Neutral Citation Number: [2020] EWHC 810 (QB)

Case No: QA-2019-000248

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE ROYAL COURTS OF JUSTICE
ON APPEAL FROM THE CENTRAL LONDON CIVIL JUSTICE CENTRE BY ORDER OF HHJ LUBA QC DATED 18 JULY 2019
COUNTY COURT CASE NUMBER; B11YP636
APPEAL REF: QA/2019-000248

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2020

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

- -

Between :

Arif Barber **(trading as Barber & Co Solicitors)**	**Appellant/ Defendant**
- and –	
Medico Services Limited	**Respondent/ Claimant**

- -

Mr Richard Goddard (instructed by **Barber & Co Solicitors**) for the **Appellant**
Mr Simon Butler (instructed by **MBH Solicitors**) for the **Respondent**

Hearing date: Monday 30th March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 11.00am on Tuesday 7th April 2020.

The Honourable Mrs Justice Tipples DBE :

Introduction

1. Mr Arif Barber is a solicitor who trades as "Barber & Co Solicitors" and acts for clients in low value personal injury cases. He is the appellant and I shall refer to him as "**the solicitor**" in this judgment. Medico Services Limited is a company which arranges and provides medical reports for claimants in such cases, it is the respondent and I shall refer to it as "**MSL**" in this judgment.

2. On 19 October 2005 MSL issued proceedings against the solicitor claiming "damages for outstanding fees for medico-legal services provided to [the solicitor]" in the sum of £26,069.13 for unpaid fees, plus interest of £9,949.79.

3. MSL alleged that it had a contract with the solicitor, and it was an implied term of that contract that the solicitor would pay MSL's reasonable fees, such fees to include (a) cost of expert reports; (b) costs of retrieving medical records; and (c) cost of any missed medico-legal examination reports. MSL alleged that, in breach of contract, the solicitor failed to pay it the reasonable fees which it had been invoiced in accordance with the schedule attached to the Particulars of Claim marked Appendix 3. The particulars of the outstanding 85 invoices are set out in Appendix 3 and, in each case, there is a sum identified as "shortfall" said to be owed by the solicitor to MSL. The total value of the shortfall in respect of all the invoices is £26,069.13. The solicitor disputed the agreement alleged, and said that any instruction to MSL was contingent upon certain criteria being met and, in order to recover the sums alleged, MSL had to prove that these criteria had been met in respect of each and every invoice.

4. MSL's claim was listed for trial before His Honour Judge Luba QC on 18 July 2019. The judge heard evidence from three witnesses, Mr Talha Hassan and Mr Bilhal Hassan on behalf of MSL and Mr Javid Daud for the solicitor. The trial was completed in a day. The judge gave an extempore judgment late in the afternoon of 18 July 2019.

5. The judge explained, at the start of his judgment, the background which gave rise to the "novel form of business called medico-legal services providers" and, in particular, "the phenomenal amount of litigation [which was] conducted to recover modest amounts of damages arising from small road traffic accident claims". It was against this background, which was not disputed, that the judge went on to consider the facts of this case. The judge then recited the evidence he heard from the witnesses, the relevant (albeit limited) documentary material, and the parties arguments. The judge concluded "without any hesitation" that MSL had "established its primary case that there is a contractual basis here on which services being commissioned and then paid for were provided" (paragraph 48). Further, he concluded that the amounts claimed on the invoices were recoverable (paragraph 52) and he gave judgment for MSL in the full amount claimed, namely £26,069.13 plus interest. The order gives judgment for MSL against the solicitor for £38,860.27 (comprising both the sum due and interest down to 18 July 2019).

6. The solicitor appeals the order made by the judge with the permission of this court.

7. Permission was given in respect of four of the seven grounds of appeal. The solicitor advances these four grounds as follows:

a. Ground 1: The judge erred in concluding that there was a contract between [MSL] and [the solicitor] in respect of fees claimed in respect of failure by clients for not attending medical appointments. Further particulars were then provided of this ground.

b. Ground 2: The court fell into error in failing to construe the contract as a contingent contract in that fees were owed only if and to the extent where fees had been received in the claim.

c. Ground 4: The judge erred in awarding the full amount as claimed by MSL. This is because the learned judge failed to take into account the fact that, even if there was a contract and a breach of that contract, the loss stemming from that breach amounted to the claim in full. Further particulars were then provided of this ground.

d. Ground 6: The judge erred in concluding that the amount claimed was recoverable. On its own evidence MSL conceded that the fee was not agreed. MSL in its particulars conceded that the amount recoverable would have to be reasonable. Given the evidence the parties never agreed to the amount of fees to be charged, the onus on the court if it did conclude a binding contract between the parties was to ascertain what a reasonable fee was. The court did not exercise this duty and simply awarded MSL the full amount it claimed.

8. The relief sought by the solicitor on the appeal is that: (a) the judgment against him for £38,860.27 be set aside; and (b) the order that he pay the MSL's costs be set aside.

9. I can only grant this relief if I am satisfied that the judge's decision was (a) wrong; or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court: CPR Part 52.21.

10. Before turning to each of these grounds, it is necessary to refer to the contractual relationship between the parties found by the judge.

The contractual relationship between MSL and the solicitor

11. At paragraphs 21 to 24 of his judgment the judge explained:

> "[21.] Mr Bilhal Hassan [of MSL] told me, somewhat surprisingly, that there was no direct communication between himself and anyone from [the solicitor] as to the terms on which services would be provided. What happened, virtually 'out of the blue', as I think he described it, was that [the solicitor] began to send instructions to his company. This was in 2010. A standard form template letter was used, the terms of which I shall come to in a moment[1]. On receipt of those standard form instructions, by Bilhal Hassan's firm [MSL] would make the necessary arrangements for a medical examination and would communicate directly with the injured party to ensure that they attended the appointment with the relevant practitioner.

[1] Set out at paragraph 12 below.

> [22.] In order to facilitate this business model, Mr Bilhal Hassan's business [MSL] obtained the use of a number of premises around the country at which persons could attend, almost back to back, to be seen by an appropriate medical examiner. This business model, in the case of the connection with [the solicitor], was one that seems to have operated successfully and without too much difficulty over a number of years. The modus operandi, as it is described in the claimant's statement of case, was simply that after having obtained a medical report an invoice would be rendered to the solicitor's firm for [MSL's] fees, included in which would be the fee for the medical practitioner. In most cases, in due course that fee was paid and matters proceeded happily."

12. There was an example of the standard form letter of instruction sent by MSL to the solicitor at page 27 of the appeal bundle ("**the MSL instruction letter**"). The MSL instruction letter is dated 5 November 2010, the client is a Mr Patel and the accident was on 19 October 2010. It is addressed to MSL and says this:

> "We act on behalf of the above-named client in relation to personal injuries sustained as a result of a road traffic accident. We enclose herewith letter of instruction to the expert which we would ask you to put before the expert in our client's area. Please find enclosed our client's Medical Consent Form should you require it. We should be obliged if you could obtain our client's medical records and forward the same to the expert in order for him to prepare the report only if the expert requires them. We look forward to receiving our client's medical appointment in a month's time from the date of instructions. If you are unable to supply an appointment within this period, please telephone us upon receipt of these instructions. When acknowledging these instructions, it would assist if you could give an estimate of the likely time scale for the provision of our report and also an indication as to your fee. We await hearing from you and thank you in anticipation of your assistance. Finally, in compliance with the Law Society's new Pre-Action Protocol, we attach a notice in relation to Provisional Damage and would ask you to bring this to the expert's attention. Thank you."

13. The MSL instruction letter was signed by the solicitor.

14. The enclosed letter of instruction to the medical expert ("**the medical expert letter**") said this:

> "We are acting for the above named in connection with injuries sustained as a result of the above accident dated the 19th October 2010. We would be obliged if you could make the necessary arrangements to have our client examined and provide a full and detailed report dealing with any relevant pre-accident medical history, the injuries sustained, treatment received and present condition, dealing in particular with the capacity for work and giving a full prognosis… Please send our client an appointment direct for this purpose. Should you be able to offer a cancellation appointment, please contact our client direct. We confirm we will be responsible for you [sic] reasonable fees which will be settled upon conclusion of our client's claims. Please also advise of the appointment date. Could you please make arrangements for the release of our client's GP records should you feel the need to review the same. In order to comply with the rules we would be grateful if the Dr's would insert there [sic] signature and a statement that the contents of the report are true to the best of his

> knowledge and believe. In order to avoid further correspondence we can confirm from the information before us that there is no reason to suspect we may be pursuing a claim against the hospital or its staff."

15. The medical expert letter was also signed by the solicitor. This letter was then sent by MSL to the medical expert, as instructed in the MSL instruction letter.

16. The judge then continued:

> "[31.] Letters would then be generated to the individual injured party by the claimant service providers [MSL]. The function of those letters was to ensure that the individual injured party actually [attended] the appointment that had been fixed for their medical examination. The wording of those standard letters made it plain that if there was a failure to attend a medical examination which incurred a cost, the individual lay client might in the future expect to see that amount recouped from any damages that they might recover… in the great majority of cases, the procedure worked correctly or as envisaged but sometimes appointments were missed. In those circumstances, [MSL] generated invoices not to the individual lay clients but to [the solicitor]. Many examples of such invoices appear in the documents before me."

17. There was an example of MSL's standard form letter to an individual, in this case Mr Patel, at page 25 of the appeal bundle. This letter was dated 24 November 2010 and provided details of Mr Patel's appointment on 11 December 2010 at the Britannia Hotel in Bolton with a Dr Rehman. The letter then told Mr Patel this:

> "Please bring a form of photo ID with you. Please be aware that if you fail to attend your appointment then a £150 fee will be deducted from your total compensation amount. In order to avoid any non-attendance fees, please ensure you attend the appointment at the time provided. You must provide [MSL] with 72 hours' notice should you wish to cancel."

18. Once a doctor's report had been prepared, MSL then invoiced the solicitor. There is an example of this at page 10.24 of the appeal bundle, which is an MSL invoice dated 29 October 2010. The description of work and fee for it was explained as follows:

> "Medical legal report compiled by Dr Mukhtar; Claimant name; Mr [GNDA]; Appointment date 28/10/10; Cost of report: £375.00; VAT @17.5%: …; Total amount due: £375. Please send cheques to the below address, complete with covering letter and your reference number. Cheques made payable to Medico Services Ltd."

19. This invoice did not therefore provide any breakdown of the fees charged, for example, identifying (a) the cost of the expert report; (b) the cost of retrieving medical records; or (c) the cost of any missed medico-legal examination appointments. This was the only example in the appeal bundle, and I was not provided with any of the other invoices before the trial judge.

20. The judge then turned to the payment of MSL's invoices, and how they were dealt with by the solicitor. He said this at paragraph 33:

> "[33.] In some cases the third-party insurers would not pay all of the sums claimed. But where they would and those sums included the full sum due to [MSL] on the invoice, then the present claimant [MSL] would be paid in full. In other cases, the third-party insurer would offer a lesser amount. There seemed … to be a standard fee that many third-party insurers considered an appropriate fee for obtaining simple medical reports. That would sometimes be short of what [MSL] had invoiced for. In those circumstances Mr Daud (the Accounts Manager for the firm [the solicitor]) told me that the expectation would be that the medico-legal service provider [MSL] would waive the difference or, perhaps, alternatively would raise a dispute with the third party insurer as to the reasonableness or otherwise of what the third party insurer was prepared to pay.
>
> [34.] Crucially, for the purposes of the present case, Mr Daud told me that if there remained an unpaid balance in the sense of a shortfall between the invoiced amount from [MSL] and the amount provided through third parties, then the loss represented by that shortfall, would be borne by the service provider [MSL] and not by the firm [the solicitor] which had commissioned the services…"

21. There was an example of a letter from third party insurers at page 34 of the appeal bundle. This letter was to the solicitor from Horwich Farrelly, solicitors for Aviva Insurance UK Limited, and was dated 19 October 2011. The claimant or client was a Mr Brookes in respect of an accident on 8 March 2011. Horwich Farrelly said this to the solicitor:

> "We have been instructed by Aviva Insurance UK Limited … We confirm that stage 2 costs are agreed in the sum of £960.00 inclusive of VAT and the success fee is agreed in the sum of £180.00 inclusive of VAT. We consider the medical report fee claimed to be excessive and are instructed to offer the sum of £264.00 as reasonable. A cheque has been requested from our insurer client in the sum of £1404.00…"

22. There is a further document in the bundle which shows that on 24 January 2019 Dr Rehman emailed the solicitor and confirmed that he had received payment in respect of Mr Brookes' claim "from [MSL] according to my contract with th[em.]" The email did not say, or go on to say, that Dr Rehman was owed any money by MSL in respect of the report he had prepared in respect of Mr Brookes.

23. In relation to the "standard fee" the judge referred to, the appeal bundle included Appendix 3 to the "2012 Medical Reporting Organisation Agreement" dated 2 April 2012 made between AMRO and DAC Beachcroft LLP. Appendix 3 is a table of rates, which appear to be standard rates, paid in respect of certain work done by doctors. There were two rates, Rate A and Rate B. Rate A is if the relevant invoice is paid within 90 days, and Rate B (which is slightly higher) is if the relevant invoice is paid after 90 days. Rate A provided that for a general practitioner report (no notes) the fee was £200 (£225 for Rate B) and an accident and emergency report (including review of notes) the fee was £375 (£410 for Rate B).

24. Having recited the relevant facts, followed by the parties' arguments, the judge concluded there was a contract between MSL and the solicitor and, in relation to this conclusion, said:

> "[49.] I have drawn particular comfort from, firstly, the general and specific factual backgrounds which I have outlined earlier in this judgment. This was an industry standard, operating method. Second, the specific context was one of instruction of engagement of the services of the claimant [MSL] by the defendant [the solicitor]. To suggest, particularly in the context where solicitors are delivering those instructions, that they are doing so on a non-enforceable, non-contractual basis simply flies in the face of reality; all the more so, when the instructions have attached to them yet further subsidiary instructions specifically authorising the engagement of medical practitioner services.
>
> [50.] … In this operating scenario, in the great majority of cases it did not become necessary to spell out anything further as to the basis upon which fees would be demanded and paid.
>
> [51.] Yes, that left a degree of uncertainty. What would happen if the client disappeared and broken their contractual agreement with the solicitors? What would happen if the insurers paid less than the amount that [MSL] were demanding from the solicitors? The answer to those questions is to be inferred from all the circumstances. There are two possibilities. One is that the claimant [MSL] was agreeing itself to bear the loss. The other is that they were not. [The solicitor], which had the legal right to recover the relevant monies from their own client or the other party, claim that they were not taking any risk as to loss. That seems to me an absurd construction of the relevant underlying relationship.
>
> [52.] Accordingly, for all those reasons, I am satisfied that the primary case of the claimant succeeds and that the amounts claimed on the invoices are recoverable."

Grounds of appeal

(a) Ground 2 – Is the contract between MSL and the solicitor a "contingent contract"

25. I shall deal with this ground first, as it seems to me more logical to do so.

26. The solicitor's case is that the agreement between MSL and the solicitor, and the understanding between them, was that MSL would not render any charges in respect of any cases that were unsuccessful. Mr Goddard, counsel for the solicitor, submitted that in reality, liability was never an issue in a great many personal injury claims, and they were settled at a disposal hearing. This meant that, if the claim was successful, the solicitor then recovered on behalf of their client. Whereas if the claim was unsuccessful, there was no recovery at all by the solicitor, and the medical experts were not paid in respect of the any reports prepared for unsuccessful claimants. Mr Goddard relied, in particular, on the contents of the letter sent by MSL to a claimant stating that "if you fail to attend your [doctor's] appointment then a £150 fee will be deducted from your total compensation amount" (paragraph 17 above). This, he said, showed that payment was dependent upon success because, unless successful, there would be no compensation amount from which the £150 fee could have been deducted. The solicitor says that the majority of cases identified in Appendix 3 are not concluded, but accepts that there are 11 concluded matters that "fall for settlement". These concluded matters amount to £4,140 and are particularised in an attachment to the defence marked "Defence 1".

27. In addition to that, Mr Goddard also argued that this is what happened in practice, and was accepted by both MSL and the doctors examining claimants. For example, he said the doctors never complained if (a) they were not paid a fee, ie in the event of an unsuccessful claim; or (b) were not paid the full amount of their fee, ie when the third party insurers did not pay the full amount claimed, as in the case of Dr Rehman who examined Mr Brookes (see paragraph 22 above).

28. Mr Butler, counsel for MSL, submitted that it was common ground between the parties that the solicitor sent MSL a letter requesting it to provide a service, and that a fee would be raised and charged by MSL. This is the MSL instruction letter set out at paragraph 12 above, which had to be considered against the relevant background. The judge made findings of fact in relation to the factual background and the relationship between the parties, and the solicitor does not challenge any of these findings. Having done so, Mr Butler said the judge construed the MSL instruction letter in the correct factual context, consistent with well-established legal principles, and his decision in relation to the terms of the contract between the parties was correct. Mr Butler submitted that the solicitor's argument that the payment of MSL's fees or invoices under the contract was contingent upon the successful outcome of any claim, was simply wrong. This is because there is no reference at all to any such contingency in the MSL instruction letter.

29. I agree with Mr Butler's submissions. The judge provided a very clear analysis of the context which gave rise to the relationship between firms of solicitors and various agents, including the providers of medico-legal services, at paragraphs 12 to 16 of his judgment. It is in that context that the MSL instruction letter, which governs the relationship between the solicitor and MSL, has to be considered and construed. That letter says, amongst other things, "When acknowledging these instructions, it would assist if you could give an estimate of the likely timescale for the provision or our report and also an indication as to your fee". The letter does not say that MSL's fee will only be paid if the claimant's claim is successful. This is a significant point because if that was to be the basis upon which the solicitor instructed MSL, then one would expect such an important point to be spelt out in the MSL instruction letter. It is not mentioned anywhere. I therefore agree with the judge's conclusion that there was a contract between MSL and the solicitor pursuant to which services were commissioned and then paid for (paragraph 48 of the judgment). The payment for such services was not contingent upon the successful outcome of any claimant's claim.

30. I should also add that I do not find the letter which was sent by MSL to a claimant, or underlying client, of assistance (see paragraph 17 above). This is because this letter was sent by MSL to the claimant setting out details of the appointment for a medical examination, together with the consequences of failure to attend. It is not a letter from the solicitor to MSL, setting out the terms upon which MSL is instructed, or the basis on which MSL will be paid.

31. Further, in the medical expert letter, which was enclosed with the MSL instruction letter, the solicitor informed the doctor that "We [the solicitor] will be responsible for you [sic] reasonable fees which will be settled upon conclusion of our client's claims". The medical expert letter was signed by the solicitor, and did not inform the doctor that his or her fees would only be settled upon the successful conclusion of the claim. Rather, the fees would be settled upon the conclusion of the claim. If it really was the solicitor's

intention that these fees should be settled only upon the successful conclusion of the claim, then the medical expert letter could and should have said so. It does not say this, and that reinforces my conclusion that payment for the doctor's services were not contingent upon the successful outcome of any claimant's claim.

(b) Ground 1 – Is the solicitor liable for a doctor's cancellation fees?

32. Mr Goddard for the solicitor argued that, based on the letter sent by MSL to the claimant, it is clear that the solicitor is not liable for any cancellation fee if the claimant fails to attend the doctor's appointment. This is because the letter spells out that that cost will be "deducted from [the claimant's] total compensation amount", and there is no agreement for the solicitor to pay that charge.

33. Mr Butler for MSL argued that was the wrong approach as the starting point is the contract for services between the solicitor and MSL and, on the proper construction of the MSL instruction letter it is obvious that any cancellation fee by the doctor, falls within the ambit of the fees in respect of which the solicitor was liable.

34. Again, I agree with Mr Butler's submissions. Further, it seems to me that the MSL letter of instruction has to be read together with the medical expert letter, which was enclosed with it. This is because in the MSL instruction letter, the solicitor tells MSL to put the medical expert letter before "the expert in our client's area". MSL is acting as the solicitor's agent, in sending the letter to the doctor. Then, as I have mentioned above, in the medical expert letter the solicitor gives instructions to the doctor and tells the doctor that "we confirm we will be responsible for you [sic] reasonable fees which will be settled upon conclusion of our client's claims." The doctor's fees must, as a matter of common sense, include any cancellation fees charged by the doctor, and in the medical expert letter the solicitor made it plain that he would be responsible for these fees, provided they were reasonable. Therefore, I agree with the judge that it is an "absurd construction of the relevant underlying relationship" to suggest that the solicitor was not taking any risk as to loss. Rather, the true position is that the solicitor was liable for any cancellation fees charged by a doctor, provided the fee was reasonable and that was irrespective of the outcome of the case.

(c) Ground 4 – MSL have not suffered the alleged loss

35. The judge began his judgment by stating that "this is my judgment at the conclusion of a trial in a claim for damages". That is how the claim is formulated on the claim form and how the parties proceeded at trial. I only mention this because, the Particulars of Claim puts the matter this way:

> "[9.] In breach of contract, [the solicitor] has failed to pay [MSL] the reasonable fees for which they have been invoiced in accordance with the attached Schedule at Appendix 3. [10.] By reason of [the solicitor's] breach of contract, [MSL] has sustained loss and damage and [the solicitor] is indebted to [MSL]. *Particulars of Special Damage* (1) Total unpaid fees: £26,069.13… AND [MSL] claims: (1) Repayment of the debt sum of £26,069.13; (2) Interest under the Late Payment of Commercial Debts (Interest) Act 1998 in the sum of £9,949.79 …"

36. Appendix 3 provides the particulars of the alleged "shortfall" in respect of 85 invoices sent by MSL to the solicitor which were unpaid. The particulars show that MSL received part payment from third party insurers in respect of 10 of these invoices. The remaining 75 invoices were completely unpaid. The amount outstanding in respect of each invoice is set out under a heading "shortfall", and the sums claimed are in many cases the same. For example, many of the invoices are for £395 or £495. Some are for £100 which I was told related to the doctor's cancellation fee. However, there is no breakdown of the short fall, which explains in respect of each claim how much is attributable (a) cost of expert reports, (b) cost of retrieving medical records; or (c) cost of any missed medico-legal examination appointments. It is impossible to tell from Appendix 3, and I was not shown any document explaining this.

37. The solicitor argued at trial that, if the judge found there was a contract, then there was only a contract for the provision of reasonable sums, and no basis was advanced upon which the court could determine what sums are reasonable. The judge dealt with this at paragraph 41 of his judgment and said: "that point does not arise if I find liability for the sums claimed in the invoices".

38. The judge's conclusion on damages is set out at paragraph 52 of his judgment:

> "Accordingly, for all those reasons, I am satisfied that the primary case of the claimant succeeds and that the amounts claimed on the invoices are recoverable. Mr Jessop [counsel for the solicitor] made a decent point in relation to the VAT questions but the appropriate way, in my judgment, for that to be addressed is for me to give judgment for the amount on the claimed invoices …".

39. Mr Goddard, counsel for the solicitor, criticises the judge's approach. He submits the judge was wrong to give MSL judgment for the full amount claimed. This is because in relation to the invoices in Appendix 3 there was no evidence before the court showing what sums, if any, MSL had paid to the doctors in question. Further, if a doctor had not been paid, there is no evidence that he or she had pursued MSL for the outstanding fees and any such claim would now be statute-barred. Rather, the evidence which was before the court was contained in paragraph 16 of the witness statement of Mr Tahla Hassan dated 10 May 2016, which explained:

> "Most of our experts give no longer than 12 months to settle while exclusive experts whom we have long terms [sic] relations with [sic] agree to take payment on case settlement, though it is rare to find such experts. We have struggled to pay all the experts used for [the solicitor's] instructions due to cash flow issues. Almost half the expert invoices where we have not been paid by [the solicitor] have been paid without receiving any payment from them, the others remain outstanding as debts to our experts. Some of the experts have permanently left our panel or refused to work with us and have threatened to issue proceedings against [MSL]."

Mr Tahla Hassan became the sole director of MSL in 2012, and worked at MSL before that date.

40. Mr Goddard argued that these are significant points, which are relevant to the assessment of damages, because in order for MSL to recover damages against the solicitor in respect of any unpaid doctor's fees, it must have incurred the cost in the first place or otherwise

be liable to pay the fee. In addition to that, Mr Goddard submitted there was no breakdown of any of the invoices in Appendix 3.

41. Mr Butler, counsel for MSL, submits that the judge took the correct approach at paragraphs 41 and 52 of his judgment. He says that the invoices were all before the trial judge and the sums claimed were reasonable. Further, if the solicitor wished to challenge reasonableness, then it was for the solicitor to adduce evidence that the sums charged were unreasonable. Mr Butler also referred me to *Chitty on Contracts* 33rd Edition (2019) at paragraph 26-021 in which the editors say this:

> "Where the Court of Appeal hears an appeal against the assessment of damages made by the judge sitting alone, without a jury, it applies similar principles to those followed previously in considering appeals against the award of damages by the verdict of a jury. The court will interfere only if it is convinced that the trial judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court of Appeal, an entirely erroneous estimate of the damages to which the claimant is entitled. Great attention is paid to the opinion of the trial judge and the appellate court should be slow to reverse the judgment of the judge who saw and heard the witnesses. In special situations, the appellate court may take account of circumstances affecting the assessment of damages which arise after the first instance trial, eg if the fresh evidence showed the "basic or fundamental assumption" underlying the judge's assessment had been "falsified by later events".

Mr Butler did not refer me to any other authorities on this point, either in his skeleton argument or in his oral submissions.

42. The rule of the common law is, that where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed: *Robinson v Harman* (1848) 1 Exch 850, 855, Parke B. The breach of a party's primary legal obligations in a contract gives rise to a secondary obligation on the part of the contract breaker to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach. Damages for breach of contract are in that sense a substitute for performance: *One Step (Support) Ltd v Morris-Garner SC* [2019] AC 649, SC at [35] and [95(6)], per Lord Reed. Further, Lord Reed at [37] explained: "the quantification of economic loss is often relatively straightforward… The court will have to select the method of measuring the loss which is the most apt in the circumstances to secure that the claimant is compensated for the loss which it has sustained …". A consequence of the compensatory principle is that the claimant cannot recover substantial damages if the breach has not adversely affected his position; for "damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained": see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, HL at 357E, per Lord Jauncey of Tullichettle. These principles are, it seems to me, relevant to the present context. However, it appears the judge was not reminded of them, before he gave his judgment at the end of the trial.

43. After my judgment had been circulated in draft, Mr Butler sought to add to his submissions. He said, in some written submissions on the judgment, that MSL's position

was that, where a medical expert had not been paid, then MSL was entitled to recover the damages for the loss which it and a third party had suffered, as MSL was duly accountable to the third party in respect of his or her actual loss. Mr Butler relied on *St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85, HL. He maintained that MSL was duly accountable to the medical experts at the date of issuing the claim form, and that the claim for damages against the medical experts was still within time and was not statute-barred.

44. The solicitor instructed MSL as its agent to engage the medical expert to prepare reports. MSL then invoiced the solicitor in respect of its fees which included (a) the cost of expert reports; (b) the cost of retrieving medical records; and (c) the cost of any missed medico-legal examination appointments. The purpose of doing so was so that MSL could use the money received from the solicitor to cover these costs. However, if the instructed medical expert did not invoice MSL in respect of his or her fees, or did not pursue MSL in respect of his or her outstanding fees, then the position today is that it is difficult to see how MSL is accountable to any medical expert in respect of any such fees. This is because the medical expert has not claimed, or is not claiming, any loss against MSL in respect of his or her fees. Further, any claim by the medical expert for those fees will now be statute-barred as the invoices in Appendix 3 all date back to 2010 or 2011. This means that, if MSL receives compensation in respect of: (i) invoices where it has not paid the medical expert's fees or any part thereof (ie because the medical expert did not seek or pursue payment, or accepted the sum paid by the third-party insurer); or (ii) invoices where it is no longer obliged to pay the medical expert any fee, then I agree with Mr Goddard that MSL will receive a windfall.

45. Therefore, in my view, the judge's approach to the assessment of damages was wrong and, by awarding MSL the full amount claimed, it has been very substantially over-compensated for the actual loss it has suffered.

(d) Ground 6 – Were the fees invoiced by MSL unreasonable?

46. In the light of my conclusion on ground 4, this ground can be dealt with briefly.

47. It is accepted by MSL that a fee was not agreed between the parties. However, that does not prevent MSL from recovering a reasonable fee for the service delivered on the basis that it was an implied term under the contracts that the solicitor would pay MSL's reasonable fees: see *Benedetti v Sawiris* [2010] EWCA Civ 1427, per Etherton LJ at [140]. MSL provided a detailed schedule of all the clients and the date instructions were received from the solicitor, and I agree that MSL should be entitled to a reasonable fee in respect of each invoice for the work it did in carrying out the solicitor's instruction.

48. The solicitor's complaint is that, in respect of any doctor's fee, he should only be liable to pay the amount paid by the third-party insurers, as the amount paid by them was accepted to be reasonable. Further, it is for MSL to prove its claim is reasonable.

49. MSL, on the other hand, say that the solicitor's liability is governed by the contract between them, and what the third party-insurers were prepared to pay was neither here nor there. I agree with MSL that reasonableness is not determined by what the third-party

solicitors were prepared to pay in respect of the doctor's fees. However, there was still a requirement that the doctor's fee was reasonable, as set out in the medical expert letter.

50. The judge held that, this point did not arise, if he found liability for the sums claimed on the invoices (paragraph 45 of the judgment). The judge did not therefore specifically consider whether the sums claimed in Appendix 3, which provided the particulars of each invoice, were reasonable. This is not surprising given that, although there were 85 invoices, each one is for a sum less than £665, and most are for £395 or less. Therefore, in the overall context of the case which the judge clearly explained, and notwithstanding his observation at paragraph 45 of his judgment, there is nothing to suggest that he considered the invoices rendered by MSL to the solicitor, and particularised in Appendix 3, to be unreasonable in amount, and I have no reason to disagree with that approach. Further, I agree with Mr Butler that, having instructed MSL to obtain the expert reports, the onus is on the solicitor to show that any medical expert's fee it disputes is unreasonable.

Conclusion

51. The solicitor's appeal is therefore allowed in part. The damages awarded to MSL in paragraph 2 of the judge's order dated 18 July 2019, together with interest thereon, need to be substantially reduced. In relation to this:

    a. the solicitor accepts that it is liable in damages for the sum of £4,140 together with interest thereon (in respect of the invoices identified in the schedule entitled "Defence 1" annexed to the Defence); and

    b. it seems to me that the matter should be remitted to the County Court for a judge to assess the quantum of damages in respect of the remaining invoices.

52. I will also hear from the parties in relation to the form of Order and costs.