



Neutral Citation Number [2024] EWHC 1869 (SCCO)

Case No: SC-2023-BTP-000330

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building, Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th July 2024

Before :

COSTS JUDGE WHALAN

Between :

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| <ul style="list-style-type: none"> (1) MBR Acres Limited (2) Demetris Markou (3) B & K Universal Limited (4) Susan Pressick | <p><u>Claimants</u></p> |
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- and -

<p>Gillian Frances McGivern</p>	<p><u>Defendant</u></p>
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Roger Mallalieu KC (instructed by **Mills & Reeve LLP**) for the **Claimants**
Adam Tear (Solicitor Advocate, instructed by **Scott Moncrieff & Associates**) for the
Defendant

Hearing dates: 4th December 2023

Approved Judgment

This judgment was handed down remotely at 10.00am on 18th July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE WHALAN

Costs Judge Whalan:

Introduction

1. This judgment determines preliminary points of principle raised in a detailed assessment commenced by the Defendant, as the receiving party, against the Claimant, as the paying party.
2. Page references in parenthesis refer to the Key Documents Bundle, paginated 1-130 and the Authorities Bundle, paginated 1-415.

Background

3. The First and Third Claimants are involved in the breeding of animals for medical and clinical research. They and their premises have been subject to repeated and, they would argue, unlawful protesting.
4. In 2021 the Claimants issue proceedings for trespass and other causes of action against named defendants and also 'persons unknown'. The Court granted the Claimants injunctive relief, in the form of various orders that were perfected ultimately on 10th November 2021. The injunction prohibited, inter alia, persons unknown from entering or remaining in a marked area of land at a site occupied by the First Claimant.
5. The Defendant is a solicitor with Credence Law Group, which represents a number of the protestors at the First Claimant's site. The Claimants alleged that by visiting the area outside the First Claimant's site on 4th May 2022, the Defendant breached the injunction. On 4th July 2022, the Claimants issued an application for contempt of court against the Defendant on that basis. The Application was heard in July 2022 before Nicklin J. Judgment was given on 2nd August 2022, when the application was dismissed. The judge, having certified the contempt application as being 'totally without merit', awarded the Defendant her costs, to be assessed on the indemnity basis.

Funding

6. The Defendant, a solicitor by profession, instructed Scott-Moncrieff & Associates Ltd to represent her in the contempt proceedings. She was represented pursuant to a Legal Aid Certificate granted under s.16 of the Legal Aid, Sentencing & Punishment of Offenders Act 2012 ('LASPO'). The certificate, following several extensions, was subject to a costs limitation of £75,000. It did not cover the appointment of a KC or a second advocate.
7. The Bill of costs served by the Defendant claims a total of £120,292.31 (including VAT). The Narrative notes that the inter partes claim is not calculated on legal aid

rates, but rather than on private client rates pursuant to a clause in the retainer agreed between the Defendant and SMA as follows:

Should costs be ordered to be paid by the other side, I would seek to recover these at the inter-partes' rate that I charge for civil litigation, which is £400 per hour. The only limitation to this is that I will not seek to recover as against you more than is paid by the other side.

Issues

8. The assessment raises matters of principle relevant to the recovery and quantification of the Defendant's costs:
 - (i) Is the inter partes' claim limited to the sums to which the Respondent is entitled to under her Legal Aid Certificate and the provisions of the Criminal Legal Aid (Remuneration) Regulations 2013?;
 - (ii) Alternatively, can the Bill be assessed by reference to rates contained in a 'private retainer' concluded between the Respondent and Scott-Moncrieff & Associates Ltd ('SMA')?
 - (iii) Are the fees paid to Leading and Junior Counsel recoverable and, if so, in what sums?

Legal Framework

Contempt proceedings and Legal Aid

9. Contempt proceedings may be 'civil' or 'criminal'. For the purposes of legal aid under LASPO, however, the proceedings are classified as 'criminal proceedings'. This fact was affirmed of Garnham J in Liverpool Victoria v. Khan & Others : the relevant reference is cited by CJ Leonard in Liverpool Victoria Insurance Co. Ltd v. Khan & Others [2022] SC-2020-BTP-000037, at para. 11: 'He found that although the proceedings before him were civil contempt proceedings, for the purposes of LASPO they were criminal proceedings'.

LASPO 2012

10. The fact that criminal legal aid is available for civil contempt proceedings is the result of specific statutory provisions set out in LASPO. Part 1 of the 2012 Act deals with legal aid. S.15 provides for the grant of criminal legal aid to individuals subject to actual or anticipated 'criminal proceedings'. S.14 defines 'criminal proceedings' and 14(g) refers specifically to '*proceedings for contempt committed, or alleged to have been committed, by an individual in the face of a court,...*'. Following the judgment of Blake J in Kings-Lynn & West Norfolk Council v. Bunning & Legal Aid Agency [2015] 1 WLR 531, it is clear that s.14(g) must be construed with s.14(h), which refers to '*such other proceedings, before any court, tribunal or other person, as may be prescribed*'. Blake concluded that the combined wording was sufficiently broad to

encompass civil contempt not in the face of the court. This conclusion was followed by CJ Leonard in Liverpool Victoria v. Khan (ibid) at para. 7 of his judgment:

I agree with Blake J's analysis. Although these were civil contempt proceedings they were not "relevant civil proceedings", but instead were criminal proceedings, for the purposes of LASPO. Where the terminology may make for confusion, this is a perfectly sensible reading of the Act since it recognises the "criminal" characteristics of the contempt proceedings, even in civil cases, and the "criminal proceedings" nature of the sentence that may follow.

11. Accordingly, contempt proceedings, including civil contempt, are to be treated as criminal proceedings for the purposes of Part 1 of LASPO.

S.14(g)/(h) and the Criminal Legal Aid (Remuneration) Regulations 2013 ("the 2013 Regulations")

12. The 2013 Regulations are made pursuant to the Lord Chancellor's powers under LASPO. They provide, inter alia, for the imposition of restrictions and the sums the LAA may fund for different categories of criminal proceedings. Regulation 8 applies, inter alia, to '*representation pursuant to a section 16 determination and proceedings prescribed as criminal proceedings under section 14(h) of the Act (8(1)(c))*'. Regulation 8(2) provides that
 - (2) *Claims for fees in cases to which this regulation apply must –*
 - (a) *....; and*
 - (b) *be paid in accordance with the rates set out in Schedule 4*
13. Insofar as the substantive contempt proceedings were heard in the High Court, Schedule 4(7) provides for the payment of 'fixed amounts and hourly rates' as set out in a Table. The rates for a London based provider such as SMA are set out in the Schedule applicable to 29 September 2022. Schedule 4(7)(3) provides additionally for fees paid to assigned counsel, subject to limits in the Table following para. 12.

The Claimants' case

14. The Claimants, in summary, submit that the Defendant's costs are limited between the parties to a maximum of the sums she is entitled to under her Legal Aid Certificate, calculated by reference to the provisions of the Remuneration Regulations. No counsel was permitted under the LAA certificate and counsel's fees are not recoverable. Further, or alternatively, if counsel's fees are recoverable, they are limited to junior counsel fees, effectively as 'the advocate', at the fixed rates and maximum sums permitted under the Regulations, and effectively in place of (the relevant part of) the solicitors' advocates' fees.
15. Mr Mallalieu's first and primary submission concerns the applicability of the indemnity principle, which is applied in legal aid cases. The indemnity principle "remains a fundamental rule of law applicable to between the parties' costs recovery" (Skeleton Argument, 29 November 2023 ('CSA') 58). An immediate and obvious

indemnity principle problem arises, therefore, in legal aid cases, as an individual in receipt of legal aid is not required to make any payment in connection with the provision of funded services, except where the regulations expressly permit. Save, therefore, in certain limited circumstances, where the client has no liability for costs, there is nothing to indemnify. The costs between the parties would constitute a prima facie breach of the indemnity principle.

16. Provisions relevant to civil legal aid produce a ‘work round’ for this. Longstanding provisions exist to ensure that a funded party can recover costs ordered against an opponent without breaching the indemnity principle. Section 28(2) of LASPO prevents a service provider taking any payment for funded services ‘*except as permitted by arrangements or authorised by the Lord Chancellor*’. Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013 (the latest iteration of an established arrangement) then provides that:

21 – Amount of costs under a legal aided party’s costs order or costs agreement

(1) Subject to paragraph (2) to (4), the amount of costs to be paid under a legally aided party’s costs order or costs agreement must be determined as if that party were not legally aided.

(2) Paragraph (3) applies only to the extent that the Lord Chancellor has authorised the provider under section 28(2)(b) of the Act to take payment for the civil legal services provided in the relevant proceedings other than payment made in accordance with the arrangement.

(3) Where this paragraph applies, the amount of costs to be paid under a legally aided party’s costs order or costs agreement is not limited, by any rule of law which limits the costs recoverable by a party to proceedings to the amount of the party’s liable to pay their representatives, to the amount payable to the provider in accordance with the arrangement.

These provisions, submits Mr Mallalieu, are not so much as to disapply the indemnity principle, but rather to establish an entitlement to take payment in circumstances where the indemnity principle is lifted.

17. Regulation 21 does not, however, apply to criminal legal aid. Indeed, there is no equivalent provision in respect of criminal legal aid in LASPO or the relevant Remuneration Regulations. Mr Tear, representing the Defendant, agrees that the indemnity principle does not disapply by statute in criminal legal aid as it is in civil aid (Skeleton Argument, 29th November 2023 (‘RSA’), 9(a)).
18. The s.28 LASPO prohibition prevents any question of ‘topping up’. The courts, submits Mr Mallalieu have traditionally been very clear as to prevent topping up. He refers to the judgment in Merrick v. The Law Society [2007] EWHC 2997 (Admin), where Gross J held a solicitor to be guilty of misconduct for doing so (para. 54):

Mr Merrick, an experienced solicitor, was here in breach of the fundamental rule, whether the old or the new regime applied, that solicitors, acting for legally aided clients, are not entitled to look to that client for payment. This is

not a complex matter; it is basic; it is also of the first importance to the reputation of the profession in its handling of legal aid work.

19. Nor are the legal aid rates capable of enhancement. Under regulation 8(2)(2) of the Criminal Legal Aid (Remuneration) Regulations 2013, the rates and maximums are expressly prescribed, and the regulation makes clear that work payable under s.14(8) of LASPO must be paid in accordance with those rates.
20. Turning to the question of counsel's fees, Mr Mallalieu cites the provisions of the 'Standard Crime Contract' at para. 8.41-8.43, a provision relied on specifically by Mr Tear for the Defendant at para. 31 of his RSA. The relevant section is entitled '*Payment other than through this Specification*' and provides:
 - 8.41 *Subject to Paragraph 8.43 below, you must not charge a fee to the Client or any person for the services provided under this specification or seek reimbursement from the Client or any other provision for any Disbursements incurred as part of the provision of such services. This Paragraph does not apply to services you provide which cannot be paid under this contract or the Act, but which are in connection with a Matter or Case.*
 - 8.42 *Where you have been carrying out Contract Work on behalf of the Client, you may not accept instructions to act privately in the same matter from that Client unless the Client has been first advised by you in writing of the consequences of ceasing to be in receipt of services and as to the further services which may be available under criminal Legal Aid, whether from you or another Provider, (including the possibility of an extension of the limit for Advice and Assistance or Advocacy Assistance, an application for Representation or the availability of Advocacy Assistance or the Duty Solicitor and has nevertheless elected to instruct you privately.*
 - 8.43 *Where an application for prior authority for costs to be incurred under a determination has been refused and the Client has expressly authorised you to:
 - (a) *prepare, obtain or consider any report, opinion or further evidence, whether provided by an expert witness or otherwise; or*
 - (b) *obtain or prepare any transcripts or recordings of any criminal investigation or proceedings, including police questioning; or*
 - (c) *instruct Counsel other than where an individual is entitled to Counsel (as may be determined by the court) in accordance with regulation 16 and 17 of the Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013,*
*then Paragraph 8.41 will not apply for payment by the Client on a private basis for that work.**
21. The evidence of fact, notes Mr Mallalieu, does not suggest that the Defendant obtained express authorisation for the cost of counsel, Mr Underwood KC. Indeed, the evidence rather excludes the fact of express authorisation. The answer, moreover, to this point, and the application of 8.43(c), as relied on by the Respondent, is found in para. 5.27(d) of the Contract, which explains that the provisions that apply '*in*

magistrates' courts only'. Thus, instruction on a private basis is precluded, and any such payment would contravene the prohibition against topping up.

22. All this, submits Mr Mallalieu, casts considerable doubt on the contractual enforceability of SMA's retainer with the Respondent. Insofar as it purports to impose a contractual liability on the Respondent, apparently on a CFA 'lite' basis, it appears to be intended to provide for topping up, contrary to s.28 of LASPO and, indeed, public policy. As such, the retainer is unlawful and unenforceable. To suggest, moreover, that the Respondent was entitled to "abandon" her legal aid and agree to a retrospective, private contractual liability for costs, would be "unprecedented and remarkable". Mr Mallalieu describes this argument – raised by SMA in correspondence – to be "ineffective, unlawful, contrary to public policy and wrong in law" (CSA 112). Finally, Mr Mallalieu submits that the arguments raised by the Claimants in this case are essentially those heard and upheld by CJ Leonard in Liverpool Victoria Insurance Co. Ltd. v. Khan & Others (ibid). In Khan, the court held that the receiving party's claim was limited, by virtue of the indemnity principle, to the amounts payable by the LAA. The receiving party was unable to rely upon any primary or secondary legislation disapplying the indemnity principle for a party in receipt of criminal legal aid. Nor was there anything in the Criminal Specification that had that effect (para. 153-166).

The Defendant's case

23. The Defendant, by way of broad comment, submits that adopting the Claimants legal construction "produces an absurd result" (RSA, 12). Instead of permitting this "absurdity", the court should pursue a "sensible outcome" (RSA, 11). To affect this, the Defendant proffers a primary and a secondary position.
24. The Defendant's primary position is that the Claimants' interpretation of LASPO is essentially academic, as the receiving party has expressed clearly a desire to, if necessary, revoke her criminal legal aid and rely instead on the private retainer. Irrespective of the date or precise terms of the contract, a "retrospective costs agreement is capable of being valid" (RSA, 19). Tacit approval – even encouragement – for is provided by the Court of Appeal in Kings-Lynn & West Norfolk Council v. Bunning [2016] EWCA Civ 1037, where Irwin LJ (at para. 39) stated:

I accept also that it is important for costs orders to be made in favour of successful legally aided parties. We are told that such an order makes a very considerable difference to those acting, who receive a very much reduced rate if paid by the Legal Aid Agency rather than the unsuccessful party. There will also be evidence that successful legally aided parties do not obtain costs orders when they should, a false picture will emerge as to the care the Agency takes of public money: Legal Aid litigation will appear to be less effective and the judgments of the Agency less well-considered than they should.

25. The Defendant's secondary case submits that inter partes recovery, assessed by reference to private retainer rates is permitted in any event by LASPO. LASPO,

submits Mr Tear “did not in principle make any changes to the long-standing practices of the Court in respect to the costs implications of losing in a committal matter, which are the same as a general civil matter” (RSA, 21). It is submitted that the correct interpretation of ss.28 and 30 of LASPO indicates the existence of a wide discretion and that, specifically, the Act has no effect on liabilities in normal solicitor relationships. The cost limit of £75,000 in the Defendant’s LA Certificate is, moreover, essentially academic, as “in any event the limitation is more than the bill claimed” (RSA, 38).

26. Mr Tear recognises that the same point was considered by CJ Leonard in Liverpool Victoria Insurance Co. Ltd. v. Khan (ibid), when the court upheld the arguments advanced by Mr Mallalieu in this case. But he points out (correctly) that this decision is not authoritative or binding on another costs judge. He points out that in Liverpool Victoria the court was concerned additionally with other, complex issues, and that the question of legal aid and the indemnity principle were decided after “different arguments [were] advanced” (RSA, 20). In effect, Mr Tear submits that the relevant parts of the decision in Liverpool Victoria Insurance were wrongly held.
27. It is relevant, Mr Tear submits, that in this case, Nicklin J ordered that the Defendant’s costs be assessed on the indemnity basis. “Indemnity basis of assessment of costs are awarded to express the displeasure of the Court over the conduct of a party but also to achieve fairness” (RSA,17). The difference between a standard and an indemnity basis assessment is “a matter of real significance”. Insofar as an indemnity assessment basis renders it more likely that a receiving party “recovers a sum which reflects the actual cost of proceedings” (RSA,17), this is relevant to my determination of these issues.
28. Turning to the question of counsel, specifically Queen’s Counsel, Mr Tear notes that the Defendant applied twice, unsuccessfully, for permission from Nicklin J for the appointment of a KC, or for an additional advocate to Mr Tear. Quoting the decision on 6th July 2022, the judge “was not persuaded that the case against Ms McGivern justifies the instruction of a KC under legal aid”. Having recorded that “the contempt application appears to be straightforward”, albeit with “some unusual aspects”, he held that it was in no way “exceptional”. Nor did the contempt application “give rise to any issues of privilege”. Accordingly:

For those reasons, the Judge is not prepared to grant the application for a QC. If you consider that the Judge has failed to appreciate, or misunderstood, the basis of the application, then you can renew it at the hearing on 21-22 July 2022. As you will understand, this decision is limited to the application made under legal aid. Ms McGivern is free to instruct a KC independently if she wishes to do so.

This is, of course, ultimately what the Defendant did in retaining Mr Underwood KC, as well as junior counsel. This, submits Mr Tear, does not constitute topping up, as it represents the incidence on a private basis of a disbursement refused by legal aid. Thus, while a party with legal aid cannot pay privately on top of that public funding for the same legal service, there is no prohibition against incurring the cost of an item or expense refused by legal aid. LASPO, it is submitted, preserves that entitlement at

paragraph 8.43 of the ‘Standard Criminal Contract’. As such, “whether Counsel’s fees are within or outside the legal aid scheme, the proper rates for recovery are those of his (or their) costs at the usual inter partes’ rate(s) and not the suppressed rates of the LAA system”.

My analysis and conclusions

29. I must acknowledge from the outset that in determining these issues I have been greatly assisted by the careful and considered submissions of both advocates. Nonetheless, I generally prefer the submissions of Mr Mallalieu for the Claimants to those of Mr Tear for the Defendant.
30. I am not persuaded by the Defendant’s primary position, namely that the “Receiving Party has clearly stated her wish that the costs be paid and is prepared if necessary to revoke her criminal legal aid” (RSA, 33). Insofar as the retainer purports to impose a contractual liability on the Defendant, albeit on a ‘CFA lite’ basis, it is difficult to avoid the conclusion advanced by Mr Mallalieu, namely that in providing for, inter alia, an enhanced solicitors’ hourly rate, it expressly intended to provide for topping up, contrary to s.28 of LASPO. The question is probably academic in any event, in that notwithstanding an apparent intention to revoke criminal legal aid, the Defendant has not actually done so. Indeed, the certificate remains in place and she continues to rely on it, in that a Legal Aid Agency assessment of her costs was conducted in September 2023.
31. On the Defendant’s secondary case, it is (or appears to be) common ground that the indemnity principle arises in legal aid cases, and that whilst s.28 of LASPO provides for the Lord Chancellor authorising, in certain circumstances, the receipt of payments other than by the Legal Aid Agency, it does not disapply the indemnity principle. Indeed, the indemnity principle is not disapplied by any primary or secondary legislation in criminal cases.
32. It now seems clear and settled law that while contempt proceedings may be civil or criminal, they are ‘criminal proceedings’ for the purposes of LASPO and the Legal Aid Agency. This was the conclusion expressed substantively by Graham J in Liverpool Victoria Insurance Co. Ltd v. Khan (ibid), and follows the decision of Blake J in Kings-Lynn West Norfolk Council v. Bunning (ibid), that s.14(h) of LASPO should be interpreted broadly, so that criminal proceedings encompasses civil contempt not in the face of the court.
33. Section 8(2) of LASPO, along with provisions set out in Schedule 4, provide for payment under the Legal Aid Certificate in accordance with prescribed rates and maximums. For London based solicitor, as in this case, the relevant rates are set out in Schedule 4, as applicable to September 2022. These rates are not capable of enhancement and cannot be topped up, given the general prohibition against the payment of additional sums. Accordingly, inasmuch as the funded party cannot recover costs against an opponent in breach of the indemnity principle, inter partes’ costs are effectively limited to these rates and maximums.

34. Regulation 21 of the Civil Legal Aid (Costs) Regulations 2013 provides (in its current gestation) an exception for civil legal aid. But reg. 21 does not apply to criminal legal aid and there is nothing, on my reading of the statute, in the regulations or the Standard Criminal Contract which operates to lift the indemnity principle in respect of criminal legal aid.
35. I am not persuaded of the argument that when a costs order provides for an indemnity taxation this has any material bearing on the issues in this determination. There are, of course, differences between a standard and indemnity basis taxation, but they do not bear on any of the applicable questions of indemnity of statutory interpretation. Insofar as a similar (but not quite identical) issue was considered (at great length) and determined by CJ Leonard in Liverpool Victoria Insurance Co Ltd. v. Khan (ibid), I express the view that, whilst this decision is not binding on me, it is nonetheless carefully and correctly determined.
36. Turning to the question of counsel, and specifically the Defendant's instruction of Mr Underwood KC, the issues are, perhaps, a little more complicated. It is noted that the Defendant made two unsuccessful applications for authority under the LA certificate to instruct leading counsel. Nicklin J, in refusing the request on 6th July 2022, observed that "Ms McGivern is free to instruct a KC independently if she wishes to do so". I suspect, however, that he was purporting to articulate what he understood to be the practical reality, rather than the commentary in the technicalities of legal aid in funding. Either way, when construing para. 8.41-8.43 of the Standard Criminal Contract, I prefer the interpretation of the Claimants to that of the Defendant. I am not satisfied that as these were proceedings in the High Court, in contrast to those in a magistrates' court, that 8.43 authorises the payment (and inter partes' recovery) of private instruction outside the legal aid scheme. If I am wrong on that point, it seems to me very unlikely that the Defendant could justify as reasonable the instruction of a KC in this case. Nicklin J, who became intimately familiar with the contempt application, considered it to be "straightforward", and in no way "exceptional". While acknowledging that the case raised "some unusual aspects", along with the fact that a finding of exceptionality is not a prerequisite to reasonableness in assessment, it seems to me that the substantive tribunal considered this to be a relatively straightforward (as well as a wholly unmeritorious) application which did not reasonably justify the instruction of leading counsel. Whatever construction was placed on the statutory framework, I do not allow recovery of those disbursements.

Summary of conclusions

37. My findings are summarised as follows:
- (i) On the assessment of this Bill, the Defendant's solicitors are limited between the parties to a maximum of the sums they are entitled to under Regulation 8(2) and Schedule 4 of the Remuneration Regulations.
 - (ii) The fees of Mr Underwood KC are not recoverable inter partes.
 - (iii) Junior counsel's fees may be recoverable, subject to the fixed rates/maximum sums set out in the Remuneration Regulations, and subject to a suitable adjustment and scrutiny of the solicitors' fees on assessment.

38. In handing down this judgment, I will liaise with the advocates as to the future conclusion of the assessment and, if necessary, set the case down for a short Directions Hearing.