NCN No: [2023] EWHC 3032 (SCCO)
Case No: SC-2022-BTP-001207

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 27/11/2023

Before:

COSTS JUDGE ROWLEY

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Between:

(1) Tanka Thakali & Nagendra Gauchan **(2) Khim Prasad Gauchan & Others** **(3) Thakali Welfare Society UK Limited (a company limited by guarantee)**	**Claimants**
- and -	
(1) Navin Kumar Gauchan **(2) Basudha Gauchan**	**Defendants**

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Written submissions by:
Sternberg Reed LLP for the **Claimants**
Alan Steynor instructed directly by the **Defendants**

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. This my second written judgment in respect of this case. The first judgment dealt with challenges to routine items and to the documents' item. Those challenges remained after a day's hearing of the points of dispute and replies. That hearing itself was the second day of the detailed assessment because the first day was very largely taken up with questions surrounding the terms of the claimants' retainer with their solicitors. Those questions could not be satisfactorily answered on the (first) day and so the case was adjourned.

2. The bill of costs claims the sum of £105,133.49 and has been assessed at £88,409.44. A bill of this size would normally be assessed comfortably within a day, but as can be seen from the first paragraph of this decision, in fact two days of court time together with two written decisions have been required to deal with this detailed assessment.

The costs of the detailed assessment proceedings

3. Following my last written judgment, the parties have calculated the costs that have been allowed and have then provided written submissions in respect of the costs of the proceedings. I have received a bundle of documents which consists of approximately 16 pages of submissions between the parties and a further 160 pages of exhibits which are said to be relevant to the question of who should pay whose costs and how much those costs should be.

4. CPR rule 47.20 presumes the costs of detailed assessment proceedings will be the receiving party's i.e. the claimants in this case. Subparagraph (3) to that rule enables the court to make some other order, taking into account the circumstances of the case, and in particular, the conduct of the parties, the amount of any reduction to the bill of costs and whether it was reasonable for a party to claim the costs of a particular item or to dispute it. The court will inevitably have regard to offers that have been made to settle proceedings, whether that is said to be part of the conduct of the proceedings or as a stand-alone factor.

5. I do not need to recite the offers that have been made save to record that the claimants have beaten their own offers and not just the offers made by the defendants. The reduction of the bill is in the order of 15% which is modest and there is no suggestion by either side of any particular item being pursued or disputed inappropriately. In these circumstances, it might be thought that there was no doubt that the costs would be awarded to the receiving party in the usual fashion.

6. However, the defendants contend for there to be no order as to costs. In support of this contention, the defendants say that the first day of the detailed assessment was essentially wasted due to the claimants' failure to be able to meet the retainer issues set out in the points of dispute. Whilst this might lead to an order for costs in the defendants' favour, the defendant say that it should be weighed in the balance when making no order as to costs.

7. Furthermore, following the adjournment, the claimants produced a 10 page witness statement and an electronic bundle of more than 3,000 pages in order to deal with, the

defendants contend, the shortcomings of the evidence before the court at the first hearing. The defendants say that this was "surely overkill" and as such are not costs that should be allowed between the parties.

8. This is the extent of the defendants' argument regarding why they should not pay the costs of the proceedings in the usual way. The submissions regarding "overkill" are plainly matters going towards the quantum of costs rather than the incidence of them.

9. The first argument, regarding the adjournment, has more weight to it but it can only relate to the costs of that adjourned hearing rather than the proceedings as a whole. I reserved the costs of that adjournment and that is a clear indication to me that I was not certain at the time as to who was at fault for the hearing having to be adjourned. That uncertainty seemed to stem from the relatively limited documentation put forward by the paying party regarding the existence of a fixed fee, but which could not be answered by the claimants, notwithstanding their full files seemingly being in the court and, in particular, the fact that there was some question about the hourly rate terms within the documentation that I had seen.

10. At the next hearing, I found in favour of the claimants in respect of the retainer issues. Nevertheless, I think there is some weight in the defendants' argument on this point and I note that the claimants' submissions seek to concentrate on settlement negotiations around the time of the first hearing rather than the cause of the adjournment.

11. From the correspondence (and the submissions on the day) it is apparent to me that the claimants thought that the case would settle upon their offer to accept a further £25,000 in addition to the £55,000 which had been ordered on account of costs. That was a reasonable assumption based on the sum actually allowed, but it is not, in my view, sufficient to justify being unable to deal with retainer issues at the first hearing. It is plain from the numerous pieces of correspondence in the bundle I have been sent that negotiations were protracted and there was no guarantee that the case would settle prior to the hearing.

12. In these circumstances, I take the view that the defendants should not have to pay for the costs of the attendance on the day which I am defining as counsel's brief fees and the attendance times of the solicitor and costs lawyer on the day, not the time spent beforehand.

13. Strictly, Mr Steynor's submissions do not contend for the claimants to pay the defendants' costs of the day. I accept that this is on the basis that such costs would be subsumed in a "no costs" order for the entire proceedings. But, in any event, I do not think that I should be ordering the claimants to pay the defendants' costs of that hearing. I reserved them at the time which, as I have indicated, means to me that I did not think the issue was clear cut. The end result is that the claimants have recovered more than they offered to accept prior to the first hearing and I think that offer is sufficient to protect the claimants from paying the defendants' costs of the first day.

14. However, the claimants' offer is not, in my view, sufficient to make the order for costs (excluding the first day) one to be assessed on the indemnity basis. The offer could have been made via Part 36 which would almost inevitably have resulted in an indemnity basis order in accordance with CPR 36.17, but it was not couched in those

terms. Instead, the claimants have to show that the defendants' conduct was "out of the norm" to obtain an indemnity basis order. There is only a single paragraph in the claimants' submissions on this point and it refers solely to the defendants' conduct in relation to negotiations and offers.

15. There is no amplification of this point and, in my view, it clearly cannot be sufficient for an indemnity basis order for a party simply to point to the opponents' rejection of an offer which, as it turns out, the opponents would have been better off accepting.

16. In any event, I have looked at the correspondence and I do not see anything outside the norm in terms of the positions taken which would justify an indemnity basis order.

17. To sum up, I award the claimants their costs of the detailed assessment proceedings on the standard basis save for the costs of the hearing on 25 May 2023.

Quantification of the claimants' costs

18. I remind myself that this is a summary assessment of the claimants' costs rather than a detailed assessment. The claimants' submissions decry the detail of the defendants' submissions as being an attempt to deal with the claimants' costs in a quasi detailed assessment fashion. I do not think that description is apt. The submissions are in writing and I have found it helpful for the defendants to set out their concerns with the costs claimed section by section. It has enabled the claimants to respond in a logical fashion as well.

19. I am going to make reference to the schedule which comes to the figure of £46,303.64 rather than the updated schedule which the defendants have inevitably not had the chance to cover in their submissions. [I have considered the additional costs at the end of this decision.

20. The sum of £46,303.64 can be broken down into the following constituent elements:

    (i) £2,698.20 - communications with the clients and others

    (ii) £5,290.40 - attendances at the hearings

    (iii) £8,118.60 - time spent on 'documents'

    (iv) £21,150.00 - counsel's fees

    (v) £1,595.00 – disbursements

    (vi) £7,451.44 - VAT

21. I bear in mind the procedural history in this case. The detailed assessment hearings and the written judgments are set out in the first two paragraphs of this decision. There was also a video directions hearing on 6 February 2023 given the wide ranging impact that some of the points of dispute might have had on the detailed assessment hearing. In particular, there was a challenge to the entitlement of the claimants to have commenced detailed assessment proceedings at all. The reasonable and proportionate costs to be allowed need to bear in mind the complexity of the issues raised.

22. This procedural history would undoubtedly have increased the communications (or 'attendances' as they are described in the N260) between the claimants and their solicitors as well as communications with third parties such as counsel and the court. I do not think the amount of time claimed for keeping the claimants informed of these proceedings appears unreasonable nor does the involvement with the opponents (not actually challenged) or third parties. The rates claimed throughout the schedule are those allowed in the detailed assessment and so are not challenged. I allow all of the time claimed in respect of category (i).

23. In respect of category (ii), I have disallowed the solicitor and costs lawyer's time for one of the two hearings. The times claimed are not challenged for the second hearing and so I allow half of the fees claimed for this category i.e. £2,645.20.

24. The documents time always excites considerable argument. The first entry does appear to coincide with the signing of the bill as the defendants effectively suggest. The time claimed for drafting points of dispute is unremarkable and much of the following work is not challenged (rightly in my view) until the witness statement of Mr Gill and the electronic bundling time is reached. In my view, little of this time should be recoverable. I asked for documents at the first hearing which would demonstrate payments by the claimants which would then negative the possibility of a fixed fee. They were not forthcoming at the hearing, perhaps not too surprisingly, but I had expected them to be produced before the next hearing. I did not expect a lengthy witness statement from Mr Gill which, in any event, dealt with matters in a rather roundabout fashion.

25. This witness statement was an attempt to overcome the shortcomings in the evidence before the court on the retainer issue. In a similar way, the decision to produce an electronic file of papers rather than the paper version was an attempt to overcome the difficulty in finding any documents in those paper files. Considerable time has been claimed (6 hours) for sorting out the paper files prior to the first hearing. I do not doubt that time was spent but it does cast a considerable shadow over the state of the files before that work was undertaken since they were not at all user-friendly after the remedial time had been spent.

26. Similarly, I do not doubt that at least 20 hours was spent in creating the electronic bundle since it is a time-consuming activity. But, having decided to use the paper files originally, and in the absence of any direction from the court that an electronic file was required, the time spent creating that file has to be considered as something to be laid at the claimants' door.

27. Bearing these matters in mind, I allow 3 hours of Mr Gill's time and 20 hours for Mr Richards. By my calculations this amounts to a sum of £3,360 for category (iii).

28. In respect of Mr Nicol's fees (category (iv)), I think the brief fees for the directions hearing and the hearing on 13 June are high but not, by any means, as high as the defendants' challenges would suggest. I allow £1,750 and £5,000 respectively.

29. I have disallowed the fee for the hearing on 25 May already and that just leaves the fee in respect of Mr Gill's witness statement. The defendants offer £1,000 (at most) if any fee is to be allowed. Having considered Mr Gill's witness statement again for the purposes of this assessment, I am persuaded that some input by counsel was

reasonable but I do not think it ought to have been all that lengthy and I allow the figure of £1,000.

30. Categories (v) and (vi) can be dealt with shortly. The court fee for the detailed assessment hearing has not been allowed in the bill itself and is recoverable here. VAT is not challenged but it plainly has to be recalculated to reflect the profit costs and counsel's fees allowed. I have done so in the following table:

(i) £2,698.20

(ii) £2,645.20

(iii) £3,360.00

(iv) £7,750.00

(v) £1,595.00

(vi) £3,290.68 – VAT on categories (i) to (iv)

TOTAL = £21,339.08

31. In the light of these figures, I do not think that it is appropriate essentially to award the claimants further costs in respect of these written submissions. The schedule has been reduced significantly, although defended in its entirety and, indeed increased by over £1,800 in the process. I consider that the sum that I have allowed is both reasonable and proportionate having regard to the factors in Part 44 and especially those in CPR 44.3(5).

32. Finally, a novel point is raised in relation to interest. The claimants are entitled to interest at 8% in accordance with the Judgment Act. The defendants say that the claimants have had the benefit of other monies belonging to the defendants which has (or could have) been invested in a deposit account to gather interest. As such no interest should be ordered.

33. I do not need to make an order because the Act provides for the entitlement to interest. My order would be a limitation on that statutory entitlement. My understanding is that I can disallow interest for certain periods but cannot alter the rate post-judgment. Interest allow pre-judgment is a different matter. But in any event, I do not propose to make any order in respect of interest. The defendants' entitlement to offset interest obtained by the claimants, if it is in dispute, is a matter to be taken back to the County Court. There may be any number of factual findings required which are outside the remit of a detailed assessment hearing.

34. I have circulated this judgment in its final version rather than in draft since the submissions have been made on paper. In the event that a hearing is thought to be required by either party, I will consider any such representations and give directions accordingly.