Case No: 3YQ14606

IN THE COUNTY COURT

SITTING AT THE CARDIFF CIVIL JUSTICE CENTRE
On appeal from District Judge Marshall Phillips

Date: 15/09/2016

Before:

HIS HON JUDGE CURRAN QC

- -

Between :

DREW MALONE	**Claimant (Appellant)**
- and –	
BIRMINGHAM COMMUNITY NHS TRUST	**Defendant (Respondent)**

- -
- -

Benjamin Williams QC (instructed by **New Law**) for the **Claimant (Appellant)**
Richard Booth QC (instructed by **Acumension Ltd**) for the **Defendant** (**Respondent)**

Hearing date: 15 September 2016

- -

ADDENDUM TO JUDGMENT
FOLLOWING FURTHER ARGUMENT

HANDED DOWN ON 7 OCTOBER 2016

Judge Curran QC:

1. I gave judgment in this case in September 2015, dismissing the appeal in respect of all three grounds upon which it had been brought. Upon receipt of the draft judgment, with the invitation to correct any errors which counsel might consider the draft contained, leading counsel for the Claimant, Mr Benjamin Williams QC attempted to draw to my attention a point which he considered to amount to a factual misapprehension in respect of the third ground. Regrettably, the judgment was handed down before I became aware of Mr Williams's point. Subsequently Mr Williams invited me to consider hearing further argument, with a view to a possible variation of my ruling in accordance with CPR Part 3.1.7. I agreed to do so on a date convenient to both parties. It seems that it was not possible to arrange any earlier date for the subsequent hearing.

2. The case cannot properly be understood without reference to the full judgment, dated 14th of September 2015, but, for ease of reference, I shall give a very brief summary of the issues involved in the case, and then set out the full terms of the third ground, and of the defendant Trust's response to it.

3. The appeal was from a decision of the Regional Costs Judge for Wales, District Judge Marshall Phillips, who ruled on a detailed assessment that the Claimant might not recover his solicitor's costs or disbursements in respect of an unsuccessful claim against the defendant Trust. The district judge had held that the claim had not been covered by the Claimant's conditional fee agreement ("CFA") with his solicitors, and that that agreement was the only retainer which had subsisted between them.

Background

4. The Claimant had sought to bring a claim for damages for clinical negligence in respect of medical treatment received by him whilst a prisoner at HM Prison, Birmingham. From the beginning it seems that there was some uncertainty as to who should be named as the appropriate defendant. After some initial consideration of his case,

the solicitors, NewLaw, had a meeting with the Claimant and signed a CFA under which he authorised the solicitors to act for him in respect of a claim against "Home Office" (*sic*). A central issue before the costs judge was whether or not that CFA covered a claim against the defendant Trust. The judge found that it did not.

The basis of the appeal

5. Counsel for the Claimant contended that the learned costs judge was wrong in finding that the CFA did not cover the claim against the defendant NHS Trust, and that the judge had misconstrued it. Alternatively, it was submitted that the claim against the defendant was subject to a conventional retainer, outside the CFA, under which costs were recoverable. In the further alternative, the Claimant submitted that the judge was wrong to conclude that he could not recover the disbursements made by his solicitors to third parties.

6. The relevant provisions of the CFA are set out at paragraph 14 of the judgment of 14th of September 2015.

7. In the judgment I summarised the Claimant's third ground as follows:

> "Despite the express terms of the CFA, it was submitted that the standard terms of business governed payment of disbursements, and while the solicitors deferred repayment until the end of the case, the Claimant had an unconditional liability to pay them. In any event, when disbursing funds for their clients, solicitors are discharging liabilities to third parties as the agent of their client. Irrespective of any contractual right to reimbursement under their retainer, solicitors are therefore entitled to be indemnified against reasonable disbursements on conventional principles relating to agents. Hence, even if the district judge was correct to find that the Claimant's solicitors had acted without any contractual right to payment for their time, he was wrong to conclude that they had no right to payment for their disbursements either."

8. The case advanced by the defendant Trust against the third ground was summarised in the judgment as follows:

> "The Trust's case was advanced by Mr Booth QC in detail in both written submissions and in oral argument at the hearing. It may however be summarised in very brief terms as follows.

(1) The Trust is self-evidently not the Home Office. Nor is it the Ministry of Justice. The CFA cannot possibly be construed to apply to the claim against it.

(2) The CFA was the retainer between the Claimant and NewLaw. There was no alternative retainer in place.

(3) It therefore follows that under the CFA the Claimant's liability to pay disbursements to his solicitors was identical to his liability to pay other charges: if the Claimant was not liable for the latter, he could not be liable for the former."

9. The ruling I made upon the point is to be found at paragraphs 65 to 68.

"Ground 3

"65. On the final ground, in my view the logical soundness of the judge's reasoning is self-evident. If, as he found, the CFA was the retainer between the Claimant and NewLaw, and, as he found, there was no other retainer, the CFA had an express provision dealing with disbursements:

> "*If you win your claim, you pay our basic charges, our disbursements and success fee. You are are entitled to seek recovery from your opponent of part or all of our basic charges, our disbursements, a success fee and insurance premium…"*

That was the agreement between the Claimant and NewLaw as to disbursements. No other terms or conditions in the CFA provide for disbursements to be treated differently, nor is there any provision to cater for the state of affairs between the parties which the judge found to be the legal and factual reality.

66. Complaint was made that the judge failed to "follow through the consequences of his own findings" in that once he had held that the CFA only permitted action against the Home Office or its successor, he overlooked the basis for such agreement as (it was submitted) had been made between the Claimant and

NewLaw to sue the Trust. That, the argument went, could only have been under a separate retainer.

67. In my view the judge did not overlook this point at all. He found that the Claimant's signing of the claim form did not vary the terms of the CFA. He had also found that the CFA, for reasons with which I agree, was the only retainer between him and NewLaw. The reality may well be that both the Claimant and NewLaw regarded the CFA, mistakenly, as covering the work in preparing a case against the Trust (insofar as either of them may have given it any conscious thought ….) Whether that is to be regarded as a mutual mistake, or a mistake by one induced by the other, is neither here nor there. In such circumstances there was no formation of any new contract to sue the Trust or to act as the Claimant's agents in making disbursements. I agree with Mr Williams that the solicitors were not consciously acting on a frolic of their own. Nor were they consciously acting *pro bono publico*. They were acting under the mistaken belief that the work was covered by the CFA, when it was not.

If that resulted … in either the Claimant or NewLaw being left "high and dry" whether as a result of work being done or money expended which could not be recovered at the detailed assessment, it was the result of their not having amended the CFA or not having entered into a new retainer. In fairness, the Claimant could hardly have been expected to have taken the initiative in such circumstances,…."

"*Misapprehension of fact*"

10. Mr Williams's further submission appears to address that part of the judgment in which I said that,

> "[n]o other terms or conditions in the CFA provide for disbursements to be treated differently…."

The way in which he puts it is that is that in reaching this conclusion the court proceeded on an "assumption" that disbursements were subject to the CFA and were subject to the same payment terms as the solicitors' own charges. It was upon this point that the court was under a misapprehension, he submitted. Disbursements were not subject to conditional payment terms under the CFA. Disbursements were payable, "win or lose."

This might be shown by the standard Law Society Conditions, to which (as he put it) "the CFA was subject." Once that misapprehension was corrected, and it was accepted that liability for disbursements was not excluded, Mr Williams submitted that the court should allow the appeal on ground 3, and rule that disbursements are recoverable, notwithstanding the dismissal of the other grounds of appeal.

11. During today's hearing it became clear that the main point was one which perhaps should have been made more clearly at the original hearing concerning a document prepared by the Law Society, to which reference was made in the CFA, and its effect upon the contractual position in respect of disbursements. Be that as it may, Mr Williams developed his argument under three heads.

12. First, "the appellant's primary case" was that, on analysis, disbursements were not subject to the CFA at all. There was no element of "conditionality" to their payment. Whatever the outcome of the case, they were payable. There had been no variation of the "original terms of business of NewLaw" in respect of disbursements. There should be no difficulty in recovering them, insofar as they were reasonable.

13. Alternatively, Mr Williams advanced an argument under a second head as a "secondary case" as follows. Even if the disbursements were *prima facie* within the CFA, the appellant had agreed that they were always payable win or lose. This was clear from the preamble to the CFA, which made reference to a document which "*must be read in conjunction*" with the CFA entitled "*Conditional Fee Agreements: what you need to know.*" It was said to be a document which had been produced by the Law Society, and for ease of reference I shall henceforth call this document "the LSD." The LSD contained a reference to the possibility that the solicitors *might* require the client (the nominal appellant) to pay their disbursements in the event that the claim was unsuccessful. Thus the appellant might properly be taken to have assumed an unconditional payment obligation for the disbursements made by his solicitor, even if they were outside the scope of his formal retainer.

14. Mr Williams also submitted that there was a third way of looking at the matter, which he described as putting "the same point in another way in respect of disbursements" and that was that the solicitors were entitled to remuneration for their disbursements upon the basis of a *quantum meruit* of the kind explained by Lord

Atkin in the decision of the House of Lords in the case of *Way v Latilla* [1937] 3 All ER 759, at 763:

> "… but, while there is, therefore, no concluded contract as to the remuneration, it is plain that there existed between the parties a contract of employment under which Mr Way was engaged to do work for Mr Latilla in circumstances which clearly indicated that the work was not to be gratuitous. Mr Way is therefore entitled to a reasonable remuneration on the implied contract to play in *quantum meruit*."

15. Mr Booth QC, in reply, first questioned whether under the terms of CPR 3.1 (7) the Claimant's further submissions justified variation or revocation of the order of the court. He drew my attention to the case of *Tibbles v. SIG plc (trading as Asphaltic Roofing Supplies)* [2012] EWCA Civ 518, in which the Court of Appeal said that the discretion under rule CPR Part 3.1 (7) should normally be exercised only in the following circumstances:

    (1) where there had been a material change of circumstances since the order had been made; or
    (2) where the facts on which the original decision had been made and been, innocently or otherwise, misstated; or
    (3) where there had been a manifest mistake on the part of the judge in the formulation of his order.

    None of those circumstances, Mr Booth submitted, applied in the instant case. It was not contended that either (1) or (3) applied. Thus the case was being put upon the basis of point (2) and the matter characterised by Mr Williams as a "factual misapprehension." There was in reality, counsel submitted, no factual misapprehension or incorrect assumption of fact. There was instead express approval of the cost judge's finding of fact that there was an express provision dealing with disbursements which made them recoverable only by NewLaw from their client in the event that the claim was successful. No other terms or conditions in the CFA provided for disbursements to be treated differently, nor was there any provision to cater for the state of affairs between the parties which the judge had found to be the legal and factual reality: see paragraphs 65 to 67 of the judgment.

16. Mr Booth submitted that, in this context, before giving consideration to the Claimant's further submissions I should take account of two particular points.

(1) A clear concession had been made by the advocate then appearing for the Claimant before the costs judge at the detailed assessment of costs that disbursements were not recoverable. The transcript of the proceedings before the costs judge, whilst incomplete in some respects, contains the following passage at page 39 of the appeal bundle.

> Mr SWALLOW ["Costs Lawyer" for the Claimant]
>
> *"…. We have already established and [counsel for the defendant] accepted and this was a concession I made, disbursements that NewLaw paid, unless they have [already] been paid by Mr Malone, they fail.*
>
> THE DISTRICT JUDGE
> *"Yes."*

In the light of that concession, Mr Booth submitted that it might have been open to Mr Williams QC at the original appeal hearing to have raised the point in a submission that that had been a mistaken concession for Mr Swallow to have made, on the ground that it was arguably wrong in law. Mr Booth contended that whilst at the stage of the original appeal hearing it might have been appropriate for Mr Williams to have argued that it was open to permissible recantation on behalf of the Claimant, it was quite inappropriate for him to attempt to do so now by way of submissions made under CPR part 3.1 (7).

(2) The Claimant's solicitors were themselves the authors of their own misfortune: they themselves chose to use the blank form for completion of the CFA and were therefore responsible for what Mr Booth described as the very confusing terminology to be found in the combination of the CFA and the LSD.

17. Mr Williams countered by submitting that Mr Booth's own reference to the LSD involved an acceptance that there was at least arguably a factual misapprehension which remained uncorrected at the original appeal hearing.

The terminology of the CFA and of the LSD

18. The provisions of the CFA include, under the heading,

"*[p]aying us*"

very detailed observations preceded by the words,

"*[i]f you win….*"

However, after the words,

"*[i]f you lose …*"

the only liability in costs is stated as follows:

"*you remain liable for <u>the other side's</u> costs.*" (Emphasis added.)

The first part of the LSD, by contrast, under the heading,

"*[w]hat do I pay if I lose?*"

contains the following statement as to liability in costs:

> "*[i]f you lose, you pay your opponent's charges and disbursements. You may be able to take out an insurance policy against this risk. If you lose, you do not pay our charges but <u>we may</u> require you to pay our disbursements.*" (Emphasis added.)

No explanation is given in the document of the circumstances in which the solicitors "may" require the client to pay their disbursements, nor of the circumstances in which they may not require the client to pay their disbursements. Mr Williams sought to explain that omission by observing that in most circumstances such disbursements would be the subject of insurance, and it would only be in circumstances where there were no insurance to cover disbursements that the solicitors would be likely to turn to the client for payment. That explanation does not appear in the document.

19. Mr Booth QC also referred to other parts of the LSD as compounding the confusion as to the contractual position in respect of disbursements. The CFA did not expressly incorporate the terms of the LSD as being terms and conditions of the CFA. The words,

> "*[t]his agreement must be read in conjunction with the enclosed document [the LSD]…"*

were consistent with its being essentially an explanatory note, at least up to the point where, in a section headed *Law Society Conditions*, the following words appear.

> "*The Law Society Conditions <u>below</u> are part of this agreement. Any amendments or additions to them will apply to you. You should read the conditions carefully and ask us about anything you find unclear.*" (Emphasis added.)

Those conditions include details of matters under the heading,

> "*[d]ealing with costs if you win …"*

But, remarkably, there is no corresponding section setting out any observations under a heading dealing with costs

> "*… if you lose.*"

20. Mr Booth QC pointed out that in respect of barristers' fees very clear conditions were set out both in respect of counsel who had conditional fee agreements with the solicitors and counsel who did not have conditional fee agreements. In either case the provisions were made entirely clear if the client won the case and if the client lost the case. But if counsel had a conditional fee agreement with the solicitors,

> "*If you lose, you pay the barrister nothing*."

Conversely, if counsel was instructed with whom the solicitors did not have a conditional fee agreement,

> "*If you lose, then you must pay [counsel's] fee.*"

It is also to be noted that specific provisions were included in the LSD under the *Law Society's Conditions* as to payment of disbursements if the client ended the agreement:

> *"… we <u>then</u> have the right to decide whether you must pay… our disbursements…";* (emphasis added)

and, similarly, in the event that the solicitors brought the agreement to an end, they "*then*" had the right to decide whether the client must pay charges including disbursements.

21. In the light of those matters Mr Booth submitted that the combination of documents made the provisions as to payment of disbursements so uncertain, in circumstances such as those relevant to the present case, as to render them unenforceable even if the intention of the author of the document had been that contended for by Mr Williams.

The concession made before the Costs Judge

22. I agree with Mr Booth that the learned costs judge cannot possibly be criticised for his decision that the Claimant's solicitors were not entitled to claim disbursements from the client when, at the detailed assessment, their representative expressly conceded that they were not entitled to claim any disbursements which had not already been paid by the client.

23. On the other hand, if Mr Williams is correct in his submission that as a matter of law, on the proper construction of the contract, disbursements *were* payable by the client, it might be thought unjust for a concession made by a costs lawyer on a point which involved substantive law to be an impenetrable obstacle to any appeal. In view of the fact that I have now heard detailed argument on the point, it does not seem to me to be appropriate to refuse to entertain the further submissions.

Whether the appellant should be entitled to raise fresh arguments under CPR Part 3.1(7)

24. On the second objection taken by Mr Booth, as to whether such confusion over the terms of the CFA was the fault of the Claimant's solicitors, Mr Williams's point was that, be that as it may, at the original hearing of the appeal no analysis had been undertaken of its terms upon the issue of whether disbursements were *not* subject to the CFA at all, and that, whatever the outcome of the case, they were payable. In that context he made reference to the original terms of business signed by the Claimant, and to be found at pages 15 to 23 of the appeal bundle. His alternative points were:

(a) that even if the disbursements were within the CFA, a conventional retainer for disbursements could be implied outside its scope because the Claimant had agreed that disbursements were always payable 'win or lose';

and

(b) that disbursements might be payable upon a *quantum meruit* basis also involved a more detailed analysis of the CFA and other documents than had been undertaken at the original hearing.

25. It might be difficult for an objective observer not to agree with Mr Booth's submission that it was always open to counsel for the Claimant to undertake such an analysis at the original hearing, and that these submissions amounted to an attempt to have a second bite at the cherry. However, it seems to me to be more in accordance with the overriding objective, given that the matter has now been the subject of further argument, to deal with the points raised by the Claimant.

The original terms of business

26. In the judgment I dealt with this aspect of the matter as follows.

"*NewLaw's standard terms of business*

12. Counsel drew attention to NewLaw's standard terms of business, signed by the Claimant, which provided for a conventional solicitor's retainer whereby the solicitors would be paid "win or lose." However, they indicated that a CFA retainer might be made available to clients "in suitable cases." The standard terms of business provided that the client would always be liable to pay NewLaw's disbursements, with payment deferred until the case was closed.

13. In this case, however, NewLaw did offer the Claimant a CFA, and he accepted that offer, and he signed the CFA. It was in the standard terms of the Law Society model agreement for personal injury cases."

Later, at paragraphs 61ff I said:

"61. In my view the judge's reasoning on this ground is unassailable. He held that the retainer between the Claimant and NewLaw was the CFA alone, and that there could not be an additional retainer in place. On such evidence as was

before the judge, the Claimant had signed the standard terms and conditions document at the same time as he had signed the CFA. The terms of the former made it clear that it was an alternative to the latter: the 'no win, no fee' provisions of the CFA were logically in conflict with the standard terms. Whilst NewLaw's *standard terms* of business provided for a conventional solicitor's retainer, 'win or lose' they had stated that a CFA retainer might be made available to clients 'in suitable cases.' In this case, NewLaw did offer the Claimant a CFA, and he accepted that offer. The CFA therefore was the retainer. In other words, the standard terms on the one hand, and the terms of the CFA on the other, were such as to make the same mutually exclusive. Not only was this clear from the reference, in general, in the standard terms that '*in suitable cases*' they would offer a CFA: in this case they did offer a CFA, in particular, as an exception to the general rule. That CFA was governed solely by its own terms and not by those of the standard terms. (Emphasis added.)

62. It does not seem to me that the fact that the Claimant signed the claim form against the defendant Trust is of any significance, in the absence, at the very least, of any evidence that the fact that taking action against the Trust was outside the scope of the CFA was specifically drawn to his attention before he did so. Not only is there is no such evidence, but the probability is that neither he nor the solicitor or other representative of NewLaw who dealt with him at that moment gave the distinction a moment's thought: it is NewLaw's primary case, after all, that the CFA did indeed cover action against the Trust.

63. Moreover, as Judge Cotter said of the Appellant in *Brookes, vis-à-vis* her solicitors,

> "35. … the Appellant is unlikely to have turned her mind to whether the ongoing work was covered under the original CFA relating to Exeter City Council. In all probability she simply thought that she had signed a '*no win no fee*' agreement and that all issues of costs were being dealt with by her solicitor, who was after all the professional in this relationship providing legal services to [someone who] must be assumed absent any other evidence to … [have] no knowledge of costs law and practice."

64. In the circumstances, I agree with District Judge Phillips that in all the circumstances of this case the fact that the Claimant put his signature to the claim form against the Trust cannot amount either to a new retainer or to a valid variation of the CFA."

The further submissions – the primary case

27. Mr Williams attempted to argue today that, in respect of disbursements, there had been no variation of those original terms of business. In my judgment that submission is not well founded. The original terms of business, although signed by the client, constituted the basis of an agreement for a retainer in circumstances where no alternative to the normal form of retainer might be agreed. In other words, absent a CFA, those terms governed liability for payment for both professional fees or charges, and disbursements. The express terms included the words,

> "*If you do not have an appropriate legal expenses insurance policy, we may be able to agree with you an alternative charging arrangement, such as a conditional fee agreement (CFA - No win - No fee.) This may need to be linked with an 'After The Event Legal Expense Insurance policy (ATE). We will discuss this with you separately once we have considered your statement of evidence and established whether you have any other form of insurance. .... For the avoidance of doubt, our charges are payable whether or not the matter proceeds to completion, unless we agree in writing to the contrary.*" (Emphasis added.)

28. As I said in the original judgment, the undoubted fact is that the Claimant and his solicitors did agree an alternative charging arrangement, namely the CFA. As that was an alternative charging arrangement, it was an alternative contract, and the full terms of that contract can only be found within the CFA itself. In my judgment it is not possible to regard the original terms of business as subsisting, to govern any of the terms of the CFA, once the CFA had been agreed.

The 'secondary case'

29. The first limb of this argument is that, even if the CFA governed liability for disbursements, there was "*... no difficulty in implying a conventional retainer for disbursements made in service of the claim which were outside the scope of the CFA.*"

Whilst the court had rejected any such retainer in the context of the solicitors' own professional charges on the ground that the appellant would have assumed that those charges were subject to the CFA payment terms, there would have been no equivalent assumption in respect of disbursements *"because the appellant had agreed that they were always payable win or lose."* Upon that basis, counsel submitted, the Claimant might properly be taken to have assumed an unconditional payment obligation the disbursements made by his solicitor, even if they were outside the scope of the formal retainer.

30. In my judgment this submission is simply not tenable upon the basis of the documents themselves. The Claimant had not agreed that disbursements were always payable, win or lose, if the CFA was the sole contract of retainer. The terms of the CFA do not permit any additional implied conventional retainer for disbursements inconsistent with it. The provisions of the CFA provided for liability for disbursements if the Claimant won. In such circumstances the contemplation was that all fees would be recovered from the unsuccessful party. The crucial part of the agreement material to the present case is to be found in the words "*if you lose, you remain liable for the other side's costs.*"

The impact of the LSD

31. Mr Williams's resourceful attempt to incorporate the reference in the first part of the LSD document (*"What do I pay if I lose? …. If you lose, you do not pay our charges but we may require you to pay disbursements"*) into the Law Society conditions set out in the second part of the ("*The Law Society conditions <u>below</u> are part of this agreement"*) cannot, in my view, succeed. In the first place, the requirement to pay disbursements if the Claimant loses is not set out in the conditions "*below*." In the second place there are express provisions dealing with "*costs if you win*" but there are no provisions whatever dealing with costs "*if you lose*." Thirdly, express provision is made for the payment of counsel's fees if the Claimant were to lose in circumstances where a conditional fee agreement subsists between solicitors and counsel or in circumstances where there is no such agreement. The absence of any specific provision for payment of solicitors' disbursements in such circumstances weighs against an objective interpretation of the combination of the CFA and the LSD as conveying the meaning that the Claimant and his solicitors can be seen to have shared the meaning that disbursements were payable, win or lose: see, *e.g., Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912H. Fourthly, the provisions are

both confused and confusing, and the consequent uncertainty makes it impossible for the appellant's contention to be sustained.

32. The *quantum meruit* point does not seem to me to take the case of the Claimant any further. In the case of *Way v Latilla* (*supra*) upon which reliance was placed, the facts were very different. In that case a string of communications between the parties, by cable and otherwise, over a significant period of time were found not to be capable of constituting a concluded contract as to remuneration. However, it was clear, the House of Lords held, that there existed between the parties a contract of employment under which the plaintiff was engaged to do work for the defendant. The circumstances clearly indicated that that work was not to be gratuitous. There was no alternative no-cost option of the kind envisaged by a "no-win, no-fee" agreement. In the instant case the costs judge held that a concluded contract *did* exist between the parties, namely the CFA. It provided for remuneration of the solicitors, but only in certain defined circumstances. It also provided for no remuneration to be paid in other circumstances. Upon its true construction, however, he found, in my view correctly, that if the Claimant were unsuccessful it did not cover disbursements made by the solicitors: it could not be said that the circumstances "clearly indicated" (to borrow a phrase from *Way v Latilla*) that the Claimant was obliged to bear the cost of the disbursements.

Conclusion

33. Conditional fee agreements are part of business reality in modern times both for solicitors and their lay clients. One aspect of such business reality is that, absent a clear and express understanding to the contrary, the lay client is likely to think that, having signed a "no-win no-fee" agreement, all issues relating to his or her costs, including disbursements, will, if the case is *lost*, be dealt with without charge by his or her solicitor, whom the lay

client would regard as the professional legal service-provider: see the citation from the judgment of Judge Cotter in the case of *Brookes* at paragraph 63 of the original judgment in this appeal.

34. It follows that despite Mr Williams's interesting further arguments the appeal remains dismissed upon all three grounds.

15th September 2016

Case management directions (which are not part of the judgment.)

This judgment will be formally handed down on the 7th October 2016. No party need attend upon the handing-down. If there are any consequential applications to be made in respect of costs or any other matter, and if the parties are unable to agree the terms of the final Order, the parties must attend upon such later date as may be agreed with the listing officer. No order will be made upon the handing-down save an order dismissing the appeal, all other matters then being adjourned to a later hearing, and all relevant time limits extended to 21 days after that hearing or further order.