Case No: **E90SE061**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
[2019] EWHC 1854 (QB)

Leeds Combined Court
1 Oxford Row
Leeds LS1 3BG

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Before:

MRS JUSTICE O'FARRELL

- -

Between:

MS JASMINE BADAEI	**Appellant**
- and -	
WOODWARDS SOLICITORS	**Respondent**

- -
- -

MR ROBIN DUNNE, Counsel for the **Appellant**
MR KEVIN LATHAM, Counsel for the **Respondent**

- -

APPROVED JUDGMENT

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MRS JUSTICE O'FARRELL:

1. This is an appeal by the Appellant/Claimant, Ms Jasmine Badaei, against the order of Batchelor DJ, made on 29 October 2018, whereby she struck out the Appellant's Part 8 claim and ordered that the costs of that Part 8 claim should be the Respondent's solicitors, Woodwards Solicitors, in any event, such costs to be summarily assessed if not agreed.

2. The District Judge further ordered that the Defendant, the Respondent's Part 7 claim should be transferred to the Chester County Court to be listed for a directions hearing, and that costs in the Part 7 claim should be costs in the case.

3. The background to this matter is that on 15 August 2014, the Appellant went on holiday and stayed at the Red Sea resort in Egypt. Her case is that she ate and drank at the hotel resort, and as a result suffered food poisoning. She wished to make a claim for damages for personal injury and loss of enjoyment of her holiday against the resort.

4. On 12 September 2016, the Appellant entered into a conditional fee agreement with the Defendant's solicitors, whereby they agreed to represent her in bringing those proceedings against the resort.

5. The conditional fee agreement incorporated the Law Society conditions, which imposed on the Appellant an obligation to give instructions that would allow the Respondents to carry out their services properly, not to deliberately mislead them and to cooperate with them.

6. The conditions also provided that the solicitors could terminate the CFA if the Appellant failed to meet her responsibilities. In those circumstances, the Respondents could decide whether or not the Appellant should pay the solicitor's basic charges, expenses and disbursements, including counsel's fees.

7. In the absence of a termination of the CFA, in the event that the Appellant's claim was successful, then she would be responsible for paying the solicitor's basic charges, expenses and disbursement, together with the premium for insurance taken out.

8. If the Appellant's claim failed, then she would not be responsible for paying any of the Respondent's charges, and usually would not have to pay any costs order in respect of costs incurred by the Red Sea Resort.

9. Proceedings were commenced by the Respondents, acting on behalf of the Appellant. The trial was fixed to start on 26 April 2018.

10. The Respondent's position is that the Appellant acted in breach of the CFA conditions.

11. The Appellant signed a declaration in which she stated that during her holiday at the Grand Hotel, Hurghada, Egypt: she did not take any photographs or videos during the holiday on a mobile telephone camera or other device; she was not on Facebook or Twitter; she was on Instagram, but did not post any holiday photographs.

12. During the course of the preparation for the trial, the Red Sea Resort, the defendant to those proceedings, produced photographs of the Appellant taken whilst she was on holiday, including a photograph of her scuba diving.

13. It is the case made by the Respondents that those photographs evidenced misleading information by the Appellant as to the circumstances giving rise to the claim.

14. By reference to the misleading information, counsel, instructed on behalf of the Appellant, advised that the Appellant's credibility reduced the prospect of success to 50%. As a result, it is said by the Respondents they were forced to file a notice of discontinuance, which they did on 12 April 2018, just over two weeks before the trial was due to commence.

15. On 17 May 2018, KWLC Legal Costs Limited, agents acting on behalf of the Respondent's solicitors, sent a letter to Ms Badaei, in which they stated as follows:

> "We act on behalf of our above client as their cost agent in this matter. Please ensure that all future correspondence in this regard is sent to us. You have failed to meet one or more of your responsibilities, which are required of you as part of the conditional fee agreement. This is in breach of the conditional fee agreement, signed 12 September 2016. The agreement is, therefore, cancelled, and our client must charge you for work carried out on your behalf. We enclose bill of costs on an informal basis for a period of 21 days only. We put you on notice that Part 7 court proceedings will be commenced should we fail to hear back from you within the stipulated timeframe. For complete clarification, we now require you to pay the attached bill of costs in full in the sum of £12,372.56 or contact us to arrange a payment plan."

16. The bill of costs that was attached to the letter was signed and dated for, and on behalf of, Woodwards Solicitors, dated 17 May 2018. It contained a detailed breakdown of the costs claimed by the solicitors in the total sum of £12,372.56.

17. The Appellant disputed that she was in breach of the CFA or had any liability to pay those costs, and there was a series of exchanges between her new costs solicitors and the agents acting for the Respondents.

18. The issues that were raised in that correspondence ranged from: the identity of the relevant solicitor, firm or company; whether or not there had been a breach of the CFA; whether or not the bill of costs submitted by the agents to the Appellant amounted to a statutory bill of costs for the purposes of the Solicitors Act; and whether or not there should be any detailed assessment of those costs.

19. On 11 July 2018, the Appellant issued proceedings by way of a Part 8 claim seeking the following relief:

    i) firstly, an order, pursuant to section 70 of the Solicitors Act 1974, for assessment of the final bill delivered by the solicitors in the sum of £12,372.56;

    ii) secondly, in the alternative to paragraph 1, should the court find that the bill set out does not constitute a bill that is capable of assessment, an order in the same form for assessment of such final bill as the court does find capable of assessment; and

    iii) thirdly, in the further alternative, an order pursuant to section 68 of the Act for delivery of such a bill.

20. On 30 July 2018, the First Respondent issued proceedings, namely Part 7 proceedings, claiming damages for breach of contract. The particulars of claim identified the allegations of breach of the retainer, and stated that the claim was for: firstly, £12,372.56 by way of fees; and secondly, the costs of, and occasioned by, the claim for breach of contract.

21. On 29 October 2018, this matter came before Batchelor DJ for directions. The District Judge found that the Part 8 proceedings were premature, pending a determination of the issue as to whether or not there had been a breach of the CFA.

22. The District Judge made an order striking out the Part 8 claim, together with an order that the Appellant pay the Defendant's costs of that claim and transferred the Respondent's claim to the County Court for further directions.

23. The relevant statutory framework in relation to the assessment of solicitor bills of costs, as between those solicitors and their client, is set out in section 69 and 70 of the Solicitor Act 1974. Section 69(1) provides that:

> "(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2)..."

24. Section 69(2) provides that the requirements of the bill of costs include that the bill must be signed and delivered to the client.

25. Section 70(2) provides that:

> "Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment) order—
>
> (a) that the bill be assessed; and
>
> (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed."

26. CPR Part 67 concerns proceedings relating to solicitors, and, in particular, concerns proceedings pursuant to Part 3 of the Solicitors Act 1974. CPR 67.2 provides:

> "(1) Where the relationship of solicitor and client exists or has existed, the orders which the court may make against the solicitor, on the application of the client...include any of the following –
>
> (a) to deliver a bill...
>
> (b) to pay or deliver up any money...
>
> (2) An application for an order under this rule must be made –

(a) by Part 8 claim form; or

(b) if the application is made in existing proceedings, by application notice in accordance with Part 23.

(3) If the solicitor alleges that he has a claim for costs against the applicant, the court may make an order for –

(a) the detailed assessment and payment of those costs; and

(b) securing the payment of the costs, or protecting any solicitor's lien."

27. CPR67.3 provides that:

"(2) A claim for an order under Part III of the Act must be made –

(a) by Part 8 claim form; or

(b) if the claim is made in existing proceedings, by application notice in accordance with Part 23."

28. At 67.3:

"(3) A claim in the High Court under Part III of the Act may be determined by –

(a) a High Court judge;

(b) ...

(c) a District Judge, if the costs are for –

(i) contentious...proceedings in the District Registry of which he is the District Judge;"

29. The Appellant's primary submission is that the District Judge was wrong to reach the conclusion that the Part 8 costs claim was premature on the grounds that the breach of contract issue had not yet been determined.

30. Mr Dunne, on behalf of the Appellant, submits that the District Judge was in error in concluding that the Part 8 proceedings had been wrongly commenced because the question that the court needed to decide was whether or not there had been a breach of contract, as asserted by the Respondent, and the Part 8 process was an improper process for determining that dispute.

31. He submits that it is wrong on the basis that the Part 8 proceedings are not so confined. The proper process, if the District Judge wished to determine the issue of the breach of contract, was to determine that as a preliminary issue hearing within the scope of the Part 8 proceedings.

32. He also makes the submission that an issue between the parties was whether there was a statute bill that had been delivered to the Appellant at all; if it had not, then the Part 7 proceedings were without foundation and should have been struck out.

33. If there was a statute bill that had been delivered to the Applicant, then the appropriate course of action was a detailed assessment of that bill of costs in accordance with CPR67, pursuant to the Part 8 proceedings.

34. On that basis, he submits that the District Judge was clearly wrong, and the appeal should be allowed.

35. Mr Latham, on the part of the Respondent, accepts in his skeleton that it is clearly possible to resolve the dispute between the parties under the Part 8 procedure, as was urged by the Appellant, but the Part 7 procedure is the most appropriate forum in which to resolve the dispute between the parties. The primary ground on which that submission is made is that ordinarily, Part 8 procedure is limited to proceedings where a party seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact.

36. In this case, he submits that there is a significant dispute of fact, and the court will require witness statements from both parties and cross-examination at trial, as well as substantial arguments on the documents and on the law in order to determine the question of whether the Appellant was in breach of the CFA by misleading the Respondents, failing to give instructions and failing to cooperate.

37. The Respondent's case is that in any event, it is necessary to decide the issue of breach of contract before going on to consider whether there was a statutory bill of costs, and, if so, whether there should be an assessment and, if so, in what amount of that bill.

38. The appropriate way to deal with that was to deal with the Part 7 claim first and determine that issue, and then if it proved to be necessary, return to the Part 8 proceedings.

39. In any event, it is submitted that although it was open to the court to determine these issues under either Part 7 or Part 8, the District Judge in this case had a broad discretion to determine the appropriate case management decisions. The judge was entitled to determine that in this case, on these particular facts, the Part 8 claim should be struck out, or stayed, so that the Part 7 claim could be determined. That decision was within the exercise of the District Judge's discretion.

40. That brings me on to a preliminary issue that has been raised by the parties.

41. On 31 May 2019, that is last Friday, the Respondents served a Respondent's notice in which they stated that the Respondent does not wish to appeal against the order of Batchelor DJ, because the Respondent relies on the findings of the learned judge and upon her reasoning, as set out in her judgment and/or the Respondent's skeleton argument.

42. Objection is taken to the Respondent's notice on the grounds that it is admittedly very late indeed. There is no application for a relief from sanctions. Even if there were, there is no evidence to support such an application, and even today, there is no explanation from the Respondents for the delay in serving the Respondents' notice.

43. The way in which Mr Latham, for the Respondents, puts his arguments in relation to the Respondents' notice is that he wishes to rely upon the District Judge's reasons to

support an argument that, in substance, the District Judge was exercising her case management powers, as opposed to simply deciding that the Part 8 proceedings had been wrongly issued.

44. If I considered that those submissions were well-founded, I would be concerned by the late issue of the Respondents' notice, and the lack of any proper application for relief from sanctions. In fact, in practice, it really went no further than making submissions as to the basis on which the District Judge was entitled to, and did, reach her decision. Those arguments have been fully argued before me this afternoon on both sides.

45. As it turns out, first of all, I am not convinced that a Respondent's Notice was necessary. It was always open to the Respondents to seek to uphold the Judge's decision based on their interpretation of the comments and/or findings that she made, which is in practice what has been done. This can be contrasted with a situation where a Respondent seeks to rely on the decision reached for reasons that were not articulated or relied upon by the District Judge. I am satisfied that is not what Mr Latham has endeavoured to do. He has not sought to rely upon other grounds for upholding the decision.

46. However, unfortunately for Mr Latham, I am also against him on his interpretation of the findings of the District Judge and the reasons for her decision, primarily because the District Judge did not simply stay the Part 8 proceedings pending a determination of the limited issues under Part 7 as to whether or not there was a statutory bill, and whether or not there was a breach of contract.

47. The District Judge went further, and as Mr Dunne submitted, wrongly considered that the Part 8 proceedings should not have been issued and were an improper method of seeking to resolve the dispute between the parties. I say that because she struck out the proceedings and she awarded costs against the Appellant.

48. It is now common ground between counsel, and correct, that the Part 8 proceedings were proper proceedings to be issued. There is nothing to stop the court determining all of the issues that have arisen between the parties under Part 8, in the same way that those matters could be determined under Part 7.

49. The Part 8 proceedings were started first in time, and although that is not a conclusive matter, it is certainly a factor that the judge should have taken into account when considering whether or not the Part 8 proceedings were effectively an abuse of process, which is what she found. Further, if the District Judge considered that a sensible case management of this matter was by determining the breach of contract matter first under Part 7, that could have been accommodated by a stay of the Part 8 proceedings and/or reserving the costs.

50. For those reasons, I have no hesitation in allowing the appeal, reinstating the Part 8 proceedings, and setting aside the costs order made by the District Judge in relation to the Part 8 claim.

51. I then have to consider whether I should go any further, because the court has a discretion where there are Part 8 proceedings under the Solicitors Act 1974 to (a) order that the bill of cost costs be assessed, and (b) to consider whether there should be an order that no action should be commenced on the bill, or that any action already commenced should be stayed until the assessment is completed.

52. Contrary to the valiant attempt by Mr Dunne, there is a clear discretion there. Although in many cases the assessment will be ordered and other proceedings stayed, it depends on the facts of each case. In this case, the issue is whether there would be anything to be gained by having a slightly different procedure, namely a hybrid Part 8/Part 7 procedure, or whether the contract issue should be decided under Part 7 first or not.

53. Considering the Part 7 proceedings, the first point is that they are not limited to a claim for a declaration as to whether or not there has been a breach of the CFA, or a declaration as to whether or not the Respondents are entitled to recover their fees and disbursement. This is a claim for the solicitor's fees in total, plus costs as damages, and therefore the pleaded case is, on its face, for a substantive remedy of the payment of the bill of costs.

54. The only basis on which that claim could be made is if there were a valid delivery of a bill of costs, which would be a statutory bill of costs for the purposes of sections 69 and 70 of the Solicitors Act 1974.

55. The court could determine the issue of breach without determining anything else, but given that it would only be able to do that under current proceedings if there had been a statutory bill, and given that the Appellant has started Part 8 proceedings on the grounds that there has been an invalid statutory bill, in those circumstances the starting point is that the Appellant is entitled to seek an assessment of those costs set out in the bill, and to seek a stay of other proceedings pending that assessment.

56. In relation to the Part 8 claim for an assessment and/or delivery of an appropriate bill of costs, the quantum clearly can be determined on the assumption that there is a statutory bill of costs and on the assumption that the Appellant is liable to pay those costs.

57. It would, of course, as both parties have now recognised, be possible for the court to determine the allegation of breach as well.

58. I accept Mr Latham's submission that Part 8 proceedings generally are not suitable to determine serious disputes of fact.

59. I also accept that on the current pleadings, although it is dealt with by way of a bare denial in the defence, there is a dispute as to whether or not, both factually and legally, the Appellant is in breach of the CFA and whether or not that would have any consequences regarding the Respondent's ability to recover their fees and disbursements.

60. However, on balance, I consider that that could be accommodated fairly readily within the Part 8 proceedings. There already are the relevant CFA documents. There are contemporaneous documents, including the declaration signed by the Appellant. There are the photographs that were posted on her Instagram page.

61. Therefore, the scope of any dispute is relatively narrow. I accept that there may be the need for factual witness statements and some limited cross-examination. I accept that there will be a need for detailed skeleton arguments and submissions, but they are not so cumbersome, so as to remove the clear advantages of dealing with this as part of the Part 8 proceedings.

62. I have come to the conclusion that what I should do is to stay the Part 7 proceedings and remit the Part 8 proceedings, which have now been resurrected, to the District Court at Sheffield, for detailed case management.

This transcript has been approved by the Judge.

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