IN THE SENIOR COURTS COSTS OFFICE

Case No: JJ1802856/HQ13X02779

Courtroom No. 95

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 31st October 2019

Before:

MASTER JAMES

B E T W E E N:

MR COLIN FARMER

and

THE CHIEF CONSTABLE OF LANCASHIRE

MR C EDWARDS (instructed by McMillan Williams Solicitors Ltd)
appeared on behalf of the Claimant
MR M SMITH (instructed by Hill Dickinson LLP) appeared on behalf of the Defendant

JUDGMENT
(For Approval)

MASTER JAMES:

1. This bill started out at £174,565.79 as per the notice of commencement dated 21 June 2018. That included a success fee on parts two and three in the sum of £28,088.41. It is now conceded that that first CFA is unenforceable and therefore that success fee is no longer pursued.

2. The bill also included costs calculated at incorrect hourly rates in part four, worth £20,556. It is now conceded that the rates claimed were too high as well.

3. Those two figures, plus VAT, total £58,373.29, and the receiving party has lodged a replacement bill. A copy was handed to me today but, in fairness, I am sure I have seen that document before and I think it has just gone astray from the Court's file: it is £116,192.50.

4. In short, a third of the bill, as originally drawn, has already been conceded, but the paying party applies pursuant to the Civil Procedure Rules at 44.11, or pursuant to contract in relation to the second CFA, to disallow the entirety of the bill.

5. I am not going to rehearse either side's submissions at length, but I will deal with the issues as follows.

6. As at the notice of commencement, and as at the request for detailed assessment, the receiving party clearly believed that the first CFA was valid and enforceable. They claimed not only base costs, but £28,088.41 plus VAT of success fee, which could only have referred to the first (pre-LASPO) CFA.

7. According to the replies to the points of dispute served on 14 August 2018, the success fee claimed at item 27 is recoverable *inter partes*, as per the terms of the CFA dated 20 October 2012.

8. It would be incorrect to claim a success fee from the defendant beyond part three, due to the transfer of instructions to Sophie Khan & Co, (so it says – I believe there was another firm name, still run by Ms Khan but styled "Police Action" or some such name). The ATE premium is not recoverable from the defendant as it was obtained post-LASPO.

9. Therefore the bill, and that reply, indicate that the receiving party believed as late as August of 2018 – and indeed up to day one of the detailed assessment on 18 March 2019 – that the first CFA was valid and enforceable.

10. It is now said by the receiving party that the second CFA was retrospective to day one, and would cover all of the work done in parts one, two and three as well as part four. That, in my judgment, cannot be correct.

11. I have looked without success for anything on McMillan Williams' file to suggest that Mr Farmer was advised that the second CFA was intended to go right back to the very beginning (in October of 2012) rather than just going back the few days between Mr Farmer reconnecting with McMillan Williams on or around 14 May 2015 – in the bill on page 24 the documents item starts on that date – and the second CFA being signed on 29 May 2015.

12. What there is on the file tends to suggest the opposite. For example, there is a 21-page client care letter dated 19 May 2015, paragraph 21 of which states: 'We estimate that your total charges and expense will be approximately £20,000 plus VAT'. It adds that that is not a fixed estimate but, as at 19 May 2015, the costs in parts one, two and three of the Bill as as drawn were already £71,073.91 excluding VAT; or £85,127.69 including VAT.

13. Mr Farmer is blind. At the time he signed the second CFA he had a litigation friend – Sophia Khan – in place. There was a question mark as to whether he did indeed have capacity. I gather that after Ms Khan left off being his litigation friend, a different litigation friend was appointed.

14. Therefore capacity was clearly an issue, yet McMillan Williams asked the Court to find that with no evidence that he was ever advised, either orally or in writing, that he was committing himself to a CFA backdated to October of 2012, Mr Farmer validly agreed to do exactly that. The Court does not so find.

15. Firstly, as already stated, McMillan Williams attempted to claim the success fee on parts two and three of the bill and maintained that position as late as day one of the detailed assessment. The second CFA states at schedule one that the success fee is 0% unless it goes to trial, in which case it rises to 100%.

16. Before purporting to sign a blind man with (potentially) questionable capacity up to an agreement to pay 100% success fee on costs, where there had been a pre-LASPO CFA with a success fee of 67%, McMillan Williams should have advised him to take independent legal advice. They did not do so, because they saw no need. They were intending to claim under CFA 1 to the point where he left to be represented by Ms Khan and under CFA 2 from the point where he returned to McMillan Williams.

17. There is nothing contemporaneous on the file to suggest otherwise, and certainly nothing that would show that Mr Farmer knowingly made what would have been a colossally bad bargain and one which – if it had indeed been made – would have created a massive conflict of interest with McMillan Williams.

18. Accordingly, I find – as Mr Smith invited me to do – that the only proper interpretation of CFA 2 is that it is retrospective only to around 14 May 2015, and not to around 20 October 2012.

19. That being the case, there is no retainer under which parts two and three of the bill can be recovered, so they would need to be deducted as well.

20. Now, at this point I tried to do arithmetic on the new bill, and the new bill is still wrong. The bill total is £116,192.50 – I agree that – but looking on page 20 of the new bill there is £106,037.98 – that is costs – plus £22,026.25 VAT, plus £6,977.25 disbursements.

21. Anybody around this table being of the costs persuasion will know that 106 plus 22 plus 6 is more than 116. I make the total £135,041.48, and part of the reason why I took longer to get this judgment out than I had hoped is that it took me a while to track down what has happened.

22. In part three (in the summary) the receiving party still have the success fee in there - £39,151,48 includes the success fee. Whilst in the final total it has come out, it is still in that summary. It is not helpful.

23. If we take off part two, by my arithmetic that is £20,247.60. If we take off part three, I initially calculated it at £48,020.78 but that is including that success fee; minus that success fee it is £29,171.80. That would leave a bill in the order of £66,773.10 – certainly that is the total in part four. With part one as well it would come to about £68,000.

24. The point is that the bill should be something like one third of the figure it started out at, and that it would be well below the threshold for provisional assessment.

25. As to the remainder, in my view Mr Smith's point on cancellation of the second CFA was well made. Mr Farmer cancelled it inwriting on the 1st/4th June 2015, (he signed the document on one day but did not serve it until later). If McMillan Williams wished to continue under a no-win-no-fee agreement, they needed to sign him up to a new one.

26. However, in case I am wrong, I turn to the CPR 44.11 point. It is clear that the bill, properly drawn, should have been in the region of £66,773.10 – being the costs in part four – or £68,775.30 if part one is included. Either way it would be well below the threshold for provisional assessment under CPR 47.15, in which case the Court fee would have been correspondingly lower and the costs, absent an oral hearing, would be limited to £1,500 plus VAT.

27. Instead, two days were set aside in March, and a further two – today and tomorrow – have been set aside this week to hear a bill which is still not right, and which is supported by a witness statement of Mr Shrimpton which is not right either.

28. In a letter dated 9 January 2017, McMillan Williams wrote to Mr Farmer stating that, 'The defendant has agreed to pay the costs of the claim that the Court would deem to have been reasonably incurred, and do not include costs that have arisen out of the issues that concern the application that was made to the Court and heard before Master Yoxall on 15 October 2015 and 21 December 2016. These costs will be dealt with at the end of the application currently before the Court'.

29. Now, that was the application to get Ms Khan out of the picture as Mr Farmer's litigation friend, and I should say in fairness I have seen ample evidence – particularly in the later correspondence filed – that there has been a good effort to try and exclude those costs. There is a lot of material there – attendances, hearings, bundling, and so on – clearly tens of thousands of pounds has been expended on this and not put into this bill.

30. However, there are still significant costs in this bill which relate to the application to dislodge Ms Khan, and they should not have been in there either.

31. Mr Edwards – counsel for McMillan Williams – invited me to restrict any disallowance to the amount claimed for drawing and checking the bill and the Court fee. The Court fee is not included in the running total of the bill, whether that be £66,773.10 or £68,000. However, if I take the bill drafting and checking off that figure – and I make that £6,8040 including VAT – it would give £59,933.10 or thereabouts. That is 34% of the bill as

originally drawn at £174,565.79.

32. The point is that none of the above would represent a CPR 44.11 sanction as such. Even disallowing the bill preparation and checking, in these circumstances that is still not right as such a disallowance is just a normal detailed assessment decision.

33. McMillan Williams have conceded the hourly rates and the success fee points already, and my decision on CFA 2 as against CFA 1 was not a decision taken in order to penalise McMillan Williams but to put matters back on the correct footing as regards their contract with Mr Farmer.

34. Therefore, where we are now is we have a bill of £59,933.10 – or 34% of the bill as originally lodged – and numerous examples of documents, specifically the bill, the replies and the witness statement, which have been signed without any proper regard for the need to fact-check and ensure that matters were dealt with properly.

35. I agree with Mr Smith, as well as being unreasonable or improper – which Mr Edwards accepts that it was – the conduct of McMillan Williams up to and including the witness statement of the costs lawyer has been in breach of the Civil Procedure Rules, and especially of the provisions of CPR 1.3 whereby the parties are required to help the Court to further the overriding objective.

36. I was grateful to Mr Edwards for his learned submissions on the law, but again I am not going to go through it in any detail. I am, of course, familiar with Bamrah and, in particular, MXX as I was an assessor in that case.

37. This case turns on its own facts. In my view, on the facts of this case, the conduct of McMillan Williams (as set out above) warrants disallowance of what is left of the bill. That is what I order.

End of Judgment

Transcript from a recording by Ubiqus
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