Neutral Citation Number: [2026] EWCA Civ 698

Case No: CA-2025-000773

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT HERTFORD
HIS HONOUR JUDGE DAVIES
ON FIRST APPEAL FROM THE COUNTY COURT AT HERTFORD
UPPER TRIBUNAL JUDGE ROBIN SOMERVILLE
(SITTING AS A DISTRICT JUDGE)
Claim No LQZ1940

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/06/2026

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ANDREWS
and
LORD JUSTICE WARBY
(sitting with SENIOR COSTS JUDGE ROWLEY as an assessor)

- -

Between :

BROADFIELD LAW UK LLP (formerly BDB PITMANS LLP)	**Claimant/ Respondent**
- and –	
MS EMILY BARNES	**Defendant/ Appellant**

- -
- -

Robin Dunne and **Priya Gopal** (instructed by **JG Solicitors Ltd**) for the **Appellant**
Jake Coleman (instructed by **Broadfield Law UK LLP**) for the **Respondent**

Hearing date: 14 May 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3rd June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

INTRODUCTION

1. The issue raised in this appeal is whether a written agreement between a solicitor and a client under which the solicitor's fees for work in connection with litigation will be charged at hourly rates is a Contentious Business Agreement ("CBA") under s. 59 of the Solicitors Act 1974 ("the 1974 Act"), even if, in the words of Lord Denning in *Chamberlain v Boodle & King* [1982] 1 WLR 1443 ("*Chamberlain"*), it is "insufficiently specific to tell the client what he is letting himself in for by way of costs".

2. The District Judge in the County Court (Tribunal Judge Robin Somerville) decided that the agreement made in this case was not a CBA, because it was too uncertain, and HH Judge Davies upheld that decision on appeal. Permission for a second appeal was granted by Lewison LJ on the basis that the case raises an important point of principle, namely, whether the decision of this Court in *Chamberlain* is still good law following the amendments to ss.59 to 61 of the 1974 Act made by s.98 of the Courts and Legal Services Act 1990 ("the 1990 Act").

3. The parties agreed that the consequence of a finding that the agreement in this case is a CBA would be that the claim for the balance of fees brought by the Respondent solicitors (£75,000 plus interest) should be transferred to the Senior Courts Costs Office ("SCCO") for examination by a costs judge and determination of the amount payable by the Appellant.

4. The Court of Appeal has had the great benefit of advice from Senior Costs Judge Rowley, who sat with us on this appeal as an assessor. We are most grateful to him for that advice, and to counsel for both parties for their helpful written and oral submissions.

5. In my judgment, for the reasons I will explain, the amendments to ss. 59 to 61 did not dispense with the requirement of certainty that was identified in *Chamberlain*. I therefore agree with the judges in the lower court that the agreement entered into by the parties in this case was insufficiently certain to be a CBA.

THE TWO COSTS REGIMES

6. The ordinary regime for the recovery of costs by the solicitor and their assessment by a costs judge under ss.69 and 70 of the 1974 Act requires the solicitor to deliver to the client a bill complying with the requirements of s.69(2). The solicitor must then wait until one month after delivery before bringing an action to recover any sums due under that bill (s.69(1)), unless one of the exceptions under that section applies.

7. The client has an absolute right to an assessment of the bill within a month after its delivery (s.70(1)). Between one month and 12 months after delivery, the court has an unfettered discretion to order an assessment (s.70(2)). If the application for an assessment is made after 12 months from the date of delivery of the bill, or within 12 months after it is paid, the court may only order an assessment "in special circumstances" (s.70(3)(a) and (c)), though that expression is given a fairly wide interpretation. There is a longstop of 12 months after the date of payment of the bill

(s.70(4)) although, even after the right to a statutory assessment has expired, the court retains the power at common law to assess the bill, see *Turner v Palomo* [1999] 1 WLR 37.

8. A CBA is defined by s.59(1) of the 1974 Act as an "agreement in writing with his client as to [the solicitor's] remuneration in respect of any contentious business done, or to be done by him." If the agreement is a CBA, the client has no right to an assessment (s.60(1)). Moreover, subject to the exception in that section (which would apply in this case) the solicitor is not obliged to deliver a bill, let alone a bill which complies with the requirements of s.69(2). Nor is there an obligation to wait a month before seeking to recover what is due. However, before the solicitor does so, they must apply to the court under s.61 for a determination of the validity and effect of the agreement and an order for its enforcement.

9. Whether or not the solicitor makes such an application, the client may challenge the *agreement* on the basis that it is unfair or unreasonable (s.61)(1)). If the court finds that it is unfair or unreasonable, it may reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made (s.61(2)(b)). However, if the court finds the agreement to be fair and reasonable, the client cannot challenge the amount of the costs they have agreed to pay[1].

10. A CBA which provides for the remuneration of the solicitor to be "by reference to an hourly rate" ("an hourly rate CBA") straddles both regimes. By virtue of an express exception to s.60(1), it is subject to the provisions of s.69. That means that the solicitor is obliged to deliver a statutory bill, to which the time limits for assessment under s.70 will apply. If, on the assessment of any costs, the solicitor relies on the terms of an hourly rate CBA, and the client does not seek to challenge the CBA as unfair or unreasonable, the costs judge may only enquire into the number of hours worked by the solicitor and whether the number of hours worked by them was excessive (s.61(4B)). These restrictions do not affect the client's right to have disbursements (such as counsel's and experts' fees) assessed in the normal way (s.60(2)). S.60(4), which applies to all CBAs, provides that a CBA shall be deemed to exclude any claim by the solicitor in respect of the business to which it relates other than (a) a claim for the agreed costs and (b) a claim for such costs as are expressly excepted from the agreement.

11. The CBA regime has advantages and disadvantages for both parties. The solicitor must wait for the court to scrutinise the CBA before it can be enforced, but provided that the court thinks the agreement is fair and reasonable, their fees cannot be challenged. At most, the court will examine the number of hours the solicitor has worked, and then only if the agreement is an hourly rate CBA. The client has the protection of the court's power to order a reduction in fees or a full assessment if the bargain they made is unfair or unreasonable. Moreover, provisions in a CBA which seek to relieve the solicitor from the consequences of negligence, or from any professional responsibility to which they would otherwise be subject, will be void if the client is a consumer (s.60(5) and (6)).

[1] There is an exception if the solicitor dies or becomes incapable of acting or if the client changes solicitor. In those circumstances the court may order an assessment even if the CBA is in all respects fair and reasonable, see s.63(2).

12. Another advantage for the client is that a challenge to the CBA under s.61(1) of the 1974 Act on the basis that it is unfair or unreasonable can be made at any time, including after the agreed fees have been paid. If the agreement is an hourly rate CBA, the time limits set by s.70 will apply to any application to have the statutory bill assessed (in the limited manner prescribed by s.61(4B)). However, despite s.70(4) the court has an express power to re-open a CBA and order an assessment "in special circumstances" if the amount agreed under the CBA has been paid, and an application to re-open it is made by the client (or someone who has paid the bill on their behalf) more than 12 months after the date of payment (s.61(5)). Therefore, if the client is out of time for seeking an assessment of a bill because more than 12 months has elapsed since the date of payment or the date of delivery, and there are no special circumstances, the only course open to them if they wish to bring about an assessment is to make an application under s.61(1).

THE FACTS

13. In 2018 the Appellant, Ms Barnes, engaged the Respondent, which was then known as Bircham Dyson Bell LLP ("BDB"), to act for her in relation to her divorce. The contract of retainer between them was set out in a client care letter written to Ms Barnes by one of the partners in the firm, a Mr Thompson, dated 14 August 2018. It incorporated BDB's "Information for Clients and Terms of Business" ("the Standard Terms") and "Additional Information for Clients and Additional Terms of Business Regarding Litigation and Dispute Resolution," ("the Additional Terms") both of which were enclosed with the letter. Although the letter made provision on the final page for Ms Barnes to countersign it to signify her acceptance, there is no signature on the copy in our bundles. However, it has never been in issue that the parties entered into an "agreement in writing" within the meaning of s.59.

14. The letter provided, so far as is relevant, as follows:

> "Thank you for instructing me on your divorce…
>
> As you know, I will be the Partner in charge of your matter and I shall be responsible for any issues you may have. From time to time [IM], a Senior Associate, [AS], an Associate, [AM], a Solicitor or a Trainee Solicitor may assist on your matter…
>
> My charge out rate is £540 per hour plus VAT, [IM]'s rate is £285 per hour plus VAT, [AS]'s rate is £250 per hour plus VAT, [AM]'s rate is £225 per hour plus VAT and the Trainee Solicitor/Court Clerk rate is £120 per hour plus VAT. Other members of the department have charge out rates of between £65 plus VAT for paralegals and £285 plus VAT for Senior Associates and where it is cost effective to do so, they may be asked to deal with aspects of your matter. Cases are normally billed on a monthly basis so that you know where you stand in relation to our fees.
>
> Legal fees in connection with financial matters are more difficult to predict because they largely depend on the number of issues involved. If a financial settlement can be reached in correspondence between Solicitors after full financial disclosure has taken place, then the costs

> are likely to be in the region of a further £15,000 - £20,000 plus VAT, plus sometimes, disbursements, for example, Counsel's fees. Most of the fees are incurred in the preparation of the section 25 statement we discussed…
>
> If the case proceeds to the final hearing in November lasting four days, then the fees will likely be around £50,000 plus VAT and disbursements (Counsel and expert fees) for each party, with counsel fees likely to be in the region of an additional £25,000 plus VAT.
>
> In family cases, each party generally has to pay their own legal costs for the financial proceedings or the negotiations."

15. The Standard Terms provided, among other matters, that:

> "57. Our fees are calculated largely on the basis of time it takes to perform the work during normal office hours. Other factors may however come into consideration such as the need to act rapidly or exclusively or outside the usual hours of business; the monetary value of the matter and its overall importance and complexity; out of office attendances; and the amount of documentation involved…
>
> 60. The hourly rates … are increased from time to time to take account of increases in our overheads. They may also be increased when an individual rises in seniority or attains professional qualifications. A charge, possibly at lower rates, may be made for necessarily spent additional time (e.g. travelling or waiting).
>
> 61. Where no fixed fee has been agreed we will, where possible, also try to indicate how much the overall cost of our work might be, but it can only be a rough estimate and it will need periodic review since factors beyond our control often influence matters to a material degree. For instance, the course and hence cost of litigation or other adversarial proceedings will depend very much on the response of your opponent."

16. Paragraph 8 of the Additional Terms provided that:

> "… any cost estimate that we have already given you, or which we will in the future give to you, is not a fixed price or quotation. On the contrary, all cost estimates are reviewed from time to time and may require updating. Any revised cost estimate will be notified to you in writing."

17. There is no dispute that BDB carried out work for Ms Barnes pursuant to that agreement. It is also common ground that four statutory bills were delivered by BDB to Ms Barnes between 2 October 2018 and 30 January 2019, totalling £139,198.40, of which £23,191.40 represented the VAT and £26,125 counsel's fees. Ms Barnes paid a total of £39,000 to BDB. The first bill, for £19,200, dated 2 October 2018, was paid in full. She also paid £20,000 in respect of the fourth bill for £52,968, which was dated 30 January 2019. The remaining two bills, for £27,248, dated 31 October 2018, and

for £39,782.40, dated 28 November 2018, were not paid. The amount outstanding, exclusive of interest, was £99,998.40.

18. On 18 January 2024, long after the statutory time limits for Ms Barnes to seek an assessment of the costs under s.70 of the 1974 Act had expired, BDB brought a claim in the County Court against Ms Barnes for the balance of its fees. It limited the sum claimed to £75,000 plus accrued interest of £24,999 (and continuing interest at a daily rate of £16.44), in order to be able to use the money claims online process, which can only be used for claims of up to £100,000.

19. Ms Barnes served a Defence in which she admitted the retainer and the delivery of the bills, asserted that the £39,000 she had paid was a payment on account, and raised, as a preliminary objection, the contention that the agreement was a CBA and therefore BDB was required by s.61(1) of the 1974 Act to apply to the court to enforce the agreement and "determine every question as to its validity or effect."

20. Ms Barnes then made an application to strike out the claim on the grounds that, because the retainer was a CBA, it was an abuse of process to use CPR Part 7 proceedings to seek payment of the sums said to be due under it. Instead, BDB should have applied to the court under s.61(1) to enforce the agreement. Alternatively, if the claim was not struck out, she sought an order for the claim to be stayed and the matter transferred to the SCCO for assessment under s.70 of the 1974 Act, or in the further alternative, a common law assessment. She did not plead in terms that the agreement was unfair or unreasonable, though she took issue with the amounts of the fees and disbursements. In particular she contended that she had relied on BDB's costs estimate of £50,000 in the original letter of retainer, and complained that they had never supplied her with any updated or revised estimates as the matter progressed.

21. In their Reply, BDB denied that the retainer was a CBA. Among other matters, they pointed out that Ms Barnes was out of time under s.70(4) for seeking an assessment of the first bill (which she had paid); that the 12 months for seeking an assessment of the other three bills had long since elapsed; and that no special circumstances had been pleaded.

22. In an ex tempore judgment delivered on 24 October 2024, the District Judge held that the agreement was not a CBA, on the basis that it was insufficiently clear and certain. He relied on *Chamberlain* and on the decision of Mann J in *Wilson v The Specter Partnership & Others* [2007] EWHC 133 (Ch) ("*Wilson"*) which was decided seventeen years after the amendments to the 1974 Act upon which Ms Barnes relies. He ordered her to pay £63,750 by 2 December 2024, and awarded costs to BDB in an agreed sum.

23. Ms Barnes appealed with the permission of HH Judge Murch. On 11 March 2025, HH Judge Davies dismissed the appeal. He agreed with the District Judge that the contract of retainer between the parties was insufficiently certain to constitute a CBA, applying *Chamberlain* and *Wilson*, both of which were binding on him. When permission to appeal was granted on 15 October 2025, Lewison LJ granted a stay of Judge Davies' order pending determination of this appeal.

THE LEGAL BACKGROUND

24. The right of a client to receive a bill from their solicitor and to challenge that bill in court dates back to the Attorneys Act 1605 (see Friston on Costs, 4th Ed. 2023, para 1.50). The modern history of a client's statutory right to seek assessment of their solicitor's bills was set out in some detail by Lord Hamblen JSC in *Oakwood Solicitors Ltd v Menzies* [2024] UKSC 34; [2024] 1 WLR 4745 ("*Oakwood"*) at [49] to [57]. In summary, the framework of the current statutory scheme for the delivery and assessment of bills in ss. 69 and 70 of the 1974 Act was first introduced in the Solicitors Act 1843, and then broadly replicated in the Solicitors Acts of 1932, 1957, and 1974, each of which was described as a "consolidating" Act.

25. In *Oakwood* the Supreme Court held that (for the purposes of calculating when the 12 months started to run for seeking an assessment of a bill that had been paid) the word "payment" in s.70(4) of the 1974 Act required agreement by the client to the amount taken, or to be taken, by way of payment of a statutory bill of costs. At [43] Lord Hamblen explained that:

> "As to the purpose of the regime, it is apparent that the requirements that bills of costs be delivered, that the bills comply with statutory conditions, and the right to have those bills assessed are concerned with the protection of the interests of the client – the consumer of solicitors' services. The court's power to assess costs exists to ensure that excessive costs are not claimed from the client."

26. Despite the client's right to assessment, in practice solicitors and clients have sought to reach agreements (both prospectively and retrospectively) in order to avoid the necessity of going through that process. Before 1870, such "agreements as to costs" were permitted but could be set aside by the court at common law if they were not fair and reasonable.

27. The CBA regime has its origins in the Attorneys and Solicitors Remuneration Act 1870 ("the 1870 Act"), s.4 of which provided, inter alia, that:

> "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor… either by a gross sum or by commission or per-centage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated… Provided always, that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity, the amount payable under the agreement shall not be received by the attorney or solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement…"

28. The section went on to provide that the taxing officer, if he considers that the agreement is not fair and reasonable, may seek the opinion of the court or a judge on that point. The court or judge would have power:

> "either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

29. As Fletcher Moulton LJ explained in *Clare v Joseph* [1907] 2 KB 369, at p.376, s.4 of the 1870 Act did not alter the substance of the common law as to "agreements as to costs" but provided a procedure for their regulation:

> "As at [the date of coming into operation of the 1870 Act] agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's behalf to benefit himself at his client's expense. But when it appeared that the agreement was favourable to the client, the Courts often held the solicitor to his bargain, for there was no ground in equity why they should be suspicious of a bargain of that kind. Sect.4, therefore, was not required for the purposes of enabling persons to enter into these agreements, nor was it required in order to strengthen the hands of the Courts in their examination of them. Before 1870 the Court had full power to investigate their propriety and in my opinion the specific provisions of s.4 did no more than provide and regulate a procedure for the control of such agreements; they did not in substance alter the law affecting them."

30. He went on to express the view at p.377 that s.4 of the 1870 Act was intended to hold the balance equally between solicitor and client, and bind them to the agreed remuneration, whether it was higher or lower than the solicitor's ordinary rate. If an agreement was made in accordance with s.4 of the 1870 Act and had not been set aside (as unfair or unreasonable) then, by virtue of s.15 of that Act, "the ordinary provisions as to delivery and taxation of a duly signed bill of costs are no longer to have effect." However, in order to obtain those benefits, the solicitor or client must comply with the requirements of s.4, and have an agreement in writing.

31. In its original form, s.59 of the 1974 Act provided as follows:

> "…a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done by him (in this Act referred to as a "contentious business agreement") providing that he shall be remunerated by a gross sum, or a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated."

S.60 provided, so far as relevant, that:

> "… the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to taxation or to the provisions of section 69."

32. Those were the provisions in force when *Chamberlain* was decided. The issue in *Chamberlain* was whether the agreement between the client and solicitor was a CBA. The agreement relied on by the solicitor was contained in two letters. The first was sent by the solicitor to the client, telling him that they would bill him for their services rendered "on the basis of the standard hourly rates applicable to the particular attorneys or solicitors involved in the litigation". The letter then set out a range of hourly rates from £60 to £80 per hour for partners and from £30 to £45 per hour for associates who might be involved. It said that these standard rates were reviewed for adjustment "on a regular basis, ordinarily at the conclusion of the firm's fiscal year". The letter asked the client to pay £2,000 on account; he sent a response enclosing a cheque for £1,000 and promising to remit the balance within two weeks.

33. Lord Denning gave the leading judgment. At p.1445B he referred to the 1870 Act and said that "to satisfy its terms, the agreement should be clear and represent an agreement in writing by both parties to the whole of its terms." Having cited two authorities for that proposition, he continued:

> "It seems to me that an agreement in writing can be contained in letters. But the letters ought at least to be signed by the client if he is to be deprived by the agreement of his right to tax. Further the agreement must be sufficiently specific – so as to tell the client what he is letting himself in for by way of costs. It seems to me that the letters in this case do not give the client the least idea of what he is letting himself in for. As Mr Hirst said to us, there is a broad band of many uncertainties. Take, for instance, the rate. It certainly seems high enough to me. It is £60 to £80 an hour. What rate is to be charged? And for what partner? Of what standard? Then £30 to £45 an hour for associates who may be involved. Which legal executives? Of what standard? Which associates? Does it include the typists? That is one of the broad bands which is left completely uncertain by this agreement. Then there is the hourly rate. That must depend upon the skill and expertise of the individual partner or associate. A skilled partner can do the work in half the time of a slow partner. Is the client to be charged double the rate because a slow partner has been put on the case?
>
> …
>
> I only make those observations because it seems to me that *this is not an agreement as to remuneration at all. It is simply an indication of the rate of charging on which the solicitors propose to make up their bill.* It is by no means an agreement in writing as to the remuneration." [Emphasis added.]

34. Lord Denning then pointed out that there was nothing in writing from the client saying "I agree your terms", and therefore it was impossible to say that this was a CBA. He indicated that he was not prepared to decide the question whether a contentious business agreement *could* provide for remuneration by an hourly rate (which, I interpolate, would have involved consideration of the scope of the words "or otherwise"). He added that because it was plain that the agreement was not a CBA, it was also unnecessary to go into the question of whether it was fair and reasonable.

35. Dunn LJ agreed. O'Connor LJ, who delivered a short concurring judgment, observed at pp.1446H-1447A that the letters were:

> "entirely silent as to how disbursements are to be dealt with and *they do not set out any plan by which the client could make any reasoned calculation as to what his monthly or quarterly liability might be*." [Emphasis added.]

36. The amendment to s.59 by the 1990 Act simply added the words which I have italicised below:

> "…a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done by him… providing that he shall be remunerated by a gross sum, *or by reference to an hourly rate*, a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated."

No change was made to the phrase "agreement in writing with his client as to his remuneration" which this Court construed in *Chamberlain*. S.60 was amended so as to provide that:

> "… the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to assessment or *except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate* to the provisions of section 69."

S.61 was amended to introduce subsections 4A and 4B, which provide that if a CBA provides for the remuneration of the solicitor by reference to an hourly rate:

> "If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable) the costs officer may enquire into -
>
> a. The number of hours worked by the solicitor; and
>
> b. Whether the number of hours worked by him was excessive."

37. The effect of those amendments was to permit the client to ask the court to assess the number of hours of work carried out by a solicitor under an hourly rate CBA. In order to do so, a statutory bill must be delivered under s.69, to which the time limits in s.70

will apply. Of course the client still has the right (in the alternative) to challenge the reasonableness and fairness of the CBA itself under s.61, but it is only if such a challenge succeeds that they would be able to challenge the hourly rate.

38. Mr Dunne, who appeared with Ms Gopal on behalf of Ms Barnes, sought to rely on an extract from Hansard, and on published guidance indicating what the Law Society believed the position to be before and after the amendments to ss. 59 to 63 of the 1974 Act. He submitted that these materials were admissible to provide "context" to the amendments. The Court looked at them without prejudice to their admissibility, but I was unable to derive any assistance from them. Taken at their highest, they indicated that the Law Society had sought a "modest" amendment to the 1974 Act to make it clear that an agreement which provides for the solicitor's remuneration by reference to an hourly rate *may* be a CBA: in other words, the fact that an hourly rate is charged will not in itself preclude the agreement from meeting the requirements of s.59. That was the point which Lord Denning had expressly left open in *Chamberlain*. Any views expressed by or on behalf of the Law Society about the impact of the changes after they came into effect are plainly inadmissible.

39. In *Wilson* (cited at [22] above), a firm of solicitors wound up a client company on the grounds that a bill for their legal services had not been paid. The company unsuccessfully applied to rescind the winding up order, contending that the petition debt arose under a CBA, which obliged the solicitors to seek an order for enforcement from the court under s.61. Dismissing the company's appeal from the decision of the District Judge in the County Court, Mann J held that the agreement was not a CBA. He said, at [15]:

> "The essence of a CBA is certainty. The parties to the CBA define how the client will be charged. The benefit to both parties is certainty. The disadvantage to the client (or one of them) is that he no longer has a right to taxation, though he has protections under s.61. One disadvantage for the solicitor is the limits on enforcement under s.61. But both have the benefits of certainty. Since the client is disadvantaged, the agreement has to be in writing, and it has to be sufficiently certain."

He then quoted most of the passage from Lord Denning's judgment in *Chamberlain* which I have set out at [33] above, observing: "that demonstrates the degree of certainty as to the charging that must appear in a CBA."

40. Mann J. next considered the terms of the particular agreement and concluded, among other matters, that its terms as to charging were insufficiently fixed. He said at [16(b)]:

> "The purpose of a CBA is to fix the fees, or provide a fixing mechanism, so that the parties (and in particular the client) know where they stand. Under the terms of this document there is still an element of uncertainty. While it is more certain in its charging consequences than the agreement in *Chamberlain*, it still leaves open the possibility of charging at a higher rate than the specified rates. The agreement specifies fixed hourly charging rates, but at two points refers to the possibility of increase. First, there is a reference to the

> fees being calculated "according to the…nature and complexity of the case." Second, there is the reference to "cases of unusual complexity or urgency" …
>
> the agreement is not one which fixes the costs by reference to a fixed hourly rate, and since it is not one for an overall sum then it falls outside s.59."

WHAT TYPE OF AGREEMENT WOULD CONSTITUTE AN HOURLY RATE CBA?

41. Mr Dunne submitted that any written contract of retainer which specified the solicitor's hourly rates for work amounting to contentious business was an hourly rate CBA, however many fee earners might be involved in doing the work, and irrespective of the fact that they would each charge different hourly rates. Mr Dunne did not contend that *Chamberlain* was wrongly decided. However, he submitted that its rationale does not apply to hourly rate CBAs. The requirement of certainty, which was not articulated in the statute itself, was introduced in order to protect the client, as a quid pro quo for giving up their right to an assessment. The changes brought about by the amendments to the 1974 Act meant that if the CBA provided for the solicitor's remuneration by reference to an hourly rate, the solicitor was obliged to deliver a statutory bill which the client could ask the court to assess, subject to the usual time limits in s.70 and the restrictions introduced by s.61(4B).

42. If the client chose not to challenge the fairness or reasonableness of the CBA itself under s.61, they still had a right to have an assessment of the number of hours spent by the solicitor, and of the disbursements. Mr Dunne contended that this had been overlooked by Mann J in *Wilson*, who wrongly identified as a disadvantage to the client that "he no longer has a right to taxation". Because there is still a right to an assessment, though it is more limited in scope than an assessment under the normal regime, the effect of the amendments to ss.59 to 63 was to eliminate the reason for requiring certainty identified in *Chamberlain* and therefore to dispense with that requirement if the retainer is an hourly rate CBA.

43. Mr Dunne submitted that any written retainer which set out the hourly rates of each fee earner who might work on the case would qualify as an hourly rate CBA, even if the client had no way of ascertaining who would be doing what work and when, and even though this potentially exposed the client to being charged for a partner doing the work that a more junior person within the firm should have undertaken. Indeed, he contended that there was nothing objectionable to the agreement containing provisions for the specified hourly rates to be increased by unspecified amounts at unspecified times, as this one did. He suggested that the increased rates would not bind the client unless the client agreed, and if the client did not wish to agree to them they could always terminate the retainer, although in reality if they objected it was likely that the solicitor would come to some arrangement with them.

44. As to the prospect that the client might be charged at partner's rates for work that should have been done by a junior associate, Mr Dunne suggested this could be addressed by the costs judge disallowing some of the time spent in doing that work. I do not accept that this would be possible under s.61(4B), since the costs judge would only be entitled to assess the number of hours worked by the partner and whether

those hours were excessive. If an appropriate amount of time was spent in doing the work, it would not be permissible to decrease the rates by the back door, by disallowing some of that time.

45. Mr Dunne submitted that it would be unduly narrow to construe s.59 as requiring that in order for the retainer to qualify as an hourly rate CBA, the client should be able to calculate exactly how much he was going to have to pay the solicitor for the work he had agreed to do. If, for example, the solicitor agreed to carry out 50 hours' work at £100 per hour, that would be tantamount to agreeing a fixed fee, albeit that the gross sum would be produced by calculation. In the real world it was impossible to predict how many hours the solicitor would work, and therefore if there is such a thing as an "hourly rate CBA," there is bound to be at least some element of uncertainty built into it.

46. Whilst Mr Dunne is undoubtedly right that an hourly rate CBA affords the client better protection than a fixed fee or salary CBA, it still affords them far less protection than a standard retainer under which the solicitor's bills can be subject to full assessment. In my view, when Mann J referred to the client "no longer having a right to taxation" he meant a full assessment, not the more restricted type of assessment that is permitted for an hourly rate CBA. The reality is that the only advantage for a client of seeking to establish that an agreement is a CBA lies in hoping to delay enforcement (as in *Wilson*), or in seeking to bring about an assessment in circumstances where the time limits for challenging the bill or bills of costs under s.70 have expired, and there are no special circumstances, as in the present case.

47. In any event, it seems to me that the answer to the question of what constitutes an hourly rate CBA lies in the proper construction of the words: "an agreement in writing with his client as to his remuneration" in s.59, which was authoritatively determined in *Chamberlain*.

48. The historical context which I have set out earlier in this judgment establishes that that this is another way of describing "an agreement respecting the amount … of payment for the whole or any part of past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor", which was the formula used in s.4 of the 1870 Act to define an "agreement as to costs" at common law. Bearing that in mind, I accept the submission of Mr Coleman, on behalf of BDB, that the requirement of certainty is inherent in that definition. An agreement *as to remuneration* is an agreement as to the amount that the solicitor is to be paid for their services. If the parties agree what the solicitor will be paid for doing the work he or she has agreed to carry out, then, in deference to their rights of contractual autonomy, the court will hold them to their bargain unless it is unfair or unreasonable. That is why s.60(4) limits the solicitor's recovery under a CBA to the "agreed costs".

49. I therefore agree with Mann J's observation in *Wilson* that the essence of a CBA is certainty. When Lord Denning said that the client must know what he is letting himself in for, he was not seeking to put some gloss on the statute; he was describing in everyday language what is inherent in what is meant by "an agreement for remuneration." The amendments to the statute touch on the method by which the remuneration may be fixed, and put paid to any doubt that it may be fixed by reference to an hourly rate, but they have no bearing on the meaning of those words.

50. If the agreement is for a fixed fee for all the work to be done, there will be certainty. If the agreement is for remuneration by way of a salary, a salary is calculated on a periodic basis for all the work done within that period, whether it be daily, weekly, or monthly. So if the parties agree that the solicitor will receive a specified monthly salary for doing the work, the client knows exactly how much they will have to pay the solicitor each month. In both those scenarios there is no need for a bill of costs to be delivered, which explains why s.60 disapplies s.69 to such CBAs. The client has given up the right to an assessment (as reflected in s.60) because they have agreed what the solicitor is entitled to be paid for the work done. Having agreed that amount, they cannot afterwards be heard to complain that it is too much. Nor can the solicitor complain it is too little. Both parties will be held to their bargain, provided it is fair and reasonable.

51. If the parties agree that the solicitor will be paid, say, £250 per hour and the number of hours is specified in the agreement, again there will be certainty, but Mr Dunne's point that this is just a different way of calculating a fixed fee is a fair one. Such types of arrangement are likely to be rare. However, bearing in mind the express power of the court to assess the number of hours worked under an hourly rate CBA, and to determine whether those hours were excessive, it seems clear that it would also be possible for an agreement to qualify as an hourly rate CBA if it provided that the solicitor would be paid £250 per hour for all the work they did on the case, throughout the lifetime of the litigation, which Mr Coleman described as the "paradigm case". Likewise it would be possible for a specified hourly rate to be agreed for the solicitor doing up to a maximum number of hours of work. In both those scenarios there is, as Mann J put it, a "fixing mechanism". There is sufficient certainty because the agreed rate would be applied to the actual hours worked, which will be set out in the statutory bill.

52. If the agreement is otherwise fair and reasonable, the court has the power to protect the client to a limited extent by satisfying itself (a) that the work did in fact take the time that the solicitor claims it did, and (b) if so, whether the time spent was reasonable. If the costs judge considers that the number of hours worked was excessive, they can disallow the costs claimed for the excessive period, but they cannot adjust the agreed hourly rate. The check on the number of hours worked and the check that those hours were reasonable are separate and cumulative means of protection for the client.

53. On the other hand, if the agreement provides that the solicitor will be paid "between £150 and £250 per hour" depending on the nature of the work and the complexity of the case, there is no certainty at all: there is no agreement as to remuneration "by reference to *an* hourly rate". The hourly rate at which the solicitor is to be paid has not been identified. The client does not "know what he is letting himself in for" even though there is a maximum hourly rate set within the range. There are no "agreed costs" for the solicitor to claim.

54. There is no unfairness to the client in requiring certainty. If such an agreement were a CBA the client would be unable to challenge the rate within the range chosen by the solicitor, whereas under the normal assessment regime they would be able to do so. The ability of the court to assess the number of hours worked would afford no compensation for a choice of rate at the upper end of the range, and such an agreement might well be regarded as objectively fair and reasonable.

55. The question whether any firm with more than one solicitor could ever enter into an hourly rate CBA is not straightforward to answer. Mr Dunne suggested that it was "absurd" to suggest that hourly rate CBAs were restricted to one-person practices. I am not persuaded by that. It seems to me that this may well be a situation in which the rule of statutory construction that the singular includes the plural *unless the context otherwise requires* may come into play. S.59 refers to a solicitor making an agreement in writing with his client "as to his remuneration… by reference to an hourly rate." The requirement of certainty may dictate that in this context there must only be one hourly rate and not a variety of different hourly rates applicable to different people within a solicitor's firm.

56. However, as Mr Coleman accepted, it is at least theoretically possible to conceive of an agreement which specifies with precision the work to be carried out by A, B and C and their hourly charging rates for doing that work so that the client does know with sufficient certainty how much they are letting themselves in for in respect of each of them. For that reason, and because it is unnecessary to do so in order to determine the outcome of this appeal, I would prefer to express no concluded view on that point.

CONCLUSION

57. Applying the test of certainty to the agreement made between the parties in this case, it is plain that it was not a CBA. It is every bit as uncertain as the agreement in *Wilson*. Whilst the rates are set out for certain named fee earners, even those rates are subject to unspecified increases at unspecified times - if, for example, one of those individuals is promoted or attains professional qualifications. It is far from clear who within the firm will be doing what, leaving open the possibility that a task may be performed by someone inappropriately senior and charged accordingly, something that can only be addressed on a conventional assessment. A range of fees is set out for paralegals and other un-named senior associates, and there is just a general indication that they will be used to deal with unspecified aspects of the matter when it is more cost-effective for them to do so. As Judge Davies pointed out, there is nothing to indicate how cost-effectiveness will be evaluated, or by whom. The hourly rates are also subject to change from time to time to take account of the firm's overheads.

58. As Lord Denning put it, this is not an agreement as to the solicitors' remuneration, but "simply an indication of the rate of charging on which the solicitors propose to make up their bill." The judges in the County Court were right to find that the agreement in this case was insufficiently certain to be a CBA. I would therefore dismiss this appeal.

Lord Justice Warby:

59. I agree.

Lord Justice Lewison:

60. I also agree.