph 12-015:

Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term.....the party tendering the document must show that it has been brought fairly and reasonably to the other's attention.

It is clear from the context that the term is not binding if the party tendering the document fails to show that a particularly onerous or unusual term has been brought fairly and reasonably to the other's attention.
10. SFA/99 (RIBA Standard Form of Agreement for the Appointment of an Architect) consists of 21 pages, including the cover. The conditions of engagement, including clauses 5.13 and 9.6, occupy 5½ pages of small print. Even a commercial customer, having hypothetically received the claimant's letter of appointment, might well miss those two unusual and onerous clauses. But it is unnecessary for me to decide whether they constitute terms of the contract, and I shall assume that they do.
11. It is common ground that Mr. Harold entered into the contract as a consumer, and that the Unfair Terms in Consumer Contracts Regulations 1999 ("the Regulations") apply to it. The relevant regulations are these:
 5. (1) *A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
 - (2) *A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.*
 6. (1) *Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the*

contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or another contract on which it is dependent.

8. (1) *An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.*

12. Mr. Roberts submitted that clauses 9.6 and 5.13 were unfair in that they caused a significant imbalance in the parties' rights and obligations under the contract. There was no provision that in the event of litigation in which the client was successful the architect should pay the client his costs on an indemnity basis or pay the cost of time expended by the client in pursuing or defending such litigation. There was no provision for the payment by the architect to the client of interest at a rate of 8% over Bank of England base rate on any monies such as damages due to the client. Further, in relation to the rate of interest Mr. Roberts submitted that the provision constituted a penalty because it was not a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer on breach of the obligation to make payment.
13. Mr. Russell submitted that requiring an indemnity in relation to costs did not create a significant imbalance between the parties. On the contrary, if the court had to assess costs on the standard basis then there was a real risk that, applying a test of proportionality, an architect suing for his fees might have substantial irrecoverable costs. A client could use the threat of that unfairly to negotiate a discount. The provision ensured balance, not imbalance.
14. Mr. Russell relied on the following evidence of Mr. Munkenbeck. SFA/99 was prepared and issued by the Royal Institute of British Architects in consultation with client bodies and it is an industry standard for the terms of appointment of architects. Mr. Munkenbeck expressed the belief that the terms were reasonable and that they did not create any significant imbalance between the parties. On the contrary, he believed that they were necessary to protect an architect's position. His evidence on the latter point was directed to the provision in clause 9.6 providing for the payment of a reasonable sum in respect of the architect's time spent in connection with the proceedings. As indicated above, it is unnecessary for me to consider that aspect of the matter.
15. My conclusion on these points is this. The terms in question, 5.13 and 9.6, are unusual and onerous. They are unusual, in my judgment, notwithstanding that they form part of profession-wide standard terms. They were not drawn to the attention of Mr. Harold, who was unaware of them. There is force in the argument that clause 9.6 is there to protect the architect against unfair treatment by the client. The same may be said for the high interest rate. Those points are relevant to the question whether the requirement of good faith mentioned in regulation 5(1) has been satisfied. There is the further point that Mr. Harold was by no means without bargaining power. He negotiated a reduction in the claimant's fees from 10 per cent. to 9.5 per cent. of final cost. But there is an imbalance, as submitted by Mr. Roberts, and it runs to the detriment of the consumer. That imbalance is not required by the requirement to protect the position of the architect. I conclude that the terms in question are unfair in this case, and fall within regulation 5(1). By reason of regulation 8(1), they are not contractually enforceable.
16. Mr. Russell drew my attention to the Late Payment of Commercial Debts (Rate of Interest) (No. 3) Order 2002, SI 2002/1675. That order came into force on 7th August 2002 and was in force at the time of the claimant's letter of appointment. It provided that the rate of interest for the purposes of the Late Payment of Commercial Debts (Interest) Act 1998 should be 8 per cent per annum over the official dealing rate applicable on specified dates. The official dealing rate is the "Bank of England base rate" mentioned in clause 5.13 of SFA/99. In those circumstances, it cannot in my judgment be said that the provision for the payment of interest in clause 5.13 does not represent a genuine pre-estimate of the damage likely to be suffered by the claimant in the event of non-payment of sums due to it. Accordingly, I reject Mr. Roberts's argument that clause 5.13 constitutes a penalty.
17. I now consider the rate of interest that I should order in the exercise of my discretion. The claimant made a Part 36 offer which was not accepted. Interest was calculated in the particulars of claim at the rate of 12 per cent. per annum. The relevant paragraph was not pleaded to in the defence. Nevertheless, in my judgment, Mr. Harold must pay interest not at 12 per cent. but at 8 per cent. per annum on the outstanding fees calculated from the date they were due, 12th November 2002, until 12th

January 2005, the last date for acceptance of the part 36 offer. On the evidence, the VAT element of those fees has not yet been paid by the claimant, and it was submitted on behalf of Mr. Harold that the amount of that VAT should be deducted from the principal sum on which the interest is calculated. I reject that submission. By paragraph 3 of the draft consent order, it is ordered that the claimant is entitled to interest on the sums amounting to £53,424.36 (i.e., the fees including VAT), subject to the determination of issue (2). Mr. Harold cannot go back on that agreement.

18. By its Part 36 offer dated 22nd December 2004, the claimant offered to accept the sum of £50,000 (inclusive of interest) "plus its costs in preparing the claim and legal costs", in full settlement of the claim and counterclaim. Mr. Roberts submitted that the offer was not clear, since the costs of preparation were not specified. The letter stated
- The costs incurred by our client in preparing the fee claim in accordance with SFA/99 amount to £11,200 (excluding VAT).*

It is not clear to me why reference was made to VAT. No clarification of the offer was sought. The submission was amplified in a letter sent to me after the hearing by the solicitors acting for Mr. Harold. The solicitors acting for the claimant, in reply to that letter, submitted that the offer was clear and did not state that any sum was to be added to the £11,200. Moreover, VAT was not payable on that amount in any event. The argument of Mr. Harold's solicitors was an afterthought, not in accordance with their contemporaneous understanding of the offer or with their understanding of it when they instructed counsel.

19. I do not accept that the offer was clear. Acceptance of it could have led to an argument whether an extra 17½ per cent. fell to be added to the figure of £11,200. I am not suggesting that this claimant would have put forward such an argument. But it would not be reasonable to expect a defendant to settle one lawsuit at the risk of being landed with another. It is true, however, that Mr. Harold could have asked for clarification of the offer.
20. If the offer is to be construed as an offer to accept £61,200 plus VAT at 17½ per cent. on the element of £11,200, the offer amounts to an offer to accept £63,160 plus legal costs. Liability to pay the legal costs is the consequence of acceptance of the offer as provided by CPR 36.14. Interest at 8 per cent. calculated up to the date of the offer in accordance with paragraph 17 above amounts to £9016.27. Calculated up to 12th January 2005, the interest amounts to £9262.17. Thus the total amount, apart from costs and interest accruing after 12th January 2005, for which judgment is to be entered is £62,686.53. Thus on this hypothesis the judgment against Mr. Harold will not be more advantageous to the claimant than the proposals contained in its Part 36 offer. It follows that on this hypothesis no question arises of my ordering a higher rate of interest following upon non-acceptance of the Part 36 offer, and the rate of interest at 8 per cent. will continue from 12th January 2005.
21. If the offer is not to be construed as involving the addition of VAT to the costs of £11,200, then the judgment to be entered against Mr. Harold will be more advantageous to the claimant than the proposals contained in the offer. Nevertheless, in my judgment it would not be just to order payment of a higher rate of interest given the ambiguity of the offer, even though Mr. Harold could have asked for clarification of it.
22. I have to decide whether in the exercise of my discretion I should order the costs of the claim and counterclaim on the standard or the indemnity basis. It is agreed that those costs should be paid by Mr. Harold. By reason of the settlement of the claim, Mr. Harold is liable to pay the claimant's outstanding fees. He has nevertheless succeeded in part in his defence. Mr. Harold has, in the event, not sought to justify any of the allegations of negligence that he made against the claimant. As recently as 28th January 2005 I permitted Mr. Harold to serve a re-re-re-amended defence and counterclaim, and on his application I permitted the parties to adduce limited expert evidence of quantity surveyors. Mr. Russell submitted that in the light of the expert evidence obtained by Mr. Harold, Mr. Harold had found himself unable to justify any of the claims he had made against the claimant. He had, submitted Mr. Russell, conducted this litigation irresponsibly and thereby imposed unreasonable burdens on the claimant. He should pay the claimant's costs of at least the counterclaim on the indemnity basis.

23. Mr. Roberts submitted that the reason why Mr. Harold had settled the case at the last minute was because he could not afford his costs of a hearing estimated to last five days and involving expert witnesses. There is no direct evidence before me of Mr. Harold's means. However, there is evidence that his property in question will support a loan of £5 million. Mr. Russell drew my attention to paragraph 31 of the re-re-re-amended defence and counterclaim which claimed that Mr. Harold would carry through a revised project (which would cost a sum of the order of £1 million or more).
24. I am not satisfied that Mr. Harold settled this case by reason of impecuniosity. Nor am I satisfied that he settled the case because his expert quantity surveyor was unable to support it. I am not satisfied that he conducted this litigation irresponsibly.
25. Mr. Russell submitted that in the absence of misconduct on the part of Mr. Harold I could still, and should, make an order for indemnity costs against him. Mr. Russell relied on a passage in paragraph 31 of the judgment of Lord Woolf, C.J. in *Excelsior Commercial and Industrial Holdings Limited v. Salisbury Hammer Aspden & Johnson and another* [2002] EWCA Civ 879. Lord Woolf said:
An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.
Mr. Russell submitted that the claimant was justified in defending its professional reputation, even though the costs of doing so might be out of proportion to the amount of fees claimed or to the amount of the counterclaim. I accept that the value to the claimant of its professional reputation is likely to be far greater than the costs of defending it. Mr. Russell submitted that this was a case where the claimant could not have been expected (or at any rate required) to conduct the litigation in a proportionate manner. This case justified an order for costs to be assessed on the indemnity basis since the standard basis would not properly compensate the claimant.
26. I reject Mr. Russell's argument. It seems to me that it could apply to any failed claim made on the basis of professional negligence. It is clear from CPR 1.1(2)(c) that the concept of proportionality involves not only the amount of money involved, but also the importance of the case and the complexity of the issues. In my judgment the proper order for costs to be made against Mr. Harold in the case both of the claim and of the counterclaim is an order for costs to be assessed on the standard basis.
27. The fourth issue that I have to determine is whether Mr. Harold should make a payment to the claimant on account of costs. Normally, such an order would be made. But in this case the claimant's costs of the claim are subject to a conditional fee "CFA Lite" agreement, dated 19th January 2004. Mr. Roberts submitted that that agreement fell within the more demanding "CFA heavy" regime and in consequence was made in breach of the Conditional Fee Agreements Regulations 2000, SI 2000 No. 692 (CFAR 2000). It failed, he submitted, by reason of regulation 4 of CFAR 2000.
28. The agreement contained a clause, clause 4, providing that the client was directly liable to pay third party costs plus VAT, and that any instructions given by the solicitors or payments made by the solicitors to third party suppliers would be given or made as agent on behalf of the client. Seven items of third party costs were listed, including barristers' fees, court fees, experts' fees, witness fees and the premium of any after the event insurance purchased by the client. The agreement provided by clause 5 that if favourable judgment was secured, the third party costs might be recoverable by the client from the opponent, but would remain the client's primary liability to pay in any event.
29. Regulation 4 of CFAR 2000 does not apply to a conditional fee agreement to which Regulation 3A applies. Regulation 3A of CFAR 2000 provides, so far as material, as follows:

This regulation applies to a conditional fee agreement under which.....the client is liable to pay his legal representative's fees and expenses only to the extent that sums are recovered in respect of the relevant proceedings, whether by way of costs or otherwise.

Mr. Roberts submitted that the agreement did not fall within regulation 3A since the client was liable, regardless of recovery, to pay expenses constituting the third party costs listed in the agreement. Mr. Russell submitted that those expenses were not the legal representative's expenses, and thus did not fall within regulation 3A. I thus have to consider two questions: first, whether the word "expenses" is governed by the words "legal representative's"; and second, whether, even if so, the expenses in question are legal representative's expenses. As to the first question, I am of the opinion that the word "expenses" is governed by the words "legal representative's", on the plain meaning of the language. That view is reinforced by the following two other passages in CFAR 2000, where the expenses referred to are unambiguously those of the legal representative:

2. —(1) *A conditional fee agreement must specify—.....*

(b) the circumstances in which the legal representative's fees and expenses, or part of them, are payable,.....

and

3—(1) *A conditional fee agreement which provides for a success fee—.....*

(b) must specify how much of the percentage increase, if any, relates to the cost to the legal representative of the postponement of the payment of his fees and expenses.

As to the second question, Mr. Roberts submitted that expenses included third party costs. Whilst CFAR 2000 did not provide a definition of expenses, he submitted that expenses meant the same as disbursements as defined in rule 2(2)(k) of the Solicitors' Accounts Rules 1998, i.e. any sum spent or to be spent by a solicitor on behalf of the client. It is arguable that sums, if any, paid by the solicitor to third party suppliers, even "as agent" for the client in accordance with the terms of the conditional fee agreement, are disbursements and are expenses of the solicitor. If so, the agreement does not fall within regulation 3A. But I decline to decide whether the agreement falls within that regulation. Mr. Russell and, I think, Mr. Roberts envisaged full argument on the question before the costs judge.

30. It was also submitted on behalf of Mr. Harold by letter, after the hearing, that one copy of the agreement that had been disclosed was not signed by the claimant and that another copy, though signed by the claimant, was not dated. My attention was drawn to regulation 5(1), which provides that a conditional fee agreement must be signed by the client and the legal representative. One copy was signed by both parties, so there is nothing in this point.
31. In deciding whether an interim payment of costs should be ordered, and if so how much, I have to consider the probabilities. It is arguable that the conditional fee agreement is invalid. The total amount of the claimant's costs of the claim and the counterclaim that have been put before me is £193,921.10. That amount depends on the apportionment between the claim and the counterclaim, since a success fee of 43 per cent. is based on the costs of the claim only. Mr. Roberts submitted that the rate of 43 per cent. might be held on assessment to be too high, for example if it was based on an unduly pessimistic estimate of the chances of success. And he said that he did not accept what he described as the high after the event insurance premium of £53,590.50. I express no view on either of those figures. But I accept that there is more uncertainty in these figures, so far as the liability of Mr. Harold is concerned, than there would be in the absence of the claimant's funding arrangement. There is a further point that on 12th February 2004, two days after service of Mr. Harold's first, and home-made, defence and counterclaim, the claimant's future costs allowing for a two-day (not a five-day) trial, were estimated at about £40,000. In the event, the costs from the issue of the counterclaim on 10th February 2004 up to, but not including, the expected five-day trial are stated as about £186,000. Whilst I can make no comment on the justification of that increase, it does require me to be cautious in deciding whether to order an interim payment, and if so how much. I order that Mr. Harold make an interim payment of costs in the sum of £60,000.
32. The question remains as to the costs of the hearing of these issues. Paragraphs 1, 2 and 4 of the draft consent order provide for judgment for the claimant for the fees and dismissal of the counterclaim.

Paragraph 3 provides that the claimant is entitled to interest on the fees at 8 per cent., subject to determination by the court of issue (2). Mr. Russell submitted that the costs of hearing these issues (set out in paragraph 6 of the draft consent order) are part of the costs of the claim and counterclaim, which by paragraph 5 of the draft consent order have been agreed to be paid by Mr. Harold. No separate provision is made for the costs of determining the remaining issues. The estimated length of the hearing of those issues was half a day. In the event, that length was substantially exceeded. Mr. Roberts pointed out that much of the time was spent in cross-examining Mr. Munkenbeck on a witness statement that he had produced "at the last minute" without any supporting documents in order to support his claim for time spent in connection with the proceedings. Especially given that I have found Mr. Munkenbeck's evidence on this point to be wholly unreliable, it would be unreasonable, Mr. Roberts submitted, for Mr. Harold to have to pay the costs incurred on that issue.

33. In the ordinary course, if a claim is not settled, the judge may give judgment for the claimant with costs. That does not affect interlocutory orders for costs, nor does it prevent the judge from making a different order for costs in relation to an application arising out of his judgment. In my judgment, the draft consent order is to be construed in the same way. It is true that the "remaining issues" mentioned in paragraph 6 relate to the claim and counterclaim, and indeed issue (1) relates to part of the principal sum claimed. But those issues are outwith the settlement. The draft consent order does not clearly show any intention that the costs of determining the issues not settled should be covered by paragraph 5. In my judgment, the costs of determining those issues are not provided for by the draft consent order on its true construction. I hold them to be within my discretion. The only issue on which Mr. Harold has not entirely succeeded is issue (4), whether he should make a payment on account of costs. The claimant must pay 90 per cent. of Mr. Harold's costs of determining the issues in paragraph 6 of the draft consent order, to be assessed on the standard basis if not agreed.

John Russell (instructed by Reynolds Porter Chamberlain) for the Claimant

Richard Roberts (instructed by Blake Laphorn Linnell) for the Defendant