Case No: CL1801471

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 2/10/2018

Before:

MASTER LEONARD

- -

Between:

Mr Norman Allen	**Claimant**
- and -	
Brethertons LLP	**Defendant**

- -
- -

Nigel ffitch (instructed by **Checkmylegalfees.com**) for the **Claimant**

Fred Robbins (instructed by **Brethertons LLP**) for the **Defendant**

Hearing date: 28 June 2018

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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.

.....

MASTER LEONARD

Master Leonard:

1. This is an application by the Claimant for the court to order the delivery by the Defendant of a bill of costs (along with a cash account), in the exercise of the jurisdiction referred to in section 68 of the Solicitors Act 1974 and at CPR 67.2. The application was received at the SCCO on 30 January 2018. The application is opposed, for reasons I shall explain. I will summarise the circumstances that led to its issue.

The Contract of Retainer

2. In January 2016, the Claimant signed a retainer agreement with the Defendant. The retainer documentation came in three parts: a "Client Care Letter" dated 19 January 2016 (countersigned by the Claimant on 21 January); a standard set of Terms and Conditions of Business; and a Conditional Fee Agreement ("CFA"). I have found it necessary, for the purposes of determining the issues before me, to consider the terms of retainer. These seem to me to be the pertinent provisions.

3. The subject matter of the retainer was identified in the Client Care Letter as a claim for compensation following a Road Traffic Accident on 12 December 2015. The Defendant was, on the Claimant's behalf, to seek compensation for pain, suffering and expenses incurred as a result of that accident.

4. Under the heading "Our Fees & Expenses" the Client Care Letter, cross-referencing to section 4 in the Terms of Business, explained that the Defendant's fees would be calculated by reference to the amount of time spent dealing with the claim and identified the hourly rates chargeable by particular fee earners.

5. Under the same heading it provided an estimate of costs at £2000 and disbursements at £400.

6. Under the heading "Payment Arrangements" the Client Care Letter read:

> "Please refer to section 4 of our Terms for information about our fees and other charges and your liability for these. As explained elsewhere we will seek to recover our fees and the charges we have incurred on your behalf from your opponent if we are successful with your claim…."

7. Section 4 of the Terms of Business, under the heading "How Our Fees are Calculated", read:

> "… You agree to pay our fees and expenses as set out in the Client Care Letter… This letter will provide you with an estimate of our likely fees or an agreed quotation… Where an agreed quotation does not apply, our fees are calculated based on the time spent by our staff in dealing with your matter…
>
> … In certain claims (e.g. personal injury arising out of a road traffic accident) where our fees are paid by the other side these may be calculated in accordance with the formula laid down by the rules of Court (Predictable Costs). We shall be entitled to be paid the full amount of the Predictable Costs that are calculated even of that amount exceeds any fees that would be payable on a variable fee/time spent basis…"

8. The Terms of Business set out hourly rates for fee earners of different seniority and incorporated standard provisions for the payment of bills, interim or final, specifying that payment must be received in full upon receipt by the client of a bill. They incorporated procedures for querying bills and resolving complaints and give notice of the Claimant's right to assessment of bills under the Solicitors Act 1974.

9. The CFA confirmed that the Claimant would not be required to pay any base costs or success fees should he lose the case. Under the heading "Paying us if you win" it read:

> "If you win your claim, you pay our basic charges, our expenses and disbursements and a success fee… The overall amount we will charge you for our basic charges, success fees, expenses and disbursements is limited as set out in schedule 2…"

10. Schedule 1 to the CFA confirmed that the success fee had been set at 100% of basic charges and explained the statutory cap on success fees in cases of this type. It again incorporated advice on assessment as between solicitor and client on application to the court and stated that the Claimant had the right to apply to the court for assessment of the Defendant's costs, including the Defendant's success fee.

11. Like the Client Care Letter and the Terms of Business, Schedule 2 to the CFA confirmed that the basic charges would be calculated for the time spent upon the matter. It provided further information upon the hourly rates upon which the basic charges would be calculated. It also incorporated a contractual cap on the total fees and disbursements to be charged to the Claimant by the Defendant:

> "We will limit the total amount of charges, success fees, expenses and disbursements (inclusive of VAT) payable by you (net of any contribution to your costs paid by your opponent) to a maximum of 25% of the damages you receive."

12. The CFA incorporated standard Law Society conditions including a definition of "our expenses and disbursements" as "Payments we make on your behalf such as… Expert' fees…" and the following paragraphs:

> "Subject to any overall cap agreed with you you are liable to pay all our basic charges, our expenses and disbursements and the success fee (up to the maximum limit) …
>
> Normally, you can claim part or all of our basic charges and expenses and disbursements from your opponent…"

13. A covering letter from the Defendant to the Claimant dated 19 January 2016 and enclosing the retainer documentation read:

> "… You will see that if I am successful with your claim and obtain compensation for you I will be able to deduct a success fee of 25% (inclusive of VAT). Therefore, if you obtain £10,000 compensation I would be able to deduct £2500 toward my success fee and you would receive £7500 …"

14. In summary, the Defendant agreed to act for the Claimant on a conditional fee basis, its profit costs in the event of success being determined on a very standard time-costed basis. In the event of success, the Claimant was contractually responsible for all costs and disbursements (of which part would normally be recovered from the Claimant's opponent) but the Defendant agreed to limit its total charges and disbursements, including VAT, to 25% of damages recovered plus whatever was recovered from the opponent. In correspondence with the Claimant (in its letter of 19 January 2016 and subsequently) the Defendant referred to that 25% maximum as it is "success fee".

The Damages Claim

15. By 20 October 2016, the Defendant had secured from the Claimant's opponent (as represented by Ageas Insurance Ltd) an offer of £7146.50 in settlement of his damages claim. The Defendant advised the Claimant that if this offer was accepted, he would receive "(after deducting my 25% success fee)" £5359.87. The Claimant instructed the Defendant to accept the offer and on 24 October 2016 the Defendant sent an email to Ageas Insurance:

> "We confirm that we have now accepted settlement on the Portal, to the sum of £7146.50… We await Stage II fixed costs of £300 plus VAT and attach details of disbursements…"

16. The disbursements set out in the Defendant's email came to a total of £760; £660 for a medical report and another £100 for medical and GP records.

17. On 24 November 2016 the Defendant wrote to the Claimant: next

> "I confirm that I have received the payment from the insurers… Unfortunately the insurers have only paid the sum of £610 for the medical report… and the hospital and GP records… The total cost of the medical report medical records was in fact £760.... You have previously kindly paid the sum of £90 and if you wish me to accept the offer of £610 then I will not be able to reimburse you with the cost of the records totalling £90 and will also to deduct the sum of £70 from your compensation which will leave you with the sum of £5289.87.
>
> If you do not wish me to accept the offer that has been made for the medical report and medical records I can, on your behalf, pursue payment of the full amount but this will only increase the costs incurred and I think it is very unlikely that, unfortunately, Ageas will increase the payment without us having to commence court proceedings… Could you please confirm whether you wish me to send you the above amount of £5289.87 in full and final settlement?"

18. The arithmetic in this letter was incorrect. The Defendant wished to take from the Claimant £160 to cover a reported shortfall in disbursement recovery of £150.

19. No-one appears to have noticed this, nor the fact that under the terms of retainer, the Claimant was entitled to receive a minimum of £5359.87, along with the return of the £90 he had paid on account for disbursements: £5449.87. The matter was concluded on the basis that the Claimant received £5289.87 from the Defendant.

Billing and Disbursements

20. The Defendant's file contains three invoices addressed to the Claimant. The first, numbered 53969, is dated 4 October 2016 and comes to £240. A brief description reads "Our professional charges regarding Stage I costs in relation to your personal injury claim". The second, numbered 54689, is dated 22 November 2016 and comes to £360. The description is "Our professional charges regarding your personal injury claim- Stage II Portal costs".

21. Both of those bills are addressed to the Claimant at his home address but described as "Payable by Ageas Insurance Ltd". It is common ground (*Parvez v Mooney Everett* [2018] EWHC 62) that neither was delivered to the Claimant.

22. The Defendant delivered one bill to the Claimant. This was numbered 54687, dated 22 November 2016 and came to £1,786.63 (as with the above figures, including VAT). The description read "our professional charges regarding our success fee in relation to your personal injury claim". A covering letter dated 1 December 2016, enclosing a cheque for £5289.87, reads:

> "I confirm that the total settlement was £7146.50 from which I have deducted my success fee of 25% (£1786.63 receipted invoice enclosed) and the sum of £70 which I was unable to recover from the insurers regarding the cost of the medical report…"

23. None of the disbursements incurred upon the Claimant's behalf were included in any bill, whether delivered to the Claimant or not.

24. So, as at November 2016, the Defendant had received from the Claimant or from his opponent a total of £3,156.63 to meet costs, disbursements and VAT, of which £1,786.63 had been billed to the Claimant, described as a "success fee". The Claimant had received from the Defendant £5289.87. He had been overcharged by £160, but the overcharge did not appear in any bill.

25. On 23 March 2017 the Defendant wrote to the Claimant again:

> "Further to my letter of the 1 December 2016, now that all the disbursements have been paid I am now able to forward you the further sum of £20 in respect of the payments you made for the release of your medical records…"

26. No explanation was given for the discrepancy between this and the Defendant's earlier account of the amount due to the Claimant.

The Accounts Rules

27. The Part 8 Claim Form issued for the purposes of this application asserts a breach of rule 17.2 of the SRA Accounts Rules in that no bill was delivered to the Claimant by the Defendant before taking payment in respect of the totality of their fees. In the course of submissions I suggested that this was not really to the point of this application, but I have concluded that (for reasons I hope will become clear) it does have some bearing.

28. In a witness statement dated 22 March 2018, Mr Jon Rees, a member of the Defendant LLP, takes issue with that. He refers to the wording of Rule 17.2:

> "If you properly require payment of your fees from money held for a client…in a client account, you must first give or send a bill of costs, or other written notification of the costs incurred, to the client…"

29. A bill of costs, Mr Rees points out, is only required by rule 17.2 in the absence of "other written notification of the costs incurred", and written notification has he says been given to the Claimant. In support of this, he exhibits to his witness statement a copy of a letter dated 14 February 2018, to which I shall refer in more detail below.

30. Mr ffitch for the Claimant rightly points out however that rule 17.2 expressly requires a bill to be delivered or written notification to be given "first", in other words before payment is taken, not (as appears to have been the case here) more than a year later.

31. Mr Robbins, for the Defendant, argues rather that adequate notice was given in letters written to the Claimant from time to time advising them of the amount that he would receive after deduction of the Defendant's "success fee". I am unable to agree. The relevant correspondence does not, as required, gave "written notification of the costs incurred" because they did not identify the sums which would be appropriated by the Defendant in settlement of its costs.

32. On the contrary, given the sequence of events that I am about to summarise, it is evident that if the Claimant had not instructed Checkmylegalfees.com to investigate the position, the Defendant's letter of 14 February 2018 would never have been written and the Claimant would never have received any form of notice in relation to the sums taken by the Defendant in payment of bills 53969 and 54689.

The Events Which Led to the Issue of this Application

33. On 12 October 2017 Kerry-Anne Moore, a Costs Lawyer employed by Checkmylegalfees.com, wrote to the Defendant advising the Defendant that of Checkmylegalfees.com had been instructed by the Claimant to advise upon the viability of an assessment of their legal fees under section 70 of the Solicitors Act 1974. She requested copies of documents from their file. Her letter enclosed a form of authority electronically signed by the Claimant.

34. The Defendant did not accept the form of authority as sufficient to allow them to release papers to Ms Moore, indicated that the signature on the form of authority did not match the Claimant's signature on their records, and insisted upon receiving a form of authority direct from the client. The papers were finally sent to Ms Moore on 19 December 2017.

35. Following receipt of the papers, Ms Moore queried with the Defendant the status of bills 53969 and 54689 and established that they had never been delivered. On 16 January 2018, on the basis that no "statute bill" (that is to say, a final and complete bill, enforceable and subject to detailed assessment on application by the solicitor or the client) had been delivered to the Claimant she wrote to the Defendant requesting delivery of such a bill and confirming that Checkmylegalfees.com had instructions to accept service. No response having been received, on 29 January Ms Moore sent to the court the Claimant's application for delivery of a bill and notified the Defendant that that had been done.

36. On 14 February 2018 the Defendant wrote directly to the Claimant, copying its letter to Checkmylegalfees.com:

> "We were disappointed to hear that 'Checkmylegalfees' have initiated legal proceedings in connection with the claim… concluded on your behalf in December 2016. Our understanding from Checkmylegalfees is that you simply wish to have your fees explained so that they might assist in advising you whether or not you have inappropriately charged… We would very much appreciate an opportunity to directly address any concerns you might have about our charges in respect of work completed in pursuing your claim …"

37. The letter went on to recite, at some length, the history of the contractual relationship between the parties and of the personal injury claim conducted upon the Claimant's behalf by the Defendant. In the course of the letter the Defendant explained, apparently for the first time, that the £20 sent to the Claimant in March 2017 had been a refund, sent due to an earlier miscalculation of total disbursements.

38. The letter of 14 February 2018 again uses the term "success fee" to refer to the maximum amount payable to the Defendant by the Claimant after recovery from his opponent, but otherwise seems to me to set out thoroughly and clearly the precise position regarding monies received and costs, disbursements and VAT charged and incurred. It includes confirmation that the Defendant's basic costs, at the contractual hourly rates, came to £2092.50 plus VAT and that to that point, the total "contribution" paid by the Claimant to the Defendant had been £1926.63.

39. The letter concluded:

> "Having reviewed our file, we are on this occasion prepared to pay the sum of £140… (our cheque is enclosed) as a gesture of goodwill. We are obliged to make clear that the sum has been paid to you without any admission on our part that you were not appropriately charged, noting both the agreement we entered at the outset and the subsequent variation made to that agreement in respect of the Defendant's reluctance to pay the full cost of your disbursements (your email of 24 November 2016 refers)…
>
> In having read this letter you have any cause for concern or query we should be grateful if you could please contact us directly in order that we can assist you ..."

40. In his written submissions for the Defendant Mr Robbins does not maintain this assertion that the terms of retainer had been varied. On the contrary, he states without equivocation that the maximum figure that the Claimant should have been charged was £1786.63 inclusive of VAT.

41. It seems to me that that must be correct. There was, on the evidence, no agreement to vary the terms of retainer. As I have observed, the advice given to the Claimant about the amount that would be received by him on settlement of his claim at £7146.50 was obviously incorrect, because it was not consistent with the terms of retainer previously agreed between the parties. It does not follow that in accepting what his solicitors told him, the Claimant agreed to vary those terms. Even if the parties had purported to (as they clearly did not) enter into a variation entirely advantageous to the Defendant and

disadvantageous to the Claimant, it would have failed for want of consideration (and might have put the Defendant, professionally speaking, in an embarrassing position).

42. The fact is that the payment of £140 enclosed with the Defendant's letter of 14 February 2018 and described as a "gesture of goodwill" was a refund of the balance of the £160 overcharged to the Claimant in November 2016 and partly refunded in March 2017.

The Defendant's submissions

43. Mr Robbins accepts that as a general principle (subject, he argues, to exceptions where special circumstances justify it) the costs recovered from another party are the client's costs, not the solicitor's: *Cobbett v Wood* [1908] 2 KB 420. From that, he says, is derived the indemnity principle, under which a receiving party cannot recover from a paying party more than the amount which the client must pay his own legal advisers.

44. That there are exceptions to the indemnity principle is recognised in *Thornley v Lang* [2003 EWCA Civil 1484 at paragraph 5:

> "… There is… a well established principle, known as the indemnity principle, that governs the basis upon which a court can properly make an award of costs. Subject to any statutory exceptions, an award of costs can only be made in order to indemnify a litigant against legal costs and expenses that he has paid, or become liable to pay...."

45. Mr Robbins argues that the Stage I and Stage II costs recovered by the Defendant fall within such statutory exceptions. They are fixed costs recoverable under CPR 45.17 and CPR 45.18 and as such are the solicitor's costs, not the costs of the client. Mr Robbins relies, in making this submission, upon the description of the costs recovered by the Defendant, at CPR 45.18, as "the legal representative's costs".

46. For those reasons, Mr Robbins submits that Bill 54687 qualifies as a valid, complete and final statute bill, representing all the costs payable by the Claimant to the Defendant in accordance with the terms of the Defendant's retainer.

47. In the alternative, Mr Robbins reminds me that the power to order delivery of a bill or a cash account is a discretionary power. There is no need, he says, for either of those to be delivered. The Claimant has received all the information he needs to seek advice as to, and if so advised, to exercise his right to apply for assessment of their bills. Even if, contrary to his submissions, the fixed costs recovered by the Defendant should have been included in an invoice are delivered to the Claimant, that would not be information required for the Claimant to seek advice upon the exercise of his rights.

48. He also submits that I have no jurisdiction to order delivery of both a bill and a cash account: CPR 67.2(1)(a) provides only that the solicitor may be ordered "to deliver a bill *or* cash account" (my emphasis).

49. The Claimant's section 68 application has, he says, been made 15 months after the delivery of bill 54687, and no explanation has been given for the delay. The Defendant contends that the Claimant is relying upon a technicality to avoid being caught by the time limits imposed by the 1974 Act upon a client wishing to apply for assessment of a solicitor's costs. He has not only received a full account of the basis upon which he has

been charged and of monies paid and received, but he has received the Defendant's full file of papers and there is no explanation as to why he requires a further bill.

Conclusions

50. I should mention that Mr ffitch argued that the costs recovered by the Defendant by the Claimant's opponent were recovered under part IIIA of CPR 45, rather than under part III, so that the terminology relied upon by Mr Robbins does not apply. That does not seem to me to be correct, but if I have missed his point, nothing will turn on that: I am in any case unable to accept Mr Robbins' argument.

51. I do not accept that that the fixed costs recovered by the Defendant from the Claimant's opponent belonged to the Defendant. I believe that Mr Robbins is right in saying that where the amount of recoverable costs is prescribed by statute, those costs are not open to challenge by a paying party under the indemnity principle. It does not however follow that they thereby become the costs of the solicitor rather than the costs of the client.

52. The Stage I and Stage II costs recovered by the Defendant from the Claimant's opponent are described at CPR 45.18 as "the legal representative's costs" only to distinguish them from an advocate's costs ("advocate" being defined, by CPR 45.18(3) and CPR 45.37(2)(a), as a person exercising a right of audience). CPR 45 does not purport to, nor does it, create any exception to the principle referred to in *Cobbett v Wood*.

53. Mr Robbins' submission is also inconsistent with the terms of retainer between the parties, which, in the usual way, made the Claimant responsible for all of the Defendant's costs and disbursements on the basis that his liability would be reduced by costs recoverable from his opponent. An estimate was given (and, in correspondence, updated) on that basis. The Defendant cannot on the one hand hold the Claimant contractually responsible for all its costs and disbursements (even on a capped basis) and on the other assert that he is not entitled to receive a bill for, or challenge, part of them because they are not his costs.

54. The retainer terms also made specific provision to the effect that the Defendant would be entitled to payment of the full amount of fixed costs recovered even if the Defendant's time charges did not justify it. If the Defendant were already in a position to claim such costs as its own, that contractual provision would have been redundant.

55. The true position is recognised by the Defendant in the evidence of Mr Rees. In relying on the Defendant's letter of 14 February 2018 in support the proposition that the Defendant has complied with rule 17.2 of the SRA Accounts Rules, he accepts that the fixed costs recovered by the Defendant were, in the words of the rule, "held for a client".

56. Another, in my view insurmountable, obstacle to Mr Robbins' argument is that none of the disbursements expended on the Claimant's behalf and charged to him have been included in any bill. For a bill to be complete, they must be included. In the words of Farwell LJ in *Cobbett v Wood*:

> "… The bill of fees, charges, and disbursements contemplated…" (*by statute*) "… is, I think, a complete bill of the whole of the fees, charges, and disbursements in respect of the particular business done...."

57. Mr Robbins rightly argues, referring to paragraphs 57 and 58 of the judgment of Soole J in *Parvez v Mooney Everett*, that the content of a solicitor's final bill is ultimately a matter for the solicitor. This does however miss the point that the solicitor is bound by that final bill and cannot charge to the client any item of costs or disbursements omitted from the bill. If the Defendant, as it does, claims the right to retain all of the money received by it for the Claimant's costs and disbursements, then it must render a complete and final bill which includes them.

58. This brings me to Mr Robbins' alternative argument to the effect that there is no need to make an order for delivery of a bill, because the Claimant has been provided with all the information he needs to judge the reasonableness of the Defendant's charges. Again that seems to me to miss the point. The Client has a statutory right to challenge the Defendant's charges by an application for detailed assessment, and he cannot exercise that right until a final, complete statute bill has been delivered to him. It is for him to decide whether to make such a challenge. It not for the Defendant to say that he should not have the choice.

59. Mr Robbins' argument might have more force had the information provided to the Claimant as to the Defendant's costs and disbursements, given in the course of the Defendant's retainer, been complete, clear and accurate. It was not. The breach of SRA Accounts Rule 17.2 (designed to ensure that a client is fully informed of monies being appropriated by a solicitor in payment of fees), the confusing misuse by the Defendant of the term "success fee" and the inaccurate information provided to the Claimant as to his contractual entitlement, all demonstrate that.

60. For the reasons I have given, I will make the order for delivery of a bill sought by the Claimant. I will not, however, order the delivery of a cash account. That is not because, as Mr Robbins contends, I do not have the power to do so: I do not accept that CPR 67.2 stands to be read in the restrictive way he advocates. The point is rather that (as the Claimant accepted in written submissions) a cash account would add nothing to the information already provided in the Defendant's letter of 14 February 2018.

Footnote

61. Ms Moore, the Claimant's professional adviser, is a Costs Lawyer, that is to say a person regulated by the Costs Lawyer Standards Board and with the right, in cases such as this, to conduct litigation and to exercise a right of audience. In correspondence with the Defendant, she identified herself as such from an early stage and from the outset requested that the Defendant communicate with Checkmylegalfees.com, rather than with the Claimant directly.

62. That seems to me to be consistent with the current provisions of the Solicitors' Code of Conduct (at chapter 11), which indicate that a solicitor should not contact a party directly where that solicitor is aware that that party has instructed "a lawyer", defined in the glossary to the Code of Conduct to include "a profession whose members are authorised to carry on legal activities by an approved regulator other than the SRA".

63. If the Defendant had been any doubt about Ms Moore's status, a quick check of the public register maintained by the CLSB, and freely available on the Internet, would have confirmed it.

64. The Defendant refused to comply with Ms Moore's request not to contact the Claimant directly. Its response to Ms Moore's initial communication was to write directly to the Claimant on the basis that Checkmylegalfees.com is not a firm of solicitors. Even after its file had been released to Checkmylegalfees.com and it had received notice that the Claimant's application had been filed, the Defendant wrote its letter of 18 February 2018 directly to the Claimant, encouraging him to deal with the Defendant directly.

65. I appreciate that the Defendant may have had some initial concerns about its authority to release papers to Checkmylegalfees.com, but by 18 February 2018 can have been no mistake about the Claimant's wishes or Ms Moore's professional status.

66. Whether the Defendant has complied with the Code of Conduct is not a matter for me, but I would offer the view that Ms Moore, when acting as a Costs Lawyer with a right to conduct litigation, is at the least entitled to expect from the Defendant the same professional courtesy as a solicitor would expect. It does not seem to me that she has received it.