Case No: CL1801471

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London WC2A 2LL

Date: 08/05/2019

Before :

MASTER LEONARD

- -

Between :

Mr Norman Allen	**Claimant**
- and -	
Brethertons LLP	**Defendant**

- -
- -

Erica Bedford (instructed by **Checkmylegalfees.com**) for the **Claimant**
Fred Robbins (instructed by **Civil and Commercial Costs Lawyers Ltd**) for the **Defendant**

Hearing date: 15 January 2019

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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.

.....

MASTER LEONARD

Master Leonard:

1. I am assessing the costs of the successful Claimant in an application for delivery of a final statute bill under the Solicitors Act 1974.

2. The assessment was listed, in the usual way, for a short (30 minute) summary assessment appointment but was not possible to complete the summary assessment due to a particular point raised by the Defendant.

3. Briefly, the point is this. As will be evident from my judgment on the substantive issues dated 2 October 2018, the person with effective conduct of the Claimant's application has been Ms Kerry-Anne Moore, a Costs Lawyer employed by Checkmylegalfees.com. The Defendant refers me to guidance published by the Costs Lawyer Standards Board ("CLSB") as to the conduct by Costs Lawyers of "reserved legal activities" (as defined by the Legal Services Act 2007).

4. That guidance emphasises that the CLSB authorises and regulates individual costs lawyers, not authorised entities or licensed alternative business structures: and in consequence, that a Costs Lawyer cannot delegate reserved legal activities such as the exercise of a right of audience or the conduct of litigation.

5. In this particular case, Ms Moore (although she has quite evidently undertaken the bulk of the work) has, according to the Claimant's N260 costs schedule, been assisted by Mark Carlisle and Leanne O'Gorman, both described in the schedule as costs draftsmen rather than Costs Lawyers, and by Jamie Bedford, a litigation executive without professional qualifications.

6. It is not in dispute that Ms Moore is, for the purposes of these proceedings, an authorised person with the right, under the provisions of the 2007 Act, to conduct litigation and to exercise a right of audience. The Defendant says however that as she is unable to delegate either a right of audience or the conduct of litigation to others, the Claimant cannot recover the cost of any of her colleagues' work.

7. These (heavily edited, to eliminate a substantial body of irrelevant material) are the provisions of the 2007 Act.

Sections 12, 13 and 19

8. Section 12 reads:

> "(1) In this Act *"reserved legal activity"* means–
>
> (a) the exercise of a right of audience;
>
> (b) the conduct of litigation…
>
> (2) Schedule 2 makes provision about what constitutes each of those activities.
>
> (3) In this Act *"legal activity"* means–
>
> (a) an activity which is a reserved legal activity…

(b) any other activity which consists of one or both of the following–

(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;

(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes…

(5) For the purposes of subsection (3) *"legal dispute"* includes a dispute as to any matter of fact the resolution of which is relevant to determining the nature of any person's legal rights or liabilities."

9. Section 13:

"(1) The question whether a person is entitled to carry on an activity which is a reserved legal activity is to be determined solely in accordance with the provisions of this Act.

(2) A person is entitled to carry on an activity ("the relevant activity") which is a reserved legal activity where–

(a) the person is an authorised person in relation to the relevant activity, or

(b) the person is an exempt person in relation to that activity.

10. Section 19:

"In this Act, "exempt person" , in relation to an activity ("the relevant activity") which is a reserved legal activity, means a person who, for the purposes of carrying on the relevant activity, is an exempt person by virtue of… Schedule 3..."

Schedule 2: Reserved Legal Activities

11. Schedule 2 to the 2007 Act defines reserved legal activities. Paragraph 3 deals with right of audience:

"(1) A "*right of audience*" means the right to appear before and address a court, including the right to call and examine witnesses."

12. Paragraph 4 deals with the conduct of litigation:

"(1) The "conduct of litigation" means–

(a) the issuing of proceedings before any court in England and Wales,

(b) the commencement, prosecution and defence of such proceedings, and

> (c) the performance of any ancillary functions in relation to such proceedings (such as entering appearances to actions)..."

13. Paragraph 5 deals with "Reserved instrument activities":

> "(1) "Reserved instrument activities" means–
>
> (a) preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002 (c. 9);
>
> (b) making an application or lodging a document for registration under that Act;
>
> (c) preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales.

Schedule 3: Exempt Persons

14. Schedule 3 to the 2007 Act identifies exempt persons in relation to reserved activities. The definition with regard to rights of audience is at paragraph 1:

> "(1) This paragraph applies to determine whether a person is an exempt person for the purpose of exercising a right of audience before a court in relation to any proceedings (subject to paragraph 7).
>
> (2) The person is exempt if the person–
>
> (a) is not an authorised person in relation to that activity, but
>
> (b) has a right of audience granted by that court in relation to those proceedings….

15. The definition with regard to the conduct of litigation is at paragraph 2:

> "(1) This paragraph applies to determine whether a person is an exempt person for the purpose of carrying on any activity which constitutes the conduct of litigation in relation to any proceedings (subject to paragraph 7).
>
> (2) The person is exempt if the person–
>
> (a) is not an authorised person in relation to that activity, but
>
> (b) has a right to conduct litigation granted by a court in relation to those proceedings…."

16. The definition with regard to Reserved instrument activities is at paragraph 3:

> "(1) This paragraph applies to determine whether a person is an exempt person for the purpose of carrying on any activity which constitutes reserved instrument activities...

> (3) The person ("E") is exempt if–
>
> (a) E is an individual,
>
> (b) E carries on the activity at the direction and under the supervision of another individual ("P"),
>
> (c) when E does so, P and E are connected, and
>
> (d) P is entitled to carry on the activity…"

Agassi v Robinson and *Kynaston v Carroll*

17. Ms Bedford for the Claimant refers me to *Agassi v Robinson (Inspector of Taxes) (No 2)* [2005] EWCA Civil 1507, in which the Court of Appeal considered the nature of "ancillary functions in relation to proceedings". This was in the context of the Courts and Legal Services Act 1990, but the relevant wording was (almost) the same. Dyson LJ, giving the judgment of the court, found at paragraph 56:

> The word "ancillary" indicates that it is not all functions in relation to proceedings that are comprised in the "right to conduct litigation". The usual meaning of "ancillary" is "subordinate". A clue to what was intended lies in the words in brackets "(such as entering appearances to actions)". These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation…But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition…even if… correspondence with the opposing party is in a general sense "an integral part of the conduct of litigation", that does not make it an "ancillary function…"

18. It follows that the giving of legal advice, the conduct of correspondence with an opposing party and the performance of administrative support services ancillary to the conduct of litigation but not amounting to formal steps fall outside the definition of "ancillary functions" in relation to proceedings. They constitute "legal activity" within the meaning of the 2007 Act, but not "reserved legal activity."

19. Ms Bedford also refers me to *Kynaston v Carroll* [2011] EWHC 2179 (QB) in which Burnett J found that the cost of the conduct of costs proceedings (including advocacy) undertaken by an employee of a limited company, not personally authorised but working under the supervision of an authorised Costs Lawyer, was recoverable. At paragraph 6 of his judgment, he observed that such circumstances were "amply covered" by Schedule 3 to the 2007 Act; that such practice is commonplace; and that it has always been understood to be covered by the schedule.

20. That judgment, as Ms Bedford points out, concerned permission to appeal and as such is not authoritative, but it is highly persuasive. It also demonstrates judicial reluctance to entertain arid technical objections to the recovery of the cost of work

done, in the normal course of business, under the supervision of an authorised person like Ms Moore.

21. There may be a distinction to be drawn, for these purposes, between an employee and (for example) an independent unauthorised costs practitioner and I do not have evidence about the precise employment status of each member of Ms Moore's team, but in the light of the conclusions to which I have come, that is not needed.

Conclusions

22. Ms Bedford makes the following submissions, with all of which I agree. First, the Defendant's submissions on "delegation" miss the point. The Claimant's case is that the work undertaken by Ms Moore's team for the most part did not constitute reserved activity, and in so far as it did, the relevant persons undertook it as exempt persons, as defined by the 2007 Act.

23. The 2007 Act, as Ms Bedford says, creates a narrow class of reserved legal activities. If work falling within that narrow class is carried out by an authorised person or an exempt person, such work is undertaken lawfully. If work falls to be considered merely a "legal activity" as opposed to a reserved legal activity, then it is undertaken lawfully, whoever undertakes it.

24. It follows that the appropriate questions for me are whether the tasks undertaken by Mr Carlisle, Ms O'Gorman and Mr Bedford were reserved legal activities, or merely legal activities; if they were reserved legal activities, whether the person undertaking them was an authorised person; and if not, whether that person was an exempt person.

25. Ms O'Gorman's only role in this litigation has been to prepare a bill of costs. Ms Bedford submits that the preparation of that document amounts to the preparation of a reserved instrument, and therefore is a reserved activity; it was however undertaken under the supervision and instruction of Ms Moore, thus making Ms O'Gorman an exempt person, and the cost of her work recoverable.

26. Assuming that a bill of costs is a reserved instrument, I agree with Ms Bedford. Ms Moore has been overseeing this matter, including the task of preparing the N260. Ms Bedford confirms that (contrary to the impression given by the N260 itself, corrected in submissions) Ms Moore checked and signed it once it was complete.

27. The point is however academic. As Mr Robbins for the Defendant points out, I did not order detailed assessment. Work on a bill of costs was premature and has been disallowed.

28. Mr Bedford performed a fairly typical grade D supporting role, preparing indices, bundles, etc. None of that (bearing in mind the guidance of the Court of Appeal) constitutes a reserved activity. I have however disallowed most of his time: excluding a little correspondence and telephone time, it seems to me to be largely administrative in nature.

29. Mr Carlisle has played a limited role in these proceedings. He appears to have played a broad advisory role from the early stages, offering some support services,

and he has also engaged in correspondence. Again, in my view, none of this constitutes reserved activity but again, I have disallowed much of such time as duplicative.

30. Mr Carlisle also prepared for the short costs hearing before me on 15 January, and addressed me on behalf of the Claimant. He has appeared before me a number of times. I am well aware of his qualifications and his experience. The issue of his right to appear as an advocate on costs hearings has come up before. His case is probably on all fours with *Kynaston v Carroll* but it is in any event my practice, for the avoidance of doubt, to grant him a right of audience. That was the basis upon which I heard him on 15 January. He was, for the purposes of that hearing, an exempt person, and his costs of preparation for and attending that hearing are, insofar as reasonable and proportionate, recoverable.

Quantum

31. I have received written submissions on the quantum of costs, only two of which need to be addressed directly in writing. First, the Defendant complains that the Claimant's costs, as presented for summary assessment, exceed by a substantial degree a schedule filed before the hearing of the substantive application on 28 June 2018. I am invited to take this as evidence that the costs now claimed are unreasonable in amount and disproportionate.

32. I do not. Ms Moore makes the point that the first schedule was prepared in something of a hurry, with various items being omitted. The second schedule picked up those omitted points and incorporates additional work in the intervening period.

33. I am not prepared to conclude, by virtue even of a substantial increase in costs between schedules prepared months apart, that the costs finally claimed are in themselves unreasonable or disproportionate. The matter has evolved. Reasonableness and proportionality have been judged by reference to all of the items in the schedule, considered individually and collectively.

34. The second point is proportionality generally. The Defendant proposes a reasonable and proportionate figure of £2,400, which is in my view unrealistic.

35. The draft of this judgment was accompanied by a marked copy of the Claimant's N260 with my calculation of the amounts allowed. I make it £6,410.80 including VAT (base costs being £5,351.50) and I understand that to be agreed. A figure in that region does not in my view come close to being disproportionate.

36. In saying that I bear in mind (CPR 44.4(1)) all the circumstances of the case and the criteria at CPR 44.3. It has been necessary for me, in a reserved judgement which attracted a degree of interest among costs professionals, to identify significant shortcomings in the Defendant's conduct both toward its former client and his properly authorised Costs Lawyer. The application itself was hard fought, the Defendant taking a robust stance and defending its position with sophisticated arguments which I ultimately found to be insupportable. The Claimant was given no choice but to see the matter through. Much trouble and expense could have been avoided had the Defendant delivered a bill when it was asked to do so.

37. The Defendant's submissions on the costs of the application themselves furnish an example of the robust approach to which I refer. On proper analysis, they have no real merit. To accept them would have been to render Ms Moore's working life, in practical terms, impossible. Their effect was to turn a simple 30 minute summary assessment into yet another round of submissions, with all the attendant, avoidable cost.