Case No: SC-2019-APP-000066

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 29/12/2021

Before:

COSTS JUDGE LEONARD

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Between:

Spencer McGuinness	**Claimant**
- and -	
Kevin Mawer	**Defendant**

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- -

Joshua Munro for the **Claimant**
The Defendant in Person
Hearing date: 18 October 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. I will be assessing the costs payable by the Claimant to the Defendant, the Trustee of the Claimant's estate and bankruptcy, under an order made by ICC Judge Jones on 25 January 2019. The detailed assessment hearing is listed for three days on 15 March 2022. The Defendant's bill of costs has been certified as to accuracy, the indemnity principle, costs orders and payments and VAT by Mr Toomey, a solicitor and a partner in the firm that conducted the relevant proceedings, Ward Hadaway ("WH"). It sets out hourly rates for each WH Fee Earner.

2. On 4 December 2020 the Claimant served upon the Defendant a Part 18 Request for details of the funding and retainer arrangements between the Defendant and WH. The request covered not only details of the funding arrangements and any conditional element but a copy of the retainer and, for example, details of all payments made and invoices raised by WH; the details of the arrangements between the Defendant and a former joint Trustee, Mr Pitts; whether there had been any assignment or change of the retainer; and copies of any retainer arrangement with Counsel.

3. On 3 March 2021 the Claimant applied for an order that the Defendant answer the Part 18 Requests and that in respect of the contract of retainer and other documents specified in the Part 18 Request, he be put to the election procedure described at Practice Direction 47, paragraph 13.13:

> "The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence."

4. I dismissed that application on 28 April. My order recorded the fact that Counsel for the Defendant had, at the hearing, advised me that the Defendant had a written retainer, which would be provided to the court at the assessment, and would deal with the Claimant's challenge in Replies to his Points of Dispute.

5. The Replies were, I understand, served on 7 June 2021. They confirm in the reply to Point 7 in the Points of Dispute that the Defendant (not Mr Pitts), personally and in his capacity as Trustee entered into a contract of retainer dated 23 January 2012 with WH, whom he (not Mr Pitts) instructed. They also say that if Mr Pitts had been a party to the retainer, he and the Defendant would have had joint and several liability for the fees, and that if he ever instructed WH, it would have been as agent for the Defendant, their actual client.

6. The Replies confirm that the retainer provides that all fees for all work done under the scope of the retainer are payable by the Defendant. There are no definitions of "win" or "lose" because it is not a conditional fee agreement ("CFA"), but the amount of the Trustee's personal liability is subject to this cap:

> "…any fees payable are limited to assets available in the Insolvency

> Appointment…"

7. Alternatively, say the Replies, if the agreement is a CFA, it is a valid CFA meeting the requirements of section 58 of the Courts and Legal Services Act 1990 ("CLSA").

8. Those Replies are supported, for the purposes of this application, by a witness statement from the Defendant dated 25 September 2021.

9. On 2 July 2021 the Claimant made another application for the Defendant to be put to an election in relation to any retainer documents or funding agreements, and for him to be ordered to file and serve a witness statement explaining what costs had been incurred by and paid to WH and from what sources, supported by "all relevant documentary evidence" including but not limited to copies of invoices; whether the VAT on the invoices had been reclaimed by any party; why the Defendant says he is entitled to claim costs from the Claimant "given the costs "have, or appear to have already been paid by the Claimant's estate in bankruptcy"; what invoices have been raised by the Defendant, Mr Pitts or Begbies Traynor or Forensic Recovery Limited the estate, together with copies; and "the specific nature of the agreement between Mr Pitts and Ward Hadaway".

10. That is the application addressed by this judgment. On the hearing of this application Mr Munro for the Claimant (wisely, in my view) made it clear that the only the application for the Defendant to be put to an election as to disclosure of the retainer was pursued. The application for the Defendant to be ordered to serve a witness statement was, in effect, abandoned. I shall nonetheless refer to some of the evidence given in respect of that part of the application, because it overlaps to some extent with the evidence in support of the "election" application and it seems to me to be illustrative of the Claimant's approach to these assessment proceedings.

11. For the purposes of the hearing, a copy of the Defendant's retainer of 23 January 2012 was filed with the court.

Whether the Retainer is a CFA, and the Significance of That Issue

12. Section 58(2)(a) of the CLSA defines a CFA:

> "… a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances..."

13. Section 58(2)(b) of the CLSA defines a success fee:

> "a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances."

14. Bearing in mind these definitions my own view is that the Defendant's retainer agreement with WH is a CFA, because it provides in express terms that the Defendant is obliged to meet WH's fees only to the extent that assets from the estate are available to pay them. It is not, however, a CFA that provides for a success fee, because it does not provide for the fees to be increased in specified circumstances.

15. Whether it is or is not a CFA seems to me to have no real bearing on the merits of this application. That is both for reasons of principle (to which I will come next) and because insofar as any grounds have been raised to challenge the validity of the CFA, they have already been met in evidence by the Defendant. That evidence serves the dual purpose of demonstrating, first that there are no real grounds for putting the Defendant to an election and second, that insofar as there might have been, the "other evidence" upon which Defendant could rely under Practice Direction 47, paragraph 13.13 has already been given.

The Authorities

16. In *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570, CA Henry LJ said that the certification of a bill of costs by a solicitor as an officer of the court, to the effect that a receiving party's solicitors are not seeking to recover, in relation to any item, more than they had agreed to charge their client is normally sufficient confirmation that there has been no breach of the indemnity principle. That finding still applies. Absent any real reason for doubting the certification, it will offer sufficient assurance that the indemnity principle has not been breached. Speculative indemnity principle challenges should not be entertained.

17. In *Hollins v Russell* [2003] EWCA Civ 718 the Court of Appeal took a different view where Conditional Fee Agreements were concerned. At paragraph 71 of its judgment of the court said:

> "In all the circumstances, we have come to the conclusion that the Bailey decision should not be extended beyond the facts with which it was dealing, namely that of a conventional bill, so as to obviate disclosure of the CFA as the norm. As we see it, where there is a CFA, a costs judge should normally exercise his discretion… so as to require the receiving parties… to produce a copy of their CFAs to the paying parties in order that they can see whether or not the Regulations were complied with and (where a CFA provides for a success fee) whether the liability of the receiving party to pay that success fee is indeed enforceable. We consider that this is appropriate where receiving parties may claim more than they would otherwise be entitled to in circumstances in which their whole claim may turn out to be unenforceable. Noncompliance may be sufficient to remove the paying party's liability."

18. The regulations referred to were The Conditional Fee Agreements Regulations 2000, any breach of which, at the time, could render a CFA entirely void and allow a paying party to escape from having to pay any costs at all.

19. As is evident from the above extract from its judgment, the court in *Hollins v Russell* decided that disclosure should be the norm with CFAs, as distinct from other forms of

retainer, because receiving parties relied upon them to recover success fees against paying parties and because of the potentially drastic effect, in 2003, of any breach of the 2000 Regulations. Subsequently the Costs Practice Direction set out requirements for providing key information about success fees if the CFA was not disclosed, breach of which could render the success fees irrecoverable and which in practice often tended to take the place of disclosure.

20. The reasons given in *Hollins v Russell* for requiring a receiving party to elect either to disclose a CFA or rely upon other evidence have largely, if not entirely, fallen away. The 2000 Regulations were revoked in 2005. The only statutory requirements for a valid CFA now are that it be in writing and not in relation to family or criminal proceedings, and that it complies with certain limits upon any success fee. Success fees are only recoverable in very limited categories of cases, so the practice directions requiring disclosure of success fee information no longer apply except in those limited cases. In this case, as I have observed, there is no success fee.

21. In short, *Hollins v Russell* has limited if any bearing on the facts of this case. The Defendant should only be required to decide whether to disclose his retainer with WH, or to rely upon other evidence, if there is a real reason for doubting the certification of the bill.

The Claimant's submissions and the Defendant's Answers

22. This is a summary of the stated grounds given by the Claimant for his application, and, where I consider it necessary, of the Defendant's responses.

23. The Claimant says that the Defendant and his representatives have been inconsistent in their descriptions of the retainer as either conditional or non-conditional. There is supposed to be no success fee, but the points of dispute referred to an "uplift" on hourly rates of up to 42%.

24. The answer to this seems to me fairly self-evident from the Points of Dispute, which spell out the only term in the retainer which might justify the conclusion that the retainer is a CFA and take the position that it is not a CFA, but point out in the alternative that if it is, it is a perfectly valid one. As I have said, I take the view that it is a CFA, but there is a perfectly respectable argument to the effect that it is not. The Defendant and his representatives have simply been expressing their own views.

25. The reference to an "uplift" is made by the Defendant in response to Point 17 in the Claimant's Points of Dispute. Point 17 argues that the Defendant should recover only the 2010 National 2 Guideline Hourly Rates for the work done by WH. In reply the Defendant argues that insofar as the 2010 Guideline rates apply at all, the appropriate comparator would be the National 1 hourly rates. The Defendant then lists the hourly rates charged by various fee earners at WH and calculates the corresponding percentage "uplift" over the National 1 Rates.

26. The Points of Dispute appear to have been drafted by the Claimant in person, so he evidently understands the guideline rates and (insofar as they have any application to this particular case) their significance. I have heard the Claimant represent himself in these and other proceedings and I am aware that whatever his faults might be, an inability to understand and apply legal concepts and terminology is not one of them. I

am unable to accept that he could ever have been under the illusion that the Defendant's hourly rate comparison with the National 1 rates was a reference to some sort of conditional element in the contract of retainer, especially as the pertinent terms of the retainer had already been spelt out in the reply to Point of Dispute 7.

27. The Claimant argues that the estate accounts show that WH have been paid substantial sums from assets realised by the estate, so that depending upon the precise terms of the agreement the Defendant might not be able to claim costs against him, as it would constitute a double recovery.

28. As one would expect, the Defendant as Trustee and the solicitors acting for him in that capacity have accepted payment of their fees from assets realised by the estate. In due course, any monies received from the Claimant under the costs order of 25 January 2019 will fall to be credited against that, to the benefit of the estate. The suggestion that there might be some contractual arrangement to the effect that the estate should bear the ultimate burden of a costs order made against the Claimant personally is not just speculative, but fanciful.

29. The Claimant also says that the Defendant has referred, in insolvency proceedings, to a 50/50 fee-sharing arrangement with WH which must be a material condition of the retainer having an effect upon recoverability. If WH are claiming only 50% of the fees, then the Defendant would profit by retaining and keeping the other 50%.

30. The answer to this is provided by the Defendant in his witness statement of 25 September 2021, and it was previously provided in a witness statement produced by him in September 2020 for the purposes of insolvency proceedings. Both the Trustee's fees and WH's fees are liabilities of the estate. As a pragmatic arrangement WH, at the Defendant's request, agreed that he and they would each receive a proportionate part-payment of their fees from monies realised by the estate (not, as the estate accounts clearly show, a 50/50 split). WH have never however been contractually bound to do so. Their contractual right to recovery is as provided for in the retainer.

31. It seems to me that the position as described by the Defendant is perfectly straightforward and unsurprising. It had been fully explained before either of the Claimant's applications in the detailed assessment were made. The suggestion that there is some sort of fee-sharing arrangement with WH that might limit the Defendant's ability to recover the costs that the Claimant has been ordered to pay has no basis either in fact or in principle.

32. The Claimant says that the position regarding Mr Pitts is also unclear because Mr Pitts may have had some liability to pay which could reduce the Defendant's ability to recover WH's full fees from the Claimant. The Claimant has made the most of the rather (to my mind) over-cautious reply as to what the position would have been if Mr Pitts had either been a party to the retainer or instructed WH, but the challenge is entirely speculative and a plain answer has been given to the effect that neither was the case.

33. The Claimant complains that the Defendant has claimed VAT in his bill of costs, although he says presumably VAT was reclaimed by the Defendant, Begbies Traynor, or Forensic Recovery Ltd. This, he says, has not been clarified by the Defendant.

34. In fact (again) it has. In his September 2020 witness statement the Defendant confirmed that he had explained to the Claimant in a number of occasions that he recovery of VAT in respect of an estate in bankruptcy relates to the VAT registration of the insolvent. The Applicant was never registered for VAT, so VAT is not recoverable. Further, the Replies confirm that the Defendant is not registered for VAT, and that in his capacity as the person personally liable to pay WH's fees he cannot recover the VAT upon those fees.

35. Mr Munro did his best to polish what remained of the Claimant's application after the abandonment of his demand for witness and documentary evidence. He pointed out that the Claimant was discharged from bankruptcy on 24 February 2011 and the Defendant was appointed as Trustee (on the application of the Official Receiver) on 20 December 2011 (according to the Defendant, the correct date is 15 January 2012). There would have been no assets in the estate when the Defendant was appointed, and by the time of the costs order of ICC Judge Jones on 25 January 2019, all assets in the estate would have been realised. Mr Munro suggested that a real issue was raised by the likelihood that the retainer could not have been intended to extend to a hearing in 2019.

36. That, to my mind, simply does not follow. The Defendant and WH might not have supposed, in January 2012, that the retainer entered into by them then would still be in effect seven years later, but one only has to have regard to the history of the litigation that started (according to the bill of costs) on 28 November 2012 to understand why that should have been the case.

37. Mr Munro submitted also that the agreement reached by the Defendant and WH as to the payment of fees from assets was an unwritten CFA, but for the reasons I have given there is nothing in that. It was not a contractual arrangement, much less a CFA.

Summary of Conclusions and Further Observations

38. Between them, the certified bill and the Replies to the Defendant's Points of Dispute (supported by the Defendant's witness statement) demonstrate that the retainer of 23 January 2012 between the Defendant and WH is a standard contract of retainer under which fees are payable in standard fashion by reference to hourly rates, subject to the proviso that the Defendant is obliged to meet WH's fees only to the extent that assets from the estate are available to pay them. I have no reason not to accept the certification of the bill or the Defendant's evidence as to the nature of the retainer, and I do accept both. The Claimant's unfounded and at times plainly incorrect speculations offer no basis for rejecting it.

39. Although I am of the view that it is, strictly speaking, a CFA, I find no real basis for requiring the Defendant either to disclose his retainer with WH or elect to rely upon other evidence. In any event he has, in demonstrating the lack of merit in the Claimant's application, already produced all the evidence upon which he might need to rely in order to meet the Claimant's speculative challenges. This application will, accordingly, be dismissed.

40. One might be tempted to think that all of this could been avoided if the Defendant had simply disclosed the retainer. He explains in his witness evidence why he has not done so:

> "Mr McGuinness' conduct in these proceedings has caused me great difficulty and cost. If I believed that he was capable of acting reasonably I would be more inclined to provide a copy of the retainer. However, he has shown time and time again that he is not. If I provide a copy of the retainer, it will simply lead to a slew of further baseless arguments and demands for information, which will lead to even more. There has to be an end point."

41. I can understand the Defendant's caution. What stands out about this application is not that there is no, or no adequate, answer to the Claimant's speculations about the nature of the retainer. It is that such answers have been given more than once, but that the Claimant refuses to accept them and presses forward with applications regardless of the evidence that demonstrates that there is no real substance in them.

42. Notwithstanding Mr Munro's protestations to the contrary, this is largely a repackaged version of the application I dismissed on 28 April. I am concerned at the Claimant's willingness to make repeat applications (the costs of which he says he cannot pay, and as a matter of fact he does not pay) based on such unmeritorious challenges.

43. I find it necessary to refer to my judgment in *McGuinness v Clintons* (SCCO SC-2019-APP-000119, 7 April 2021) in which I concluded that the Claimant had wasted significant court time and resources in repeatedly pursuing the same inaccurate factual assertions and unsuccessful legal arguments in different contexts. I also observed that the volume, prolixity and repetitive nature of the evidence, submissions, and correspondence the Claimant had produced was intended to wear his opponent down and that a great deal of court time and resources, and of his opponent's resources, had in consequence been wasted.

44. I see the same pattern emerging on this assessment. As the Defendant has pointed out, the application I dismissed in April was supported by a 950-page bundle and this application by a 452-page bundle, which the Defendant and this Court have been obliged to review for the purposes of applications that lacked any real substance.

45. I also have to mention that extensive reference is made in the Defendant's Replies to a judgment of ICC Judge Jones dated 25 January 2019 in which, I am told, he expressed concerns about the Claimant's account of his business and financial affairs, criticised the Claimant's "kitchen sink" approach to litigation and expressed the hope that a detailed assessment proceedings, a *Days Healthcare* order might prevent him forcing his opponent to incur costs which he would never pay. To the best of my knowledge, I have not seen that judgment. If I had, it might well have informed my response to the *Days Healthcare* application made by the Defendant, which I also dismissed in April 2021.