Neutral Citation No: [2024] EWHC 3206 (SCCO)
Case No: SC-2024-BTP-000753

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 06/12/2024

Before :

COSTS JUDGE NAGALINGAM

- -

Between :

Jennifer Underhill	**Claimant**
- and –	
Thackray Williams Solicitors	**Defendant**

- -
- -

Jennifer Underhill for the **Claimant**
Anahita Zandi (instructed by **Thackray Williams Solicitors**) for the **Defendant**

Hearing dates: 02/12/2024

- -

Approved Judgment

This judgment was handed down remotely at on 10/12/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

1. This solicitor and client dispute concerns a single bill raised in the sum of £3,841 plus VAT.

2. The Defendant refers to two additional instructions, neither of which are the subject matter of this judgment but both of which may have some relevance.

3. The first was a fixed fee instruction, for a 1 hour meeting and a written advice. The sum charged was £250 plus VAT which has been paid and is not challenged. Having read the advice, the fee represents remarkable value but it was explained by the Defendant that this represented something of a "loss leader" strategy by the firm, which may or may not have led to a further more substantive instruction.

4. In this case a further instruction did follow, albeit the costs associated with that further instruction are now in dispute.

5. The second additional instruction is in essence the work advising on and proposing amendments in relation to a settlement agreement drafted by the Claimant's former employer. That agreement crystallized a package of compensation the Defendant had secured on the Claimant's behalf, and in doing so avoided the longer and more costly path of progressing to a full employment tribunal hearing.

6. As part of that agreement, the Defendant secured a £500 plus VAT costs contribution from the Claimant's former employer, which was to be allocated to the costs associated with the settlement agreement document. The Defendant avers that the actual costs they incurred in this regard were well over £2,000 plus VAT, but say they chose to not raise an invoice in relation to that work, and instead utilised the £500 plus VAT costs contribution received and wrote off the balance.

7. Having said that, and whatever the Defendant's reasons may have been, the Claimant has never received a bill for that work. There is no ledger for that work before the court either.

8. The important point is that this assessment does not take into account either the initial fixed fee amount, nor the unbilled work relating to the settlement agreement. In both instances, the work was distinct, has been completed, and the Defendant has been paid.

9. The focus is thus on a bill for £3,841 plus VAT, covering work for the period from 11 April 2023 to 18 May 2023 inclusive, a period of just over 5 weeks.

10. Against the amount sought, the Claimant considers she should be required to pay no more than £1,470 plus VAT, based on an estimate of costs provided on 5 April 2023, and the absence of updates to that estimate.

11. Following directions for a Solicitors Act assessment, the parties dispensed with the need for a specially prepared breakdown of costs document because they agreed that the time ledger already provided sufficient detail.

12. The time ledger shows a total sum of £5,863 plus VAT. No disbursements are claimed and counsel was not instructed.

13. The bill figure of £3,841 plus VAT is explained by firstly, a deduction of £250 plus VAT to account for the fixed fee element of work undertaken, and a write-off value amount of £1,772 plus VAT - according to the Defendant.

Is the time ledger accurate?

14. One of the Claimant's criticisms is that the time ledger is not accurate. This would appear to be well founded in that whilst the front of the ledger refers to 26 hours and 11 minutes, and the final page refers to 27 hours and 24 minutes, the time adds up (on my calculation anyway) to 23 hours and 36 minutes.

15. This would be problematic, were it not for the fact that £1,772 plus VAT of time is already said to have been written off. To put it another way, I am satisfied that the written off element more than adequately covers any mathematical errors caused by discrepancies in the time recording addition. However, there may be implications to such errors in the time ledger when it comes to consideration of the costs of assessment.

16. An issue also arose with respect to the extent to which the Claimant's records of e-mails and calls sent and received tallied with her own records.

17. I raised concern that the Claimant had not put in a witness statement nor, for example, phone records to evidence discrepancies. I concluded that it would be disproportionate to adjourn and order directions for further evidence and provision for cross-examination. Instead, I resolved to question the parties appearing before me.

18. In doing so, I established that where the Claimant denied sending e-mails on certain dates (based on the dates the Defendant said they recorded the time for reading those e-mails), this was simply because the time in question was not recorded until the following date (where e-mails were sent after usual office hours).

19. I am also unconcerned by unproven discrepancies in the parties' respective phone records. Ms Zandi and Mr Flockhart are both officers of the court, who were able to consistently refer me to or show me evidence of any challenged item of work.

20. I am satisfied that that none of the time claimed has been concocted, exaggerated, embellished or otherwise. That does not necessarily mean that the time has been reasonably incurred and is reasonable in amount.

Did the Claimant agree to time in supervision?

21. The initial engagement letter dated 30 March 2023 states that Mr Flockhart "will be responsible for the day-to-day conduct of the transaction and Emma Thompson, a Partner in the firm, will be responsible for overall supervision".

22. Thereafter it is Mr Flockhart's contact details which are provided, and on 5 April 2023 a detailed letter of advice followed, authored by Mr Flockhart.

23. The "People responsible for your work" element of the terms and conditions simply defaults to what the client care letter says. The only rate the Claimant was ever advised of was an initial £195/hr for Mr Flockhart, which rose to £210/hr by April 2023 (when the substantive work was billed for up to conclusion).

24. I was informed by Ms Zandi that the Defendant has a "policy" of Partner supervision of newly qualified solicitors up to 3 years from the date of qualification. That is no doubt sensible and of some comfort to professional indemnity insurers. However, I cannot see that it was something that the Claimant was sufficiently warned of in terms of that policy adding to her fees.

25. Indeed, I have been unable to identify where in the documents filed that a rate of £350/hr was advised and then agreed to for Ms Thompson. In that regard, my assessment accounts for nil Partner time.

Does the billed work duplicate the fixed fee work?

26. The Claimant raised concerns that the pre-action letter prepared on her behalf mirrored the advice letter produced under the fixed fee agreement to such an extent that it raised concerns about duplication.

27. Put bluntly, the Claimant says it matters not if the Defendant entered into a bad bargain by agreeing to a 1 hour attendance and lengthy advice letter for £250 plus VAT. If that work then substantially informed the content of the pre-action letter, then the time allowed should reflect any duplication of work already covered under the fixed fee arrangement.

28. I don't agree with the Claimant in this regard. The Defendant made it clear that the time and work required to prepare the pre-action letter was also "subject to any further documentation" which fell to be reviewed. Such further documentation, amounting to some 40 documents, fell to be reviewed.

29. Any duplication of effort as between the work undertaken under the fixed fee agreement following a 1 hour attendance is minimal as compared to the work undertaken under the hourly rates agreement to produce the pre-action letter.

What did the agreement cover?

30. The client care documentation is disjointed. There is a letter dated 30 March 2023 which (aside from advising of a rate of £195/hr) is generic in nature, refers to a fixed fee initial meeting, and that any instruction beyond that would require payment of £750 on account. The letter also refers to the term and conditions which were attached.

31. There is a second letter, also dated 30 March 2023, in which an hourly rate of £210/hour is confirmed. No other rate is referred to.

32. The terms and conditions document is generic and does not set out what the agreement covers, nor the rates to be charged.

33. Through submissions, it was established that Mr Flockhart's rate in March 2023 was £195/hr, but was £210/hr from April 2023. I am satisfied that the Claimant was advised of the rates and did not object to the same. In this regard, any allowance I do make is based on rates of £210/hr.

34. It was not until the 5 April 2023 letter that the Defendant descended into any detail as to the service they would provide upon confirmation of instructions.

35. The key passages in that letter are:

> "I would estimate the preparation of a pre-action letter and without prejudice letter would take 5-7 hours of time at £210 plus VAT per hour. Please be advised that I would do my best to recover these legal fees during the course of negotiations however, you would principally be responsible for these costs".

36. The letter made it clear that the provision of an estimate was "difficult" and given "subject to any further documentation" that fell to be reviewed.

37. As to costs updates, the 5 April 2023 letter states:

> "One part of my job in managing your case is to keep a constant eye on the costs situation. I will therefore be keeping costs under regular review, and I will be happy to discuss any concerns you may have at any time"; and
>
> "If it appears that the total costs estimate is likely to be exceeded, I will bring this to your attention at the earliest opportunity and seek your approval before further work is carried out".

38. Whilst conduct in the provision of continuing instructions can lead to the inference of approval for that work to be carried out, the Claimant's case is that she would not have provided that approval had she known the level of costs being incurred, and, or in the alternative, could not have even contemplated the Defendant would exceed their initial estimate so quickly given the work required – such that she genuinely was not aware the Defendant had exceeded the initial estimate until she received the bill dated 19 May 2023.

39. On a strict interpretation of the client care documentation, the Defendant agreed to prepare a pre-action letter and, if required, a without prejudice letter. However, and having comprehensively questioned the Claimant on this issue, I am satisfied that at no time was the Claimant under the impression that she had *only* instructed the Defendant to prepare a pre-action letter, a without prejudice letter, and nothing else.

40. I am satisfied that the Claimant knew the preparation of a pre-action letter was not the end of the matter, and had anticipated a defensive response from her former employer and the need for without prejudice proposal letters, subsequent negotiations and the possibility of a full employment tribunal hearing.

41. In the event, the Claimant's former employer responded to the pre-action letter with settlement proposals. Negotiations followed, advice was provided, instructions taken and ultimately work was completed with regards to the settlement agreement.

42. The Claimant's primary argument is that she should not be required to pay a penny more than the initial assessment she was provided with.

43. The Claimant's secondary argument is that because of her former employer's pragmatic response to the pre-action letter, the work required to move to the stage of the settlement agreement phase was so minimal that any allowance over and above the maximum estimate provided should be modest.

44. In my view, the basis of the retainer was to intimate a claim by way of a pre-action letter, and thereafter engage in negotiations with a view to the Claimant avoiding the stress and expense of proceeding to an employment tribunal hearing.

45. It was never the case that the costs would be limited to just the preparation of a pre-action letter. The estimate of 5-7 hours was clearly expressed as being for "preparation of a pre-action letter and a without prejudice letter". The client care letter then proceeds to set out that the employer's response may be unpredictable, and outlined the possibility of the claim being defended "all the way to the Tribunal".

46. Whilst I was not taken to the second paragraph under the "Litigation" section of the client care letter, I note that the possibility of going all the way to tribunal is outlined as:

> "It is difficult to estimate the overall costs you are likely to incur; however, based on my experience in this area of work, I would estimate that my charges could be in the region of £15,000-£20,000 plus VAT".
>
> It is made clear that figure excludes additional charges such as counsel's fees.

47. I am slightly bemused by Mr Flockhart's reference to his "experience in this area of work" given I was advised he qualified as a solicitor on 1 March 2023, and wrote the 5 April 2023 client care letter to the Claimant barely a month later.

48. However, the important point to note is that when read in full, I am satisfied that the retainer in this matter permitted costs beyond the initial estimate to be incurred.

49. It is a different question, which is addressed below, as to the adequacy of costs information provided after 5 April 2023 and the implications that has on the assessment and costs of assessment.

Basis of a Solicitor and Client costs assessment

50. Pursuant to CPR 46.9(3), "costs are to be assessed on the indemnity basis but are to be presumed (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client; (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client"

51. There is no dispute that the costs associated with preparing the pre-action letter were incurred with the Claimant's express approval, hence the Claimant's case is that her bill ought to be reduced to a figure not exceeding £1,470 plus VAT.

52. I am satisfied that the costs beyond preparation of the pre-action letter were incurred with the Claimant's express approval, by virtue of the funding arrangement she agreed to. Even if I am wrong about that, I consider that through her conduct of receiving advice and giving instructions, the Claimant otherwise gave her implied approval.

53. However, I cannot conclude that the costs beyond preparation of the pre-action letter was reasonable in amount because the Defendant cannot demonstrate the Claimant's approval as to the amount of those additional costs, either expressly or impliedly.

54. Mr Flockhart was very clear in his correspondence to the Claimant on 5 April 2023 where he said:

> "One part of my job in managing your case is to keep a constant (emphasis added) eye on the costs situation".
>
> "I will therefore keep the costs under regular (emphasis added) review, and I will be happy to discuss any concerns you may have at any time".
>
> "If it appears that the total costs estimate is likely to be exceeded, I will bring this to your attention at the earliest opportunity (emphasis added) and seek your approval before further work is carried out".

55. Whilst I have acknowledged the additional element to the client care letter detailing the potential for solicitors' costs to rise to £20,000 plus VAT, that was in the context of the matter progressing to a tribunal. Thus where Mr Flockhart speaks of the "total costs estimate", I don't consider the Claimant could reasonably have taken that to mean she would only be advised at the point costs were likely to exceed £20,000 plus VAT unless and until the dispute was proceeding a tribunal.

56. In my view, the Claimant was not unreasonable in assuming she would be told if the initial estimate was to be exceeded.

57. In reality, the initial estimate was always likely to be exceeded, save for where the Defendant effectively capitulated upon receipt of the pre-action letter and actively engaged in trying to give the Claimant the outcome she was seeking.

58. The difficulty in which the Defendant finds themselves is their admitted internal process for how frequently costs are monitored. Ms Zandi was frank in acknowledging that, as is common for many firms, costs were reviewed on a monthly basis.

59. In the index matter, where it was anticipated that the Claimant's former employer would defend the claim, and that a without prejudice offer letter would then be required, Mr Flockhart might well have expected a conduct period lasting a few months, which would have given him the time and opportunity to review costs and advise the Claimant accordingly.

60. Instead, and because of the Claimant's former employer's surprisingly swift and cooperative stance in response, a without prejudice letter was not necessary and Mr Flockhart enthusiastically engaged in securing a negotiated settlement on behalf of the Claimant – which resulted in the settlement agreement (the costs of which have already been resolved as part of that agreement).

61. In doing so, the Defendant did not turn their mind to their agreement to "keep a constant eye on the costs situation". Further, whist the Defendant may have understood "regular intervals" to mean monthly, I cannot see this interpretation was communicated to the Claimant.

62. The Defendant contends that they updated the Claimant with respect to costs on 18 May 2023. With respect, the horse had well and truly bolted by this stage. The bill is dated 19 May 2023, and was based on the time ledger. The final entry on that time

ledger, on 18 May 2023, reads "Email out to client re final decision and update on costs/invoice".

63. In reality, this was not an updated estimate but confirmation of what time and costs the Defendant had already incurred, ahead of a demand for payment sent the very next day. The Claimant had no time to react to this "update" at all. Further, the Defendant cannot adequately evidence the extent of costs information provided in a call in which they say costs was discussed on 15 May 2023, and which the Claimant cannot recall.

64. In all the circumstances, I am unable to "presume" that the Defendant's costs are "reasonable in amount", because I am unable to conclude that the "amount was expressly or impliedly approved by the client".

65. That does not mean that costs in excess of the estimate are automatically disallowed, but rather that it falls to me to assess what the reasonable amount is. As I explained to the parties, in order to conduct this assessment proportionately I have had regard to the points of dispute and responses, as well as the parties' submissions, and resolved to assess the costs on a broad brush basis. In this regard, there is no recalculation of the breakdown of costs required and I will immediately know the percentage by which the costs have been reduced.

Assessment of the bill dated 19 May 2023

66. Having taken into account the basis of the work done under the fixed fee instruction, charged and paid in the sum of £250 plus VAT, disallowed any partner time, disallowed work of a purely administrative / accounts nature, considered the reasonableness of the time claimed, and taken into account the work relating to the settlement agreement (which was not billed to the Claimant but for which the Defendant has been remunerated from monies secured from the Claimant's former employer as part of the settlement agreement), I assess the Defendant's costs in the sum of £3,150 plus VAT on a broad brush basis.

67. It is a matter for the parties if they wish to engage in discussions as to the making of a single payment or a payment plan. In either event, credit must be given for any payments on account. The addition of interest is dependent on the contractual terms of the retainer. Any claims as to interest, provided there is a contractual right to the same, shall run from the date of this judgment and not the date of the invoice.

Costs of Assessment

68. Pursuant to section 70(9) of the Solicitors Act 1974, if the amount of the bill is reduced by one fifth the solicitor shall pay the costs of assessment. Otherwise, the party chargeable (i.e. the former client) shall pay the costs of assessment.

69. However, under section 70(10) of the same act, "The costs officer [or judge] may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit.".

70. For the purpose of the "one fifth" rule, one takes the assessed sum and the amount the former client was actually billed. This equates to a reduction of around 15.39%.

However, I am minded to exercise my discretion under section 70(10) of the Solicitors Act 1974 and certify there are special circumstances relating to the bill.

71. Special circumstances does not mean extraordinary, but rather outside of the norm. In my view, the bill presented to the Claimant was not clear as to what it covered or was intended to cover.

72. As a result of these assessment proceedings, and the Claimant's decision to query the costs, it has transpired that the bill delivered flows from a time ledger which purports to total 27.4 hours but in fact does not.

73. The discrepancy is not explained by the deduction of the fixed fee element. Further, whilst in submissions the Defendant said they have written off £1,772 plus VAT of costs (to eventually arrive at the billed £3,841 plus VAT figure), that doesn't explain why the hours total in the time ledger is more than the individual items add up to.

74. Further, I am dissatisfied as to how the write-off amount has been arrived at or how it has been applied. I have recorded that during the course of the hearing, Mr Flockhart corrected himself several times with regards to write-off figures.

75. In addition, the bill was produced one day after a purported costs estimate update, and so in reality after those costs had been incurred and absent the opportunity for the Claimant to approve the amount of those costs (albeit I have concluded the Claimant impliedly approved the incurring of those costs, if not the amount).

76. The order that respects the costs of assessment in these circumstances is in my view no order as to costs. To be clear, neither party shall recover from the other party the costs of their costs dispute (i.e. the costs of assessment).

77. As such, the Claimant shall pay the Defendant the sums set out in paragraphs 66 and 67 (if applicable) above, with credit to be given for any payments on account.

78. In order to account for the forthcoming festive period, I permit 35 days for payment, save that if the parties agree a payment plan they may file a Tomlin Order with an attached schedule which sets out the terms of any such plan.