Neutral Citation Number: [2020] EWHC 862 (QB)

Case No: QA-2019-000372

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

Before :

MR JUSTICE CHAMBERLAIN

- -

Between :

Mr Jason Edinburgh

Appellant

- and –

Fieldfisher LLP

Respondent

- -
- -

Thomas Blackburn, Costs Draftsman (instructed by **Croft Solicitors**) for the **Appellant**
Ben Nethercott, Costs Lawyer (instructed by **Fieldfisher LLP**) for the **Respondent**

Hearing dates: 2 April 2020

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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.

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MR JUSTICE CHAMBERLAIN

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 08.04.2020 at 16:30pm.

Mr Justice Chamberlain:

Introduction

1 This is a renewed application for permission to appeal against the decision of Master James sitting in the Senior Courts Costs Office on 2 December 2019. Permission to appeal was refused on the papers by Freedman J.

2 The proceedings before her arose from a dispute about the level of fees charged by Fieldfisher LLP ("Fieldfisher"), the Respondent, to its client Mr Jason Edinburgh, the Appellant. The Solicitors Act 1974 makes provision for the resolution of such disputes by a cost judge.

3 The background is as follows. In 2007, Mr Edinburgh was advised along with a number of others to invest in a tax savings scheme. This ultimately resulted in him being investigated by HMRC, dismissed from a lucrative and high-profile role with Royal Bank of Scotland and being arrested and tried for tax evasion. He was acquitted, but lost many hundreds of thousands of pounds in legal fees. In 2017, he instructed Fieldfisher with a view to a possible claim against Greystone Financial Services Ltd ("Greystone"), which had given him the original investment advice.

4 On 30 October 2018, Mr Edinburgh terminated the retainer with Fieldfisher and continued the claim against Greystone as a litigant in person. Fieldfisher rendered four invoices in respect of the work done on Mr Edinburgh's behalf, for a total of £87,247.35. Mr Edinburgh applied for assessment of those invoices on 10 December 2018. On 18 December 2018, Master James considered the application and adjourned it to a directions hearing on 29 January 2019. That hearing took place by telephone. Directions were given and the matter was listed for a further hearing on 16 May 2019. At that hearing, the master ordered that there would be no assessment of the December 2017 invoice, but the remaining three invoices would be assessed. Mr Edinburgh was ordered to make a payment on account in the sum of £44,000 in respect of those invoices on or before 14 June 2019. Fieldfisher was ordered to serve a bill of costs containing a breakdown of the three invoices subject to assessment on or before 12 July 2019. Mr Edinburgh was ordered to serve any points of dispute on that bill on or before 8 August 2019 with a reply from Field Fisher on or before 29 August 2019.

5 Mr Edinburgh made the payment on account. Fieldfisher sent the bill of costs to Mr Edinburgh's new solicitors, Crofts, by email timed at 11.23 on 12 July 2019. It therefore fell to Mr Edinburgh, in accordance with the Masters directions, to serve the points of dispute by 8 August 2019. On 7 August 2019, Crofts wrote to Fieldfisher indicating that they considered service of the bill of costs to be defective because the bill had been served by email and they had not indicated that service by that method was acceptable. Crofts served points of dispute containing two general points only. The first related to the alleged defective service. The second was not really a point of dispute at all: it was simply a reservation of Mr Edinburgh's right to dispute each and every item claimed in the bill and to serve supplemental points of dispute if service was determined to be effective.

6 Fieldfisher applied for a confirmatory order. That was granted by Master James on 5 September 2019. She decided that the service of the defendant's bill of costs by email

on 12 July 2019 was valid and Mr Edinburgh's points of dispute should stand as the points of dispute in the case. On 27 September 2019, Fieldfisher indicated their intention to apply for assessment of the 3 remaining invoices if no response was received from Mr Edinburgh by 11 October 2019. No such response was received and the application was made. On 4 November 2019, a detailed assessment was listed for 2 December 2019 with a time estimate of 1 hour. On 27 November 2019 (2 clear days before the hearing), an application was made on Mr Edinburgh's behalf for permission to serve supplemental points of dispute. The points of dispute themselves were provided about 90 minutes before the start of the hearing.

The decision under challenge

7 Mr Blackburn, who appeared for Mr Edinburgh before Master James as he does before me today, argued that permission should be given to serve supplementary points of dispute. He pointed out that Mr Edinburgh's brother had died in the summer at a young age. Mr Edinburgh had been close to his brother and was understandably affected by his death. Furthermore, Mr Edinburgh had been preoccupied by the claim against Greystone, which had settled "within the last few months". Mr Blackburn submitted that the Master should have regard to the fact that Mr Edinburgh was a private individual whereas Fieldfisher was a global law firm with a turnover in excess of £240 million. The bill as drawn amounted to £73,999.41, of which only £18,053.41 remained outstanding. This was a modest sum to a firm of Fieldfisher's size and standing but a sizeable amount to a private individual such as Mr Edinburgh. If Mr Edinburgh was ultimately unsuccessful in the assessment proceedings, Fieldfisher would be compensated by an award of interest for being kept out of their money.

8 Having heard the parties, the Master gave an *ex tempore* judgement. She said that she did not think relief from sanctions was required having regard to CPR 46PD, para. 6.15 to which she had been directed by Mr Blackburn. The Master said that it was very sad that Mr Edinburgh's brother had passed away in the summer but she did not understand why that had not been put to the court in August 2019. Instead, she said, what had been put to the court was an "unmeritorious technical point" (by which she meant Mr Edinburgh's challenge to the validity of service of the bill of costs). She noted that Mr Blackburn had said that the Greystone litigation had settled "within the last few months", which suggested that he had "had it off his plate for at least a while now". The Master pointed out that, if the application to serve supplemental points of dispute had been made when Fieldfisher applied for detailed assessment on 11 October 2019, it would have been possible for her to deal with the detailed assessment "today". Instead of that, it was made less than 3 working days before the hearing and, even then, did not have the supplemental points of dispute annexed to it. Those had been provided 90 minutes before the hearing. The "one point" which went against this, in the Master's view, was that Fieldfisher's bill of costs for the assessment proceedings (£49,000) was "an extraordinarily high sum and a sum that is likely to come down significantly". Nonetheless, she decided not to allow any amendments to the points of dispute.

9 Given that the assessment of own client costs takes place on the indemnity basis, disallowing the supplemental points of dispute was, as the Master accepted, bound to mean that the assessment allowed almost all of Fieldfisher's costs. So it proved. Costs were assessed in the sum of £71,103.35.

The hearing

10 With my permission, Mr Edinburgh was represented before me, as before Master James, by Mr Thomas Blackburn, a Costs Draftsman, and Fieldfisher was represented by Mr Ben Nethercott, a Costs Lawyer. I was greatly assisted by their excellent submissions at a remote hearing by video-link.

Submissions for Mr Edinburgh

11 For Mr Edinburgh, Mr Blackburn explained the background to the dispute. I have drawn on this explanation in what I have already said. It was common ground that the Master had been correct to regard service of the bill of costs by email as valid. The sole question was whether this court should interfere with her decision not to allow Mr Edinburgh to amend his points of dispute in terms of the supplemental points provided just before the start of the hearing on 2 December 2019. As to that, Mr Blackburn drew attention to the provisions of CPR 46PD, para. 6.15:

> "If a party wishes to vary that party's breakdown of costs, points of dispute or reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties. Permission is not required to vary a breakdown of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation."

Because permission is not required to vary points of dispute, the Master held that this was not a case where it was necessary for Mr Edinburgh to apply for relief from sanctions. It was not, therefore, necessary to apply the structured approach set out in *Denton v T.H. White Ltd* [2014] 1 WLR 3296. Mr Blackburn accepted, however, that para. 6.15 gave the Master a general discretion to disallow the variation, or permit it only upon conditions. He submitted that the question for me was whether his case, that she erred in the exercise of that discretion, had a real, as distinct from a fanciful, prospect of success: *Swain v Hillman* [2001] 1 All ER 91.

12 In considering whether the Master erred in the exercise of her discretion, Mr Blackburn properly accepted that a judge of this court would be asking not whether he or she would have exercised the discretion differently, but whether there was an error of approach, which could include taking account of any irrelevant consideration or failing to take account of a relevant one. It followed that, at this permission stage, I should ask myself whether it is arguable that there was such an error. Mr Blackburn identified two. First, he relied on the Master's comment that there was only one thing that weighed in the balance in Mr Edinburgh's favour – the "extraordinarily high" bill for the assessment proceedings. This, he submitted, showed that the Master had not properly taken into account the factors in CPR r. 1.1(2), namely:

> "(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders."

Of these, Mr Blackburn submitted the Master took into account only the last. Even looking just at that, the Master failed to recognise that this was a case where there had been no breach of rule, practice direction or order, since CPR 46PD para. 6.15 permitted the variation of points of dispute (albeit subject to a discretion to disallow).

13 Furthermore, Mr Blackburn submitted, the Master fell into error by taking in account irrelevant matters. In particular, he submitted there was no cause to criticise Mr Edinburgh for delay, given the death of his brother and the fact that he had had to attend to the Greystone litigation by himself. It was also wrong to say that, had the supplemental points of dispute being served earlier, Fieldfisher would have consented to their being considered. This was unrealistic given their attitude to the costs litigation, which was to dispute every possible point. Mr Blackburn submitted that it was also wrong to suggest that the late filing of the supplementary points of dispute made it impossible for the hearing to be completed on the day allotted for it, given that only one hour had been set aside for it anyway.

14 It was also relevant, in considering whether to grant permission to appeal, to note that the effect of the Master's decision was to deprive Mr Edinburgh of the opportunity to dispute a potentially substantial proportion of Fieldfisher's bill of costs. This could be demonstrated by looking at Fieldfisher's bill for the assessment proceedings which had been reduced from about £49,000 to about £12,000.

15 Finally, Mr Blackburn submitted that permission to appeal should be granted not only because the appeal had a real prospect of success but also because it raised an important point about the exercise of discretion under CPR 46PD para. 6.15, a topic which had not been considered in any decided case to date.

Submissions for Field Fisher

16 For Fieldfisher, Mr Nethercott submitted as follows. Fieldfisher had notified Mr Edinburgh that they would be applying for detailed assessment as long ago as 27 September 2019. They had given Mr Edinburgh until 11 October 2019 before applying

for detailed assessment. They received no reply, so made the application. After that, Mr Edinburgh had more than three weeks in which to file supplemental points of dispute before the notice of hearing was given on 4 November 2019. It was only then that the case was set down for hearing with a time estimate of one hour. Even then, Mr Edinburgh could have filed supplementary points of dispute in good time before the hearing. He did not. Instead, he gave notice of his intention to file them only two clear days before the hearing. The supplementary points of dispute themselves were provided only 90 minutes before the start of the hearing. That inevitably meant that they could not be dealt with at the hearing. In those circumstances, Mr Nethercott submits that the Master was fully entitled to disallow them. The decision to do so fell squarely within her discretion and there is no real prospect that this court would interfere.

17 As to the disputed invoices, Mr Nethercott notes that part of these related to counsels' fees and disbursements. Only £48,835 plus VAT was in dispute.

Discussion

18 I start, as Mr Blackburn did, with the terms of CPR 46PD para. 6.15. I accept, as Mr Blackburn submitted, that the default position under that paragraph is that parties may vary points of dispute if they so wish. That default position is, however, subject to a general discretion to disallow the variation or to allow it upon conditions. This is an important discretion, without which it would be possible for parties to ambush their opponents by waiting to the last minute to file supplemental points of dispute raising points not previously heralded. This would be productive of unfairness. Paragraph 6.15 does not prescribe how the discretion to disallow supplemental points of dispute should be exercised, but the overriding objective (enabling the court to deal with disputes of this kind) "justly and at proportionate cost" should be borne in mind.

19 Despite Mr Blackburn's persuasive submissions, I am unable to find any arguable error in the approach of the Master to the exercise of the discretion conferred on her by CPR 46PD para. 6.15. The "points of dispute" filed in August 2019 were not really points of dispute at all. The two general points they contained gave no indication of the grounds on which the amounts in the invoices were disputed. The first point was accurately described by the Master as an "unmeritorious technical point". That point is not pursued before me. The second was simply saying "More later". The Master was properly cognisant of the effect on Mr Edinburgh of the untimely death of his brother, but that had occurred in June 2019. Without more, it did not explain the delay until 2 December 2019 in submitting the supplementary points of dispute. Likewise, the Master properly placed little weight on Mr Edinburgh's claim to preoccupation with the Greystone proceedings. This was because the submission made to her was vague as to when those proceedings had settled. Mr Blackburn was equally vague in his submissions to me. This is not a criticism of him. He did not know when the proceedings had settled. That being so it is simply not possible to say to what extent those proceedings explain the delay in serving the supplementary points of dispute.

20 Moreover, as Mr Nethercott submitted, even after Fieldfisher had applied for detailed assessment of the 3 invoices on 11 October 2019, Mr Edinburgh had more than 3 weeks in which to file supplementary points of dispute. Had he done so, Fieldfisher might have consented to those points being considered. More importantly, though, even if they had not, the hearing might have been listed with a time estimate that permitted the

resolution of those points. As it was, had the Master agreed to consider the supplementary points of dispute, fairness would have required her to adjourn the assessment hearing, which would have given rise to yet more cost. The Master was therefore fully entitled to conclude that the delay gave rise to "grave concern". The contrary is not arguable.

21 The complaint about the Master's failure expressly to refer to the matters set out in CPR r.1.2 is in my judgment not arguably justified. The list of matters set out in CPR r. 1.2 is not intended to be a rigid checklist. It is not necessary to refer to each and every one of the factors there set out in every case. The extent to which it is necessary to refer to any or all of these factors will depend on the facts of the case. What matters is whether the decision maker has referred to the key factors relevant in the particular case. In this case, the master properly concentrated on the question whether it would be fair to consider substantive objections to the amounts claimed in invoices when no such objections had been received until 90 minutes before the hearing.

22 I accept that it is possible that, had the supplementary points of dispute not been disallowed, Mr Edinburgh might have secured a substantial reduction in the bill. The Master, however, had this fully in mind when she referred to the likelihood that Fieldfisher's bill of costs for the assessment would be substantially reduced, as it in fact was. This was, as the Master said, a point in Mr Edinburgh's favour. But the fact that the bill for the costs of assessment fell to be reduced on assessment was not a strong indicator of the likelihood that the bill she was then assessing would also be reduced. (The work done on the assessment related to work done by some of the same fee earners as had worked on the original case, but the Master took the view that this was not appropriate.) In any event, the Master was perfectly entitled to take the view that this point was not enough to outweigh Mr Edinburgh's failure to indicate any substantive points of dispute until 90 minutes before the assessment hearing. The decision she made was, in my judgment, well within the "generous ambit within which reasonable disagreement is possible": see *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, cited in *Tanfern Ltd v Cameron-Macdonald* [2000] 1 WLR 1311, [32] (Brooke LJ). Again, the contrary is not arguable in the sense explained in *Swain v Hillman*.

23 Finally, as to Mr Blackburn's submission that the appeal raises a point of wider significance, the language of CPR 46PD para. 6.15 is clear. The factors that may be relevant to the exercise of the discretion to disallow supplementary points of dispute depend on the circumstances of each case. This case raises no point of wider significance that justifies the grant of permission where, as I have found, the appeal has no real prospect of success.

Conclusion

24 For these reasons, an appeal against the Master's case management decision disallowing Mr Edinburgh's points of dispute would have no real prospect of success. Permission to appeal is therefore refused.