Neutral Citation Number: [2024] EWCA Civ 1111

Case No: CA-2023-002356

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Turner
[2023] EWHC 2539 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 October 2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE NUGEE
and
LADY JUSTICE ELISABETH LAING

- -

Between :

(1) MICHAEL GLASER KC **(2) VICTORIA MILLER**	**Claimants / Appellants**
- and -	
KATHARINE JANE ATAY	**Defendant/ Respondent**

- -
- -

Paul Mitchell KC (instructed by direct access) for the **Appellants**
Jacqueline Perry KC and **Alexander Bunzl** (instructed by direct access) for the **Respondent**

Hearing date: 2 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 3 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This second appeal concerns contracts entered into between counsel instructed under the Public Access scheme and their lay client. The issue is whether the terms of those contracts are unfair within the meaning of Part 2 of the Consumer Rights Act 2015, and, if so, what the consequences are.

2. The Defendant, Mrs Katharine Atay, directly instructed the Claimants, Mr Michael Glaser KC and Ms Victoria Miller, to act as leading and junior counsel on her behalf in financial remedy proceedings against her former husband, including representation at a 10-day hearing in the Family Court. The terms of the written contracts between each barrister and Mrs Atay provided for a fixed fee that was payable even if the hearing was adjourned for any reason. In the event the hearing was adjourned. Mrs Atay disinstructed counsel and refused to pay any further fees; both counsel sued her for them.

3. The trial was heard by HHJ Berkley sitting in the County Court at Winchester. He held that the term of the contracts requiring payment even if the hearing was adjourned was unfair. But he held that counsel were entitled to a reasonable fee by way of *quantum meruit*, which he assessed at 70% of the outstanding contractual fees.

4. Mrs Atay appealed to the High Court, and Mr Glaser and Ms Miller cross-appealed. The appeal was held by Turner J. He dismissed the cross-appeal, agreeing that the relevant term of the contracts was unfair. He allowed Mrs Atay's appeal on the basis that counsel had no contractual right to payment of the agreed fees, and that there was no basis for a payment on a *quantum meruit* basis.

5. Mr Glaser and Ms Miller now appeal to this Court with the permission of Falk LJ. They were represented by Mr Paul Mitchell KC, and Mrs Atay by Ms Jacqueline Perry KC and Mr Alexander Bunzl.

6. For the reasons that follow I would dismiss the appeal.

Facts

7. There was little dispute as to the facts. Mrs Atay first instructed Mr Glaser in March 2019. She had by then been engaged for some time in financial remedy proceedings in the Central Family Court against her former husband, Mr Ulas Atay, a Turkish businessman. She had initially been represented by solicitors but she was dissatisfied with their handling of the case, and had thereafter acted in person for a time before instructing Mr Glaser on a direct access basis. His fee note shows that he not only advised her but represented her at a number of hearings between March 2019 and March 2020, for all of which he was duly paid.

8. The litigation was high-value and hard-fought. It involved numerous allegations by Mrs Atay of non-disclosure of assets by her former husband, her case being that he had hidden beneficial interests in a wide range of assets (including a number of companies, various properties and other land, and a yacht), mostly in Turkey, and that the total family assets amounted to some £20m. In March 2020 the final hearing was re-listed

with a doubled time estimate of 10 days, to be heard in the 2 weeks commencing 21 September 2020.

9. A pre-trial review was due on 10 July 2020. On 3 July 2020 Mr Glaser's clerk e-mailed Mrs Atay two draft contracts. The first was between Mr Glaser and Mrs Atay and covered not only the pre-trial review but also the 10-day final hearing listed for 21 September 2020, Mr Glaser's proposed fee for preparation and representation at both hearings being £90,000 plus VAT (=£108,000). The other was a similarly worded draft contract between Ms Miller and Mrs Atay for her to act as junior counsel, her fee for the two hearings being precisely half of Mr Glaser's at £45,000 plus VAT (=£54,000). Ms Miller had only recently been brought in as a junior, another junior in Mr Glaser's chambers, Ms Rachael Cassidy, having previously been instructed.

10. There was a short e-mail exchange in which Mrs Atay raised some queries with the clerk. It was suggested to HHJ Berkley that this was Mrs Atay negotiating the terms of the contracts but he rejected this description of the e-mails, finding that she was, as she said in evidence, "merely seeking clarification of what work was included in the fee and ultimately accepting what she was told" (judgment of HHJ Berkley at [85]).

11. By e-mail dated 7 July Mrs Atay confirmed that the contracts were agreed. It appears she never in fact signed the contracts but she accepted in her pleadings that they were duly entered into. I will refer to these contracts as **"the First Contracts"**.

12. I can take Mr Glaser's First Contract as an example as Ms Miller's was identically worded save that in all respects her fees were half of his. Mr Glaser's First Contract took the form of a letter addressed by him to Mrs Atay. After explaining that the letter constituted a contract and that he would be pleased to accept instructions from her, it continued:

> "I thought it would be helpful to set out the work that I will carry out for you and the fees that I will charge for this work.
>
> **The work I will carry out**
>
> **The work you are instructing me to carry out is:**
>
> **Preparation of and representation at the PTR hearing on the 10 July 2020, and the 10** [sic] **Final hearing commencing from the 21 September 2020, listed at the Central Family Court.**
>
> **For the avoidance of doubt, the fee covers the above mentioned work and therefore if the hearing concludes early or is adjourned to another date or does not go ahead for any reason beyond our control, then the full fee is still payable and another fee will be payable for any adjourned hearing.**
>
> If subsequent work is needed on this matter, there will be another letter of agreement between us. Because I carry out all my work personally and cannot predict what other professional responsibilities I may have in the future, I cannot at this stage confirm that I will be able to accept instructions for all subsequent work that may be required by your case.

> **My fees for this work**
>
> **My fee for accepting the instruction to appear as an advocate on the occasions described above will be £90,000 plus VAT. You and I agree that I will not attend the hearing unless you have paid the fee in advance.**
>
> **Total fees for my work as described above (exc. VAT): £90,000**
>
> **VAT: £18,000**
>
> **Total amount due: £108,000**
>
> **The first payment of £12,550 is due by 6 July 2020**
>
> **The second payment of £12,550 is due by the 10 July 2020**
>
> **The third payment of £79,200 is due by the 31 August 2020**
>
> **The final payment of £3,700 and any other fees due in respect of additional work is due 28 days after receiving the final order**
>
> **Unless otherwise agreed failure to send payments on the aforementioned dates will mean that I will not be able to represent you at the hearings.**
>
> **Any additional work will be billed at my hourly rate of £500 plus VAT.**"

(The bold text and underlining is in the original).

13. It then dealt with other matters such as what Mrs Atay should do if dissatisfied with the service she received, and her right to cancel within 14 days. There was an attachment headed "My terms" which contained a number of terms and conditions. It was not suggested that any of these were relevant to the appeal and we were not referred to them.

14. Mrs Atay made certain payments to both counsel. We were not addressed on the details of the amounts paid. In their evidence Mr Glaser and Ms Miller had said that she made payments to them of the following:

14 July 2020	£8,230 (MG)	£4,115 (VM)
31 July 2020	£12,550 (MG)	£6,275 (VM).

But it appears (although it is not as clear as it might be from the limited material before us) that Mrs Atay's case was that she in fact paid the entirety of the first and second instalments. HHJ Berkley does not spell this out in his judgment but Turner J records that Mrs Atay "had made the first and second payments" (judgment of Turner J at [16]), and this was not disputed by Mr Mitchell in his skeleton argument for this Court.

15. However Mr Atay then applied for a further adjournment of the final hearing. That

application was listed for hearing on 26 August 2020. It was not covered by the existing contracts, so Mr Glaser and Ms Miller each entered into a second contract with Mrs Atay. I will refer to these as **"the Second Contracts"**. They covered preparation for and representation at the hearing of the application, to include advice in conference on 24 August 2020. Mr Glaser's fee was £10,000 plus VAT (=£12,000), and Ms Miller's again half that at £5,000 plus VAT (=£6,000). These sums were due 28 days after receiving the final order (unless an order was made for Mr Atay to pay the costs in which case the amount was payable on receipt of money pursuant to the order). The Second Contracts were dated 25 August 2020 and signed by Mrs Atay on that day.

16. Mr Atay's application was heard by DJ Hudd on 26 August 2020. She granted the application and adjourned the final hearing. HHJ Berkley accepted that that seemed to have been "an unexpected, if not surprising, decision" (judgment of HHJ Berkley at [24]).

17. On 31 August 2020 (the day when the third instalment was due under the First Contracts) Mrs Atay sent an e-mail to Mr Glaser and Ms Miller. We have not seen it but it is not disputed that she indicated that she no longer wished to use their services (or those of any member of their chambers). She made no further payments to them.

18. There was some evidence as to how much work counsel had done on her case by the time they were disinstructed. So far as the Second Contracts are concerned, there is no difficulty: those contracts covered preparation and representation at the hearing of Mr Atay's application on 26 August 2020 (including advice in conference on 24 August 2020) and all that work had been done. HHJ Berkley held that the fees due under the Second Contracts were payable and gave judgment for them, and that was not appealed to the High Court.

19. So far as the First Contracts were concerned, part of the fee covered preparation and representation of Mrs Atay at the pre-trial review on 10 July 2020 and again all that work was of course done. The balance of the fee covered preparation and representation of her at the 10-day final hearing listed to commence on Monday 21 September 2020. Mr Glaser's evidence was that he set aside 2 weeks before the trial to prepare for the case. That would have been the 2-week period commencing Monday 7 September 2020, so that when his services were dispensed with (on Monday 31 August 2020) he had not started his planned 2-week preparation. He said however that he estimated that he spent 15 to 20 hours in general preparation / thinking time / discussions with Ms Miller in respect of Mrs Atay's case. He also said that he advised in consultation on 2 July, 4 August and 27 August 2020 for which no separate charge was made. Ms Miller's evidence was to like effect, namely that she had blocked out her diary for the 10 days in advance of the trial for preparation, but had also advised in consultation on the dates given by Mr Glaser and had started trial preparation, including numerous e-mails and telephone calls with Mrs Atay. No express findings on this were made by HHJ Berkley, but he did not reject their evidence and said that in general he accepted the evidence of the witnesses as being "a faithful and largely accurate attempt to recall matters in order to assist the court" (judgment of HHJ Berkley at [13]).

20. In the event the final hearing was re-listed in March 2021, at which Mrs Atay was represented by other leading and junior counsel.

The Consumer Rights Act 2015

21. It is convenient next to set out the relevant legislation. This is found in Part 2 (ss. 61 to 76) of the Consumer Rights Act 2015 (**"the Act"**). As explained in unusually full Explanatory Notes, the Act was passed to consolidate, clarify and amend key consumer rights in relation to contracts for goods and services and the like. Part 1 deals with consumer contracts for goods, digital content and services, replacing for such contracts existing statutory provisions such as those contained in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Part 2 is concerned with unfair terms in consumer contracts and consolidates (with amendments) the existing legislation so far as applicable to such contracts. Part 3 contains a number of miscellaneous other rights in favour of consumers.

22. The existing legislation replaced by Part 2 of the Act was (i) the Unfair Contract Terms Act 1977 (a purely domestic statute) (**"UCTA"**), and (ii) the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (**"the 1999 Regulations"**). The 1999 regulations implemented European legislation, namely Directive 93/13/EEC of the Council on unfair terms in consumer contracts (**"the Directive"**). The Directive was first implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (**"the 1994 Regulations"**), but these were replaced by the 1999 Regulations which re-enacted the substance of them "with modifications to reflect more closely the wording of the Directive" as explained in the Explanatory Notes to the 1999 Regulations. This history means that caselaw on the 1994 and 1999 Regulations, as well as EU law on the Directive, can be relevant to the interpretation of Part 2 of the Act, but must be used with some caution as the wording of the relevant legislation is not in all respects identical.

23. With that introduction I can now set out the relevant parts of the Act. Under the heading "What contracts and notices are covered by this Part?" s. 61(1)-(3) provide as follows:

> "**61 Contracts and notices covered by this Part**
>
> (1) This Part applies to a contract between a trader and a consumer.
>
> (2) This does not include a contract of employment or apprenticeship.
>
> (3) A contract to which this Part applies is referred to as a "consumer contract"."

24. "Trader" and "consumer" are defined terms. By s. 76(2) they each have the same meaning in Part 2 as in Part 1, where they are defined by s. 2(2) and (3) as follows:

> "**2 Key definitions**
>
> …
>
> (2) "Trader" means a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.
>
> (3) "Consumer" means an individual acting for purposes that are

> wholly or mainly outside that individual's trade, business, craft or profession."

It is not disputed that in the present case counsel were traders and Mrs Atay was a consumer, so that the First Contracts were consumer contracts.

25. Under the heading "What are the general rules about fairness of contract terms and notices?" ss. 62 to 69 contain the substantive provisions of Part 2. The provisions relevant to the present case are ss. 62 to 64 and 67 which provide, so far as relevant, as follows:

> "**62 Requirement for contract terms and notices to be fair**
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> …
>
> (4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.
>
> (5) Whether a term is fair is to be determined—
>
> (a) taking into account the nature of the subject matter of the contract, and
>
> (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.
>
> …
>
> **63 Contract terms which may or must be regarded as unfair**
>
> (1) Part 1 of Schedule 2 contains an indicative and non-exhaustive list of terms of consumer contracts that may be regarded as unfair for the purposes of this Part.
>
> (2) Part 1 of Schedule 2 is subject to Part 2 of that Schedule; but a term listed in Part 2 of that Schedule may nevertheless be assessed for fairness under section 62 unless section 64 or 73 applies to it.
>
> …
>
> **64 Exclusion from assessment of fairness**
>
> (1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
>
> (a) it specifies the main subject matter of the contract, or

(b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it.

(2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.

(6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2.

67 Effect of an unfair term on the rest of a contract

Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect."

26. As appears above, s. 63(1) and (2) and s. 64(4) each refer to Schedule 2 to the Act. Schedule 2 is headed "Consumer contract terms which may be regarded as unfair" and Part 1 of the Schedule is headed "List of terms". This is commonly known as the "grey list" because a term on the list is not automatically to be regarded as unfair but may be. For present purposes the relevant part of Part 1 is paragraph 5 which provides as follows:

"5 A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied."

The County Court proceedings

27. Proceedings were issued in the County Court in Newport, Isle of Wight, in October 2020. Mrs Atay's Defence and Counterclaim raised issues of professional negligence but these were struck out by a District Judge so that by trial the only issues related to counsel's entitlement to their fees. We have in fact been provided only with the Amended Particulars of Claim applicable to Mr Glaser's claim but it is not suggested that Ms Miller's differed in substance save as to the amounts.

28. Mr Glaser's pleaded claim was for the balance of the sums outstanding under the First Contract (quantified as £4,320 remaining due in respect of the first two instalments, £79,200 for the third instalment and £3,700 for the fourth), £12,000 under the Second Contract, and £2,400 for work on the drafting of Mrs Atay's witness statement pursuant

to s. 25 of the Matrimonial Causes Act 1973. There was an alternative claim for the same sums or "lesser but similar sums" as reasonable fees pursuant to an implied term or on a *quantum meruit* basis. It may be noted that despite a heading "The Breach, Loss and Damage" there was no claim for damages as such (nor indeed any allegation of breach of contract other than in failing to pay sums that were due).

29. The trial took place before HHJ Berkley sitting in Winchester in July 2022. He circulated his draft judgment initially in October 2022 and in a revised version dealing with further submissions in November 2022, and it was finally handed down on 6 December 2022. In the judgment he dealt with a number of points, many of which are no longer in issue. At [14]-[19] he set out the terms of the First Contracts, labelling the provision that the fees were £90,000 (or £45,000) plus VAT and were payable in advance of the hearing as **"the Fee Term"**, and the provision that if the hearing were adjourned the full fee was still payable as **"the Payment Term"**. At [20]-[30] he considered the question of what he referred to as LASPO orders, that is orders under statutory provisions introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 by which one party to a marriage can be ordered to provide funding to the other party to assist with legal costs, and rejected a submission by Ms Perry that the history of LASPO orders in the present case affected the construction of the First Contracts. Permission to appeal that point to the High Court was refused. At [31]-[54] he considered the construction of the First Contracts, concluding that as a matter of construction the fees claimed were payable despite the fact that counsel did not carry out the preparation for and advocacy at the final hearing. That too is not now disputed: Ms Perry expressly accepted before us that but for the Act Mrs Atay would remain contractually liable for the sums outstanding under the First Contracts. At [55]-[56] HHJ Berkley rejected a submission that the Payment Term was a penalty, another contention for which permission to appeal to the High Court was refused.

30. At [57ff] HHJ Berkley considered the Act. He correctly identified at [61] that the first question was not (as had been submitted) whether the Payment Term was within the exception in s. 64(1) such that the assessment of fairness was excluded; it was instead whether the Payment Term fell within the grey list in Part 1 of Schedule 2, because if it did s. 64(6) had the effect of displacing s. 64(1). A number of paragraphs in the Schedule were canvassed in argument but HHJ Berkley rejected all of them as inapplicable except paragraph 5. At [72] he concluded that paragraph 5 applied. That was because the effect of the term had to be examined as at the date the contract was formed, and an important potential circumstance was that if the case had settled or the retainer been terminated shortly after the 14 day cooling off period, the entire fee would have been payable although no work had been done; in such a case it was highly likely that the fee would have been disproportionately high in comparison to the unperformed services.

31. That meant that the Payment Term fell to be assessed for fairness. He then considered this question at some length, his overall conclusion being that the Payment Term was unfair [91]-[96].

32. He then considered the consequences. The Act simply provided (that is by s. 62(1)) that the relevant term was unenforceable [97]. He rejected a submission by Mr Mitchell that the Fee Term by itself meant that the entire fee was payable [98]. On the other hand it was common ground that some work had been carried out under the First Contract so it was not a case of total failure of consideration [99]; nor was the First

Contract divisible in the classic sense [100]. He then referred to the pleaded claim for a reasonable fee based either on an implied term or on a *quantum meruit* basis. He said that Mr Mitchell did not press the implied term argument, and that "Ms Perry did not seek to argue that *quantum meruit* should not apply in circumstances where the Payment Term was struck down" [101]. Ms Perry told us in response to our draft judgments that she had in fact argued strongly against a *quantum meruit*, but her argument appears to have been more about whether any fee at all was reasonable in the circumstances than about the principles and HHJ Berkley clearly proceeded on the basis that it was not in dispute that such an award could in principle be made. He proceeded to consider what a reasonable fee would be. In the course of that discussion he held that Mrs Atay's termination of the retainer was a breach of contract [111]. He concluded that a reasonable fee would be 70% of the sums outstanding under the First Contract [114].

33. The remainder of the judgment is taken up with matters that are no longer in issue, namely a question as to whether Mr Glaser had any claims in respect of monies which he had paid to junior counsel, Ms Cassidy (no); whether the claims under the Second Contracts succeeded (yes); whether Ms Miller could amend to add claims for fees for some additional work (no); whether Mr Glaser could claim for work done on the s. 25 statement (yes); and a question as to when interest should run from (23 September 2020).

34. His judgment was given effect to by an Order dated 13 December 2022 giving judgment for Mr Glaser in the sum of £67,674.71 and for Ms Miller in the sum of £41,142.80, in each case including interest up to 6 December 2022. The calculation of the precise sums is not given in his judgment or his Order and has not been explored before us, but it appears from the subsequent Order of Turner J (see below) that the sums awarded by HHJ Berkley in respect of the First Contracts were £52,021.62 (Mr Glaser) and £31,998.07 (Ms Miller), although it is not clear how much of that represents interest.

The appeal to the High Court

35. Mrs Atay sought to appeal on a number of grounds but permission was only given for one of them, by Collins Rice J, namely that HHJ Berkley erred in holding her liable to pay 70% of the outstanding fees on a *quantum meruit* basis. Mr Glaser and Ms Miller cross-appealed on the ground that the Payment Term was either not assessable for fairness at all or, if assessable, was not unfair.

36. The appeal was heard by Turner J in July 2023 and he handed down judgment on 12 October 2023 at [2023] EWHC 2539 (KB), [2024] 1 WLR 1733.

37. He first considered the cross-appeal, concluding that the Payment Term was within paragraph 5 of the grey list [44]. He then considered whether, if he was wrong about that, the term fell within the "safe harbour" provisions in s. 64(1) of the Act, concluding that it did not [51]. That meant that on either view the term was assessable for fairness [52]. He concluded that the term was unfair: it created a significant imbalance in the parties' rights and obligations [59] and went significantly beyond what would have been consistent with good faith in the context of the aims and intentions of the statutory framework [65].

38. He then considered the consequences, and specifically whether any sum should have been awarded on a *quantum meruit* basis. He concluded that this was not possible.

Once the Payment Term had been removed from the contract, the contract fell to be treated as providing for a lump sum payment for the services of preparation and appearance at trial [71]; and at common law a party could not claim a sum for partial performance [72]. Counsel therefore had no contractual right to the agreed price or any apportioned part of it. And under the Act there was no power to revise an unfair term – the whole of the term must be removed and not just the unfair aspects of it [74]-[77].

39. For the sake of completeness he then considered what sum would have been reasonable had a *quantum meruit* approach been permissible. He held that HHJ Berkley had been wrong to find that Mrs Atay was in breach of contract [80]-[82]. He then said that he was reluctant to reach more than a tentative and provisional conclusion but considered that HHJ Berkley was probably wrong in his approach [88]-[90].

40. He therefore allowed the appeal and ordered Mr Glaser and Ms Miller to repay the amounts paid to them in respect of the First Contracts. These were quantified in his Order dated 9 November 2023 as £52,021.62 and £31,998.07 respectively.

Grounds of appeal

41. Mr Glaser and Ms Miller appeal on 5 grounds, which are that Turner J erred in holding that:

(1) the First Contracts contained an entire obligation which had to be completed in full before any payment was due;

(2) the Payment Term fell within paragraph 5 of the grey list;

(3) the Payment Term did not fall within s. 64(1)(b) of the Act;

(4) the Payment Term was within s. 64(4) of the Act, and hence unfair and not binding on Mrs Atay;

(5) if the Payment Term were struck out, Mr Glaser and Ms Miller would not be entitled to any payment on the *quantum meruit* basis.

Ground 3: did the Payment Term fall within s. 64(1)(b) of the Act?

42. A convenient place to start is with Ground 3, namely whether the Payment Term fell within the safe harbour of s. 64(1)(b) of the Act. I consider it clear that it did not.

43. I have set out s. 64(1)(b) at paragraph 25 above and repeat it here for convenience:

> "(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—
>
> …
>
> (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it."

44. On a straightforward reading of this sub-section, it prohibits the Court from assessing

if the fees of £90,000 and £45,000 were too high. But Mrs Atay's complaint is not that the agreed fees were too high. It is that the effect of the Payment Term is that she still has to pay them even though counsel did not in the event have to do the work. That seems to me to fall outside s. 64(1)(b).

45. This was the view taken by both judges below. HHJ Berkley said in his judgment at [73]:

> "I would have found that the Payment Term does not deal with the adequacy of the services in relation to the price and so would not have fallen within s64(1)(b)."

(By contrast he would have found the Payment Term to fall within s. 64(1)(a) but Turner J disagreed, and that point has not been pursued on appeal).

46. Turner J said in his judgment at [50]-[51]:

> "50. In my view, the core of the bargain was that the claimants' fees were £90,000 and £45,000, respectively, for preparing for and representing the claimant at the hearing. Accordingly, it would not have been open to the defendant to seek to challenge before the courts the level of fees nor the nature and extent of the work involved in preparation for and appearance at trial.
>
> 51. However, the term concerning the timing of payment and the consequences of the case not going ahead, although important, does not, in my view, fall within the parameters of section 64."

I agree.

47. Not only does this seem to me the plain meaning of the statute, but I consider that this conclusion is in line with the caselaw. In *Director-General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481 (***"First National"***) the House of Lords considered the effect of the 1994 Regulations on a term in a bank's common-form loan agreements providing for interest to be payable in the event of the customer's default until payment after as well as before judgment. One of the questions argued was whether the term fell within reg 3(2)(b) of the 1994 Regulations, reg 3(2) providing as follows:

> "In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which–
>
> (a) defines the main subject matter of the contract, or
>
> (b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied."

For the bank it was submitted that the term for payment of interest concerned the adequacy of the bank's remuneration as against the service supplied, namely the loan of money. Lord Bingham did not accept this submission. At [12] he agreed that the Regulations were not intended to operate as a price control but continued:

> "But there is an important "distinction between the term or terms which express the substance of the bargain and 'incidental' (if important) terms which surround them": *Chitty on Contracts*, 28th ed (1999), vol 1, ch 15 "Unfair Terms in Consumer Contracts", p 747, para 15-025. The object of the Regulations and the Directive is to protect consumers against the inclusion of unfair and prejudicial terms in standard-form contracts into which they enter, and that object would plainly be frustrated if regulation 3(2)(b) were so broadly interpreted as to cover any terms other than those falling squarely within it. In my opinion the term, as part of a provision prescribing the consequences of default, plainly does not fall within it. It does not concern the adequacy of the interest earned by the bank as its remuneration but is designed to ensure that the bank's entitlement to interest does not come to an end on the entry of judgment."

Lord Steyn made similar points at [34] where he said:

> "regulation 3(2)(b) dealing with "the adequacy of the price or remuneration" must be given a restrictive interpretation. After all, in a broad sense all terms of the contract are in some way related to the price or remuneration. That is not what is intended. Even price escalation clauses have been treated by the Director as subject to the fairness provision: see Susan Bright, 20 LS 331, 345 and 349. It would be a gaping hole in the system if such clauses were not subject to the fairness requirement."

48. Although the wording of the 1994 Regulations is not identical to that of the Act, there is no relevant distinction between reg 3(2)(b) as it then stood and s. 64(1)(b) of the Act, and Mr Mitchell accepted that what Lord Bingham said in *First National* at [12] was still applicable. I agree, and it seems to me that the Payment Term is just as much outside the scope of s. 64(1)(b) as the term in that case was outside reg 3(2)(b). To adapt the language of Lord Bingham, the Payment Term does not concern the adequacy of the fees earned by counsel as their remuneration but is designed to ensure that their entitlement to their fees does not come to an end on the hearing being adjourned or otherwise not going ahead. That is not a term which expresses the substance of the bargain; it is an incidental (even though important) term which surrounds it.

49. Mr Mitchell did not argue this point extensively in his oral submissions but in his written argument he submitted that what the fees purchased was the exclusive use of the barristers' time. The barrister wants to ensure that if he or she takes this piece of work he or she will be paid: the diary will be booked and other work turned away as a result of accepting this work. It followed, he said, that the Payment Term simply confirmed what the fees purchased – the exclusion of other clients so that the barrister can provide the representation. To assess it for fairness was therefore doing nothing more than assessing whether the price was a fair one for the service being supplied.

50. I do not think this is a correct characterisation of the bargain between the parties. As Ms Perry pointed out, there is in fact nothing in the First Contracts at all about counsel setting aside time in their diaries. The fees are not payable for counsel's time but for their work, and the work is identified in the contract as "preparation of and representation at" the two hearings. Now it is of course the case that if they are

representing Mrs Atay at a hearing they cannot at the same time be doing other work, and it is also the case that if they were to prepare for the hearings properly it would necessarily take them some time to do so. So I accept that it was a practical consequence of accepting the instructions that they would book out time in their diaries not only for the hearing but for adequate preparation time. But that does not mean that that is what the fees were for. What the fees were for is the service that they were to supply and that was the work necessary to represent Mrs Atay at the hearings. The point can be simply tested: if they had booked time out in the diary and kept themselves free, but not in fact done any work for Mrs Atay, she would not have got what she paid for. To adapt Lord Bingham's words in *First National* the "substance of the bargain" was that she agreed to pay the agreed fees in return for counsel preparing for, and representing her at, the hearings, not for booking out time in their diaries.

51. That is sufficient to explain why I would dismiss Ground 3 of the Grounds of Appeal.

Ground 2: was the Payment Term within paragraph 5 of the grey list?

52. The consequence of my conclusion on Ground 3 is that the Payment Term, not being within the safe harbour of s. 64(1), does in any event fall to be assessed for fairness. It is therefore not strictly necessary to consider whether it falls within paragraph 5 of the grey list. Nevertheless it may be helpful to consider the point.

53. Paragraph 5 is set out at paragraph 26 above, but again I repeat it here for convenience:

> "5 A term which has the object or effect of requiring that, where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum in compensation or for services which have not been supplied."

54. Mr Mitchell had three arguments why the Payment Term did not fall within paragraph 5. These were as follows:

(1) This was not a case of Mrs Atay not concluding or performing the contract.

(2) This was not a case where services had not been supplied.

(3) The sum payable was not disproportionately high.

55. Argument (2) was based on the same submission as I have already referred to, namely that the services supplied by counsel consisted of the exclusive use of their time and Mrs Atay did secure this. For reasons already given I do not accept this argument. Mrs Atay was not paying for counsel to book time out in their diaries but for them to appear and represent her at the hearings. She did have the benefit of their representation at the pre-trial review but she did not have the benefit of it at the 10-day hearing listed for 21 September 2020 because that did not go ahead. Nor was any substantial work done by counsel by way of preparation for the hearing. It seems to me plain that the effect of the Payment Term was to require her to pay the fees despite the fact that the bulk of the services she had contracted for were not supplied.

56. I also have no hesitation in saying that the fees were a disproportionately high sum. Although the fees are expressed as a single sum for both preparation for, and representation at, the two hearings (the pre-trial review and the 10-day final hearing)

and there is no breakdown in the contracts, the evidence gives a fairly reliable indication of how the fees were made up. Taking Mr Glaser's fees as an example, and excluding VAT throughout, his hourly rate as specified in the First Contract was then £500 per hour, and his evidence was that his refreshers were charged at £4,500 per day. 9 days' refreshers would therefore have accounted for £40,500 of the total £90,000, and allowing the same for the first day of the trial would take the total to £45,000. That leaves the other £45,000 to cover the pre-trial review and the 10 days' preparation. Mr Glaser's fee note in fact initially sought to charge a separate fee of £5,000 for the pre-trial review. That was, as later accepted, an error but indicates the sort of fee reasonably attributable to the pre-trial review. That would leave £40,000 for the 10 days' preparation and any other work, which is 80 hours at Mr Glaser's rate of £500 per hour. Interestingly, that precisely accords with an e-mail from Mrs Atay of 6 July 2020 which refers to 80 hours' preparation work for each counsel.

57. Using that as a reasonably reliable guide to the way in which the fees were made up, one can see that when counsel were disinstructed on 31 August, Mr Glaser had done the work for the pre-trial review (accounting for £5,000 of his fees) and according to his evidence he had advised in consultation and spent about 15 to 20 hours thinking about the case. But he had not started on the 10 days' preparation for the final hearing that he had allowed for, nor of course did he provide any representation at the hearing as it did not go ahead. Mrs Atay was nevertheless being asked to pay £85,000 for these services which she had not received. That seems to me plainly disproportionately high.

58. Rather more difficult is the question whether this is a case of Mrs Atay deciding not to conclude or perform the contract. Mr Mitchell said it was not a case of her deciding not to *conclude* the contract because the First Contract had already been entered into. But it seems unlikely that this is what is meant by "conclude the contract" in paragraph 5, as paragraph 5 only applies to contract terms and there will therefore always be a concluded contract in this sense as there could not be a contract term without one. Mr Mitchell also said that it was not a case of Mrs Atay refusing to *perform* the contract because the only obligation on her was to pay the fees and paragraph 5 could not sensibly have been intended to cover the simple case where a contractual price was payable but not paid.

59. We received limited submissions on this aspect of the case and as I have said it is not in fact necessary to reach any definitive conclusion because the Payment Term falls to be assessed for fairness in any event. Nevertheless I think the sense of paragraph 5 is that it applies where the consumer decides not to go through with a contract. Thus, to take an example raised in argument, if a parent books a magician for a child's party but later cancels the magician, that would I think be a case of the consumer deciding not to "conclude or perform" the contract, and paragraph 5 would be capable of applying if the amount payable were disproportionate to the services received.

60. That this was the intention would appear to gain some support from the legislative history. Although we were not referred to this, the Explanatory Notes to the Act refer at para 307 to paragraph 5 of the grey list as one of three additional items added to the list as recommended by the Law Commission in their report of March 2013, and say at para 308:

> "In this paragraph the phrase "decides not to conclude or perform" includes where a consumer cancels a contract."

The Law Commission report referred to is "Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills" (**"the Law Commission Report"**) which considers this question at paras 5.69 to 5.82 under the heading "Early Termination Charges". Much of the discussion is concerned with contract terms that tie consumers into contracts for long periods. But at para 5.77 there is reference to a case decided in a Sheriff Court in Scotland where a couple booked a venue for a wedding and were charged 75% of the anticipated cost of the entire wedding when they cancelled 10 weeks beforehand. At para 5.78 the authors comment:

> "The decision is interesting because it highlights that problems over cancellation charges are not always associated with unreasonably long contracts, but may apply to a wide range of contracts."

And they concluded their discussion at para 5.82 with the following recommendation:

> "A new paragraph should be added to the indicative list to cover terms which have the object or effect of permitting the trader to claim disproportionately high sums in compensation or for services which have not been supplied, where the consumer has attempted to cancel the contract."

61. As I have said this material was not in fact deployed before us or the subject of any submissions, and I am also conscious that the construction of a statute is to be determined by the meaning of the statutory words used in their context, and hence pre-legislative materials of this type, although admissible, have a limited role to play. Nevertheless it does seem to me entirely consistent with the view I had already come to as expressed above that paragraph 5 is apt to apply to charges made in the event of a contract being cancelled (whether a long-term contract or not).

62. On that basis I consider that paragraph 5 does apply to the Payment Term, as both judges below thought. In the present case the hearing was adjourned on Mr Atay's application, which is not I think a case of Mrs Atay cancelling the contract (even though she later disinstructed counsel), but it is common ground that the question has to be considered at the time the contract is entered into: cf s. 62(5)(b) of the Act requiring the assessment of fairness to be carried out by reference to all the circumstances existing when the term was agreed. The Payment Term in terms applies whenever the hearing does not go ahead for any reason beyond counsel's control. So if the case had settled, or Mrs Atay had discontinued the claim for other reasons, the effect of the Payment Term would still have been that the full fees were payable. I think the Payment Term would also have applied if the hearing had not been adjourned but Mrs Atay had dispensed with counsel and conducted the hearing in person. Such examples seem to me to show that the Payment Term does indeed have the "effect of requiring that where the consumer decides not to conclude or perform the contract, the consumer must pay the trader a disproportionately high sum … for services which have not been supplied."

63. I would therefore dismiss Ground 2 of the Grounds of Appeal.

Ground 4: was the Payment Term unfair?

64. As both judges below recognised, the fact that a term is within the grey list does not make it automatically unfair. By s. 63(1) of the Act the list is an indicative and non-

exhaustive list of terms that *may* be regarded as unfair, and Turner J usefully cited at [36] from the judgment of the European Court of Justice in *Commission of the European Communities v Sweden* (Case C-478/99) [2002] ECR I-4147 at [20] where the Court stated:

> "It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may nonetheless be regarded as unfair."

But the list is "of indicative and illustrative value" (ibid at [21]). What is meant by that I think is that the list indicates the type of contract term that is likely to give rise to a real question of fairness, although whether any particular term is actually unfair must depend on all the circumstances. In *First National* Lord Steyn at [36] said that the then grey list:

> "is best regarded as a check list of terms which must be regarded as potentially vulnerable."

And in the Law Commission Report at para 5.1 it was expressed as follows:

> "The Annex [to the Directive] is not a black list: in some circumstances the listed terms may well be fair. However, a suggestion of unfairness hangs over the listed terms."

That seems to me to summarise the position well.

65. Whether a term is in fact unfair is governed by s. 62(4) of the Act. As Mr Mitchell said, it is not a question of whether a term might loosely and subjectively be thought unfair in a colloquial sense, but whether it falls within the statutory requirements. Again I have set s. 62(4) out at paragraph 25 above but repeat it here for convenience:

> "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer."

66. There are therefore three requirements: see *First National* at [36] per Lord Steyn where he says (of regulation 4(1) of the 1994 Regulations which was in materially identical terms):

> "There are three independent requirements. But the element of detriment to the consumer may not add much. But it serves to make clear that the Directive is aimed at significant imbalance against the consumer, rather than the seller or supplier. The twin requirements of good faith and significant imbalance will in practice be determinative."

In the present case the Payment Term plainly operates to the detriment of Mrs Atay, and it is the twin requirements of good faith and significant imbalance that determine the question of unfairness. I will consider them in the opposite order.

Significant imbalance

67. So far as significant imbalance is concerned, Lord Bingham explained in *First National*

at [17] that:

> "The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the Regulations [ie the then grey list] provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract."

68. Both judges below concluded that the Payment Term did cause such an imbalance as to be unfair. HHJ Berkley said that it skewed the potential advantage to be gained by the barristers under the contract so far away from the consumer's interests, and so far in the barristers' favour, that it did not satisfy the test of fairness [92]. He illustrated that by saying that the case could have settled as early as 22 July 2020 (15 days after the contract was entered into and so just after the end of the cooling-off period), in which case Mrs Atay would have been liable to Mr Glaser for the full fee of £108,000 despite him having done no work and in circumstances where his diary had only been blocked out for 15 days, some 2 months ahead of the hearing date [92]. He contrasted that with a later withdrawal of the retainer, continuing:

> "94 In my judgment, it is this dichotomy of potential circumstances that lies at the heart of the unfairness of the Payment Term. There is simply no mechanism within the term, nor to be found elsewhere in the contract, to provide for the contingencies identified above and illustrated by the particular facts of this case. The Payment Term is an "all or nothing" term, weighing 100% in favour of the barrister."

69. Turner J agreed with his reasoning. He said:

> "59 I am satisfied, after taking into account the matters referred to in section 62(5), that the term as to timing of payment and the consequences of the trial not going ahead created a significant imbalance in the parties' rights and obligations under the contract. In short, the claimants were entitled to be paid far in advance for two weeks' preparation and participation thereafter in a two-week trial. Even if there had been no work done whatsoever, the fees would have remained payable and subject to no element of reimbursement at all. Counsel would thus be entitled to take on alternative remunerative work during the relevant period and any sums thus earned would not go towards reducing the liability of the defendant. I accept that it is not always easy for counsel, particularly leading counsel, to find work at relatively short notice but it is by no means impossible.
>
> 60 In contrast, the financial risk of the trial not proceeding was borne entirely by the defendant. In particular, there was provision for additional work to be charged at £500 per hour for leading counsel

> but with no abatement in the event that no work whatsoever actually was carried out. It is not suggested that the contractual sums had been reduced to reflect, in advance, the possibility that the trial may not go ahead as listed.
>
> 61 As the judge below put it, the relevant term is an "all or nothing" term weighing 100% in favour of the barrister. Clearly, the imbalance was to the detriment of the consumer. I agree with his reasoning on this issue."

70. The question whether a contract term causes a significant imbalance in the parties' rights and obligations is an evaluative assessment. It is well established that an appellate court should be slow to disturb such an assessment unless the judge below has erred in principle or reached a conclusion that was not reasonably open to them. I think that must be particularly so where there are concurrent findings in both lower courts.

71. In the present case I see no flaw in the reasoning of the judges below and consider that the conclusions they both came to were open to them; indeed I entirely agree with them. As HHJ Berkley perceptively identified, the difficulty with the Payment Term is that it potentially applies in many different situations, but does not allow for any nuanced assessment of what is appropriate in the circumstances of a particular case. It applies (see paragraph 12 above):

> "if the hearing concludes early or is adjourned to another date or does not go ahead for any reason beyond our control."

In any such case the full fee is payable. But the hearing might be ineffective for any number of reasons. Some of these might be because of decisions made by the client, such as where she settles the case, or discontinues it, or successfully asks for an adjournment herself, or disinstructs counsel. But it might be for reasons that had nothing to do with her, such as the case finishing early, or, as here, being adjourned against her wishes. And, as again HHJ Berkley pointed out, much might depend on when the hearing goes off. A case might settle, or be adjourned, weeks before the hearing; it might however be settled at the door of the court when all the preparation had been carried out, or be adjourned on the first day of the hearing, or settle part-way through the hearing. One can well see that counsel would expect to be paid for their work in preparing for a hearing if the case settles, or is adjourned, after they have done the work, and the client could scarcely complain of that; but it is nothing like as obvious that if the case goes off before counsel have carried out any substantive work, the client would accept that it was appropriate for counsel to be paid for preparation that they had not done and days in court they would not in fact undertake, particularly if she was not responsible for the hearing being ineffective.

72. In those circumstances I do not find it difficult to see why both judges below thought there was such an imbalance as to render the Payment Term unfair. If a hearing is effective, the rights and obligations of the parties can be said to be in balance: the client gets the benefit of counsel's professional skill in preparing for, and representing her at, the hearing, and counsel get the benefit of being paid the agreed fees in return. But there is always a possibility that a hearing might not go ahead. That involves risks for both parties. If a hearing is adjourned the client runs the risk that she will have to instruct counsel for the adjourned hearing and will not wish to pay twice, or for work

which is of no benefit to her. Conversely for counsel there is the risk that they will be left with a gap in their diaries which they may not be able to fill, or not fully. The Payment Term however resolves these respective risks wholly in favour of counsel, as both judges said, and places the entire risk of a hearing being ineffective on the client. The client has to pay not just for preparation of the case but for every day of the anticipated hearing. That is so whether the case goes off two months in advance or at the door of the court.

73. Counsel meanwhile, as Turner J pointed out, are free to seek other work. How easy it will be for them to do that will depend on the stage at which their diaries become free and the nature of their practices. A busy junior with a large paper practice might be able to do a substantial amount of work for other clients; even a silk with a purely litigation practice might pick up some work to fill the gaps in his diary. Mr Glaser's evidence here was that it was difficult for him as a trial advocate to obtain last-minute returns, but that he was in fact in court for three of the days that he had blocked out for Mrs Atay's case. If the Payment Term is valid, he would be able to keep the entirety of the fees from Mrs Atay as well as the fees payable by those other clients. There is no mechanism in the contract under which her liability for the fees can be abated to the extent that he was able to obtain other work.

74. Mr Mitchell did suggest in his oral submissions that counsel would nevertheless have to give credit for fees received from other clients. He said that the law does not allow you to claim more than your actual loss, and that if Mr Glaser had in fact secured another trial starting on 7 September 2020, he could not then have sued Mrs Atay for the fees due from her as there would be a defence of mitigation.

75. That does not seem to me to be right. The law of mitigation is an aspect of the law of damages: you cannot claim compensation for a loss if you either have mitigated your loss or should reasonably have done. But a claim in debt is not a claim for damages. It is not compensation for loss, but the enforcement by a creditor of his right to be paid what he is owed. I do not think there is any question of a creditor with a valid claim in debt being obliged to give credit on the basis of mitigation, and I am aware of no authority – and none was cited – which would support such a notion, which seems to me contrary to some fairly fundamental principles. See for example *Chitty on Contracts* (35th edn, 2023) at §31-002:

> "Moreover, the action in debt may have advantages over one for damages since an innocent party need not prove any loss caused by the defendant's breach, merely that he has earned the sum, and the claim cannot be reduced for being too remote or for the innocent party's failure to mitigate loss."

Indeed it is noticeable that Mr Glaser never suggested in his pleadings or his evidence (or, as far one can tell, in his submissions below) that he should or would give credit for the fees he had in fact earned elsewhere against the claim which he brought against Mrs Atay, a claim which, as I have pointed out (see paragraph 28 above), was pleaded only as a claim in debt and not in damages; it is in any event not now disputed that Mrs Atay did not act in breach of contract in disinstructing counsel so no claim for damages would lie.

76. The effect of the Payment Term therefore is that the client on the one hand has to pay

the full fees even if she does not receive any services of any value to her, whereas counsel on the other hand not only receive the full fees but are free to pursue other opportunities and, if fortunate enough to obtain other work, can keep both sets of fees. The conclusion that such a one-sided arrangement "causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer" seems to me to be one that was well open to the judges below. In the words of Lord Bingham in *First National* it imposes on the consumer a disadvantageous risk, without any corresponding risk being imposed on counsel.

77. Mr Mitchell submitted however that this conclusion was inconsistent with the principles to be derived from the European jurisprudence. The Supreme Court considered the 1999 Regulations in *ParkingEye Ltd v Beavis* (***"ParkingEye"***), an appeal heard together with *Cavendish Square Holding BV v Makdessi* and reported under the name of the latter at [2015] UKSC 67, [2016] AC 1172. In *ParkingEye* motorists were able to park in a car park for up to 2 hours for free, but were liable to pay a fixed charge of £85 (somewhat reduced if paid promptly) for parking in breach of regulations, including if they parked for any longer than 2 hours. The question was whether this provision, accepted by the Supreme Court to be a contractual term, was unfair within the meaning of the 1999 Regulations. In considering this question Lords Neuberger PSC and Sumption JSC (who gave the joint lead judgment) referred at [105] to *Aziz v Caixa d'Estalvis de Catalunya, Tarragona y Manresa (Catalunyacaixa)* (Case C-415/11) [2013] All ER (EC) 770 (***"Aziz"***) which they described as the leading case on the topic in the Court of Justice. They said that the judgment of the Court was authority for a number of propositions, including the following:

> "(1) The test of "significant imbalance" and "good faith" in article 3 of the Directive (regulation 5(1) of the 1999 Regulations) "merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated": para 67. A significant element of judgment is left to the national court, to exercise in the light of the circumstances of each case.
>
> (2) The question whether there is a "significant imbalance in the parties' rights" depends mainly on whether the consumer is being deprived of an advantage which he would enjoy under national law in the absence of the contractual provision: paras 68, 75. In other words, this element of the test is concerned with provisions derogating from the legal position of the consumer under national law.
>
> (3) However, a provision derogating from the legal position of the consumer under national law will not necessarily be treated as unfair. The imbalance must arise "contrary to the requirement of good faith". That will depend on "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations": para 69."

78. Mr Mitchell submitted that it was therefore incumbent on the Court, before concluding that there had been a significant imbalance, to consider what rights the consumer would enjoy under the general law in the absence of the contractual provision in question. In

his submission Mrs Atay was not deprived by the Payment Term of any such rights.

79. I accept that a comparison should be made with the position of the consumer under the general law in line with the guidance from *Aziz*, but I do not accept that the Payment Term did not significantly affect the rights Mrs Atay would otherwise have. The "substance of the bargain" between Mrs Atay and counsel was that they would represent her at the hearings, having prepared properly for them, and that she would pay them the agreed fees. Those elements of the contracts are not assessable for fairness because they fall within the safe harbour provision in s. 64(1). But had the contract said nothing more, counsel could not have claimed the agreed fees unless they carried out the agreed work. That seems to me the default provision in any contract for services. There was a disagreement between the judges below as to whether counsel could recover *anything* in the absence of the Payment Term, HHJ Berkley concluding that counsel could recover on a *quantum meruit* basis for the value of the work they had done (at [91]), while Turner J held that at common law counsel could recover nothing because the contracts were not divisible and a party that has performed only part of an entire obligation can normally recover nothing (at [72]). I will have to consider which of these views is right below, but on any view I do not think there is any basis for saying that at common law counsel could recover full payment of their fees if the hearing was ineffective and they did not do the work for which they were being paid.

80. Mr Mitchell as I understood him had two responses to this. The first was that what Mrs Atay was paying for was booking counsel's time out of the diary. I have already considered and rejected that characterisation of the contract: Mrs Atay was not just reserving counsel in case she needed them – she was agreeing to pay them to represent her at the hearing.

81. The second was that the provision in the First Contracts for stage payments upfront meant that even without the Payment Term counsel would have been entitled at least to the bulk of their fees as all but the final instalment had fallen due by 31 August 2020 when Mrs Atay disinstructed them. That raises quite a difficult question in relation to contractual prepayments. If a contract provides for a partial prepayment before goods or services are delivered, and the contract is then discharged, can the supplier keep (or, if it has not been paid, recover) the amount of a prepayment which has fallen due before the contract goes off? I will have to consider this further below, but the short answer is that it depends. But, to anticipate, it seems to me to have no application to the present case.

82. We heard very little in the way of submissions on this point but it seems to me that the correct analysis is as follows. On a question of fairness under the Act the Court is not concerned with what actually happened but with an assessment of the term in question at the date of the contract. Here the hearing could have become ineffective long before the third instalment fell due in which case, in the absence of the Payment Term, the default position at common law would have been that it could not be claimed. It is one thing for a supplier to claim a prepayment that has fallen due before a contract is discharged – that as I say raises some quite difficult issues – but I do not see how in the absence of express contractual provision a supplier can claim an instalment of the price that has not even fallen due before a contract goes off. So the Payment Term does significantly alter the parties' rights and obligations from what they would have been without it.

83. As I have said the question of fairness depends on an assessment of the term at the date the contract was entered into rather than on what actually happened, but the facts of the present case illustrate the point. The hearing was adjourned on 26 August 2020. It was therefore inevitable by then that counsel would not be able to represent Mrs Atay at the hearing listed for 21 September 2020. Nor were they obliged to appear at the adjourned hearing – the contracts made it clear that counsel were not committing to any future work but only to the hearing in September. So although Mrs Atay disinstructed counsel on 31 August 2020, this was not what caused counsel to be unable to represent her in September and indeed seems to me to have had very little if any effect on the parties' contractual rights. The contract was already incapable of performance. I think that the default position (that is, without the Payment Term) is that the contract would have come to an end – no doubt by frustration, as I explain below – on 26 August 2020 and the parties would have been discharged from further performance. That was of course before the third instalment fell due on 31 August 2020 and it would not therefore have fallen due. Hence in my view counsel do need to rely on the Payment Term to recover their fees, and hence this does substantially change Mrs Atay's position from what it would have been without it, or, in the language of *ParkingEye* derived from *Aziz*, it does deprive Mrs Atay of an advantage that she would enjoy under national law in the absence of the provision.

84. In those circumstances I reject Mr Mitchell's submission based on *Aziz* and would uphold the concurrent conclusions of the judges below that the Payment Term caused a substantial imbalance in the parties' rights and obligations.

Good faith

85. That is not the end of the question of unfairness, as the other requirement is that the term is "contrary to the requirement of good faith". Ms Perry submitted that this was not really a separate requirement but just a description of a contract term that caused a significant imbalance, but I cannot accept that submission in the light of the authorities. It is clear that it is one of the requirements of statutory unfairness and falls to be addressed separately.

86. In English law "good faith" has a strongly subjective element, and to accuse a contracting party of acting contrary to the requirement of good faith is usually (although not always) to accuse them of bad faith, which connotes some conscious impropriety. But the concept as used in the Act is derived from the Directive and must be given an autonomous European interpretation which is rather different.

87. As appears from the summary in *ParkingEye* of *Aziz* (paragraph 77 above), it is essentially an objective test as to:

> "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations."

Some caution is needed with applying this in the context of the Act: see below. But it does make clear that the test, as Mr Mitchell accepted, is an objective one.

88. "Good faith" was considered by the House of Lords in *First National* in the context of the 1994 Regulations. Those regulations by Schedule 2 contained a specific statutory

checklist as follows:

> "In making an assessment of good faith, regard shall be had in particular to—
>
> (a) the strength of the bargaining positions of the parties;
>
> (b) whether the consumer had an inducement to agree to the term;
>
> (c) whether the goods or services were sold or supplied to the special order of the consumer, and
>
> (d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer."

This was derived from recital (16) to the Directive which is in very similar terms. (It is not however repeated in the Act.)

89. Against that background each of Lord Bingham, Lord Steyn and Lord Millett examined the requirement of good faith. Lord Bingham said at [17]:

> "The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 to the Regulations. Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice."

90. Lord Steyn said at [36]:

> "Schedule 2 to the Regulations, which explains the concept of good faith, provides that regard must be had, amongst other things, to the extent to which the seller or supplier has dealt fairly and equitably with the consumer. It is an objective criterion…. And helpfully the commentary to *Lando & Beale, Principles of European Contract Law, Parts I and II* (combined and revised 2000), p 113 prepared by the Commission of European Contract Law, explains that the purpose of the provision of good faith and fair dealing is "to enforce community standards of decency, fairness and reasonableness in commercial transactions"; a fortiori that is true of consumer transactions.… The examples given in Schedule 3 convincingly demonstrate that the argument of the bank that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained. Any purely procedural or even predominantly procedural interpretation of the requirement of good

faith must be rejected."

91. And Lord Millett said at [54]:

> "A contractual term in a consumer contract is unfair if "contrary to the requirement of good faith [it] causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer". There can be no one single test of this. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate."

92. To that must now be added the guidance given in *Aziz* as set out in *ParkingEye.* As well as the summary of the propositions which they derived from the judgment of the Court of Justice (paragraph 77 above), Lords Neuberger and Sumption referred at [106] to the opinion of Advocate General Kokott on which the Court drew heavily. They said:

> "In determining whether the seller could reasonably assume that the consumer would have agreed to the relevant term in a negotiation, it is important to consider a number of matters. These include, at point AG75:
>
> > "whether such contractual terms are common, that is to say they are used regularly in legal relations in similar contracts, or are surprising, whether there is an objective reason for the term and whether, despite the shift in the contractual balance in favour of the user of the term in relation to the substance of the term in question, the consumer is not left without protection." "

93. Lord Mance JSC at [204]-[206] cited not only *Aziz* but the statements by Lord Bingham and Lord Millett in *First National* (without adverse comment).

94. Lord Toulson JSC dissented in the result but I do not read him as differing from the majority in the principles, only in the application of them to the facts of the case. He said at [308]-[309]:

> "308 As to whether the imbalance was contrary to the requirement of good faith, the court [ie in *Aziz*], at para 76, in agreement with the Advocate General held that:

> "in order to assess whether the imbalance arises 'contrary to the requirement of good faith', it must be determined whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations."
>
> 309 That test is significantly more favourable to the consumer than would be applied by a court in this country under the penalty doctrine. Whereas the starting point at common law is that parties should be kept to their bargains, and it is for those objecting that a clause is penal to establish its exorbitant nature, the starting point of the Directive is that the consumer needs special protection, and it is for the supplier to show that a non-core term which is significantly disadvantageous to the consumer, as compared with the ordinary operation of the law without that term, is one which the supplier can fairly assume that the consumer would have agreed in individual negotiations on level terms. The burden is on the supplier to adduce the evidence necessary to justify that conclusion."

95. That being the law, the question is whether there is any flaw in the reasoning or conclusions of the judges below. So far as HHJ Berkley is concerned, it is fair to say that he did not specifically deal with the question of good faith separately, simply reaching a conclusion on the question of fairness of the Payment Term overall. But I do not think it can be said that he overlooked the requirement of good faith. He cited the principles from *Aziz* as set out in *ParkingEye* (at [75]), and what Lord Bingham had said about the requirement of good faith in *First National* (at [86]); he noted that Lord Mance had cited what both Lord Bingham and Lord Millett had said with apparent approval and said that he had taken these into account (at [87]); and at [89] he set out Ms Perry's arguments on this aspect of the good faith requirement, which can be summarised as being that Mrs Atay was in a state of high anxiety and in no position to think through clearly the many and varied implications of the Payment Term.

96. In these circumstances I see no reason to doubt that HHJ Berkley's conclusion that the Payment Term was unfair was reached having taken into account the submissions he had received on the good faith requirement. It is well established that a judge's reasons should be read on the assumption (unless they have demonstrated the contrary) that they knew what should be taken into account, and this particularly applies where the judge has gone to the trouble of recording the rival submissions he has received on the question. In concluding that the Payment Term was unfair, I think he must have been satisfied that it was indeed contrary to the requirement of good faith as submitted by Ms Perry.

97. In any event, Turner J expressly dealt with the requirement of good faith as follows:

> "63 The issue of fair dealing in this case must take into account a number of features. Firstly, save for some enquiries from the defendant aimed at clarification, the terms reached between the parties were not the product of individual negotiation. The letter in which they are to be found is worded in the form of a fait accompli

> and the defendant, as will almost invariably be the case in direct access arrangements, was not separately legally advised. Secondly, the risks of any given trial being rendered ineffective are much more familiar to members of the legal profession than to lay clients. They would have known, for example, that the fact that a trial had already been adjourned once provided no assurance that it could not happen again. Thirdly, the means by which a direct access barrister could provide some means of reimbursement in the event of the trial not proceeding fell also (or ought to have fallen) within the knowledge of the claimants. Fourthly, as is the case in most litigation, and particularly family proceedings, the lay client is almost inevitably placed in a stressful, dependant and potentially vulnerable position. I do not overlook the fact that the claimants clearly considered the defendant to be a demanding and difficult client but this feature does little or nothing to redress the imbalance in the relationship between professional and lay client. One of the occupational hazards of direct access arrangements is that the absence of any instructing solicitor inevitably exposes counsel more acutely to the unfiltered, uncomfortable and persistent demands of the importunate client.
>
> 64 I readily accept that the relevant term was clear and brought openly to the attention of the defendant but that is not a feature which is sufficient, of itself, to establish that the requirement of good faith has been fulfilled."

This is another evaluative assessment that an appellate court should be slow to disturb unless there is an error in principle.

98. Mr Mitchell's submissions under this head made essentially two points. His main submission was that one could see from *Aziz* that the requirement of good faith was directed at contractual terms that had not been individually negotiated. The concern was to protect the consumer who was presented with standard terms and who had not read them, or could be taken not to have read them, and in any event had no choice, being presented with them on a take it or leave it basis. The Directive made limited inroads into freedom of contract. Where, as here, the consumer instead of being presented with a list of non-negotiable standard terms had an opportunity to read, understand and negotiate the terms, was asked whether they agreed them and has done so, that was highly relevant to the question of good faith. His subsidiary submission was that in considering good faith one had to view matters from the point of view of the supplier.

99. I do not think either submission is justified by the authorities. So far as individual negotiation is concerned, I accept that the Directive itself is limited to terms that have not been individually negotiated. Recital (11) to the Directive recognised that consumers ought to benefit from the same protection whether a contract was oral or written. Recital (12) however provided:

> "Whereas, however, as they now stand, national laws allow only partial harmonization to be envisaged; whereas, in particular, only contractual terms that have not been individually negotiated are covered by this Directive; whereas Member States should have the option, with due

> regard to the Treaty, to afford consumers a higher level of protection through national provisions that are more stringent than those of this Directive."

The limitation of the Directive to contractual terms that had not been individually negotiated would appear therefore to have been driven more by practical difficulties in the harmonisation of the laws of the Member States than by considerations of principle.

100. Consistently with recital (12), Art 3.1 and Art 3.2 of the Directive provide as follows:

> "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 individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
>
> The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
>
> Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him."

101. That explains why in *Aziz* the Court of Justice referred to the test of "significant imbalance" and "good faith" as "merely defin[ing] in a general way the factors that render unfair a contractual term that has not been individually negotiated" (see the first of the propositions derived from *Aziz* in *ParkingEye*, set out at paragraph 77 above).

102. In the UK, the 1994 and 1999 Regulations were similarly restricted to terms that had not been individually negotiated (reg 3 of the 1994 Regulations, reg 5 of the 1999 Regulations). So it is not surprising that the Supreme Court in *ParkingEye*, which was considering the 1999 Regulations, followed the guidance in *Aziz*.

103. But the same is not true of the Act. There is nothing in the Act to confine the statutory test of unfairness to contract terms that have not been individually negotiated. This is a deliberate choice by Parliament: see the Explanatory Notes at para 524 explaining that the Act (as the Directive permits) goes beyond the minimum requirements of the Directive in a number of respects including:

> "application to all consumer contract terms, whether or not individually negotiated."

The question whether the Act should be extended in this way was considered by the Law Commission Report at paras 7.52 to 7.66. Their recommendation at para 7.66 was that it should be, partly because UCTA contained no such limitation, and partly because it would avoid difficult arguments over whether a term had been individually negotiated

(para 7.65). They considered that it would affect very few cases: it was rare for a consumer to negotiate about any term except the price or main subject matter of the contract, and if there had been a genuine negotiation the Court would be unlikely to find it unfair (para 7.64). But they also referred to evidence from consultees that some negotiations could be exploitative (para 7.54), and that information asymmetries may mean the consumer does not properly appreciate what they are negotiating (para 7.59).

104. The upshot of this is that it cannot be the law that the requirement of good faith in the definition of unfairness under the Act can be satisfied simply by showing that the contract term in question was negotiated by the consumer. Mr Mitchell's submission that the concern of the Act is with non-negotiable standard terms cannot therefore be right – or at any rate is substantially overstated. The Act does apply to such contracts but it goes much wider than that.

105. It is certainly wide enough to include a case such as the present. It is true that, as Mr Mitchell said, Mrs Atay was sent the contracts in draft; she undoubtedly read them at least sufficiently to query precisely what the fees covered; she was asked whether she agreed with them; and she confirmed that she did. But I consider it clear that none of that is sufficient to answer the question whether the requirements of good faith under the Act are satisfied. Indeed on these facts, it seems plain that the Payment Term would not be regarded as "individually negotiated" for the purposes of the Directive: there was nothing in the brief e-mail exchange between her and counsel about the Payment Term at all, and in any event it was "drafted in advance" and hence by Art 3.2 of the Directive not to be regarded as individually negotiated.

106. Moreover it can be seen from the various speeches in *First National* that satisfying the requirements of good faith is not simply a question of complying with purely procedural requirements. Lord Bingham referred to "fair and open dealing" (paragraph 89 above) and it is apparent that these are separate and different facets of what good faith requires. Openness is indeed about such matters as contract terms being clear, transparent, understandable and prominent. But fair dealing goes beyond that to encompass such matters as taking advantage – whether deliberately or not – of the consumer's lack of experience, unfamiliarity with the subject matter, weak bargaining position and the like. That embraces the substantive effect of the term in question, not just the way in which the contract came about. Lord Steyn in terms said that the argument that good faith is predominantly concerned with procedural defects in negotiating procedures cannot be sustained and must be rejected (paragraph 90 above). And Lord Millett referred to such matters as whether one might expect to find such a term in commercial contracts freely negotiated by parties acting on level terms (paragraph 91 above), thereby anticipating the opinion of Advocate General Kokott in *Aziz* that one of the considerations in determining whether the seller could reasonably assume that the consumer would have agreed to the relevant term in a negotiation is whether such a term is regularly used in similar contracts (paragraph 92 above).

107. Given this, Mr Mitchell's main submission must be rejected. The facts that Mrs Atay was sent the contracts in draft, had a chance to read them and agreed them without querying the Payment Term are no doubt part of "all the circumstances" required to be taken into account by s. 62(5)(b) of the Act, but they cannot answer, or even really begin to answer, whether the requirements of good faith were satisfied. Instead the sort of matters referred to by Turner J – the presenting of the letter as a fait accompli, the lack of separate advice, the information asymmetries, the client being in a stressful,

dependent and potentially vulnerable position – are highly relevant to the question, and I see no error of principle in his approach.

108. The only thing that I would add to his analysis is that if one asks the question posed by Lord Millett in *First National* (and echoed by Advocate General Kokott in *Aziz*) whether one would expect to find a term such as the Payment Term in freely-negotiated commercial contracts, it is far from obvious that one would. No attempt was made before us (or it would appear below) to demonstrate that the Payment Term is a regular feature of barristers' contracts, or generally accepted as such by commercial clients well able to look after their own interests.

109. As to Mr Mitchell's subsidiary submission that good faith was to be viewed from the point of view of the supplier, I do not think this can be right. The test as I have said is an objective one. Lord Bingham in *First National* referred to the supplier taking advantage of the client's relatively weak position "whether deliberately or unconsciously"; and the test in *Aziz* is whether the supplier "dealing fairly and equitably … could reasonably assume" that the consumer would agree to it if it had been individually negotiated, which again denotes an objective test. Mr Mitchell said that the Payment Term was designed to protect the interests of counsel and pointed to the comments of Turner J at [65]:

> "I wish to make it plain that my adjudication on this issue is not to be taken as an imputation of professional impropriety whatsoever on the part of the claimants. Subjectively, they doubtless considered that there were sound commercial reasons to seek to protect themselves in clear terms against the risk of not being paid in full, regardless of whatever procedural course the ligation might subsequently take and, in particular, against the adverse consequences of any and all potential threats to the viability of the trial."

It has not been suggested to us that Turner J was wrong in this respect, and nothing in this judgment is to be taken as indicating that counsel acted in bad faith or in any way unprofessionally. But the question is not whether it was reasonable for counsel to wish to protect themselves by the Payment Term. The question is effectively whether a well-informed and well-advised client might reasonably be expected to agree to it. That is a quite different matter.

110. I therefore do not accept Mr Mitchell's criticisms of Turner J's assessment that the Payment Term was contrary to the requirements of good faith for the purposes of the Act.

111. I have now considered and rejected Mr Mitchell's arguments on both significant imbalance and good faith, and I would therefore dismiss Ground 4 of the Grounds of Appeal, with the result that I would uphold the decisions of both courts below that the Payment Term was unfair within the meaning of the Act.

Grounds1 and 5: what are the consequences?

112. Grounds 1 and 5 both concern the consequences of the Payment Term being found to be unfair. These grounds touch on some quite difficult issues on which we received limited submissions. But I have reached a clear conclusion on the particular facts of

the present case, which is that the appeal overall should be dismissed.

113. The starting point for the analysis is ss. 62(1) and 67 of the Act, which I have set out at paragraph 25 above and repeat here for convenience:

> "**62 Requirement for contract terms and notices to be fair**
>
> (1) An unfair term of a consumer contract is not binding on the consumer.
>
> **67 Effect of an unfair term on the rest of a contract**
>
> Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect."

114. These provisions do not confer any discretion on the Court and do not allow the Court to substitute its own view of what is fair. As Turner J pointed out (at [74]):

> "By the operation of the statutory regime, an unfair term must be deemed never to have existed. Where a term is unfair, the whole of that term must be removed and not just the unfair aspects of that term. Otherwise this would amount to amending the term which would be impermissible."

The inquiry instead is as to what the other terms of the contract provide, so long as it is practicable for them to continue to have effect.

115. In the present case the relevant other terms of the First Contracts were as follows (paragraph 12 above) (with Ms Miller's fees in each case half of those below):

> "**My fees for this work**
>
> **My fee for accepting the instruction to appear as an advocate on the occasions described above will be £90,000 plus VAT. You and I agree that I will not attend the hearing unless you have paid the fee in advance.**
>
> **Total fees for my work as described above (exc. VAT): £90,000**
>
> **VAT: £18,000**
>
> **Total amount due: £108,000**
>
> **The first payment of £12,550 is due by 6 July 2020**
>
> **The second payment of £12,550 is due by the 10 July 2020**
>
> **The third payment of £79,200 is due by the 31 August 2020**
>
> **The final payment of £3,700 and any other fees due in respect of additional work is due 28 days after receiving the final order**

> **Unless otherwise agreed failure to send payments on the aforementioned dates will mean that I will not be able to represent you at the hearings.**"

These terms can be summarised as (i) an agreement on a single fee of £90,000 for the work; (ii) an agreement that the fee should be payable by four instalments of specified amounts on specified dates; and (iii) an agreement that Mr Glaser was not obliged to appear at the hearing unless payment of the fee was made in advance (although since the fourth instalment was not due until well after the hearing, this must mean payment of the first three instalments).

116. HHJ Berkley took the view that these terms without the Payment Term "would have given rise to a *quantum meruit* situation", adding that "That would be usual in a contract for services" [95], but it appears that he had little assistance on the question.

117. Turner J however did consider the question at more length. He accepted, by reference to the 34th edition of *Chitty* at §32-077 that "In a contract for work to be done where no scale of remuneration is fixed, the law imposes an obligation to pay a reasonable sum (*quantum meruit*)" [70], but pointed out that in the present case the scale of remuneration had been agreed, and this was preserved intact by the safe harbour provisions of the Act [71]. He continued:

> "71 … But once the claimants are precluded from relying upon the payment term, the contract falls to be treated as providing for a lump sum payment for the services of preparation and appearance at trial. The parties could have agreed a divisible contract but they did not.
>
> 72 This background brings into focus the issue of partial performance of entire obligations which is addressed in *Chitty* at para 24-029:
>
> > "Where a party has performed only part of an entire obligation it can normally recover nothing, neither the agreed price, since it is not due under the terms of the contract, nor any smaller sum for the value of its partial performance, since the court has no power to apportion the consideration." "

118. Mr Mitchell said that this analysis overlooked the fact that the agreed fees were payable by instalments. As Turner J himself said earlier in his judgment:

> "24 Under the terms of a contract for services, the general rule is that they are to be paid for as and when rendered. However, it is open to the parties to stipulate for prepayment of part or all of the price. Where this is so, an action for the price lies as soon as the date for payment has arrived. As Lord Alverstone CJ observed in *Workman, Clark & Co Ltd v Lloyd Brazileño* [1908] 1KB 968, 976—977:
>
> > "where an agreement provides for the payment of a sum of money, and does not make the performance of the thing which is the consideration for the payment a condition precedent to or concurrent with the payment, an action may be maintained for the recovery of the sum of money without such performance."

> 25 Thus, by the operation of the common law, the claimants, at least prima facie, became entitled to claim the full amount of their fees on 31 August regardless of the amount of work, if any, they had then done."

Ground 1: entire obligation?

119. In those circumstances Mr Mitchell submitted that Turner J was wrong to treat the First Contracts as containing entire obligations which had to be completed in full before any payment was due. This is Ground 1 of the Grounds of Appeal. Mr Mitchell did not argue this extensively in his oral submissions, but his skeleton argument did contain submissions directed at this ground, the contention being that either (i) counsel became entitled to the full fees when the First Contracts were entered into, albeit that the parties agreed that they could be paid by instalments, or (ii) that counsel's entitlement to fees accrued when each instalment fell due, and their entitlement to the third instalment due on 31 August 2020 had already accrued when Mrs Atay terminated the contract. Argument (i) was based on the premise that the fee was in return for counsel booking out time in their diaries. I have already considered and rejected this contention above. But argument (ii) was based on the alternative contention that each instalment was a prepayment which counsel can retain despite not completing performance of the services they were going to render.

120. These submissions raise a number of quite intricate issues. A convenient starting point is to consider whether HHJ Berkley was right to say that in the absence of the Payment Term, the balance of the terms would have given rise to a *quantum meruit* situation. The law in this area is unfortunately not made any easier by the fact that the term *"quantum meruit"* is used in two rather different situations, one in the law of contract and the other in the law of unjust enrichment. See *Barton v Morris* [2023] UKSC 3, [2023] AC 684 (***"Barton"***) at [204] per Lord Burrows JSC (dissenting in the result but not so as to affect this point):

> "It should be noted that the right to be paid for services, where that right is not to an agreed specified sum, is the right to a quantum meruit, which means "as much as he deserved" or, as it is commonly expressed in the law of contract, a reasonable remuneration (or a reasonable charge or a reasonable price). The Latin label, which is a description of the remedy, transcends the boundary between contract and unjust enrichment. That is, on the one hand, there can be a contractual quantum meruit, and, on the other hand, there can be a quantum meruit that effects restitution of an unjust enrichment. That label does not in itself explain whether it is a contract or an unjust enrichment that is triggering the right to a quantum meruit."

121. A contractual *quantum meruit* arises in contracts for the provision of a service where no specific fee has been agreed. So long as the service was not intended to be gratuitous, the law will imply (or impose) an obligation to pay a reasonable fee for the service. As noted by Lord Leggatt JSC in *Barton* (also in fact dissenting but not so as to affect this point) at [139] this is a very longstanding rule of law, already recognised in *Blackstone's Commentaries* vol II, *Of the Rights of Things* (1766) p 443 where it is given as an example of an implied contract:

> "As, if I employ a person to do any business for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deserves."

This common law rule was codified in s. 15 of the Supply of Goods and Services Act 1982. This initially applied to any contract for the supply of a service, but so far as consumer contracts are concerned they are now dealt with in the Act, and the 1982 Act now only applies to other contracts. For consumer contracts the relevant statutory provision is now s. 51 of the Act which provides as follows:

> "**51 Reasonable price to be paid for a service**
>
> (1) This section applies to a contract to supply a service if—
>
> (a) the consumer has not paid a price or other consideration for the service,
>
> (b) the contract does not expressly fix a price or other consideration, and does not say how it is to be fixed, and
>
> (c) anything that is to be treated under section 50 as included in the contract does not fix a price or other consideration either.
>
> (2) In that case the contract is to be treated as including a term that the consumer must pay a reasonable price for the service, and no more.
>
> (3) What is a reasonable price is a question of fact."

122. It can be seen that this statutory provision does not apply in the present case. Each of the First Contracts was a contract to supply a service but the service was the preparation for, and representation at, the two hearings and the contracts did fix a price for this service, namely the agreed fees.

123. That by itself would not necessarily preclude a term being implied at common law outside the statute (compare *Barton* at [214] per Lord Burrows). But here again I agree with Turner J. If a contract does fix the price for the provision of the service, the law of contract contains rules which determine whether the service provider is entitled to payment or not. There is no need, nor indeed any room, for these to be supplemented by an implied term for a *quantum meruit*. The relevant question instead is whether the contractual fee has become due, in whole or in part. So if HHJ Berkley meant that there was a contractual *quantum meruit* (which I think is what he did mean, given his reference to it being usual in a contract for services) then I disagree and think he was wrong, although since there seems to have been little argument on the principles, it was perhaps an understandable error. (I consider below the separate question whether there was an entitlement to a *quantum meruit* on the basis of unjust enrichment).

124. I also agree that in the present case the contracts were not divisible but were contracts of entire obligation. By that I mean that they did not provide for separate elements of the fees to be payable for separate items of work. On that Turner J seems to me plainly right. The contracts stipulate for a single global fee of £90,000 or £45,000 for the work as a whole. The instalments are not payable for completing discrete parts of the work – that is illustrated by the fact that the first two instalments, amounting to £25,100 or

£12,550, were due by 10 July 2020 by which date counsel would only have prepared for and appeared at the pre-trial review. The £25,500 does not represent Mr Glaser's fee for that appearance (which as explained above would have been charged at about £5,000 if charged separately); it is largely a prepayment in advance for the work still to be done on the final hearing.

125. I also agree with Turner J that if all that had been agreed had been global fees of £90,000 and £45,000 for the work as a whole, then counsel would not have had any contractual right to payment at all. They could not have claimed the total agreed fees as they had not done the work; and for the reasons given by Turner J at [72] they could not have claimed an apportioned part of the agreed fees as the principles he cited from *Chitty* would have applied, namely that where a party has performed only part of an entire obligation they can normally recover nothing – neither the agreed price, nor an apportioned part of it as the Court has no power to apportion it.

126. But I agree with Mr Mitchell that this analysis overlooks the fact that the contracts provided for payment of the fees by instalments. Turner J seems to have treated the provision for payment by instalments as part of the term which was unenforceable under the Act. He described the term which was being assessed for fairness at [51] as "the term concerning the timing of payment and the consequences of the case not going ahead" and again in almost identical terms at [59]. But as pointed out in a helpful comment on his decision by Professor Rory Gregson, *All or nothing* CLJ 2024, 83(1) p 27, this description in fact conflates two separate terms, there being a distinction between when a contractual payment is due and whether it is non-refundable if the contract is discharged. Professor Gregson's point is that the unfairness which Turner J found in the present case consisted in the effect of the Payment Term which made the entire fee unrefundable if the hearing were adjourned; it did not follow that the term requiring payments upfront was unfair, and nothing in the Court's reasoning as to unfairness justified the conclusion that it was. I agree. Indeed it is noticeable that the Bar Standards Board Handbook at gC107 contains guidance to the profession expressly contemplating that counsel may request an upfront fixed fee before agreeing to do work on behalf of a client (although it also provides that counsel may agree to refund the difference between the fixed fee and the fee actually earned based on the time spent, without counsel thereby being in breach of the prohibition on holding client money).

127. It follows from this that the effect of s. 62(1) and s. 67 of the Act was to make the Payment Term unenforceable but to leave the term as to payment by instalments in place.

128. Where a contract provides for payment of a sum on account of the price of goods or services on a specific date, then *prima facie* the sum falls due on that date. As Turner J correctly identified at [24] it is open to parties to stipulate for prepayment of part or all of the price and where this is done an action for the price lies as soon as the date for payment arrives. So here if Mrs Atay had not paid the first two instalments by 10 July 2020, counsel could have sued for them on 11 July 2020, and she would have had no defence to such a claim.

129. But that is not the end of the analysis. If a prepayment is due in advance on account of the price of goods or services, and the contract is then discharged before the goods or services have been delivered, there is a further question as to whether the prepayment (if paid) is repayable or (if not paid) remains due. The question arises for example if

the customer repudiates the contract before the time for completion of the contract and the repudiation is accepted by the supplier. That discharges both parties from the performance of any further obligations. But what is the effect on prepayments?

130. The answer is that it depends. I largely accept the submissions of Mr Mitchell on the law on this as contained in his skeleton argument, as follows. First there is a distinction to be drawn between a non-refundable deposit and a mere prepayment. The parties can stipulate that a payment in advance is paid by way of deposit. The purpose and effect of doing so is well known. The deposit is an "earnest of performance". If the contract is completed it operates as part payment of the price. If however the contract comes to an end by reason of the buyer's breach, it is forfeited to the seller. See for example the account given by Teare J in *Griffon Shipping LLC v Firodi Shipping Ltd (The Griffon)* [2013] EWHC 593 (Comm), [2013] 2 Ll Rep 50 at [14] (his decision being upheld on appeal at [2013] EWCA Civ 1567, [2014] 1 Ll Rep 471). There are limits on the extent to which the parties can attach the incidents of a deposit to a prepayment, and it has been said that this is not possible unless such sum is reasonable as earnest money: see *Lewison, Interpretation of Contracts* (8th edn, 2024) at §17.88. It is not necessary to explore this further as in the present case none of the instalments were expressed to be payable as deposits.

131. If not paid as a deposit, a prepayment will be just a part payment on account of the price. The buyer may be able to recover this if the contract is discharged, on the basis that the price is no longer payable. Thus in *Dies v British and International Mining and Finance Corporation* [1939] 1 KB 724, the purchaser contracted to buy a quantity of rifles and ammunition for £270,000 and paid £100,000 in advance. He never however took delivery and his repudiation was accepted as discharging the contract. Stable J held that he was entitled to return of the £100,000 (less an agreed sum of £13,500 payable to the seller as liquidated damages) on the simple basis that the £100,000 was not a deposit but part payment of the purchase price for goods which were never delivered, and hence it was recoverable.

132. But there is another strand of authority in which the seller is not only entitled to keep payments that have been made but to claim from the buyer an instalment that fell due before the contract was discharged. In *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 1 WLR 1129 (***"Papadopoulos"***), the contract was to build and sell a cargo ship for $14,300,000, payable by 5 instalments of increasing amounts. The buyer paid the first instalment of 2.5%, but defaulted on the second, also of 2.5% ($357,000), and the seller cancelled the contract and sued a guarantor for the unpaid second instalment. The House of Lords held that the claim succeeded, a majority on the ground that the buyer itself remained liable for the second instalment which had fallen due before cancellation (the minority deciding on the basis that even if the buyer was discharged the guarantor was not).

133. The basis on which these two strands of authority could be reconciled was explored in a celebrated article by Mr Jack Beatson (as he then was), *Discharge for Breach: the position of instalments, deposits and other payments before completion* (1981) 97 LQR 389, described by Eder J in *Cadogan Holdings Ltd v Global Process Systems LLC* [2013] EWHC 214 (Comm), [2013] 2 Ll Rep 26 at [16] as containing a most valuable analysis (with which Teare J said he agreed in *The Griffon*). The conclusions reached by Mr Beatson were that the question depends on whether the payment by the buyer is unconditional, or conditional on performance of the contract. Where this is not

expressly stated in the contract, then the payment will be unconditional (and hence remain due from the buyer, or, if paid, be irrecoverable from the supplier) where the contractual obligations of the supplier mean (i) that he is bound to incur expenses before completing performance or (ii) that he has incurred expenses before the time of discharge in (or possibly for the purpose of) the performance of the contract. (Here (i) and (ii) are alternatives, the first reflecting Lord Fraser's formulation in *Papadopoulos*, the second Mr Beatson's suggested modification).

134. Mr Mitchell's submission was that in the present case counsel had incurred a detriment by booking out time in their diaries on the entry into the contracts, and that this was sufficient to bring the case within the *Papdopoulos* line of cases. It followed that the instalments were not conditional on completion of the work but unconditional, and hence counsel were not only entitled to keep the first two instalments but also entitled to payment of at least the third instalment which had fallen due before Mrs Atay terminated the contract on 31 August 2020.

135. It may be noted that Mr Mitchell's formulation that counsel had "incurred a detriment" is not the same as either of Mr Beatson's formulations that the supplier is "bound to incur expenses" or "has incurred expenses" in or about the performance of the contract. But I need not pursue the question whether Mr Mitchell is right that he can bring the case within the *Papadopoulos* line of authority on the basis of counsel booking time out in their diaries. This is because I do not accept on the facts of the present case that counsel could claim the third instalment even if he were right on this point.

136. Mr Mitchell's argument is based on the assumption that the contracts were discharged when Mrs Atay disinstructed counsel on 31 August 2020. But as Ms Perry said, it was not this that caused the hearing to go off: counsel's diaries were already empty as the case had been adjourned on 26 August 2020. Before she disinstructed counsel the contracts – which were of course for representation at the 10-day hearing in September 2020 – had therefore already become impossible to perform. Mr Mitchell said that if not disinstructed counsel could still have used the time in September to prepare the case and that whatever they produced would still have been useful for the adjourned hearing, but that seems to me, with respect, rather unrealistic. Nobody would sensibly spend 10 days in September 2020 preparing for a 10-day hearing in March 2021, leaving aside the fact that Mrs Atay was under no obligation to instruct counsel (nor counsel obliged to accept instructions) for the adjourned hearing. And even if counsel had prepared for the adjourned hearing they would not have been carrying out the work for which Mrs Atay had agreed to pay them, which was "Preparation of and representation at … the 10 [day] Final hearing commencing from the 21 September 2020, listed at the Central Family Court".

137. In those circumstances I do not accept that the contract was discharged only on 31 August 2020 when Mrs Atay disinstructed counsel. As we have not seen her e-mail we do not know its precise terms, but it is self-evident that it cannot have said that she did not want them to act for her at the hearing in September as that had already gone. I suspect it may have been more directed at saying that she intended to find other representation going forward, and in particular for the adjourned hearing, than at the existing contracts which were already incapable of being carried out.

138. We heard no argument on the point but it seems to me in those circumstances that this is a classic case of the contracts having been discharged by frustration: see generally

Chitty chapter 27. If a contract becomes impossible to perform through some external event which is the fault of neither party then it may be discharged automatically through frustration (*Chitty* §27-007ff). Admittedly a term in the contract which expressly deals with the consequences of the event which has occurred will normally prevent frustration (*Chitty* §27-059). So if the Payment Term, which expressly dealt with the consequences of the case being adjourned, had been enforceable, the contracts would not have been frustrated. But with this term effectively removed from the contract by the Act there is no reason not to regard the doctrine of frustration as applying in the usual way. I am conscious that there are difficulties in judges deciding cases on a basis that has not been argued, but here Ms Perry, although not articulating the point as one of "frustration", did make the submission that the contract had already ceased to be capable of performance when it was adjourned some days before Mrs Atay disinstructed counsel. That seems to me essentially the same point.

139. If that is right, then the contract came to an end on 26 August 2020 with the effect that the parties were discharged from further performance. Mrs Atay did not become contractually liable to pay the third instalment, and it is therefore unnecessary to decide if it did or did not come into the category of unconditional payments. I therefore do not accept Mr Mitchell's submissions on Ground 1 of the appeal.

Ground 5: quantum meruit

140. That leaves Ground 5 which is that Turner J was wrong to find that counsel were not entitled to any payment on the *quantum meruit* basis. Mr Mitchell spent little time on this. In his skeleton argument he effectively relied on the same arguments as under Ground 1 in support of the contention that although removal of the Payment Term might deprive counsel of the fourth instalment, the third instalment had fallen due and counsel could sue on it, and indeed had Mrs Atay paid it she would not have been entitled to its return as there had been no total failure of consideration. This way of putting it falls away if I am right that the third instalment had not fallen due before the contract was discharged.

141. In oral submissions, he said two things. The first was that if one assumed the case to have settled, or counsel to have been disinstructed, on the first day of the trial, it could not be right that counsel would get nothing. I agree, but in that situation the third instalment would have fallen due. By then counsel would have carried out all the work of preparation and there would I think be a strong argument that counsel were entitled to the payment at common law under the principle of *Papadopoulos* as explained by Mr Beatson. There might still remain a question under the Act whether it would be fair that they should keep the entirety of the third instalment, most of which would be attributable to refreshers yet to be earned; but it is not necessary to pursue that point, as it would not affect the principle that they would get paid for the work they had actually done.

142. His other submission, in reply, was that if there is a contract which does not contain an effective term for payment, then you can find one; if the Payment Term has gone, there is no term for payment in the contract but there is still a contract. That submission seems to me to overlook the fact that if the Payment Term is removed there are still provisions for payment in the contracts, namely the terms for payment by instalments. Two instalments duly fell due and were paid. The third instalment, on the view I take, did not, but that is because the contracts had been rendered impossible to perform before

it fell due. This is not therefore a case where the contracts contain no effective term for payment and hence not a case where a term needs to be implied to provide for payment.

143. As I understood him, Mr Mitchell did not argue that this was a case which justified a *quantum meruit* on the basis of unjust enrichment. In those circumstances I do not propose to consider the question in any detail. The question whether an unjust enrichment claim will lie where there is a contract between the parties is often one of some difficulty, although in many cases the existence of the contract will rule out a claim in unjust enrichment: see the discussion of the point in the various judgments in *Barton* (Lady Rose at [88ff], Lord Leggatt at [189ff] and Lord Burrows at [237ff]). In the present case, if I am right that the contract was frustrated, I think it very doubtful that a claim in unjust enrichment would lie. The consequences of frustration are now governed by the Law Reform (Frustrated Contracts) Act 1943 which gives the Court various statutory powers to adjust the position rather than simply letting the loss lie where it fell (which was the common law position). No claim under the 1943 Act has of course been suggested, and I do not intend to consider if one might have been, but the existence of the statutory regime to regulate the consequences of a frustrated contract probably makes it inappropriate to resort to the common law rules on unjust enrichment.

144. But I need not consider this as I think there is a simpler answer to the point in the present case. A claim in the law of unjust enrichment has three central elements, the first of which is that the defendant has been enriched (the other two being that the enrichment is at the expense of the claimant, and that there is an "unjust factor": see eg *Barton* at [228] per Lord Burrows). That seems to me to focus the claim squarely on the benefit received by the defendant. Unless there has been such a benefit there has been no enrichment.

145. In the present case therefore the question would be: what benefit had Mrs Atay received when the hearing was adjourned? She had had the benefit of representation at the pre-trial review, and it would appear advice at three consultations. Mr Glaser had also spent some time thinking about her case generally – I am rather doubtful if that was of any quantifiable benefit to her, but even if it were, it amounted to no more than 15 to 20 hours of his time. Valuing the representation at the pre-trial review at £5,000 as Mr Glaser's clerks did, and his time at £500 per hour as per the contract, this would come to somewhere in excess of £12,500: for example 15 hours' thinking time and 3 hours on each consultation would amount to 24 hours which would take the total to £17,000 plus VAT (=£20,400). But Mrs Atay had already paid Mr Glaser the first two instalments amounting to £25,500. She has not sought to recover those. The onus would be on counsel to show that she had received benefits worth more than that, and on the material before the Court I do not think they would have done that. Even assuming therefore that a restitutionary claim might lie in principle, I do not think it would have been made out.

146. I accept that HHJ Berkley awarded counsel 70% of the outstanding instalments. But that does not seem to me to have been based on any assessment of the benefit actually received by Mrs Atay, but to have been his assessment of what might have been appropriate to compensate counsel not only for their work but for the gap in their diaries. But for the reasons I have given I do not think that is what an unjust enrichment claim is designed to do: it is designed to require a person enriched at another's expense to account for the benefit they have received. Mr Mitchell said that having counsel

clear their diaries so they could represent her *was* a benefit to her. But as I have already said that was not what she agreed to pay for. What she agreed to pay for was having counsel prepare for and represent her at the hearings. I think the only quantifiable benefit she received was the work they did.

147. I therefore do not accept Mr Mitchell's Ground 5.

Conclusion

148. I have now considered and rejected each of the grounds advanced. The detailed examination of the various points argued on this appeal confirms to my mind how right HHJ Berkley was when he said that the contract was inadequate for the sort of case for which it was used. I do not mean to say that counsel can never stipulate for payment if a case goes off at a late stage: under the traditional model of brief fee and refreshers of course, an adjournment after briefs had been delivered would entitle counsel to payment of the brief fee but not the refreshers with, in complex cases, the possibility of the brief fee itself becoming due in stages. Nothing I have said is intended to prevent counsel from devising and agreeing with their clients contracts that fairly balance their own interests in not being left with gaps in their diaries with the interests of their clients in not paying for work that is not carried out.

149. But for the reasons I have sought to give the Payment Term in the contracts in the present case does in my judgement fall to be characterised as unfair within the meaning of the Act, with the consequences that I have attempted to identify above.

150. I would therefore dismiss the appeal.

Lady Justice Elisabeth Laing:

151. I agree.

Lord Justice Baker:

152. I also agree.