Neutral Citation Number: [2018] EWHC 1692 (QB)

Case No: QB/2017/0034

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/07/2018

Before:

THE HON. MRS JUSTICE NICOLA DAVIES DBE
Sitting with an Assessor

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Between:

HUGH CARTWRIGHT & AMIN	**Appellant/ Claimant**
- and -	
(1) MR DAVID DEVOY-WILLIAMS **(2) MRS ANJANA DEVOY-WILLIAMS**	**Respondents/ Defendants**

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Andrew Nicol (instructed by **Hugh Cartwright & Amin**) for the **Appellant**
Robin Dunne (instructed by **Direct Access by the Respondents**) for the **Respondents**

Hearing date: 12 June 2018

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Judgment Approved

Mrs Justice Nicola Davies DBE:

1. This is an appeal from the Senior Courts Costs Office, Master Rowley, in respect of a number of decisions which he made in the course of a detailed assessment hearing which took place on 26 January and 8 February 2017. The appellant is a firm of solicitors and the respondents, who are barristers and property developers, are the appellant's former clients.

Background

2. In 2009 the appellant undertook legal work for the respondents in respect of their property development business. The appellant submitted bills for the work which amounted to £19,830 excluding VAT and disbursements. Between 2009 and 2012 attempts were made by the appellant to resolve the matter. The appellant agreed that its fees could be assessed and in order, it is said, to save the respondents the costs of that assessment, by an email dated 30 June 2011 the appellant made an open offer to accept £14,873.10 as against the outstanding sum of £19, 276.50 (Pre-Action Offer). The respondents rejected the offer and denied liability. The respondents denied the

existence of a retainer with the appellant. They alleged that the appellant's bills were illegal, that the appellant had breached the Solicitors Code of Conduct, that the appellant had unlawfully terminated the relationship in breach of contract and that no costs were payable for any of the work done. The respondents made allegations of fraud and deceit against the appellant and threatened to report the appellant to the police, the Solicitors Regulation Authority and to create negative publicity about the appellant.

3. On 11 October 2012 the appellant solicitors issued proceedings against the first and second respondents for their outstanding costs and disbursements in the sum of £19,276.50. The respondents entered a Defence and Counter-Claim for the return of £3,665 held on account of costs on the basis that no lawful contract or retainer was entered into, alternatively that the appellant had wrongfully terminated its retainer. The respondents applied to amend their Defence and Counter-Claim to include allegations of negligence. The application was refused, as a result they instituted separate proceedings in the Central London County Court (B75YJ023) in order to pursue their negligence claim (the negligence claim). In the original fee recovery proceedings the respondents raised an issue as to the court's jurisdiction. A hearing to determine jurisdiction was listed for 8 January 2016, the trial was due to take place on 12 January 2016. At a mediation on 7 January 2016 Terms of Settlement were agreed between the parties, an order incorporating those terms was sealed on 8 January 2016. The final settlement figure was £24,250. The respondents agreed to pay the appellant's costs subject to a detailed assessment. On 11 April 2016 a bill in the sum of £50,305.83 was served by the appellant. These are the costs which were assessed by Master Rowley and are now the subject of this appeal.

4. In the negligence proceedings on 14 September 2016 HHJ Baucher made an order for disclosure of documents by the respondents by 21 October 2016, which included the following:

> "3. The Particulars of Claim against the Claimants together with documents evidencing (a) the quantum claimed by the Claimants in their Counterclaim in the Savills claims and (b) the settlement in the Savills Claim, or, if no such documents are available, a signed witness statement stating why the documents are not available. Failing which the claim will be struck out and judgement will be entered in favour of the Defendant."

5. On 10 October 2016 the appellant's insurers made a Part 36 offer to the respondents to settle the negligence claim in the sum of £10,000 damages plus costs. On 25 October 2016 the appellant's solicitors in the negligence claim wrote to the court and sought a strike-out of the action due to the alleged non-compliance with the unless order. On 2 November 2016 the respondents accepted the Part 36 offer.

6. By an order dated 11 November 2016 HHJ Baucher ordered that:

> "The Claimants having failed to comply with paragraph 3 of the Order of HHJ Baucher dated 14 September 2016 (drawn 15 September 2016) the Claim is struck out."

7. On 21 November HHJ Baucher made a further order which included the following:

> "Upon reading a letter from solicitors not on the record for the Claimants dated 8 November and an email from the Claimants dated 14 November (both received after the Order made on 11 November 2016) and Upon it appearing that the matter had settled prior to the Order being made it is hereby ordered:
>
> …
>
> 1. The Order dated 11 November 2016 is set aside."

The judge gave either party liberty to apply to set aside the order.

8. The appellant sought to set aside the order of 21 November. The hearing took place on 24 January 2018. The order made by HHJ Baucher includes the following:

> "And upon the Court granting the Defendant's application dated 1 December 2016 and the Court finding that the Claimants were in material breach of Paragraphs 3(3)(a) and (3)(b) of the Order of 14 September 2016
>
> IT IS ORDERED THAT:
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> 1. The Order of the Court dated 21 November 2016 setting aside the Order dated 11 November 2016 be set aside;
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> 2. The Claim is struck out with effect from 21 October 2016;
>
> 3. The Claimants' application for relief from sanction dated 21 July 2017 is dismissed;…"

The Law

9. The approach of the appellate court is identified by Lord Fraser in *G v G* [1985] 1 WLR 647 as follows:

> "…the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

10. In *SCT Finance Ltd v Bolton* [2003] All ER 434 Wilson J (as he then was) stated:

> "This is an appeal … in relation to costs. As such, it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs.... For reasons of general policy, namely that it is undesirable for further costs to be

> incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

11. In *Abbot v Long* [2012] RTR 1 Arden LJ at [10] stated that in order to succeed on an appeal against costs it must be shown that the decision of the judge below "erred in principle or was perverse".

Grounds of Appeal

12. In the skeleton arguments of both parties' submissions upon four Grounds of Appeal were made, namely:

    i) The appropriate hourly rates;

    ii) Counsel's brief fee;

    iii) The Master's order setting off the appellant's costs as assessed and the costs awarded to the parties in the detailed assessment proceedings against any costs liable to be paid in the negligence proceedings;

    iv) Following consideration of an offer made by the respondents in a letter dated 20 January 2017 to settle the appellant's costs in the sum of £29,500 inclusive of the costs of the assessment conditional upon the appellant agreeing that the respondents would be entitled to set off against that sum their entitlement to damages and costs in the negligence action, the Master ordered that the respondents do pay the appellant's costs up to 20 January 2017 and thereafter the appellant do pay the respondents' costs.

13. At the appeal hearing the Court was informed by counsel on behalf of the appellant that its primary submission was that prior to the commencement of the substantive proceedings the appellant had made the Pre-Action Offer (paragraph 2 above). It is said that the Master was wrong: (a) in disregarding the Pre-Action Offer; and (b) taking account of the respondents' offer in their letter of 20 January 2017. Further, the Master failed to provide reasons for disregarding the Pre-Action Offer. Had the offer been taken into account by the Master there would have been no need for any further consideration of the issue of costs as acceptance of the offer would have rendered the proceedings unnecessary, no costs would have been incurred. Pursuant to CPR 47.20(3) the court must have regard to all the circumstances including the conduct of the parties. This is said to include pre-action offers. The offer was brought to the Master's attention and he heard submissions upon it. The Master compounded his error in failing to take account of the offer by relying on the offer contained in the respondents' letter of 20 January 2017 and in making an adverse costs order in respect of the appellant subsequent to that date.

14. The respondents submit that the point is wrong. The offer originally made was in the substantive proceedings, it was not in the costs proceedings which were before Master Rowley. This offer was not in respect of costs, it was in respect of the substantive claim.

Conclusion

15. On the weight to be attached to the Pre-Action Offer, I accept the submission of the respondents. The offer was in the substantive proceedings. It was not made in respect of the costs of the assessment proceedings. The hearing before the Master was in relation to the assessment of costs. The Master was aware of the offer in the substantive proceedings but directed his mind to the offer in the costs proceedings. For the purpose of the assessment proceedings this was the relevant offer. The Master did not err.

Hourly Rate

16. In the Bill of Costs the appellant claims rates of £250 per hour for two conducting solicitors with more than eight years' relevant post-qualification experience, defined in the Guidelines for Summary Assessment as Grade A. Master Rowley described the appellant's claim as a modest value claim. He stated

> "It seems to me that it was treated as a straight contractual claim of £20,000. It is a Grade C-type matter, as far as I am concerned, a junior solicitor running it with some trainee assistance. The only need for more senior input I think is in relation to the allegations made against the firm, partly in providing evidence as to what happened regarding the terms of the retainer, but also the potential allegations of professional negligence."

The Master allowed a Grade C rate for Central London by reason of the location of the appellant firm at £200 per hour rather than £196, the guideline rate. He also allowed £350 per hour for a partner for the work which he did, he allowed the guideline rate of £126 for a fee earner who had been Grade D.

17. The essence of the appellant's appeal is that this is a "high temperature" case. In this context the Master failed to attach sufficient weight to the fact that allegations of fraud, misrepresentation and deceit were made by the respondents against the appellants together with threats to damage the appellant's business and report the appellant to the police and regulatory authorities. The management of the litigation would have required a solicitor of more experience than that represented by Grade C.

18. The respondents accept the "high temperature" description of these proceedings, that the allegations were made by the respondents which went to the professionalism and integrity of the appellant solicitors. That said, they state that the Master read the pleadings, he was able to assess the nature of the allegations and thereafter exercise a discretion as to the appropriate rate for the relevant fee earner. Allowance was made for a Grade A solicitor and instruction of counsel which reflects an acceptance that the nature of these proceedings went beyond a contractual claim. This Court does not have the pleadings to scrutinise. There is nothing which demonstrates that the findings made by the costs judge were outside his proper discretion.

Conclusion

19. The Master was better placed than this Court to assess the nature of the allegations contained in the pleadings as he had sight of them and this Court has not. If this was a point which the appellant sought to make it should have provided the relevant pleadings. Although the Master stated that the appellant treated the matter as a straight contractual claim he made allowance for the limited involvement of a Grade A partner and for the instruction of counsel which demonstrates an acceptance of complications which went beyond that of a straight contractual claim. In the absence of pleadings it is difficult for this Court to state that the exercise of the Master's discretion was outwith that which was reasonable. Accordingly, this Ground of Appeal fails.

Brief Fee

20. The brief fee claimed was £6,500. The Master allowed £3,000 to include £500 for jurisdictional issues. The Master's reasoning on this point is less than easy to discern. He states that

> "If this was a claim between the solicitor and the client for a brief fee, the figure of £6,500 works out in terms as to preparation and first day of hearing, in my view, to a sum which would reasonably be payable by the client. But the client here is the solicitor itself and it seems to me there are two simple points to be made. The barrister having been instructed previously was at a rather lower fee: but equally the mediation time claimed by the solicitors suggest that it was wrapped up by the end of the afternoon because it is only seven hours claimed. That is the point which counsel should have been informed that the case had settled, not at 10:30pm as it would appear has happened. So, as far as costs between the parties are concerned, it does not seem to me to be reasonable for all of counsel's brief fee to be paid by the defendant. It could have been cancelled in the afternoon. No doubt at least some of the preparation could have been avoided and counsel could have done something else the next day. …as far as an abated brief is concerned, because it settled the previous afternoon, I am going to allow £3,000 which is effectively the previous brief with £500 for jurisdictional issues which Mr Munroe was entirely aware of."

21. It is the appellant's case that the brief fee was for a two-day trial plus a half-day jurisdiction hearing. The work to be done by the barrister did not materially change because his client was a solicitor. The reference to the previous hearing was in respect of a different barrister and a different hearing with different arguments. The mediation did not in fact end until 10:30pm the night before the jurisdiction hearing. The brief fee was agreed and payable by 4:30pm. Until the settlement was concluded counsel could not be stood down. In the context of a case where many points were being taken no counsel would ever be stood down until a final settlement was reached. The decision to reduce the fee was wrong, particularly so in relying on the fact that counsel could have done something else.

22. The respondents contend that when the Master was correctly making the point that although the parties were formerly in a solicitor and client relationship this was not a Solicitors' Act assessment. He used the correct test on the standard basis and properly took into account that the mediation had substantially ended on the previous afternoon. Counsel would have been aware that where a mediation is held the day before a trial there is a good likelihood that the trial will not go ahead. The judge was entitled to take into account that the hearing was not effective and counsel would not have to attend. The judge's decision was not wrong, it was a permissible exercise of his discretion. The reduction to £3,000 was a fair one, even if some of the judge's reasoning did not stand up to scrutiny.

Conclusion

23. In the context of this "high temperature" litigation the case was not settled until it was finally settled, which was not until 10:30pm on the night before the jurisdiction hearing. Counsel's brief fee had been incurred. No counsel properly observing his or her duty would stop working on this case until he or she had been informed of a final settlement. All the preparation work had been done. The barrister was entitled to be paid his or her fee. The Master erred in finding that the brief could have been cancelled on the previous afternoon and that some of the preparation could have been avoided. The Master originally accepted that the fee *per se* was reasonable but reduced it for reasons which do not stand up to scrutiny. Reference to an earlier hearing was of limited or no relevance as this was a different hearing with different considerations and where the Master had found that the brief fee for this hearing was itself reasonable. Whether or not the barrister could find something else to do is not relevant to the brief fee which was payable on a brief properly delivered. There were no good grounds to reduce the brief fee. There is no evidence before this Court to support an argument that the lower fee was appropriate. Accordingly this Ground of Appeal succeeds both as to the exercise of discretion and to the sum claimed.

Set off

24. For all practical purposes the arguments as to set off have gone given the ruling of HHJ Baucher on 24 January 2018. There are no legal costs for which the appellant is responsible in the negligence proceedings against which any costs by these respondents could be set off. The Court was informed that permission to appeal the judge's order is being sought but upon instruction taken in court Mr Dunne, on behalf of the respondents, stated that whatever the decision upon any possible appeal the "set off" argument "goes away", a sum is owed by the respondents pursuant to the detailed assessment and "that is payable" by them.

Calderbank Offer

25. The Master dealt with the matter in this way:

> "6. This is a case where the bill has been prepared, points of dispute have been provided, and we have got to a hearing. On the way the paying party has made an offer which has not been beaten by the receiving party. On the face of it, the normal order would be for the receiving party's costs up to the date of the offer or thereabouts and the paying party's costs thereafter,

but nobody seems to think that that is the right order in this particular case.

7. It seems to me that it all revolves around the terms made in the offer on 20 January. There are effectively two terms. The first is the figure itself and the second is the fact that that sum would have to be set off against the costs in the other proceedings. Whilst I understand that the other proceedings are effectively being run by the insurers of the claimant and their chosen solicitors, it seems to me that ultimately that is simply an indemnity against the claimant's liability and a costs order in one proceedings can quite properly be set off in other proceedings in appropriate circumstances. Simply to suggest that because of the funding of the case they cannot possibly be set off is misconceived in my view and is something with which I disagree.

8. The more difficult condition in my view relates to the extent of the amount that might be set off. I recall from the previous hearings that it was said that it would be a sum in excess of the bill here. But at that time there was nothing before the court and I am told there was nothing before the parties when this offer was to be considered. That seems to me that to make it more difficult for the claimant to consider whether to accept the offer.

9. But, ultimately, I have concluded that it is not determinative of whether the offer could be accepted because it was clear that the defendants were going to apply for a set off at the end of the detailed assessment hearing and that point would have to be considered one way or another. I do not think it was a counsel of perfection to suggest that the quantum might have been accepted and the conditions either varied or an agreement reached to have a hearing before me to deal with the set off.

10. It is in fact clear from the claimant's letter of 20 January that the offer was not enough. It specifically rejected the sum offered as well the conditions imposed. If it had simply said that the conditions were the problem, that might have been a different issue. But it seems to me the claimant really did not think it was sufficient sum and, therefore, intended to pursue the proceedings.

11. It seems to me that the normal order is the one that I should consider. The question is whether or not the claimant's costs should be varied to reflect the reductions in the bill, and on balance I have come to the conclusion that it should not be. I will make the normal order in relation to the claimant's costs up to the offer made on 20 January. Whilst the figures are quite significant, it seems to me that it was always open to the paying

> party to make an offer rather earlier than it did in order to protect their position.
>
> 12. The second period, as it was described, I am going to take as being from 20 January itself given that there was a specific reply on that date and the parties knew where they stood. The question is whether the defendants should have their costs or whether I should rule that the offer made was not one which was capable of being accepted. For the reasons that I have given, it seems to me it was an offer that was effective in relation to the quantum of the costs and the conditions imposed do not detract from that sufficiently for me to decide on some other order, so I am going to order the defendants' costs to be paid from 20 January in relation to the hearing on 26 January."

26. The essence of the appellant's case is that the offer contained in the letter of 20 January 2017 was one which it was unable to accept. The professional negligence action Claim Number B75YJ023 was being conducted by solicitors on behalf of the appellant's insurers as the respondents knew. The appellant could not agree that the respondents were entitled to damages and costs in the negligence action because:

    i) That was not true;

    ii) The appellant did not have the conduct of the negligence claim, the insurers did;

    iii) The Master accepted that the offer as made was incapable of acceptance but ruled that "the quantum might have been accepted and the conditions either varied or an agreement reached to have a hearing before me to deal with the set off".

    That is said by the appellant to be plainly wrong. The quantum was incapable of acceptance without acceptance of the conditions with it. Thus the Master erred in awarding costs on the basis of an offer that was incapable of acceptance and which the respondents knew to be the case.

27. The respondents contend that it was open to the appellant to accept the quantum of the offer and either ask for the set off condition to be varied or to ask the court to list a short hearing dealing with the point. It relies on the fact that the appellant rejected both the quantum of the offer and the conditions. Further the order of the Master which allowed the appellant all costs up to 20 January and the respondents a mere six days of costs thereafter was reasonable and within the discretion afforded by CPR 47.20.

Conclusion

28. The Court accepts that the quantum offer was linked to conditions and thus was one which the appellant was unable to accept. In highly contested proceedings agreement as to conditions was unlikely. In order to rely upon this offer for Calderbank purposes it had to be an offer which was acceptable upon its stated terms, not one which contemplated further attempts to negotiate.

29. Pursuant to CPR 47.20(1) the default position is that the receiving party (the appellant) is entitled to the costs of the detailed assessment proceedings. It is open to the paying party (the respondents) to make a Calderbank offer such that by matching or exceeding the receiving party's costs as assessed it proves to be effective so as to displace the entitlement of the appellant as the receiving party to the costs of the detailed assessment. The effect of the Master's reasoning is to place the burden on the receiving party to negotiate a settlement of the conditions or to make a counter-offer. This does not reflect the wording of the Rules, nor the nature of a Calderbank offer, namely that it is either acceptable or it is not. Accordingly the Master erred in relying upon the respondents' letter of 20 January 2016 and ordering the appellant to pay the respondents' costs from that date. This Ground of Appeal succeeds.

30. Since the drafting of this judgment written submissions have been received from the parties as to the payment of costs and any further sums. Having considered the submissions the order of the Court is:

    1. The post-20 January 2017 costs of the detailed assessment to be paid by the respondents. The costs are assessed in the sum of £3,000.

    2. The respondents pay the further sums of:

        a) £3,500 in respect of counsel's fees;

        b) £3,000 in relation to the assessment costs post-January 2017 (paragraph 1 above);

        c) The total sum of £6,500 to be paid within 21 days of the date of this order.

    3. There be no order as to costs in respect of the costs of the appeal.