Neutral Citation Number [2023] EWHC 3296 (SCCO)
Case No: SC-2022-APP-001107

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th December 2023

Before :

SENIOR COSTS JUDGE GORDON-SAKER

- -

Between :

Ms Helen Sellers **(By her Litigation Friend Mr Paul Sellers)**	**Claimant**
- and -	
Mr Steven Simpkins **(formerly practising as Simpkins & Co Solicitors)**	**Defendant**

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- -

Ms Erica Bedford (instructed by **Croft Solicitors**) for the **Claimant**
Mr Mark James (instructed by **Jasper Vincent Solicitors**) for the **Defendant**

Hearing date: 24 October 2023

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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.

....

SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. As sometimes happens, by the time of the hearing of the preliminary issues, the actual issue between the parties is rather different to that which the parties agreed when directions were given.

2. The original preliminary issues in this case were whether the Defendant had a valid and enforceable retainer with the Claimant and, if so, what were the terms of it. Shortly before the hearing, the Claimant conceded that there was a valid retainer which entitled the Defendant to deliver his bill and, implicitly, that the terms were those set out in a conditional fee agreement dated 21st May 2015. At the outset of the hearing, the parties agreed that what remained to be decided was:

> (1) Whether the termination of the conditional fee agreement by the Claimant limits the entitlement of the Defendant to charge costs in excess of the amount of costs recovered from the defendant in the underlying proceedings.
>
> (2) If so, whether the Defendant's entitlement is limited to the amount shown in respect of his costs in the schedule of costs produced at the joint settlement meeting.

3. This judgment sets out my decisions on those issues.

<u>The background</u>

4. The Claimant was seriously injured in a road accident on 4th November 2014. She instructed the Defendant, a solicitor practising in Lyndhurst in Hampshire, to pursue the other driver and the Defendant agreed to act under a conditional fee agreement dated 21st May 2015. There is no issue as to the Claimant's capacity to enter into the agreement. No success fee was payable under the agreement.

5. The Defendant conducted the Claimant's claim until March 2021 when, it is not in issue, the Claimant terminated the retainer and instructed Fieldfisher. On 26th March 2021 the Defendant wrote to the Claimant indicating that he would require payment of his costs under the terms of the conditional fee agreement.

6. The claim was settled at a joint settlement meeting on 11th August 2021. In advance of the meeting, the Defendant was asked by Fieldfisher for details of his costs, but he did not provide them. The claim was settled on a global basis inclusive of costs.

7. On 16th August 2021 the Defendant was informed of the settlement, but he did not deliver his bill until 10th November 2022. The bill is in the sum of £496,983.96, of which £48,000 had been paid on account, leaving a balance of £448,983.96.

8. On 9th December 2022 the Claimant commenced proceedings for an order for the detailed assessment of the bill under s.70(2) Solicitors Act 1974. As the existence of a retainer was in issue, directions were given for the exchange of witness statements and a preliminary hearing as to that issue. Further directions for further evidence were given on 8th June 2023, including an agreed order that the bill should be the subject of a detailed assessment.

9. Witness statements have been filed by the Defendant and by Mr Boote, on his behalf, and by Mr Crowther, Mr Barrett and Mr Blackburn, on behalf of the Claimant. Mr Crowther was counsel instructed on behalf of the Claimant in the underlying proceedings and Mr Barrett was the partner at Fieldfisher with conduct of those proceedings. In the event, none of this evidence was relevant to what became the preliminary issue.

10. Initially the Claimant's position was to put the Defendant to proof of the retainer. Unusually, when the Claimant instructed Fieldfisher the Defendant had declined to hand over his files. Once the conditional fee agreement had been disclosed, as an exhibit to Mr Boote's first witness statement, the Claimant's arguments became, first, that the wording of the agreement prevented the Defendant from charging the Claimant anything and, secondly, that the agreement was unenforceable because it provided for a 7 day cancellation period, rather than the 14 days required by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

11. Shortly before the hearing, both arguments made in the Claimant's position statement dated 28th March 2023 were abandoned. In their place, the Claimant argues that the agreement limits the Defendant's entitlement to costs to those recovered from the opponent in the underlying proceedings. That is the principal issue which this judgment addresses.

12. Whatever the outcome of that issue, the Defendant's bill will still be the subject of detailed assessment and, at the hearing in October, I gave directions up to a detailed assessment hearing in April 2024.

The terms of the conditional fee agreement

13. The agreement incorporated the standard Law Society conditions and included the following terms:

Paying us if you win:
If you win your claim, you pay our basic charges, our expenses and disbursements and a success fee together with the premium for any insurance you take out. You are entitled to seek recovery from your opponent of part or all of our basic charges and our expenses and disbursements, but not the success fee or (save for clinical negligence cases) any insurance premium.
….
The overall amount we will charge you for our basic charges, success fees, expenses and disbursements is limited as set out in Schedule 2 below.

Basic Charges:
Details of our basic charges are set out in Schedule 2.

Ending this Agreement:
If you have a right to cancel this agreement under Schedule 3 (see below) and do so within the 7 day time limit. you will pay nothing. Otherwise, if you end this agreement before you win or lose, you pay our basic charges and expenses and disbursements. If you go on to win you also pay a success fee.

Schedule 2
Overall cap on your liability for costs
We will limit the total amount of charges, success fees, expenses and disbursements (inclusive of VAT) payable by you (net of any contribution to your costs paid by your opponent) to a maximum of 0% of the damages you receive.

14. The Law Society conditions included the following terms:

Dealing with Costs if you win:

- *Subject to any overall cap agreed with you, you are liable to pay all our basic charges, our expenses and disbursements and the success fee (up to the maximum limit) together with the premium of any insurance policy you take out.*
- *….*
- *If we and your opponent cannot agree the amount, the court will decide how much you can recover. If the amount agreed or allowed by the court does not cover all our basic charges and our expenses and disbursements, then you pay the difference up to any maximum agreed with you.*

What happens when this agreement ends before your claim for damages ends?

(a) Paying us if you end this agreement
You can end the agreement at any time. Unless you have a right to cancel this agreement under Schedule 3 and do so within the 7 day time limit we then have the right to decide whether you must:

- *pay our basic charges and our expenses and disbursements including barristers fees but not the success fee when we ask for them; or*
- *pay our basic charges and our expenses and disbursements including barristers fees and success fees if you go on to win your claim for damages.*

(b) Paying us if we end this agreement:
…
(iii) We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then:

- *pay the basic charges and our expenses and disbursements including barristers fees;*
- *pay the success fee if you go on to win your claim for damages.*

(c) Death
This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate.
If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee agreement, as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you.

Explanation of words used
(c) Claim
Your demand for damages for personal injury whether or not court proceedings are issued.

(e) Damages
Money that you win whether by a court decision or settlement.

(j) Lose
The court has dismissed your claim or you have stopped it on our advice.

(p) Win
Your claim for damages is finally decided in your favour, whether by a court decision or an agreement to pay you damages or in any way that you derive benefit from pursuing the claim.
'Finally' means that your opponent:

- *is not allowed to appeal against the court decision; or*
- *has not appealed in time; or*
- *has lost any appeal.*

15. It is not in issue that the "overall cap on your liability for costs" makes the agreement a "CFA lite"; that is, the client would not be liable to pay more costs, even if she wins, than are paid by the opponent. The issue is whether that applies when the client terminates the agreement.

Higgins & Co Lawyers Ltd v Evans [2019] EWHC 2809 (QB)

16. In Higgins the client and solicitors entered into a conditional fee agreement which also incorporated the standard Law Society conditions. One of the issues was whether, when the client died, the solicitors' entitlement to costs was capped by a term in schedule 2 which, in that case, limited the liability to the solicitors (net of any costs paid by the opponent) to a maximum of 25 per cent of the damages received.

17. Saini J. held that the overall cap did not apply:

> 61. If the [client's] arguments on construction were correct, then each of these clauses (not merely the Clause which is concerned with the situation of death) in this section make little sense. In particular, those clauses which expressly provide the solicitor with an option of taking immediate payment of basic charges or agreeing instead to keep the contingency alive and take basic charges and a success fee on a win make no sense at all. Counsel for the [client] rightly and realistically accepted that this was the result of his argument on construction.
>
> 62. In my judgment, the clear effect of the relevant clauses concerning the end of the CFA before the end of a claim for damages, including specifically the Clause, and the proper construction of their interaction with the overall cap is plainly that the cap only operates if the client wins, and not if the client is liable in other circumstances. How can a cap – calculated by reference to damages received – apply in a situation which expressly deals with a liability arising in a situation where the claim has not concluded? It cannot.

> 63. Were it necessary to find further support for this construction, the fact that the cap only applies where costs are payable because the client has won is expressly provided for on page 1 of the CFA. The cap is introduced in the penultimate paragraph on that page:
>
> "The overall amount we will charge you for our basic charges, success fee, expenses and disbursements is limited as set out in Schedule 2 below."
>
> 64. This clause is under the express heading of 'Paying us if you win'. It is not addressing any other situation. Nor is the explanation of this cap, set out in Schedule 2, intended to apply in any other situation.
>
> 65. In accordance with the express terms of the Clause, where the Clause is triggered, basic charges (not capped by reference to the cap which applies to basic charges, expenses and success fees in the different situation of a 'win') are payable forthwith.

(emphasis added)

18. The term referred to in paragraph 63 is identical to the term in the present case.

19. In Higgins, following the death of the claimant, the solicitors decided not to offer a new agreement to his personal representatives, but instead served a bill. At the time of the assessment of that bill, and at the time of the appeal to Saini J., the underlying claim had not been concluded. Therefore, there had been no "win".

Does the overall cap apply?

20. While Higgins was concerned with the termination by death provision, Saini J. made absolutely clear that his view applied to all of the termination provisions.

21. However, Ms Bedford sought to draw the distinction between the situations where the solicitor's entitlement crystallized on the termination of the retainer and those where the entitlement awaited the outcome.

22. She described the termination by client provision as enabling the solicitors to "stick" or "twist". They could either ask for immediate payment of their basic charges or they could wait to see if the client won and, if so, seek their basic charges and success fee.

23. If they "twisted", she submitted, then the provisions consequent on a "win", including the overall cap, would apply.

24. Clearly that would not be the case where the retainer was determined by death (as in Higgins). Nor would it be the case where the solicitors terminated under clause b(iii) (client's failure to follow advice to accept settlement) because then the solicitor is entitled to their basic charges immediately and to await the result to claim a success fee. Following Higgins, the overall cap could not apply in circumstances where the basic charges were payable before the claim had concluded.

25. It seems to me that there is a distinction between the situation where the solicitor is entitled to payment before the claim had been concluded (when the overall cap would make no sense) and the situation where the solicitor waits to see the outcome. In the latter case, the overall cap would make sense.

26. I do not read the judgment in Higgins as being inconsistent with that. Saini J. draws the same distinction in respect of "the relevant clauses concerning the end of the CFA before the end of a claim for damages" because "the proper construction of their interaction with the overall cap is plainly that the cap only operates if the client wins" [para 62].

27. The Defendant's argument is that the overall cap cannot apply where the client terminates the agreement before the case is won. Alternatively, it does not apply where there is no express costs recovery or ascertainable sum recovered in respect of costs.

28. Putting that latter argument to one side for the moment, if the solicitor elects to wait for the outcome of the case and the claim succeeds, while the agreement has been terminated before the case is won, there is no difficulty with applying the overall cap,

29. In my judgment the overall cap does not apply where the solicitor elects to claim their charges before the conclusion of the claim (for the reasons stated in Higgins), but it does apply where the solicitor elects to await the outcome of the claim.

Did the Defendant elect for immediate payment or elect to await the outcome?

30. On 9th March 2021 Fieldfisher wrote to the Defendant informing him that they had been asked to take over the Claimant's claim and attached her authority to release their files.

31. For reasons which are not entirely clear, the Defendant did not view that as terminating his retainer until an exchange of emails on 26th March 2021. In response to an email from the Claimant's litigation friend that they had lost confidence in the Defendant, he replied:

> I have considered this carefully but once formal termination of my CFA has occurred in these circumstances I shall seek payment of the costs and disbursements due as per the agreement term indicated above.

32. The "term indicated above" was that quoted in paragraph 13 under the heading "Ending this agreement".

33. The Claimant replied: "You are terminated from my case".

34. The Defendant responded:

> I shall proceed on the basis that formal termination of our retainer occurred today.
>
> …
>
> There is real risk my firm faces concerning the costs it has incurred. It is therefore entirely reasonable that now my firm is

> no longer instructed and risks apparent, the issue of costs owed to the firm must be resolved prior to the file transfer.

35. Ms Bedford submits that this was not sufficient to trigger the first bullet point in clause (a). There had to be a demand for payment which, in the context of a solicitor, would have to be a bill which complied with s.69 Solicitors Act 1974.

36. I think that ignores the factual matrix. There was no advantage to elect to await the outcome of the case, or in Ms Bedford's words to "twist", because no success fee would be payable in the event of a win. It seems to me that while the Defendant did not "ask" for payment until he delivered a bill, in March 2021 he had exercised his right to decide that the Claimant must pay his basic charges, expenses etc without waiting for the conclusion of the claim. Effectively, he had said "I'll stick".

37. Had a success fee been payable under the agreement, in view of the emails, the Defendant would have had no prospect of arguing that he had exercised his election to await the outcome.

38. Following Higgins, the overall cap did not apply because the Defendant had elected to claim his basic charges before the case was won.

Quantum

39. In the event that is wrong, it would be necessary to decide what the overall cap should be. Given that there was no separate agreement as to costs with the defendant in the underlying claim, Ms Bedford contends for £354,496.51. That was the figure given for the Defendant's costs in the schedule produced at the joint settlement meeting (less £41,800 paid directly to counsel).

40. Mr James, on behalf of the Defendant, submits that the cap does not apply because no ascertainable sum was paid by the opponent. However, in the alternative, he contends for the figure set out in the costs schedule (£396,296.51).

41. If, contrary to my view, the overall cap does apply then it seems to me that the court must do its best to arrive at a figure. The highest figure which could have been taken into account in the settlement in respect of the Defendant's costs would have been the figure presented to the opponent, namely £396,296.51, as against which the Claimant should have credit for £41,800 already paid.

42. Ms Bedford did advance, as an alternative, a figure of £84,026.44 based on the proportion to which the costs bore to the total sum of damages claimed. However, in my experience, damages are generally more amenable to reduction than costs. It may be, for that reason, that this was the Claimant's alternative figure.

43. The difference between the Defendant's bill and £354,496.51 is about 20 per cent. It may well be therefore that, whatever the outcome of this interesting preliminary issue, it will make no difference to the final result.