



Case No: B39YJ011
SCCO No: PN1904055

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

The Royal Courts of Justice, Strand
London, WC2A 2LL

Date: 19/03/2020



Before :

MASTER NAGALINGAM

Between :

Lisa Dempsey
- and -
Judkins Solicitors

Claimant

Defendant

Mr Robin Dunne (instructed by **Checkmylegalfees.com**) for the **Claimant**
Mr Robert Marven (instructed by **Judkins Solicitors**) for the **Defendant**

Hearing dates: 3 October 2019

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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MASTER NAGALINGAM

Master Nagalingam :

1. This hearing was originally listed following the Claimant's application pursuant to CPR 67.2(1)(b) that the Defendants do pay to the Claimant such monies as are due to the Claimant under the cash account in the matter of Lisa Dempsey v Drs John and Michael Mew.
2. The Claimant's Part 8 Claim Form sets out the following:
 - "1. The Claimant instructed the Defendant firm of solicitors to represent her in a claim for damages arising out of a claim for dental negligence, heard in the Central London County Court. The claim was conducted pursuant to a Conditional Fee Agreement dated 1st August 2014 and a mediated settlement followed on the 18th December 2017 for the payment to the Claimant of £140,000 inclusive of costs, in addition to £17,500 damages and £6,100 costs, already paid out.*
 - 2. The Defendant purported to deliver a Statute Bill on the 14th November 2018 in the sum of £181,009.43 and then another version of the same Bill on 21st December 2018 in the sum of £177,846.44 with the same bill number, although it had a different date, total and the disbursements figure was lower by £2,860.83 plus VAT.*
 - 3. The Defendant has delivered a final statute bill of £102,333.32 on 15th January 2019. This bill was accepted by the Claimant. The Defendant's own Cash Account (which the Claimant disputes) produces a figure of £21,676.08. The Claimant's version of the Cash Account (which the Defendant disputes) produces a figure of £38,776.70.*
 - 4. The Defendant has paid to the Claimant a lower sum than either of those, on grounds that the Claimant says are misconceived. The Court is requested to list for a short appointment to determine whether any further sum is payable and, if so, to order payment."*
3. Shortly before the hearing to determine whether any further sum was payable to the Claimant an application was submitted by the Defendant seeking:

"A declaration that the statute bill in this matter is dated 21/12/2018. Alternatively permission to substitute the bill dated 21/12/2018 in place of the bill dated 18/01/2018."
4. As is clear from the statement attached to the application, whilst reference is made to a bill dated "18/01/2018" the application in fact relates to a bill dated 14 January 2018.
5. The Claimant's position is set out in the witness statement of Mark Carlisle dated 19 June 2019 which I have summarised below.
6. The Claimant acknowledges they have received a sum from the Defendant by way of a final payment following a successfully mediated dental negligence claim. However, the parties dispute the final sum due such that the Claimant seeks an order for immediate payment of a further sum (said to be admitted by the Defendant) and a determination of whether any monies beyond that further sum are additionally due.

7. Mr Carlisle's statement directs me to a bill dated 14 November 2018 in the sum of £181,009.53 inclusive of profit costs, disbursements and VAT, and before credit was given for total monies received of £66,694.50.
8. His statement then directs me to a further bill dated 21 December 2018. This bill is identical in terms of time, profit cost and success fee but shows a disbursements total which is £2,860.83 *less* than the previous bill which in turn reduces the VAT total by £302.16. I have not seen the covering correspondence which was sent with the 14 November 2018 bill but the e-mail attaching the 21 December 2018 bill states "*Please find attached your statutory bill respect of the above matter*".
9. The statement then directs me to an e-mail from the Defendant dated 15 January 2019 (timed at 2.50pm) which encloses a consent order vacating a hearing listed for the following day and states "*I also attach statute bill with supporting statement*".
10. The statute bill attached is dated 14 January 2018 and shows the same time, profit costs and success fee detail as in the previous two bills but additionally states "*Profit Costs limited to £49,391.66 as agreed*". The listed disbursements on the 14 January 2018 bill mirror those on the 14 November 2018 bill save that the 14 January 2018 bill additionally includes the fees of £9,559.72 plus VAT for Christopher Edwards, Counsel, under a section entitled 'Disbursements unpaid'. The bill dated 21 December 2018 excludes any costs relating to DW Legal LLP.
11. The Claimant's position is that the statute bill sent on 15 January 2019 is the correct final statute bill. This argument relies in part on an email sent from the Claimant to the Defendant on 11 January 2019 in which the Claimant observes "*...we have two bills from your client, both of which purport to be the statute bill, same invoice number, but with two different totals and two different dates. Which one is the statute bill?*"
12. I note there later followed a telephone call between Mr Carlisle for the Claimant and Mr Wallis for the Defendant at or around 9.24am on 15 January 2019 in which Mr Carlisle's telephone attendance note records "*Discussing the situation – it finally dawned on him why there was an issue – he would get a consent order over to us setting out (a) which bill was the bill, (b) the date of delivery, and (c) agreeing to pay costs.*"
13. What followed later that same day (15 January 2019) was an e-mail from the Defendant which referenced the call with Mr Wallis and enclosed both a consent order (which dealt with delivery of a bill and costs following an application for delivery of a statute bill) and "*statute bill with supporting statement*".
14. The Claimant accepted the bill sent under cover of correspondence dated 15 January 2019 and elected not to seek assessment under the Solicitors Act 1974. Had either of the earlier bills been pursued by the Defendant then the Claimant says they would have sought assessment.
15. Whilst the listed hearing date was initially intended to determine whether any further sum is payable to the Claimant and if so to order such payment, that question has been superseded by a factual dispute as to which of at least three bills delivered to the Claimant is the final statute bill.

16. This judgment therefore deals with the Defendant's application, with any further matters relating to costs and further sums due to be dealt with at a further hearing failing agreement between the parties as to the same.
17. The Defendant's application seeks a declaration that the statute bill in this matter is dated 21/12/2018, or alternatively permission to substitute the bill dated 21/12/2018 in place of the bill dated 18/01/2018 (the reference to 18/01/2018 in fact being in error because the statement attached to the application makes clear that the Defendant wishes to replace the bill dated 14 January 2018).
18. I have been directed to an e-mail from Counsel in the main action to the Defendant, dated 19 December 2017. I am told the Claimant received a copy of this e-mail in March 2018. The e-mail describes what was agreed at a mediation which took place the previous day.
19. Firstly, this confirms that payments of £17,500 damages and £6,100 had already been paid, and that an agreement had been achieved such that further sums of £140,000 would be paid. This further sum of £140,000 was to be spilt as follows:

“The client will get £40,000 damages

£100,000 will go to extinguish any liability for legal costs. No success fee or other deductions will be paid in addition to this sum.

There is an outstanding balance of £3,838 from interim payments which will be paid to the client as damages. No success fee or other deductions will come from this balance.”
20. The e-mail explains how the £100,000 for costs will be distributed. This includes “£59,270 inc vat Judkins' profit costs (including success fee and any shortfall which could be recovered against the client).” The e-mail then proceeds to explain how the remaining £40,730 is to be distributed, inclusive of VAT where applicable, to discharge any remaining disbursements including fees of counsel and experts' fees. However, the e-mail also recognises monies to be repaid to the Claimant to account for experts' fees she had either personally incurred or which had been paid out of interim damages payments.
21. Counsel in the main action had, the day after the mediation, calculated that the Claimant was due to receive payments totalling £54,338 to account for damages, repayment of disbursements the Claimant had incurred (personally and from interim damages) and the available balance of interim payments. The only reported element of inaccuracy (at the time) was a recognition that the Claimant had paid out 7,000 euros for one expert's fee but that Counsel had used a figure of £6,000 sterling for the purpose of calculating a sum as he did not know the exchange rate at the time the fee was incurred.
22. Mr Marven submits that the Defendant's stance is set out in detail in an e-mail to the Claimant dated 10 June 2019 but may be summarised as follows:
 1. The bill dated 21 December 2018 is the statute bill.

2. If the Defendant is wrong about that then the 14 January 2018 bill should be read as relating to only the £140,000 element of the mediation agreement and Tomlin Order and read in conjunction with the e-mail between solicitor and counsel as to the agreed terms following mediation.
3. If the Defendant is wrong about that then the Court should exercise its discretion to give permission to substitute the bill dated 14 January 2018 with the bill dated 21 December 2018.
23. I have considered the submissions of Mr Marven and Mr Dunne, and reviewed the various documents I was taken to during the hearing. Having undertaken that exercise I observe as follows.
24. Mr Judkins for the Defendant has filed a witness statement in support of the Defendant's application. The statement is dated 30 September 2019 and at paragraph 10 of the same states:

"In order to help Miss Dempsey reach a settlement I agreed to reduce my firm's fees considerably and fixed my fees at £49,391.66, exclusive of VAT and inclusive of the CFA 50% uplift."
25. That statement is consistent with the contemporaneous e-mail of Counsel sent to the Defendant the day after the mediation.
26. The 14 January 2018 statute bill states "*Profit Costs limited to £49,391.66 as agreed*". The actual profit costs incurred were £41,421.00. VAT on £49,391.66 is claimed in the bill. I have not seen nor been taken to any reference to the success fee being "waived". Indeed, given Mr Judkins' witness evidence and contemporaneous note of Counsel, I am satisfied that the reference to "*Profit Costs limited to £49,391.66 as agreed*" may be read as to include any element of a success fee.
27. I also note the inclusion of at least six disbursements which post-date 14 January 2018 which I consider supports Mr Dunne's submission that rather than the 14 January 2018 bill being sent in error, it was in fact sent (under cover of correspondence dated 15 January 2019) with a date error which is entirely different from the entire bill being sent out in error.
28. This conclusion is further strengthened by the fact that the unchanged claim for time and profit costs includes a period described within the bill as "*To our professional fees for period November 2016 to May 2018*", which demonstrates that the bill dated 14 January 2018 (sent under cover of correspondence dated 15 January 2019) also includes profit costs which post-dates 14 January 2018.
29. The bill dated 14 January 2018 also includes a reference to "*Profit costs limited to £49,391.66 as agreed*." If the bill dated 21 December 2018 is the correct version then it strikes me as being entirely inconsistent with Counsel's report of the mediation and Mr Judkins' witness evidence to have made no reference to the figure the client agreed they would be liable to their Solicitor for within that bill.
30. The disbursements across the bills dated 21 December 2018 and 14 January 2018 are identical, save that the 14 January 2018 bill (sent on 15 January 2019) includes

additional disbursements totalling £2,860.83 which is described as being “Paid” to DW Legal LLP for preparation of a costs breakdown (14 March 2016) and “*Preparing Precedent H & Advising on Defendant’s Precedent H*”.

31. Finally, I observe that the fees paid to Counsel are identical across the two bills, save that the bill dated 14 January 2018 (sent on 15 January 2019) includes a section entitled “Disbursements unpaid” beneath which are detailed counsel’s fees of £9,559.72 plus VAT. Given that the three items of paid counsel’s fees prior to this amendment totalled £5,988.33 plus VAT and counsel reported the basis of the sum agreed at mediation included an agreement to effectively pay counsel’s fees of £12,000 plus VAT, I again conclude it would be inconsistent to find that the bill dated 21 December 2018 is the final statute bill.
32. The Claimant originally made an application for delivery of a final statute bill which was due to be heard before Master Leonard on 16 January 2019. Had that hearing proceeded it is likely that an unless order would have been made for delivery of a final statute bill. In the event, the Defendant served bills on 21 December 2018 (bill dated 14 November 2018) and 7 January 2019 (bill dated 21 December 2018). Those bills were largely similar but varied in terms of the figure for disbursements, which in turn meant that the figures for VAT and the total differed. The overall difference amounted to £3,162.99. Further, the 14 November 2018 version made reference to giving credit for monies received to date whereas the 21 December 2018 version gave no such credit.
33. It is those differences between the first two bills delivered that created confusion. When the bill dated 14 November 2018 was delivered on 21 December 2018, the Claimant requested confirmation that they could treat the delivery date as being 21 December 2018 (rather than the date on the bill) and asked for a copy of an attached statement setting out monies received (which had not been previously attached but had been referred to by the Defendant).
34. That request, made by e-mail on 21 December 2018, arguably did not require re-delivery of the bill but rather clarification of the delivery date, and provision of the statement setting out monies received. Instead the Defendant wrote to the Claimant on 7 January 2019 “*Please see further copy bill with statement attached.*” There is no mention of any alteration to the bill. However, what purports to be a “*further copy*” of a bill the Claimant had already received but re-dated to reflect the actual delivery date, was in reality an entirely new bill.
35. The Claimant’s responded on 11 January 2019 as follows:

“Thank you for your email. The issue now is that we have two bills from your client, both of which purport to be the statute bill, same invoice number, but with two different totals and two different dates. Which one is the statute bill?”.
36. One would have expected a clear response, confirming which of the two bills sent was to be considered the final statute bill. That would have enabled the Claimant to either pay any balance due to her solicitors or take steps to challenge the fees charged if the Claimant so wished. On the Claimant’s evidence, had either of the first two bills been confirmed as the correct final statute bill, she would have taken steps to challenge the same.

37. There then followed a telephone conversation between the Claimant's and Defendant's legal representatives on the morning of 15 January 2019. The Defendant does not deny this conversation nor that it took place on 15 January 2019 but provides no attendance note of the same. The Claimant's note of this discussion refers to a conversation between the appointed Costs Lawyers for both parties and is set out below. The "him" and the "he" referred to is David Wallis, the Defendant's Costs Lawyer:

"Discussing the situation – it finally dawned on him why there was an issue – he would get a consent order over to us setting out (a) which bill was the bill, (b) date of delivery, and (c) agreeing to pay any costs."

38. On the afternoon of 15 January 2019 the Defendant wrote to the Claimant as follows:

"Further to your telephone conversation with our Mr Wallis please find enclosed consent order in respect of the hearing listed for tomorrow.

Please file at court and provide me with a signed copy.

I also attach statute bill with supporting statement."

39. I reject any argument that the Claimant had, through its conduct of receiving the second statute bill, consented to the first bill being substituted. The Claimant was not expecting a second statute bill. They were expecting clarification as to the agreed date of delivery of the first statute bill. When the second statute bill was received the Claimant, rather than simply seek to accept the same because it was for a lower amount, instead asked the Defendant to confirm which bill was the correct bill.
40. I do not accept that the bill dated 14 January 2018 was an incorrect statute bill attached by mistake. The Defendant was aware of a hearing listed for 16 January 2019 at which they were very likely to be ordered to deliver a statute bill with consequences for failure. If there was any error, it was in dating the bill 14 January 2018 rather than 14 January 2019.
41. Further, having read the bill dated 14 January 2018 in conjunction with the e-mail between Counsel and the Defendant the day after the mediation, I do not consider there is any basis on which to conclude that the bill dated 14 January 2018 relates solely to the £140,000 referred to at mediation. All versions of the bills sent to the Claimant cover solicitors' costs from September 2014 to May 2018. That clearly includes work relating to interim payments for both damages and costs, and the discharging of disbursements which were paid both out of those interim payments and personally by the Claimant, as well as the work in relation to mediation.
42. In my view the bill dated 14 January 2018 is the final statute bill.
43. Further, the bill dated 14 January 2018 bill does not read as relating to only the £140,000 element of the mediation agreement.
44. Having drawn those conclusions I am left to consider whether or not to permit the substitution of the bill dated 14 January 2018 with the bill dated 21 December 2018.

45. In that eventuality Mr Marven has sought to rely on *Bilkus v Stockler Brunton* (a firm) [2010] EWCA Civ 101 as an example of where the court may exercise its discretion to permit the substitution of a bill in circumstances of genuine mistake.
46. However, I do not agree that the index facts demonstrate a genuine mistake. Contrary to the submissions made on behalf of the Defendant I consider the bill dated 14 January 2018 to be consistent with the basis upon which an agreement was achieved at mediation, and as explained in the e-mail from Counsel to the Defendant sent the day after the mediation.
47. In so far that I have additionally been referred to *Polak and Another v Marchioness of Winchester* [1956] 1 WLR 818. The index circumstances are far removed from “*a chapter of accidents, of pressure in the office, of somebody who had already had a lot of work to do having this task thrust upon him, of a departure from what was apparently the usual routine of going to a costs specialist to have the bill drafted...*” and the further catalogue of errors that persuaded the Court of Appeal in *Polak*.
48. This is a case where, on the evidence presented, £6,100 was received by the Defendant on account of their costs relating to an application to set aside judgment in the underlying dental negligence claim. Additionally, and again prior to the mediation agreement, £17,500 was received by the Defendant on behalf of the Claimant for interim damages.
49. Page 19 of the exhibits to Mr Judkins’ statement is an e-mail from Mr Judkins to Mr Carlisle dated 1 February 2019. That e-mail refers to total payments on account received of £23,600 (coincidentally the sum total of £6,100 and £17,500). The e-mail goes on to state that “*These payments were used in the main to fund ongoing disbursements*”.
50. A further £140,000 was agreed at mediation. It is clear it was a further sum because in his e-mail to the Defendant dated 19 December 2017 Counsel states “*(this £140,000 is in addition to the £17,500 damages and £6,100 costs already paid)*”. In fact this information was in bold and underlined in the original e-mail, so as to extinguish any doubt as to the total amounts received from the Defendant in the dental negligence action, and as a pre-cursor to the subsequent explanation as to how the £140,000 further payment was to be broken down.
51. £40,000 of this sum was payable to the Claimant as damages. That left £100,000 to cover solicitors’ costs, Counsel’s fees and disbursements (some of which was to cover repayment to the Claimant for disbursements she had in part or full funded herself (whether from interim payments, as referred to above, or out of her own pocket)). Every penny is accounted for in the e-mail from Counsel to the Defendant dated 19 December 2017, with the only area of doubt relating to the euros to pounds sterling conversion rate for Professor Casey’s fees.
52. I do not consider the facts and circumstances of this case to even remotely resemble those in *Polak*, and in any event, given the evidence presented, I cannot see that the Defendant will be out of pocket as a result of this decision.
53. Accordingly, the Defendant’s application is refused on all grounds.

54. The hearing of the Claimant's Part 8 claim shall now be re-listed on the first available date, with a time estimate of 2 hours. The parties are invited to provide their dates of availability for the period from April to December 2020 and specifically provide confirmation as to whether or not the parties can accommodate attendance at the re-listed hearing by the means of 'Skype for Business'.
55. The parties shall liaise and attempt to agree liability for and the quantum of any costs relating to the Defendant's application. If no agreement is reached the parties are to write to the Court to request a telephone or Skype for Business hearing, or jointly request a decision on the papers regarding liability for and the quantum of the costs of the Defendant's application.