Neutral Citation No. [2022] EWHC 1628 (SCCO)

Case No: SC-2022-BTP-000145

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 23/06/2022

Before:

COSTS JUDGE ROWLEY

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Between:

(1) DUNCAN LYLE	**Applicants**
(2) NIGEL FOX	
(as joint Trustees in Bankruptcy of Jetson Ralph Bedborough)	
- and -	
(1) JETSON RALPH BEDBOROUGH	**Respondents**
(2) SARA EVELIN BEDBOROUGH	

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Ben Nethercott (instructed by **Blake Morgan LLP**) for the **Applicants**
Stephen Fairburn (instructed by **CJJ Law**) for the **Respondents**

Hearing dates: **16 and 17 June 2022**

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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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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. By an application dated 10 January 2018, the claimants established that the respondents had been involved in a transaction at an undervalue within the meaning of section 339 Insolvency Act 1986. Judgment to that effect was handed down on 8 February 2021 and a further judgment was handed down on 26 February 2021 concerning consequential matters including orders for costs. The final order was made on 4 March 2021 and included an order that the second respondent should pay the applicants' costs of the application on the standard basis.

2. There were three limitations to that order for costs. The first concerned the redaction of Mr Lyle's evidence during the course of the proceedings. The order refers to witness statements in the plural and says that the costs payable by the second respondent in respect of those witness statements were to be allowed as if the redacted versions had been produced in the first place. Therefore, any additional costs for producing witness statements containing the contents which were subsequently redacted were to be disallowed. I have followed the wording of the order which refers to Mr Lyle's statements in the plural, though it is fair to say that I have only seen one redacted statement (Mr Lyle's second) in the papers lodged for the hearing.

3. Secondly, any costs associated with the applicant's unsuccessful claim for disclosure of Mr Fairburn's file were to be disallowed. Thirdly, any increase in costs associated with the adjournment of the trial in May 2020.

4. The applicant's bill of costs totalled £169,532.16. The parties were not able to reach an agreement in respect of the costs claimed in that bill and therefore a detailed assessment hearing took place on 16 May 2022. The applicants had requested a one day hearing for the assessment but I listed the hearing for one and a half days having seen the points of dispute and replies. In fact, that time period still proved to be inadequate – a conclusion which appeared to be a relatively obvious one to draw before the end of the first day. Consequently, I offered two options to the parties' advocates for using the court time to its maximum and yet also seek to provide a conclusion to this assessment as promptly as possible. At this stage, I should mention that I am aware that other proceedings are in existence and which have proceeded on the footing that a final figure for the applicants' costs would be to hand at the end of the detailed assessment hearing.

5. The upshot is that I dealt with all of the items in the bill save for those concerning the documents items for each of the two parts of the bill (and one discrete item dealt with at the end of this judgment). This judgment deals with those remaining items.

6. Schedule 1 to the bill contains the times claimed at item 23 concerning work done in the County Court. It runs from page 22 to page 36 of the bill and claims a total of 200 hours 6 minutes at a cost of £38,005 plus VAT. Schedule 2 contains the time claimed at item 61 for work done in the High Court. The schedule runs from page 36 to page 51. It claims a total of 192 hours at a cost of £37,277 plus VAT.

7. The work done in both parts has been carried out predominantly by Sophia Farmer, a junior solicitor who comes under Grade C of the Guideline Hourly Rates categorisation (fewer than 4 years' post qualification experience). She was supervised by Paul

Caldicot, a Grade A partner and was assisted by James Bowen, a trainee solicitor. Other fee earners dealt with work from time to time, but I concluded at the hearing that the challenge made by Mr Fairburn on behalf of the second respondent that too many fee earners had been involved was not made out to any material degree. The great preponderance of the work was carried out by Ms Farmer supported by Mr Caldicot and Mr Bowen. For the purposes of this decision, I have rolled the time of the minor fee earners into the relevant grades of the main three fee earners for simplicity.

Submissions

8. I gave both parties' advocates an opportunity at the beginning of the hearing to set out their clients' overarching view of the work done in this case. That view was reiterated subsequently in respect of the documents items and can also be found in points of dispute, replies and the coloured annotated version of the documents item served with the points of dispute by the second respondent.

9. Mr Fairburn's view of this case was that it was a straightforward application seeking the court's agreement that a transaction had been carried out at an undervalue. It involved a trust deed and an oral agreement. The evidence of that oral agreement was provided by the respondents. It was obviously important for the applicant's counsel to seek to undermine that evidence but in Mr Fairburn's submission that did not really occur. The failure of his client's case was simply that the judge ultimately concluded that the agreement between the respondents was not sufficiently detailed to amount to a transfer which affected subsequent events. There was only one application during the course of these proceedings and that related to the applicants seeking disclosure of Mr Fairburn's own file and on which they were unsuccessful (hence the limitation to the costs order). The parties' positions were clearly set out in correspondence prior to the commencement of proceedings and nothing really changed thereafter.

10. Mr Fairburn submitted that counsel had drafted all of the documentation as well as appearing at all of the hearings. Ms Farmer was the only person with whom Mr Fairburn ever had any real contact. Even at the settlement meeting, it was Ms Farmer rather than Mr Caldicot who put forward the applicants' position. Accordingly, it was Mr Fairburn's submission that there was no need for supervision by Mr Caldicot because counsel was providing that support to Ms Farmer. Furthermore, Mr Caldicot was not really doing anything to advance the case.

11. By the time Mr Fairburn came to make submissions specifically on the documents schedules, he was aware that there were no attendance notes before the court to support the times claimed. The timings were taken from the applicants' solicitors' time recording systems. In the absence of attendance notes, Mr Fairburn suggested that there was no way of knowing for certain whether entries during the period in which the specific disclosure application was being contemplated or actioned were in fact wholly or partly to do with that application and as such should be excluded from the bill.

12. Mr Fairburn referred specifically to the time of approximately 16 hours being claimed for the pre-action letter. He described it as picking up correspondence that had already occurred between the trustees and CJJ Law (Mr Fairburn's firm). In his view, it should have taken no more than one hour to draft that letter.

13. Mr Fairburn also relied upon the bundle that was produced for the specific disclosure application and said that it required little or no amendment in order to convert it into the trial bundle. The applicants did not have the costs of producing the specific disclosure bundle and therefore the time spent on the trial bundle ought to be of very little time or cost as far as his client was concerned.

14. In addition to his oral submissions, Mr Fairburn relied upon the extensive challenges set out in the annotated schedules. It is impossible for me to precis those challenges without regurgitating them at some length. They continue the theme of there being extremely long periods of time claimed for little work done. At the end of the first schedule, the second respondent's position is set out in summary as follows:

> "R2 will say that a total of 31 hours 42 minutes is agreed. R2 accepts a level of supervisory partner input is reasonable but taking into account that much of the work with counsels' input throughout; service of documents; diary entries; bundles; indexing and engrossing counsels drafts; routine correspondence; agreeing extensions and reporting progress could have been undertaken at a junior level. R2 proposes national level solicitor's rate of £185×30.7 hours = £5627.70…"

15. There is a very similarly drafted summary at the end of the second schedule. The agreed time is 40 hours rather than 31 hours 42 minutes. There is also mention made of the instruction of counsel and the management of the legal issues by counsel together with the taking of instructions which were said not to be complex. At 40 hours multiplied by £185 per hour, the second respondent offered £7,400.

16. Accordingly, the second respondent offered a total of 71 hours 42 minutes as against the 391 hours 36 minutes claimed.

17. Mr Nethercott, a costs lawyer appearing on behalf of the applicants, described these proceedings as a complex case reaching a three-day hearing before a High Court Judge leading to a 32 page judgment. It had been hard fought litigation of significant importance to all parties. There were conflicting judicial authorities on the question of "immeasurable consideration" regarding the forbearance of a threat to institute divorce proceedings as a means of obtaining a greater beneficial interest in the property. The transfer to the High Court was agreed nu the County Court so that these conflicting decisions could be clarified by an authoritative judgment by a High Court Judge. As it turned out, the judge was not satisfied that there was an agreement between the two respondents and so did not have to come to any decision regarding immeasurable consideration. Nevertheless, the parties had to prepare for the argument in order to put it forward at the trial.

18. Mr Nethercott confirmed to me that the wording in the documents schedules had generally come from the time recording entries. Some of the longer narratives had included his descriptions when drafting the bill. Mr Nethercott was keen for me to make sure that I looked at the documents about which Mr Fairburn had been critical in terms of the time taken to draft them. Only by doing so would I be appreciative of the time taken and which required experienced solicitors and counsel to deal with the far from straightforward factual and legal issues. The applicants had achieved a much more successful outcome than they had expected through the hard work put into this case.

19. Mr Nethercott submitted that the time claimed in the schedules "on the whole" came within the limitations imposed by the costs order. He conceded that there might be some time around April and May 2020 which had been included but which, on reflection, probably related to the adjournment in May 2020 and as such should not be claimed. Nevertheless, such sum came within the concession made by the applicants of offering to accept 320 hours for the time claimed in the two schedules. This figure was based on 50 hours at Grade A, 200 hours at Grade C and 70 hours at Grade D.

Decision

20. I indicated to the parties' advocates at the hearing that I had been through the first schedule before the start of the second day's hearing. I have subsequently reviewed the second schedule and am content that the comments that I set out below apply equally to the work carried out there. As is usually the case, if the same fee earners are dealing with the case throughout, their approach does not tend to vary much.

21. I have specifically looked at the initial advice to the applicants (described as an Advice Note), the letter of claim and the initial instructions to counsel to advise on the merits. I also bear in mind the documents shown to me by Mr Nethercott during the course of the hearing which were attached to emails, as well as the contents of the emails themselves.

22. When the chronology of events in this case is looked at in the bill, it is striking as to how few procedural steps there actually are. It seems to me that there is a good deal of force in Mr Fairburn's submission that, other than the application to transfer to the High Court and the failed application for specific disclosure, there was little in this case save for witness statements prior to a hearing of the evidence. At first blush therefore the number of hours claimed is surprising.

23. I have referred to three documents which I have specifically considered. By my calculations, the time spent in the first document schedule for producing those documents is as follows:

    a) Advice Note –17.0 hours (7.1 / 0.5 / 17.0)

    b) Letter of Claim – 16.0 hours (15.5 / 0 / 0.5)

    c) Instructions to Counsel – 20.8 hours (0 / 14.5 / 6.3)

24. The time in brackets reflects the work done by Mr Caldicot, Ms Farmer and Mr Bowen respectively. The advice note was therefore largely the work of Mr Bowen with input from Mr Caldicot. The letter of claim was almost entirely produced by Mr Caldicot. The instructions to counsel were produced by Ms Farmer with assistance from Mr Bowen.

25. Each document runs to four or five pages. More than 15 hours has been claimed for drafting each of these documents. Having reviewed them, I cannot see that such times can possibly be considered reasonable between the parties. These are not isolated documents since I could quite easily have taken the draft response to the second respondent's reply to the letter of claim, for example. These four items contain the great majority of the work claimed in the first four pages of the first schedule.

26. When assessing the bill at the hearing, I took the view that the routine communications were very largely recoverable. They did not seem to me to be particularly numerous and the ones that I reviewed were required for the running of the case. Similarly, I allowed a good deal of the timed attendances that had been claimed. It is unusual in my view for the approach to time spent on documents to be completely different from the time spent on timed and routine communications, but it is by no means unique.

27. Judging by the entries, there seems to have been a rigour imposed by all fee earners make sure that time on the file was amply recorded whenever it was opened. This applies to the minor fee earners as well as the major ones. For example, Ms Gallop drafted a certificate of service on 8 January 2019. The following day she amended that certificate and then drafted correspondence to file the certificate (along with the certificate relating to the first respondent). A claim of 12 minutes for drafting the certificate is not unusual but ultimately 30 minutes is claimed for dealing with the certificate. These are only modest entries in themselves, but they highlight the fact that it is not simply the longer times claimed which are surprisingly high.

28. The rigour of recording time spent is not matched, in my view, with a rigorous consideration of whether all of the time ought to have been recorded, or at least sought from the paying party. For example, 5 hours 24 minutes is claimed by Ms Farmer in November 2017 for what is obviously reading into the file. Such time is a matter between the solicitors and their client. It is not for the opponent to have to pay.

29. There is obviously some conjecture involved in considering the time claimed in the absence of any attendance notes but that is a matter for the receiving party. In the absence of such notes, then inevitably any doubt goes towards the paying party on the standard basis. It may not matter a great deal however since the time claimed for documents such as those that I have highlighted are undoubtedly unreasonable, at least as between the parties.

30. As I have indicated above, I am satisfied from my review of the second schedule that the same points apply throughout. It is entirely plain that any document drafted involves a significant number of entries, often involving appreciable amounts of time. The net result is, as the second respondent argues, that an entirely unreasonable total of time has been claimed for the work done on limited procedural steps.

31. Where considerable time has been claimed in the manner of this bill, it is tempting to consider exactly what needed to be done and simply to put times against those steps. However, in my view that tends to underestimate the vagaries of running a case and assumes that everything is done without a hitch.

32. The alternative approach is to take something of an impressionistic broad brush to the times that have been claimed bearing in mind everything that I have seen and heard during the course of the hearing and my subsequent review of the documents. I take into account the fact that this case was essentially run by a junior fee earner and that she could be expected to take longer to accomplish tasks than Mr Caldicot would be expected to have taken. The fact that Ms Farmer was the main fee earner also means that if she were involved in the same task as another fee earner, then it would be her time that would be allowed if there was any duplication. Consequently, the proportion of her time that is recoverable in my view is rather higher than either Mr Caldicot's or Mr Bowen's.

33. As far as Mr Caldicot is concerned, I do not accept that the involvement of counsel negates the need for supervision by a partner in the firm. Whilst both counsel and Mr Caldicot might provide Ms Farmer with an experienced view, those views come from different perspectives and they are not mutually exclusive. Nor do I accept Mr Fairburn's argument that because counsel has drafted documents, there was no need for the solicitors to review such documents or alternatively provide drafts on which counsel was to work. Clients expect solicitors to be able to discuss and advise them on such issues as well.

34. Nevertheless, in relation to the first schedule, it seems to me that a good deal of Mr Caldicot's work relates to the period before Ms Farmer was involved. As such it is non-supervisory work but instead it is in the guise of the main fee earner at the time. In the second schedule, it does appear that his time is more accurately described as supervisory and recoverable to a greater extent.

35. In relation to Mr Bowen, I am afraid I simply cannot comprehend the amount of time that he has recorded in the first schedule. It is often the fate of the most junior fee earner to do work that is not always recoverable between the parties. But there is a stark difference between the time recorded by Mr Bowen for the work he did in the first schedule and the entries for Ms Gallop and the others in the second schedule.

36. I have grouped the work into grades A, C and D. This has meant moving the modest work carried out by Ms Griffiths and Ms O'Sullivan into Grade C in the first schedule on the basis that the work could have been expected to be done by Ms Farmer. Doing the best I can, I have decided to allow the following times:

	First	Schedule	Second	Schedule
Grade	Claimed	Allowed	Claimed	Allowed
A	35.5	20	23.0	14
C	102.4	70	141.6	100
D	62.2	20	27.4	15

37. Finally, I deferred dealing with the bill checking time of 5 hours claimed as part of item 65 in the bill. I would not have expected more than an hour to be claimed for checking and signing a bill of this size. The need to answer the bill drafter's queries is not usually time recoverable between the parties. The question at the time of the hearing was whether I should disallow all of the time given the extent to which the bill had not been drafted in accordance with the order and the checking had not picked up that fact. Having now been through the documents schedules, I take the view that a complete disallowance of the bill checking time would not be appropriate and I therefore allow one hour of Ms Farmer's time under this item.

38. I have handed down this decision down without any prior circulation of a draft in order for the parties to have certainty in respect of my decision. The time for appealing therefore runs from the date of this judgment.

39. I will await to hear if the parties are able to resolve outstanding matters or if further involvement of the court is required.