Neutral Citation Number: [2020] EWHC 2866 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SITTING AT BRISTOL
ON APPEAL FROM THE PLYMOUTH COUNTY COURT
ORDER OF HHJ MITCHELL DATED 28 AUGUST 2018
CLAIM NO E23YJ914
APPEAL NO 8BS0115C

Bristol Civil Justice Centre
Bristol BS1 6GR
Date: 27 October 2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

RAYMOND LAWRENCE TOMS (trading as GOLDBERGS SOLICITORS)	**Claimant / Appellant**
- and -	
JOHN BRANNAN	**Defendant / Respondent**

- -
- -

Joshua Munro (instructed directly by the Claimant) for the **Appellant**
Rebecca Hodgkin (instructed by Beers LLP) for the **Respondent**

Hearing date: 27 October 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 GRIFFITHS

Mr Justice Griffiths :

1. This is an appeal against the order of HHJ Mitchell dated 28 August 2018 after a Fast Track trial. The order dismissed the Claimant's claim for fees of £12,600 excluding interest under a Conditional Fee Agreement entered into between the Claimant (a solicitor trading as Goldbergs) and the Defendant (his client) and ordered the Claimant to pay 90% of the costs of the action summarily assessed at £6,065.01 net of the 10% of costs payable by the Defendant to the Claimant. The Defendant's counterclaim was dismissed and there is no cross-appeal.

2. The notice of appeal seeks, instead, an order for judgment in favour of the Claimant; and for costs to be assessed.

3. Permission to appeal was granted to the Claimant by Murray J on 13 May 2020, who allowed the appeal to advance on Ground 1 ("to the extent that it asserts that HHJ Mitchell erred in law") and Ground 2 of the Grounds of Appeal.

4. Ground 1 is simply that the Judge erred in law (the allegation that he erred in the exercise of his discretion not being allowed to proceed) in relation to each of the decisions being appealed. Ground 2, which puts flesh on these bones, is:

> "His Honour erred in finding that the Defendant was not bound by the conditional fee agreement, notwithstanding:
>
> a. He signed it without demur.
>
> b. He alleged he had not understood it but believing it to mean something else (no finding being made as to what that might be, other than a 'no win, no fee' agreement);
>
> c. He was not found to have communicated the fact that he had not understood it to the Claimant at the time he signed it;
>
> d. The Claimant's advice in respect of the agreement was found to be 'dense', but His Honour made no finding that the advice was otherwise incorrect;
>
> e. His counterclaim was dismissed on the basis that it was misconceived;
>
> f. He acted in accordance with the agreement by making payments on account of some disbursements when asked."

5. Ground 3 challenged the judge's finding of fact that the Defendant had good reason not to instruct the Claimant not to issue proceedings. Permission to appeal on Ground 3 was refused and, since it was an appeal against a finding of fact, that refusal was perhaps inevitable. I am not, therefore, concerned with Ground 3.

6. The upshot, therefore, is that this is an appeal against a finding by the judge, as a matter of law on the primary facts found by him, that the Defendant was not bound by the conditional fee agreement and was not, therefore, bound to pay the Claimant any fees.

The terms of the CFA

7. The conditional fee agreement in question ("the CFA") was in writing and signed and dated by the parties on 31 March 2015.

8. There is a Note of Judgement which has been perfected by the judge to the best of his ability after a considerable lapse of time. No transcript was available. It was, naturally, a judgment given *ex tempore* at the conclusion of this one-day Fast Track trial. Nonetheless, it is a reasoned judgment consisting of 27 paragraphs.

9. The Note of Judgment sets out only three contractual terms from the CFA, and does so in brief paraphrase (para 14) as follows:

> "The contractual terms of the Conditional Fee Agreement included:-
>
> 1. If the Defendant ended the agreement, he would be responsible to pay the Claimant's basic charges and disbursements.
>
> 2. The Law Society standard conditions confirming that the Claimant was to act in the best interests of the Defendant.
>
> 3. The Claimant was to act with the reasonable skill and care of a reasonably competent litigation solicitor."

10. I suspect the judge may have recited more than the note taker was able to get down. Even if he did not, he cannot be criticised, because the terms of the CFA were not in dispute and everybody present knew what they were. It was not necessary to read them in full.

11. However, the CFA is in my papers and so I am not limited to the fairly brief reference to its terms in the Note of Judgment. This being an appeal, I will be more explicit and laborious in my citation than the judge below.

12. The following undisputed terms of the CFA are material to the issues considered in the judgment.

> "This agreement is a binding legal contract between you and your solicitor/s. Before you sign, please read everything carefully…
>
> Counsel's fees are treated as a disbursement…
>
> VAT will be added at the rate which applies when the work is done to all of our fees… VAT is also payable on certain disbursements.

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… and do so within the 14 day time limit [not applicable, as it did not happen], you will pay nothing.

Otherwise, if you end this agreement before you win or lose, you pay our basic charges and expenses and disbursements…

We may end this agreement before you win or lose, with the consequences set out in the Law Society Conditions.

This agreement constitutes the whole agreement between the parties… Each party acknowledges that, in entering into this agreement, it has not relied on, and shall have no right or remedy in respect of, any statement, representation, assurance or warranty (whether made negligently or innocently) other than as expressly set out in this agreement, save as aforesaid. Nothing in this clause shall limit or exclude any liability for fraud.

Schedule 2

Basic charges

These are for work done from now until this agreement ends. These are subject to review.

How we calculate our basic charges.

These are calculated for each hour engaged on your matter. Routine letters and telephone calls will be charged as units of one tenth of an hour. Other letters and telephone calls will be charged on a time basis. The hourly rates are (excluding VAT)… [hourly rates are then set out – nothing turns on the amounts]

Law Society Conditions

The Law Society Conditions below are part of this agreement…

Our responsibilities

We must

● always act in your best interests, subject to our duty to the court;

● explain to you the risks and benefits of taking legal action;

● give you our best advice about whether to accept any offer of settlement;

● give you the best information possible about the likely costs of your claim for damages.

Your responsibilities

You must:

● give us instructions that allow us to do our work properly;

● not ask us to work in an improper or unreasonable way;

● not deliberately mislead us;

● co-operate with us;

● go to any medical or expert examination or court hearing.

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

(a) Paying us if you end this agreement

You can end this agreement at any time. Unless you have a right to cancel this agreement under Schedule 3 and do so within the 14 day time limit [which is not applicable, because it did not happen] we then have the right to decide whether you must:

● pay our basic charges and our expenses and disbursements including barristers' fees…

(b) Paying us if we end this agreement

(i) We can end this agreement if you do not keep to your responsibilities. We then have the right to decide whether you must:

● pay our basic charges and our expenses and disbursements including barristers' fees…

> (ii) We can end this agreement if we believe you are unlikely to win. If this happens, you will only have to pay our expenses and disbursements. These will include barristers' fees if the barrister does not have a conditional fee agreement with us."

The judgment

13. The judgment includes the following findings of fact:

    i) The Defendant saw the Claimant on 27 March 2015 about a claim against his broker, Sabre. The detail of that claim is not important to this appeal.

    ii) The Claimant introduced the Defendant to his colleague Mr Ellis who would be acting, and did subsequently act, on the Claimant's behalf in relation to the Defendant's claim.

    iii) The Claimant and the Defendant entered into the CFA on 31 March 2015.

    iv) The Claimant expressed confidence that Sabre was in breach of duty and advised that an expert report should be obtained. (The fee for this was a disbursement which the Defendant appears to have paid, because his unsuccessful Counterclaim was for recovery of that sum.)

    v) The limitation period expired on 12 July 2017 without the Defendant authorising the issue of any proceedings. The claim therefore died.

    vi) The Claimant then terminated the CFA on 18 July 2017 "for failing to give instructions to issue the claim" (judgment para 9). The fact that it was the Claimant and not the Defendant who terminated the CFA was part of the Claimant's pleaded case (Particulars of Claim para 3).

14. After these primary findings of fact, the judgment moves to a discussion based on the evidence, in which the following additional points are made or can be deduced.

    i) It is said that the CFA "is of course familiar to lawyers but not easily understood for a lay client".

    There is no suggestion in the judgment that the CFA contained unusual, onerous or inappropriate terms. Indeed, it bears a Law Society copyright notice on the first page which suggests that it was in standard form.

    ii) There is a finding that the Defendant was "only given a cursory explanation" of the CFA before it was signed; and a finding that "the Claimant's explanation" of the CFA "fell below the standard of care which one would expect".

    However, there is no suggestion that anything was misstated, or misrepresented before it was signed. The rule in *L'Estrange v F Graucob* [1934] 2 KB 394 would seem to apply, whereby (quoting the headnote) "as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she was bound by the terms of the contract, and it was wholly immaterial that she had not read it and did not know its contents; and…

the sellers were entitled to judgment". Of course, there are exceptions to that rule, but none of them appears to apply in this case.

iii) Some time after the CFA was signed and dated 31 March 2015, Sabre denied liability "in September 2015 and May 2017. It was a detailed denial of liability on any view" (judgment para 7).

iv) After the denial of liability, the Claimant wrote to the Defendant promising further advice. The judgment says "That didn't happen. The Claimant simply said that prospects hadn't changed but in my view it was at that time that it cried out for a proper reassessment of the claim".

On the face of it, stating that the prospects had not changed was the further advice which had been promised. But the judge is here clearly saying that this was inadequate; that it fell short of the "proper reassessment of the claim" which the circumstances required. It is not clear what difference that could make to the enforceability or otherwise of a CFA signed and dated a long time before, on 31 March 2015. There is no finding (for example) that an opportunity either to make money or to save money was missed, because of negligent or inadequate advice. There was no Counterclaim for damages for negligent or inadequate advice, and the Counterclaim which was brought (for reimbursement of the expert fee paid by the Defendant) was dismissed.

v) Counsel was instructed in June 2017 (and the Defendant was informed of this in a letter of 21 June 2017) but no opinion was ever received (para 18).

vi) The limitation period expired, as I have said, on 12 July 2017. It is clear that all parties were aware of the impending expiry of the limitation period, which created (as the judgment puts it) a "frantic situation" (para 20).

> "…the Claimant wrote to the Defendant saying that the claim had to be issued and that the Defendant had to pay the 5% Court fee. At that point, the Defendant decided not to pursue the claim and the Claimant says that was a breach of the [CFA]" (para 20).

15. The judgment then concludes with the following observations and findings (paras 21-26):

> "In my mind, the Defendant was put in an invidious position. There was no proper analysis of the claim for him to make an informed decision.
>
> The first real attempt by the Claimant to assess the risk/benefit was in the letter of 21 June 2017 when it is the first time that they said they would get a Barrister's opinion.
>
> The Claimant sent the Claim Form to the Defendant 6 days before the [end of the] limitation [period] and with no advice on the risks. The Defendant didn't pursue the claim and the

> Claimant alleges that he failed to cooperate and was accordingly in breach of the Agreement.
>
> It is my view that the Defendant was not in breach of the Agreement given the circumstances.
>
> The Claimant failed to act in the Defendant's best interests, or to explain properly and in a timely fashion and that is why matters got to that stage at limitation.
>
> I do not find that the Defendant was in breach of the Conditional Fee Agreement and, as such, the Claimant's claim is dismissed."

Discussion and decision

16. Although the Claimant ended the CFA rather than the Defendant, it was obviously entitled to do this in circumstances where the limitation period had expired without the Defendant agreeing to the issue of proceedings. The CFA said "We may end this agreement before you win or lose", which is what the Claimant did.

17. What is not immediately obvious from the judgment (because they are not expressly referred to in this context) is which of the two following clauses from the CFA in relation to payment was applicable to the events which happened:

> "(i) We can end this agreement if you do not keep to your responsibilities. We then have the right to decide whether you must:
>
> ● pay our basic charges and our expenses and disbursements including barristers' fees…
>
> (ii) We can end this agreement if we believe you are unlikely to win. If this happens, you will only have to pay our expenses and disbursements. These will include barristers' fees if the barrister does not have a conditional fee agreement with us."

18. Had the Defendant failed to keep to its responsibilities?

    i) If so, under (i), the Claimant was entitled to payment of basic charges, as well as expenses and disbursements.

    ii) If not, termination by the Claimant after expiry of the limitation period must have fallen under (ii) ("We can end this agreement if we believe you are unlikely to win…"), but that would entitle the Claimant only to payment of expenses and disbursements – not charges.

19. I think, however, that the following concluding passages from the judgment (paras 23-26), which I have already cited, do decide this point:

> "The Defendant didn't pursue the claim and the Claimant alleges that he failed to cooperate and was accordingly in breach of the Agreement.
>
> It is my view that the Defendant was not in breach of the Agreement given the circumstances.
>
> The Claimant failed to act in the Defendant's best interests, or to explain properly and in a timely fashion and that is why matters got to that stage at limitation.
>
> I do not find that the Defendant was in breach of the Conditional Fee Agreement and, as such, the Claimant's claim is dismissed."

20. Since the Defendant was not in breach of the CFA (and this was a finding open to the judge, whose findings of fact cannot be challenged in this appeal as permitted by the limited order of Murray J), the Claimant was entitled to payment of expenses and disbursements, but not charges, under para (ii), in the passage I have just quoted from the CFA.

21. The claim was, however, "for the recovery of professional fees" (judgment para 1), which were charges, and not expenses or disbursements.

22. Therefore, the judge's findings are fatal to the claim and support irrefutably the conclusion that he reached. I say this on a careful reading and analysis both of the Note of Judgment (for all its imperfections as a record of the *ex tempore* judgment) and of the CFA upon which it was based.

23. Indeed, it does not appear to me that the decision was based on a finding that the CFA was not binding, which is the basis of the Grounds of Appeal. Rather, it is a finding that the professional fees claimed were not recoverable under the terms of the CFA.

24. Consequently, the appeal must be dismissed.

Costs

25. The parties agree that the costs of the appeal must follow the event, and that I should summarily assess them.

26. I order the Claimant/Appellant to pay the costs of the Defendant/Respondent which I summarily assess on the standard basis at £5,000 (having heard submissions on both sides, and looked at both sides' schedules of costs).

27. I will invite Counsel to agree and submit a minute of order for my approval.