

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 19/05/2017

Before :

MASTER GORDON-SAKER

Between :

NADARAJAH VILVARAJAH
- and -
WEST LONDON LAW LIMITED

Claimant

Defendant

Mr Jonathan Trussler (instructed by **J W Solicitors**) for the **Claimant**
Mr Roger Mallalieu (instructed by **West London Law**) for the **Defendant**

Hearing date: 2 May 2017

Judgment Approved

Master Gordon-Saker :

1. The Defendant, a limited company, practises as solicitors from offices in Ealing. The Claimant instructed the Defendant in relation to a claim against him for professional fees of about £20,000 by other solicitors, Hodders Law Limited, in the County Court at Willesden (the Hodders Law claim).
2. The Defendant acted for the Claimant in the Hodders Law claim from September 2012 to August 2014. On 2nd June 2014 the County Court transferred the Hodders Law claim to the Senior Courts Costs Office for a non-statutory assessment of the fees claimed by Hodders Law. It would appear that little work was done by the Defendant between the transfer and the determination of its retainer.
3. On 12th April 2016 the Defendant delivered a bill to the Claimant in the sum of £31,945.48.
4. On 29th June 2016 the Claimant commenced proceedings for an order that the bill delivered to him by the Defendant be the subject of detailed assessment under s.70 Solicitors Act 1974. On 15th July 2016 I made an order for the assessment of the Defendant's bill. The hearing of that assessment was listed for 9th February 2017 with a time estimate of one day. At that hearing it became apparent that there were significant discrepancies between the breakdown of the Defendant's costs, the Defendant's file and attendance notes and the Defendant's time recording ledger. Mr Walton, the Costs Lawyer who appeared on behalf of the Defendant, was unable to explain those discrepancies and nobody else was present on behalf of the Defendant. I decided to adjourn the detailed assessment part heard to 2nd May 2017 to enable the Defendant to serve evidence explaining the inconsistencies and to enable the Claimant's costs draftsman to inspect the Defendant's files (although that had been directed in the order dated 15th July 2016). It also became apparent at the hearing that the Claimant wished to challenge the fairness of the conditional fee agreement entered into between the parties and I directed that if an application under s.61(1) Solicitors Act 1974 were to be issued that should be done by 9th March 2017 so that it could be heard at the adjourned hearing on 2nd May 2017.
5. The Claimant did issue an application to set aside the conditional fee agreement under s.61(1). At the hearing on 2nd May 2017 I concluded that the agreement was unfair and unreasonable and should be set aside. I did not give reasons for that decision, as we would not have concluded the detailed assessment in the day, but I indicated that I would give reasons in writing. The detailed assessment was concluded. The result was that the Defendant's bill dated 12th April 2016, in the sum of £31,945.48 was assessed at £15,323.20. The Defendant was ordered to pay the Claimant's costs of the proceedings, save for the costs of the attendance on 9th February 2017. I decided that the costs thrown away by the adjournment could have been avoided but for the late application under s.61(1) and the failure to inspect the Defendant's files. The Claimant's costs were summarily assessed in the sum of £20,000.
6. This judgment sets out the reasons for my decision on the s.61(1) application.

Solicitors Act 1974, s.61(1)

7. Enforcement of contentious business agreements.

(1) No action shall be brought on any contentious business agreement, but on the application of any person who -

(a) is a party to the agreement or the representative of such a party; or

(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under subsection (1), the court -

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;

(c) in any case, may make such order as to the costs of the application as it thinks fit.

8. There is little recent judicial guidance on the application of s.61(1). In *Bolt Burdon Solicitors v Tariq* [2016] EWHC 811 (QB) Spencer J considered s.57, the parallel provision in relation to non-contentious business agreements. The learned judge referred to the decision of the Court of Appeal in *In re Stuart, ex parte Cathcart* [1893] 2 QB 201 which was concerned with a similar provision in the Attorneys' and Solicitors' Act 1870:

148. The outcome of the case provides no particular assistance, but in the course of his judgment Lord Esher M.R. gave the following guidance on the proper approach under those statutory provisions:

"By s.9 the Court may enforce an agreement if it appears that it is in all respects fair and reasonable. With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression "fair" cannot be re-introduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an agreement is challenged the solicitor

must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the Court that the terms of that agreement are reasonable. If in the opinion of the Court they are not reasonable having regard to the kind of work the solicitor has to do under the agreement, the Court are bound to say that the solicitor, and an officer of the Court, has no right to an unreasonable payment for the work he has done and ought not to have made an agreement for remuneration in such a manner. On this question it is quite clear to me that we cannot arrive at any other conclusion than that arrived at by the Divisional Court. It is impossible to say that work which according to information given by the taxing master to the Divisional Court would be properly remunerated by a sum of £20 can be reasonably charged at £100. The decision of the Court below must be affirmed, and the appeal dismissed."

149. I find the analysis in that case helpful to the extent of identifying that the issues of fairness and reasonableness must be considered separately. Fairness relates principally to the manner in which the agreement came to be made. Reasonableness relates principally to the terms of the agreement.

The conditional fee agreement

9. In relation to the Hodders Law claim the Claimant initially instructed the Defendant in September 2012 on a conventional basis. The letter of retainer dated 19th September 2012 (p.166 in the bundle) provided that the hourly rates of Mr Birang, Miss Yarranton and the trainee solicitors and paralegals would be respectively £350, £200 and £135 plus value added tax.
10. On 7th January 2013 the Claimant and Defendant entered into a conditional fee agreement which was expressed to have retrospective effect from 5th December 2012. The agreement provided for a discounted hourly rate of £150 in respect of "all fee earners including solicitors, trainee solicitors and paralegals" which was payable whether or not the Claimant succeeded and a "primary" rate of £420 for all fee earners in the event that the Claimant succeeded. "Success" was defined as "reducing the amount of costs claimed" in the Hodders Law claim. If the Claimant succeeded in that claim and an award of costs was made against Hodders Law he would also be liable to pay a success fee of 64 per cent of the primary rate.
11. The calculation of the success fee was explained in paragraph 4(h) of the agreement:

In exchange for us accepting the risk of payment at only 64.29% (approx) of our agreed primary hourly rate if you are unsuccessful, we are entitled to a risk success fee if you achieve success, amounting to a £270 (64%) increase on the primary rate, ie £690 per hour plus VAT.

12. Paragraph 7(a) provided that if the agreement was terminated the Claimant would be liable to pay the Defendant's "normal charges for all work done until termination date at £420 per hour plus VAT".
13. The possibilities therefore were:
 - i) The Claimant failed to achieve success (ie nothing was disallowed in the Hodders Law claim) in which event the Claimant would be liable to pay the discounted rate of £150 for all fee earners.
 - ii) The Claimant succeeded in having some sum disallowed in the Hodders Law claim in which event he would be liable to pay the primary rate of £420 for all fee earners.
 - iii) The Claimant succeeded in having some sum disallowed in the Hodders Law claim and was awarded costs against Hodders Law in which event he would be liable to pay the primary rate of £420 plus a success fee of 64 per cent for all fee earners (£690 per hour).
 - iv) The agreement was terminated in which event the Claimant would be liable to pay the primary rate of £420 for all fee earners.
14. In the event it was the last possibility which occurred and all of the work whether done by Mr Birang (a Grade A fee earner), Miss Yarranton (a Grade B fee earner) or the Grade D trainees and paralegals was billed at £420 per hour plus value added tax.

The evidence

15. On behalf of the Defendant, Miss Yarranton's first witness statement relates to the inconsistencies in the time records. Surprisingly there is no witness statement by the Claimant in support of his application under s.61(1). That application is supported by a statement of his present solicitor, Mr Joseph. He refers to the Claimant's very limited knowledge of English and asserts that the Claimant was not able to make an informed decision regarding the Defendant's hourly rates. He states, presumably on instructions, that the Claimant was not provided with a proper explanation of the conditional fee agreement and was not provided with a copy of it. Given that Mr Joseph's evidence is hearsay, contains opinion and could not sensibly be challenged in cross-examination, I give no weight to it.
16. In her second witness statement Miss Yarranton explained the circumstances in which the conditional fee agreement came to be signed and exhibited the attendance note of the meeting on 7th January 2013 at which it was signed (p.197). That note records:

Attending client in our offices. Went through the CFA with him before he signed the same. He is acceptable to the same in that he is liable for barrister's fees. I will find out how much the barrister's fee will be for the forthcoming hearing on Friday.
Time: 5 units
17. 5 units is 30 minutes.

18. At paragraph 8 of her statement Miss Yarranton recorded that she explained to the Claimant what a conditional fee agreement was, that the Defendant would be paid win or lose, “but that the rate payable would be considerably less if the claim failed”, what the different rates were, that a success fee would be payable “if the claim was successful” and that the Claimant would be liable for counsel’s fees. At paragraph 11 she stated that she could not recall whether she gave the Claimant a copy of the agreement at the meeting but “would usually do so”.
19. In relation to the Claimant’s understanding of English Miss Yarranton stated, at paragraph 23, that “it is relatively obvious that English is not his first language” and accordingly she took particular care to explain things thoroughly. At paragraph 30 Miss Yarranton explained that the Claimant had been unable to continue to fund the matter under a conventional retainer and that:

The Defendant was only prepared to act on the Claimant’s behalf under a CFA on the terms offered and the Claimant was fully aware of this.
20. At the hearing Miss Yarranton was cross-examined by Mr Trussler, on behalf of the Claimant, but only in relation to the discrepancies in the time recording, in respect of which a direction for cross-examination had been given. No direction had been given (or sought) for the cross examination of witnesses in relation to the s.61(1) application.

The parties’ submissions

21. Mr Trussler, on behalf of the Claimant, pointed to the brevity of the attendance note for the meeting on 7th January 2013 (p.197) and that only 30 minutes was recorded. He relied also on attendance notes dated 18th June 2013 and 8th July 2013 which recorded that Miss Yarranton had considerable difficulty in understanding the Claimant. He pointed to the lack of a letter from the Defendant to the Claimant enclosing a copy of the conditional fee agreement, no letter to the Claimant explaining the agreement and indeed no client care letter at all following the change in the basis of the retainer.
22. On behalf of the Defendant, Mr Mallalieu relied on Miss Yarranton’s second witness statement in support of his submission that the agreement was neither unfair nor unreasonable. The different hourly rates were set out clearly in the agreement. The Claimant carries on business in London and the underlying litigation, in which Hodders Law acted for him, was a partnership dispute. The attendance notes relied on by the Claimant were evidence only that Miss Yarranton had difficulty in understanding the Claimant over the telephone; not that he had difficulty understanding her.

Unfairness

23. I was told in the course of the hearing that the business that the Claimant runs is a Londis shop and that it was that business which had given rise to the partnership dispute. There is no evidence that, at the time the conditional fee agreement was entered into, the Claimant was particularly sophisticated in legal matters or in the construction of documents, although he had been involved in litigation previously. Without hearing any evidence from him, it is difficult to reach a conclusion as to his level of understanding of English. However it is not in issue that English is not his first language and Miss

Yarranton accepted that he required particular care when explaining things to him (2nd witness statement, para 23).

24. For present purposes therefore I take the Claimant to be of average sophistication in relation to legal matters but requiring particular care when matters are explained to him in English. On that basis were the circumstances such that it can be said that the Defendant made an agreement with a client who fully understood and appreciated that agreement?
25. The answer to that must be “no”. There is no correspondence between the Defendant and the Claimant about the conditional fee agreement. I would expect to see a letter from the Defendant to the Claimant in advance of the meeting on 7th January 2013 explaining the options clearly. I would expect that letter or a subsequent letter, still in advance of the meeting, to enclose a draft of the proposed conditional fee agreement and to explain its terms so that the Claimant would have an opportunity to consider it before the meeting and think about whether there was anything which required explanation. I would expect the solicitor to be able to produce an attendance note of the meeting at which the agreement was signed recording precisely what explanation she gave of it to the Claimant. I would then expect to see a letter sent to the Claimant after the agreement was signed enclosing a copy of the agreement and explaining the key points.
26. I see many conditional fee agreements and by comparison with most this is a complicated agreement. On my first reading of it I did not pick up the distinction between success (when no success fee would be payable) and success plus an award of costs (when a success fee would be payable). Mr Mallalieu had to point that out to me.
27. There is no suggestion that any risk assessment was carried out before the agreement was entered into and nothing to suggest that the Claimant was given any advice as to the prospects of success and thereby the likelihood that he would be liable to pay a substantial success fee on top of the primary rate.
28. I cannot conclude that an explanation given in a 30 minute appointment, with no attempt at communication before or after, enabled the Claimant fully to understand and appreciate the terms of the agreement and in particular the liabilities that he was assuming.
29. Accordingly in my opinion the agreement is unfair and should be set aside.

Unreasonable

30. I have absolutely no hesitation in concluding that the agreement was unreasonable.
31. The Hodders Law claim was a straightforward action in the County Court concerning, at most, about £65,000 (£20,000 claimed by Hodders Law and £45,000 already paid by the Claimant). The path it took, a transfer to the Senior Courts Costs Office for assessment of the bills (with or without a stay of the County Court proceedings), was also straightforward. The hourly rates agreed in September 2012 (£350, £200 and £135) were not unreasonable as between solicitor and client; although the Grade A rate was high for Outer London. Given the straightforward nature of the case, one would expect most of the work to be done by the Grade B fee earner (as indeed it was).

32. £420 is an unreasonable rate for any of the fee earners involved in this case, whether as between solicitor and client or as between the parties. That is the sort of rate I would expect to see for a Grade A fee earner based in the City or Central London doing complex, high value work. Obviously it is even more unreasonable for the junior fee earners. The guideline hourly rates for Grade B and D fee earners respectively in Outer London are £172-£229 and £121.
33. Nor can the primary rate be justified by reference to the discounted rate payable in the event that success is not achieved. In my experience it is very rare for no sum to be disallowed on a solicitor and own client assessment, whether the assessment is under the 1974 Act or not. A failure to achieve “success” (as defined in the agreement) in the Hodders Law Claim would be highly unlikely. It was therefore highly unlikely that the discounted rate would ever be payable. Further, given that most of the work in this sort of case would be done by the junior fee earners, the discount represented by the discounted rate for the Grade B was modest (25% less than the originally agreed rate). For the Grade D fee earners the discounted rate was actually higher than the originally agreed rate.
34. The calculation of the success fee, which would increase the Claimant’s liability for the work done by all fee earners to £690, is peculiar. It is based not on any assessment of risk, but on the proportion of the discounted rate to the primary rate. As these are arbitrary figures, neither of them reflecting the market rate, so the success fee is also arbitrary.
35. Crucially there is nothing to suggest that the Defendant gave the Claimant any advice that the primary rate was unusual or that there was no prospect at all that he would recover these rates from his opponent in the Hodders Law claim in the event that he was awarded costs in that claim. There would have been no prospect at all that the Claimant would recover £420 for any of the three grades of fee earners. Given the nature of the case it is unlikely that, between the parties, the solicitors would be allowed rates much higher than the guideline rates for summary assessment.
36. In my opinion the conditional fee agreement was unreasonable and should be set aside.