Case No: CH/2014/614

[2015] EWHC 2005 (CH)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
(Master Campbell)

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Friday, 22 May 2015

BEFORE:

HIS HONOUR JUDGE PURLE QC (sitting as a High Court Judge)

BETWEEN:

EMW LAW LLP

Claimant/Respondent

- and -

MR SCOTT HALBORG

Defendant/Appellant

MR VIKRAM SACHDEVA QC (instructed by EMW Law LLP) appeared on behalf of the Respondent

MR ROBERT MARVEN (instructed by Deals & Disputes Solicitors LLP) appeared on behalf of the Appellant

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Judgment
(As Approved)

Transcript of Merrill Legal Solutions
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No of words: 3,773
No of folios: 52

JUDGE PURLE QC:

1. There are 2 appeals from 2 Orders dated 24 October and 24 November 2014 respectively. The first raises familiar issues of practice and pleading. The second raises a novel point concerning the assessment of solicitors' costs of considerable significance and importance. Permission to appeal has been granted by Nugee J, in the case of the first appeal on limited grounds only.

2. The Claimant ("EMW") is a Limited Liability Partnership, consisting of practising solicitors. They are represented by themselves and by Counsel, Mr Vikram Sachdeva QC.

3. The Defendant ("Mr Halborg") is another solicitor, who retained EMW as agent, under a conditional fee agreement ("CFA") between himself and EMW, in litigation brought by him as a solicitor for his parents and a family company, who were the lay clients. Thus, Mr Halborg was the solicitor on the record. He is represented in these proceedings by Deals & Disputes LLP, of which he is a member, and Mr Robert Marven of Counsel. As Deals & Disputes LLP has a separate legal personality (unlike unincorporated partnerships) he is not treated as acting for himself, though, colloquially speaking, he is.

4. The earlier litigation was compromised by a substantial payment to the lay clients, with costs to be assessed. The condition for payment of EMW's costs under its CFA was (broadly) recovery from the losing party.

5. A bill was prepared by a costs draftsman retained by Mr Halborg and submitted to the losing party. That bill contained a certificate (presumably signed by Mr Halborg, though I have not seen a copy of the bill as delivered) that the costs claimed in the bill, which included charges for EMW's labours, did not exceed the costs which the clients were required to pay Mr Halborg. EMW had previously made its time records and other material available to the costs draftsman. I was also told during the hearing that there was correspondence between EMW and Mr Halborg prior to preparation of that bill including the submission of figures for inclusion within the bill. However, no reliance is presently placed on that earlier correspondence.

6. The costs liability in the earlier proceedings (or part of that liability) has apparently been dealt with in some way, as between Mr Halborg and the losing party, on undisclosed terms which have not resulted in payment to EMW of any costs.

7. The proceedings before me ("the SCCO claim") are brought under CPR Part 67, as they relate to the remuneration of solicitors. EMW seeks an assessment of its costs under section 70 of the Solicitors Act 1974 ("the 1974 Act"). Though started, as the rules require, as a Part 8 claim, pleadings have subsequently been served. The rationale behind the SCCO claim appears to be that either the condition under EMW's CFA with Mr Halborg has been satisfied or, if it has not, EMW can nevertheless proceed to an assessment because the breaches of contract and other matters alleged against Mr Halborg mean that he has prevented the condition from being met.

8. There are also pending proceedings subsequently issued in the Chancery Division ("the Chancery claim") for damages for breach of contract. At least part of the

motivation for the Chancery claim is the availability of disclosure. The relief claimed is different, there being no claim under section 70 of the 1974 Act. The claim is for damages for breach of contract. The thinking is that if the breaches are established, they may be said to have prevented the collection of EMW's costs, sounding in damages.

9. It is said by Mr Marven that the SCCO proceedings should be struck out as embarrassing. It is not clear, he says, whether damages for breach of contract are sought or merely an assessment. Moreover, the pleading as a whole is vague and unclear. The Part 8 procedure is in any event unsuitable, as are proceedings in the SCCO. He acknowledges that these later objections could be dealt with by directing that the proceedings continue as a Part 7 claim, and/or by directing the SCCO claim to continue in the Chancery Division. He says I should not countenance that, as the existing Chancery claim overlaps. Those proceedings do not however claim an assessment under section 70 of the 1974 Act.

10. Master Campbell declined to strike out the claim and in my judgment he was right (or at least entitled) not to. The SCCO claim could certainly be better pleaded, but it is intelligible (and has been pleaded to) albeit difficult to follow in parts, and ambitiously pleaded (and in some respects inaccurate) in other parts. The cumulative effect does not however justify a strike-out of the whole of the pleading on this ground. Moreover, whilst there is obvious overlap between the 2 claims, it is clear to me that the SCCO proceedings do not claim damages for breach of contract, and the Chancery proceedings do not claim an assessment under section 70 of the 1974 Act.

11. A separate point is taken on section 70 of the 1974 Act. It is said that the cause of action is flawed as there was no bill of any kind, still less one which complied with section 69 of the 1974 Act, delivered by EMW to Mr Halborg, and still there is not. (I mention parenthetically that there is also an issue as to whether a valid bill was delivered later. Master Campbell declined to grant summary judgment in favour of Mr Halborg on this ground and permission to appeal this ruling has not been given.)

12. The bill which was prepared for the claim against the losing party in the earlier litigation was not a bill delivered by EMW to Mr Halborg. This was Mr Halborg's bill, which included and claimed from the losing party everything which EMW now claims from Mr Halborg.

13. Section 70 must be read in conjunction with section 69 of the 1974 Act. Section 69(1) in general precludes an action for recovery of costs before the expiration of one month of delivery of a bill complying with the conditions of subsection (2). Section 70(2) also reads as if the delivery of a bill is a pre-condition to any application by a solicitor for the assessment of costs.

14. It is well settled that, despite the requirement for a bill, a solicitor's cause of action arises when the work is done: see *Edginton v Sekon* [2012] EWCA Civ 1812, applying *Coburn v Colledge* [1897] 1 QB 702, a case on one of the 1974 Act's predecessors, section 37 of the Solicitors Act 1843. Sections 69 and 70 are merely procedural requirements, not a pre-condition of the cause of action's existence. That being so, it must (at least arguably) follow that proceedings can be started, for

recovery or assessment, even before a bill is delivered, though they might be stayed, or not finally concluded, until a proper bill is delivered.

15. It cannot be said, therefore, that EMW does not have a realistically arguable cause of action in the present case.

16. I was referred to a number of cases concerning (primarily) defective bills. It is well established that, in special circumstances, a defective bill may be withdrawn and substituted by a new bill. It seems to me that the position is no different in principle between a defective bill and no bill and that the requirement of a section 69-compliant bill is not a pre-condition of the right to commence proceedings in either case. The point is at least arguable with a realistic chance of success and unsuitable for determination at the summary judgment stage.

17. The present circumstances are also, at least arguably, exceptional. EMW merely wishes to claim that part of Mr Halborg's own bill of costs which exactly reflects EMW's own input, and which Mr Halborg certified as not exceeding the amount due from the clients. It is perhaps surprising that there could be any argument over the quantum of the bill. Certainly, Mr Halborg cannot claim to be surprised by the bill. It was also redelivered in February 2014, limited to the part containing EMW's charges alone.

18. A separate attack is made on parts of the pleadings relating to implied terms. A number of implied terms are pleaded. The main ground of attack against those parts of the pleading is that they contradict the express terms. The relevant part of the CFA stipulated as follows:

> "If the clients win their claim, the Solicitors' agents will be entitled to be paid by the Solicitors our basic charges, our disbursements and a success fee provided the same has first been recovered in full from the Opponents by the clients and/or the Solicitors; and without limitation it is a condition precedent to our receiving any payment pursuant to this Agreement that the clients and/or the Solicitors have first received payment in full from the Opponents in respect of any specific fees and/or disbursements of the Solicitors' agents."

19. In the Particulars of Claim, the claim was made against 4 defendants. The first 3 defendants were the ultimate lay clients, the fourth defendant was Mr Halborg. The implied terms were pleaded against all defendants. The pleading will therefore have to be amended in any event so as to limit its applicability to Mr Halborg, because the first three Defendants did succeed in obtaining summary judgment before Master Campbell as they were not parties to the CFA, and there is no appeal from that decision. I shall therefore treat the implied terms (despite the current pleading) as being so limited.

20. The following four implied terms are pleaded, (a) that EMW would be paid a reasonable sum for its work by Mr Halborg to be assessed, if not agreed; (b) If no costs at all were recovered from "OD" (the party being sued) then that obligation was extinguished; (c) If some costs were recovered from OD, then Mr Halborg would pay

EMW a reasonable proportion of its costs; and (d) Mr Halborg is under an obligation to use best endeavours, alternatively reasonable endeavours, to recover EMW's costs from OD. Master Campbell refused to strike out any of the implied terms, though he seems to have focused only upon the obligation to use best or reasonable endeavours. Permission to appeal in respect of implied term (d) has not been given, so I am only concerned now with implied terms (a) to (c), and then only insofar as they relate to Mr Halborg.

21. It was explained in argument by Mr Sachdeva QC that the implied terms in (a) to (c) all deal with what he described as a global payment, that is to say a payment which does not distinguish in its calculation between payments in respect of Mr Halborg's costs and payments in respect EMW's costs. That can easily occur in the case of (say) a costs settlement which produces a ball park figure for the costs as a whole, without appropriating any particular amount to the constituent parts. It is, in my judgment, strongly arguable that something needs to be implied in that eventuality, and the solution suggested by EMW is at least arguable with realistic prospects of success. The CFA referred only to payment in full of all the agents' fees and disbursements. It did not address how EMW's fees were to be calculated if there was no apportionment in the recovery exercise between EMW's and Mr Halborg's costs. Moreover, on a literal reading of the CFA, if EMW's costs were discounted by even a small amount on an assessment, and that lesser figure was paid to Mr Halborg, the condition precedent as drafted would not be met, because there would not be recovery "in full" of EMW's costs. Nevertheless, Mr Marven readily conceded, as he was bound to do, that EMW would, in that event, be entitled to payment of that lesser sum. That, however, does not arise from the express terms of the agreement and really underscores the need to imply something. The need is greater still in the case of a global payment, in the sense explained by Mr Sachdeva QC. It is regrettable that the pleading does not make it clear, as it should do, that (a), (b) and (c) relate only to global payments as opposed to payments specifically related to EMW's fees but, thus understood, it does not seem to me that it can be said that the terms as pleaded either contradict the written agreement or are otherwise unarguable. In my judgment, they are arguable with a realistic prospect of success.

22. There is a further implied term which Master Campbell declined to strike out (in paragraph 7(1) of the Particulars of Claim) for which permission to appeal was given. This is to the effect that Mr Halborg would not do anything which would prevent EMW from being able to pursue OD for its costs. In fact, EMW could only pursue OD for its costs through Mr Halborg's firm as its covering letter at the time of the CFA confirmed. Later on in the same paragraph, reference is also made to what is called the "Prevention Principle", namely that the promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. There is no question in this case of Mr Halborg having prevented EMW from performing an obligation. However, there is scope for an argument that Mr Halborg would not do anything which would prevent EMW from being able to pursue its costs claim through his firm or the lay clients, which were the routes contemplated by the CFA. It is in my judgment reasonably arguable with a realistic prospect of success that some such term might be implied and that this would prevent Mr Halborg from relying upon non-fulfilment of the condition precedent, enabling EMW both to have his costs assessed and to recover them from Mr Halborg.

23. I was referred in this connection, though in a rather different context, to Khans Solicitor v Chifuntwe [2014] 1 WLR 1185 as demonstrating the extent to which the court will go, in an appropriate case, to protect a solicitor from being cheated out of his costs. On that point, I should say that I am making no findings against Mr Halborg, and am in no position to do so. Mr Marven was properly concerned to emphasise that the facts, as he says they will emerge at trial, will dispel any impression of any sharp practice on the part of his client. I am prepared to assume that that may be the case but the facts may also emerge otherwise. I can decide nothing about any of that at this stage. I can merely reiterate that these are trial points and the implication of terms is best decided against the facts.

24. In all the circumstances, Master Campbell was right not to strike out the SCCO claim, or any part of it as against Mr Halborg. The pleading was also attacked in other respects, for which, as mentioned, permission to appeal has not been given, and which I need not therefore dwell upon.

25. In the circumstances, the appeal from the Order of 24 October 2014 is dismissed.

26. There is also a separate appeal against part of the later Order of 20 November 2014. Mr Halborg was ordered to pay EMW's costs of the unsuccessful summary judgment application, which Master Campbell proceeded to assess. In making that assessment, he refused to treat EMW as a litigant in person and he refused, therefore, to limit its recoverable costs accordingly. Mr Halborg appeals, with the permission of Nugee J, against that refusal.

27. Whether Master Campbell was right has to be considered against the provisions of the rules. The relevant rule now is CPR 46.5. It is said that EMW, as a Claimant acting for itself as solicitor, is a litigant in person. The right of a litigant in person to recover costs for the litigant's own services is limited either to £19.00 an hour or, if a greater loss can be proved, two thirds of an amount which would have been allowed if the litigant in person had been represented by a legal representative.

28. That requires me to consider what a litigant in person is. As I have said, EMW is a limited liability partnership which is, of course, a corporate entity separate from its members.

29. CPR 46.5 (6) reads as follows:

> "For the purposes of this rule, a litigant in person includes –
> (a) a company or other corporation which is acting without a legal representative; and
> (b) any of the following who acts in person (except where any such person is represented by a firm in which that person is a partner) –
> (i) a barrister;
> (ii) a solicitor;
> (iii) a solicitor's employee;
> (iv) a manager of a body recognised under section 9 of the Administration of Justice Act 1985; or

> (v) a person who, for the purposes of the 2007 Act[1], is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)."

30. It is common ground that EMW is both "a company or other corporation" and is also "an authorised person" in relation to the conduct of litigation within the meaning of the Legal Services Act 2007.

31. The expression "legal representative" is defined in CPR 2.3 as including a solicitor and, accordingly, as EMW is a company or other corporation which is acting with a legal representative, that is to say a solicitor, it is not, by virtue of CPR 46.5 (6)(a), a litigant in person[2]. However, Mr Marven says, EMW is nevertheless a litigant in person by virtue of CPR 46.5 (6)(b)(v).

32. That is because EMW is, according to him, within CPR 46.5 (6)(b)(v) as a person authorised to conduct litigation, and is not within the earlier exception, which reads as follows:

> "(except where any such person is represented by a firm in which that person is a partner)"

33. EMW, Mr Marven says, cannot fairly be described as a firm and, more importantly, cannot be described as a partner in the firm. EMW is not a partner of anything. EMW is the corporate entity. Even if described as a firm, that is what it is: the firm, and not a partner in itself. In my judgment, Mr Marven is correct on this point. EMW does not therefore fall within the exception in the opening words of CPR 46.5 (6)(b).

34. A more fundamental point is whether EMW is "a person" within CPR 46.5(6)(b)(v) at all, which only extends to:

> (v) a person who, for the purposes of the 2007 Act, is an authorised person in relation to an activity which constitutes the conduct of litigation (within the meaning of that Act)."

35. The expression "Person", under Schedule 1 of the Interpretation Act 1978 ("the 1978 Act"), includes "a body of persons corporate or unincorporate". That definition applies, under section 5 of the 1978 Act, "unless the contrary intention appears", and is applied to subordinate legislation (which includes the CPR) by section 23 of the 1978 Act.

36. CPR 46.5 (6)(b)(v) has no sensible foundation if "person" is construed in this sub-paragraph as including a corporation. There is little or no sense, or good reason, for excluding from the definition of litigant in person an ordinary solicitors' partnership

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[1] The Legal Services Act 2007

[2]. No argument was addressed to me on the significance, if any, of Mr Sachdeva QC also acting for EMW

acting by one of its own solicitors, whilst including within the definition a limited liability partnership also acting by one of its own solicitors.

37. The explanation in my judgment is that companies and other corporations are dealt with comprehensively in (a). If a corporation acts with a legal representative, which includes an in-house legal representative (as the notes to the White Book recognise) it can recover its full profit costs and is not limited either to £19.00 an hour or by the two thirds cap. The same is true, in my judgment, of EMW, which falls squarely within CPR 46.5 (6)(a).

38. By contrast, CPR 46.5 (6)(b) deals in each sub-paragraph with "any of the following who acts in person". Sub-paragraphs (i) to (iv) then list individuals, who are natural persons: a barrister, solicitor, manager and employee. Sub-paragraph (v) must also in my judgment be limited to a person who is an individual or natural person, as only an individual or natural person can without special definition be said to act "in person", as the opening words of CPR 46.5 (6)(b) require.

39. This approach is confirmed by the fact that a company or other corporation in CPR 45.5 (6)(a) is not described as acting in person. It becomes a litigant in person not because it acts "in person" but because it acts "without a legal representative". It simply makes no sense to talk of a company acting in person. Individuals act in person. In my judgment therefore, the context of CPR46.5 (6)(b) requires the word "person" in sub-paragraph (v) to be construed as referring to a natural person only.

40. That conclusion is consistent also with common sense and what the general approach of the law has been for many years. I was referred in this connection at length to Malkinson –v- Trim [2003] 1 WLR 463, which set out comprehensively the historical approach of the courts, and dealt with earlier provisions of the CPR under which the two-thirds rule did not apply to solicitors acting for themselves because of the reference in the then Practice Direction to litigation conducted by a firm of which an individual was a partner. Nor, in my judgment, does the two-thirds rule apply to LLPs suing in their own right as a body of solicitors. It follows, in my judgment, that the appeal against the second order must also be dismissed because EMW was not a litigant in person for the purpose of costs assessment.