Neutral Citation Number - [2024] EWHC 402 (SCCO)
Case No: SC-2022-BTP-001200

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26th February 2024

Before :

SENIOR COSTS JUDGE GORDON-SAKER

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Between :

(1) QUANTUM CARE LIMITED	**Claimants**
(2) MRS GURPREET GIL MAAG	
- and -	
MR LALIT MODI	**Defendant**

- -
- -

Mr Jamie Carpenter KC (instructed by **NMH Costs Lawyers Limited**) for the **Claimants**
Mr Shaman Kapoor (instructed by **BlackLion Law LLP**) for the **Defendant**

Hearing date: 22nd January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 26th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. This judgment sets out my decision on preliminary point 8 in the Claimants' further supplemental points of dispute, namely:

> If the Court concludes that the claim for Mr Hora's fees includes
> claims for time which was fictitious or in any event that some or
> all of those fees are not recoverable as costs, then the Claimants allege that the Defendant (either directly or via his agents, Mr Hora and/or BlackLion Law) is guilty of misconduct under CPR
> 44.11(1)(b).

The background

2. The First Claimant is a company incorporated in the British Virgin Islands and is a special purpose vehicle for the Second Claimant's investment in Ion Care AG, a healthcare venture. The Second Claimant is an Indian national who lives in Singapore. The Defendant is an Indian national who lives in London.

3. The Defendant is entitled to the costs of proceedings in the Chancery Division from 28th May 2021. The Claimants had contended that the Defendant had fraudulently induced them to set aside US$2m and to invest US$1m in Ion Care, which he was promoting, and that he was in breach of an agreement with the First Claimant to repay the investment with interest. As well as the return of the investment, the Claimants claimed damages in respect of the profits that they would have made had they invested elsewhere.

4. The Second Claimant abandoned her claims before trial, but remained a party for costs purposes. At trial, the claim in deceit was dismissed, but the First Claimant obtained judgment for the debt in the sum of US$935,847 including interest (then equivalent to £720,602). That was less than the Defendant's Part 36 offer dated 6th May 2021, hence the costs order. No order was made in respect of the costs incurred before 28th May 2021.

5. The Claimants appealed the dismissal of the deceit claim, but were unsuccessful and were ordered to pay the Defendant's costs of the appeal.

The costs

6. The proceedings in the High Court were the subject of a costs management order. The Defendant included in his budget the fees of Mr Swadeep Singh Hora, an Indian qualified lawyer and advocate based in Jaipur. In approving the Defendant's budget, Deputy Master Lampert made no allowance in respect of Mr Hora's fees save in relation to the disclosure phase. The Claimants' costs were budgeted at £570,587 and the Defendant's costs at £631,100.

7. The Defendant commenced detailed assessment proceedings in respect of the High Court bill on 31st August 2022. The bill claimed total costs of just over £500,000,

including £100,500 in respect of Mr Hora's fees. Items 173, 174, 398, 399, 400 and 401 relate to his fees for assisting with disclosure, witness evidence preparation, attending trial, trial preparation, and preparation of the skeleton arguments and closing submissions. Item 422 relates to Mr Hora's expenses for attending trial. No fee notes or invoices in respect of Mr Hora's fees were served with the bill.

8. The Claimants' points of dispute challenged Mr Hora's fees on the basis that they had been excluded from the budget and it was said:

> no adequate breakdown of the work done by the Indian Advocate has been provided and it is therefore not possible for the paying party to dispute or agree whether the costs incurred were reasonably incurred. The paying party's position is therefore reserved pending further explanation, and no offer is made …

9. The Claimants served a Part 18 request, asking for copies of the retainers and invoices of the Defendant's solicitors, BlackLion Law LLP, and also the fee notes of Mr Hora, a breakdown of his fees, an explanation of the agreement with him and an explanation of his involvement.

10. While the Claimants should have been served with copies of the fee notes of counsel and "written evidence as to any other disbursement which is claimed and which exceeds £500", they were not entitled to most of what was sought in the Part 18 request as it was privileged.

11. The response, which largely asserted privilege, did attach counsel's fee notes and two documents entitled "memo of legal fee" in respect of the fees of Mr Hora. The first, dated 1st December 2021, is in the sum of £45,000 and is in respect of 60 hours spent reading disclosure and 40 hours in conferences with the Defendant and his witnesses. The time was charged at an hourly rate of £450. The second, dated 10th March 2022, is in the sum of £55,500 and is in respect of 50 hours reading the papers, 5 hours on skeleton arguments, 15 hours on closing submissions and 4 days attending trial (at £6,000 per day).

12. The details in the fee notes correspond with the sums claimed in the bill.

13. The detailed assessment proceedings were adjourned pending the Claimants' appeal. Following the determination of the appeal, the parties agreed directions which included an order that the Defendant should serve a "detailed breakdown" of Mr Hora's fees and a statement setting out the "need and justification" for his services. Mr Hora's fees would then be decided as a preliminary issue at a half day hearing in advance of the remainder of the detailed assessment, which would then include the Defendant's costs in the Court of Appeal.

14. Mr Hora's first witness statement explained that he was a litigator with over 23 years' experience and had acted for the Defendant and his family for many years in relation to matters in India, England and elsewhere. He was the Defendant's "principal legal advisor". Mr Hora had represented the Defendant in relation to this claim until proceedings were commenced, when the Defendant had to instruct solicitors within the jurisdiction. Thereafter Mr Hora continued to assist, in particular with disclosure

and liaising with the witnesses based in India. He exhibited two documents, again entitled "memo of legal fee" and again dated 1st December 2021 and 10th March 2022 respectively. The first was in the slightly different sum of £45,007.50 and the second in the less slightly different sum of £56,400. Each gives the date on which work was done, a description of the work and the time spent. For example, the first item is:

Date	**Description**	**Time Spent**	**Rate**	**Fee Earner**	**Costs**
01/06/2021	Calls with AS and RM regarding disclosure and strategy generally	00:45:00	£450.00	Swadeep Singh Hora	£337.50

15. The only explanation of the breakdowns in the statement was:

> I have prepared a detailed breakdown of the work carried out [SSHl/2-10] from which it is clear that the work which I did was
> focused on progressing the litigation; liaising with Mr Modi to ensure that he understood BLL and counsel's advice; assisting Ms Robson in disclosure review and consideration; assisting in the taking of witness evidence, liaising with the witnesses and attending trial.

16. The preliminary issues hearing was listed on 1st September 2023 and the remainder of the detailed assessment was listed for 3 days in November. Given the attack on Mr Hora's fees, I decided that there should be further points of dispute and replies and that the Defendant should file a further statement from Mr Hora explaining how the breakdowns had been prepared, whether they had been sent to the Defendant and producing any contemporaneous time records relied on.

17. The further supplementary points of dispute challenged the accuracy of the breakdowns which, it was said, contained items of work which could not have been done. For example, work done on closing submissions on dates after oral closing submissions had taken place, working on skeleton arguments and witness statements after they had been exchanged, and attending trial on a Saturday. It was contended that if the court concluded that the claim for Mr Hora's fees included items which were fictitious, then the Defendant was guilty of misconduct under CPR 44.11(1)(b).

18. The replies conceded Mr Hora's fees:

> … following the hearing on 01/09/23 and the indication given by Senior Costs Judge Gordon-Saker as [to] the recoverability of these costs on an inter-partes basis, in the circumstances and to save further costs and Court time in dealing with this issue, the Defendant concedes the costs of Mr Hora claimed under the items set out in these supplemental Points of Dispute.

19. From recollection, the indication that I had given was not based on the veracity of the fees charged but was simply an indication that it would be difficult to recover the fees of foreign lawyers if they were simply acting as an intermediary for the client.

20. In his second witness statement, Mr Hora explained that, as his fees had now been conceded, he would deal only briefly with the queries raised. Lawyers in India do not record time contemporaneously and clients are billed either agreed amounts or a sum based on an approximate time spent.

21. The breakdowns had not been prepared until requested by the Claimants. With the assistance of his staff, Mr Hora had prepared them from emails and diary records. They were therefore prepared some considerable time after the work had been done.

22. The initial invoices had been delivered to the Defendant shortly after the dates they bore and had been paid, save for a balance of £13,900 on the second.

23. The Claimants gave notice that they wished to cross-examine Mr Hora at the detailed assessment hearing due to start on 14th November 2023. A few days before the hearing, the Defendant's solicitors wrote to the court submitting that, in view of the concession of his fees, there was no need for Mr Hora to attend for cross-examination. Unfortunately, but for unconnected reasons, the detailed assessment hearing had to be adjourned. The Claimants then applied for an order that, unless Mr Hora attended for cross examination at the adjourned hearing, the Claimant's bills should be assessed at nil.

24. On the hearing of that application I made no order. However, I did express an expectation that Mr Hora should attend at the adjourned hearing on 22nd January 2024.

Mr Hora's evidence

25. Mr Hora duly attended by video to be cross-examined. He spoke about his busy practice in Jaipur, of which the Defendant was one of many clients. The two invoices were based on his estimate of the time spent and the estimate was based on his memory rather than on any time recording. When the breakdowns were required, he instructed his staff to go through his emails to decide what work had been done and the time that had been spent. The breakdowns set out only the work that could be identified from the emails. The staff, his clerk and a stenographer, had never had to do this before. They created a table which Mr Hora checked and it "looked ok to me". It was intended only to give the court an idea of what had been done.

26. In respect of the discrepancies raised by the Claimants, Mr Hora explained that the trial fee on the Saturday after he had attended the trial was his "out-station charge" for travelling back to India. Other discrepancies were explained by differences between time zones – for example work recorded on 4th March, after closing submissions were filed, was based on an email sent on 3rd March, before they were filed. Work recorded as done on 7th March was picked up from a record that Mr Hora was logged on to Opus that day.

27. The Claimants' case in cross-examination was that the breakdowns had been tailored to the costs order, which entitles the Defendant to his costs only from 28th May 2021. In cross-examination Mr Hora said that there were 2 earlier invoices, the second

having been sent after the filing of the Defence, which was in December 2020. The December 2021 invoice covered the work done on disclosure. Mr Hora said that he started work on the Defendant's disclosure in May 2021 when the documents were put on opentext. Mr Hora was not taken to the opentext invoices[1] but they show work starting on 21st May 2021 ("Kick off call with sales and client"), with the uncompressed data volume being uploaded on 31st. That is also consistent with the email from the Defendant's solicitor to Mr Hora of 26th May 2021 referring to having a call after the first level review planned for the weekend of 29th and 30th May, although, in the event it would appear that the documents were not uploaded until 31st. Contrary to the Claimants' case, this is not inconsistent with Mr Hora starting work on disclosure after 28th May, but entirely consistent with it. First, the documents are uploaded, then they are reviewed.

28. In relation to disclosure, the breakdown is as inaccurate as in relation to other work. It does not appear to show the 50 hours or so that Mr Hora says that he spent on the Defendant's disclosure. However it does record substantial time on "calls … regarding disclosure" starting on 1st June 2021, the day after the upload. This is perhaps not surprising, given the way that the breakdown was prepared. Reviewing documents online may not leave much of a trail in Mr Hora's files, whereas calls to others would. Time spent on reviewing the Claimants' disclosure is recorded in the breakdown from 6th July 2021.

My conclusion on the evidence

29. Mr Hora appeared to be a credible witness who was trying to do his best. In my judgment he was an honest witness.

30. He accepted that mistakes had been made and, in hindsight, he appreciated that he should have been more careful. However, he had no reason to believe that the breakdown that he had been asked to provide needed to be anything other than illustrative of the sort of work that had been done and he had no reason to suppose that it would be subjected to detailed examination.

31. It is unfortunate that there was no clearer explanation when the breakdowns were served of how they had been prepared. In this country we are used to the forensic scrutiny of every claim for costs. A breakdown of costs would be expected to be entirely accurate and, unless stated otherwise, based on detailed time records.

32. The breakdowns are however consistent with the explanation given by Mr Hora in cross-examination: that they were an attempt by people who were not involved in doing the work, and had not done this before, to piece together what work had been done based on what contemporaneous documents there were (largely emails) with estimates of the time spent which would have to add up to the totals in the invoices.

33. There is no evidence that Mr Hora explained this to the Defendant or to his solicitors and there is no reason to suppose that they would not have taken the breakdowns at face value and assumed, as we have all assumed, that they were accurate.

[1] Bundle section 1 pp 987 - 1016

CPR 44.11

34. The relevant parts of the rule are:

> (1) The court may make an order under this rule where –
>
> …
>
> (b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.
>
> (2) Where paragraph (1) applies, the court may –
>
> (a) disallow all or part of the costs which are being assessed; or
>
> (b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

35. In *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 Hickinbottom LJ set out a number of propositions in relation to the court's exercise of its powers under r.44.11 [at para 26]:

> i) A solicitor as a legal representative owes a duty to the court, and remains responsible for the conduct of anyone to whom he subcontracts work that he (the solicitor) is retained to do. That is particularly so where the subcontractor is not a legal representative and so does not himself owe an independent duty to the court.
>
> ii) Whilst "unreasonable" and "improper" conduct are not self-contained concepts, "unreasonable" is essentially conduct which permits of no reasonable explanation, whilst "improper" has the hallmark of conduct which the consensus of professional opinion would regard as improper.
>
> iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to "unreasonable or improper" conduct.
>
> iv) Although the conduct of the relevant legal representative must amount to a breach of duty owed by the representative to the court to perform his duty to the court, the conduct does not have be in breach of any formal professional rule nor dishonest.
>
> v) Where an application under CPR rule 44.11 is made, the burden of proof lies on the applicant in the sense that the court cannot make an order unless it is satisfied that the conduct was "unreasonable or improper".

> vi) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order.
>
> vii) If the court determines to make an order, any order made (or "sanction") must be proportionate to the misconduct as found, in all the circumstances.

36. For the purposes of r.44.11 the misconduct must be that of a party or a party's legal representative. It is not in issue that Mr Hora is not a legal representative, as he does not fall within the definition in r.2.3. A party would not normally be responsible for their professional advisers. While a legal representative will be responsible for the conduct of anyone to whom he subcontracts work that he (the solicitor) is retained to do, there is nothing to suggest that the Defendant's solicitors retained or subcontracted work to Mr Hora. Rather the evidence is that Mr Hora was retained directly by the Defendant to assist alongside the Defendant's solicitors.

37. Accordingly, any improper or unreasonable conduct by Mr Hora could not be visited on either the Defendant or his solicitors.

Was there unreasonable or improper conduct by the Defendant or his solicitors?

38. I am not satisfied that the threshold has been met in this case.

39. It was unlikely that much, if any, of Mr Hora's fees would be recovered because, in essence, he appears to have been acting as an intermediary for the client. This is not an uncommon practice for wealthy parties based overseas and this court is fairly astute at removing claims for such fees without spending much time on it. While claims for fees of this kind are optimistic, I do not recall ever hearing a submission that they amount to misconduct.

40. Nor was presenting Mr Hora's invoices improper or unreasonable. There should have been an explanation that the second invoice had not been paid in full and the certificate as to payment of disbursements should not have been signed. However that is not the Claimants' case and has not, as yet, been explored. Of itself, and subject to submissions if it is pursued, even if this were intentional misconduct it is unlikely to lead to any substantial penalty.

41. There should either have been a proper explanation of the breakdowns and how they were prepared or the court should have been told that it was not possible to produce a breakdown because there were no proper contemporaneous records. Either way we would have avoided anything other than the cursory dismissal of the optimistic claim for the fees of a foreign lawyer.

42. That this was not done is, I think, the result of a clash between two systems as to the accurate recording of time: in one it is essential, in the other it is unknown. There is nothing to suggest that either the Defendant or his solicitors was aware that the breakdowns were not based on contemporaneous time recording. They would be as entitled to take them at face value as the rest of us.

43. In this case there is nothing to suggest that Mr Hora did not do the work described in the invoices. The problem arose with the requirement for breakdowns which led to the

attempt to shoehorn an impressionistic approach to billing into a system which requires forensic accuracy.

44. Mr Carpenter KC, on behalf of the Claimants referred to my decision in Ikin v Shawbrook Bank Ltd.[2] However, that was a very different case, where solicitors in this country presented bills containing claims for work which had simply not been done. These were intended to mislead the court and the opponents.

45. Were Mr Hora a solicitor in this country representing the Defendant, it probably would have been appropriate to make a finding of misconduct. However, if he were a solicitor in this country, he would have been recording his time and he would not have produced the breakdowns in the way he did.

46. At paragraph 34 and following of his skeleton argument, Mr Carpenter submits that the Defendant's solicitors were also guilty of misconduct in presenting the breakdowns when they knew the extent of Mr Hora's involvement in the Defendant's disclosure and that a substantial amount of the work was done before 28th May 2021.

47. However, I have already made findings which would be inconsistent with the conclusions that Mr Hora did a substantial amount of work on the Defendant's disclosure before 28th May 2021 and that the Defendant's solicitor would have known how the breakdowns were prepared. In the circumstances, there is no basis for concluding that there was any improper or unreasonable conduct on the part of the Defendant or his solicitors.

[2] [2023] Costs LR 489 (SCCO)