Case No: SC-2021-APP-000714

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 14/12/2021

Before:

COSTS JUDGE ROWLEY

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Between:

Lisa Jones	**Claimant**
- and -	
Richard Slade & Co Ltd	**Defendant**

- -
- -

Robin Dunne (instructed by **Clear Legal Limited**) for the **Claimant**
Benjamin Williams QC (instructed by **Richard Slade & Co Ltd**) for the **Defendant**

Hearing date: **8 October 2021**

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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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COSTS JUDGE ROWLEY

Costs Judge Rowley:

Introduction

1. On 4 March 2021 the claimant commenced Part 8 proceedings against the defendant in the Sheffield District Registry. The claimant seeks an assessment of a number of bills delivered in December 2020 in the sum of £22,090.01 under s70 Solicitors Act 1974. Amongst several alternatives, the claimant seeks an order under other provisions of the Solicitors Act for the setting aside of any agreement that is found to be either a contentious or noncontentious business agreement.

2. On 12 May 2021 a directions hearing took place before District Judge Bellamy. He agreed to transfer the proceedings to the Senior Courts Costs Office and having heard submissions from the party's Representatives, gave directions for preliminary issues to be determined in the following terms:

> "2b - The following matters shall be determined as preliminary issues:
>
> (i) the legal status of the Defendant's retainer; and
>
> (ii) the legal status and effect of the agreement recorded by an email exchange between the Claimant and Richard Slade on 10 June 2020."

3. The directions provided for Points of Claim and Points of Defence to be exchanged by the parties before witness statements were to be exchanged and a hearing for the preliminary issues to be listed. Having served Points of Defence to the Points of Claim served by the claimant, the defendant decided to issue an application dated 9 July 2021 seeking:

> "an order in the form attached striking out or staying point 2 of the Claimant's points of claim dated 26 May 2021 (pursuant to CPR rules 3.4(2) or 3.1(2)(f)) on the basis that it discloses no reasonable grounds for bringing that part of the Claimant's claim."

4. At paragraph 10 of the application notice, the defendant outlined its reasoning for the application in the following terms:

> "1. This is a claim for relief under Part III of the Solicitors Act 1974 ("the Act").
>
> 2. By point 2 of her points of claim dated 26 May 2021 the Claimant claims that the settlement agreement dated 10 June 2020 should be set aside on the grounds of undue influence or economic duress.
>
> 3. The remedy sought is not one that the court has jurisdiction to give in proceedings under the Act and that part of the Claimant's claim should be struck out or stayed accordingly."

5. The application notice sought a hearing time of two hours and that application took place before me on 8 October 2021 with Benjamin Williams QC appearing on behalf of the applicant defendant and Robin Dunne of counsel appearing on behalf of the claimant respondent. This is my reserved judgement following their submissions.

Background & Submissions

6. As Mr Williams' skeleton argument says, a lengthy exposition of the background is not required for the purposes of the application. The claimant and her siblings instructed the defendant in respect of a contested will. Written retainer documents were provided at the outset and the initial work appears to have been done on a fixed fee. Thereafter, the defendant says that the work was to be charged on a conventional pay-as-you-go retainer whereas the claimant says that a conditional fee agreement was in place. It was not reduced to writing and as such, the claimant says it is unenforceable against her.

7. This set of circumstances forms the background to the first preliminary point concerning the legal status of the defendant's retainer. The parties are content for that point to be ventilated at a preliminary issues hearing and the defendant's application has no direct effect upon it.

8. The claimant's claim against her father's estate was successfully mediated on 18 October 2019. Amongst the settlement terms was a contribution of £13,750 towards the costs incurred by the claimant and one of her siblings. The invoice originally received by the claimant from the defendant provoked a dispute and that was ultimately agreed on 10 June 2021 on the basis of a payment of £15,000 plus VAT inclusive of the sum received from the estate. That left a balance of £4,250 which was deducted by the defendant from sums held on account.

9. The circumstances of this agreement form the basis of the second preliminary point. I have described it in the barest terms possible in the preceding paragraph to avoid describing the events in any term which might be thought by either party to prejudice its position. Paragraphs 1(d) to (f) of the Points of Dispute summarises the parties' positions on this point (from the defendant's viewpoint) as follows:

> "(d) the compromise agreement precludes any detailed assessment in this case, as the defendant's entitlement to payment results from the compromise agreement, and not a bill of costs amenable to statutory assessment.
>
> (e) The claimant does not dispute the compromise agreement in the instant proceedings, but contends (by point 2 of her points of claim) that it should be set aside on grounds of undue influence or economic duress.
>
> (f) While any such claim would be denied and defended on the merits, that is in any event misconceived (indeed demurrable) contention in these proceedings, the setting aside of the compromise agreement (whether on the asserted or any grounds) not being a remedy which is available in statutory detailed assessment proceedings."

10. Mr Dunne, in his oral submissions, accepted that the phrase "alleged agreement" used by the claimant did not suggest that the agreement had not been reached. It was used as a phrase to connote that the agreement ought not to be binding on the claimant. The claimant's argument is that, in a fiduciary relationship of solicitor and client, undue influence can be demonstrated by the solicitor failing to inform the client of matters about which she should have been informed. The essence of the case is that the claimant was induced to compromise at the mediation on a false basis.

11. The claimant also says that, properly analysed, the agreement is not a conclusive settlement which ousts the jurisdiction of the court but is one either for a delivery of a statute bill for a particular sum or is, in fact, a Contentious Business Agreement ("CBA"). The former agreement would not prevent the claimant's aim of having the defendant's bill assessed. The latter could be set aside if the claimant was able to establish that it was not fair and reasonable and that was an alternative contemplated in the Part 8 Claim Form. Some of the matters referred to in seeking to set aside the agreement in the first place could also be utilised in considering the fairness of the CBA if the agreement is held to be a valid CBA.

12. Mr Williams' oral submissions sought to categorise the claimant's case as evolving significantly in response to the defendant's application. He said that matters such as the possibility that the compromise agreement could be said to be a CBA were not foreshadowed at all in point 2 of the points of claim. In Mr Williams' submission, it appeared that the claimant was seeking to recast her claim in the light of the defendant's application. The defendant did not necessarily object to a recasting of the claim provided it then involved matters on which this court could deal with the case under Solicitors Act proceedings. As it is however, Mr Williams disputed the appropriateness of a claim for rescission of a contract of compromise to be dealt with in such proceedings. It could be stayed pending determination of the other preliminary issue, but it seemed fairly clear that the defendant's preference would be for the point of claim to be struck out and for any such claim to be brought elsewhere.

13. In this context, Mr Williams suggested that rescission of contracts would usually be brought in the County Court and dealt with by a circuit judge unless the value was sufficiently high for it to be brought in the High Court. He referred to the cases of Stephenson Harwood v Geneva Trust Co [2019] EWHC 1440 and Nicholas Drukker & Co v Pridie Brewster & Co [2006] Costs LR 439 where High Court judges had expressed views about the scope of proceedings in the SCCO rather than in the Chancery Division. In his written submissions, Mr Williams indicated that these cases did not purport to identify an exact dividing line but did suggest that some types of claim are not suitable for the abbreviated procedure under section 70 compared with a conventional trial. In Mr Williams' submission contested allegations of undue influence or economic duress are obviously not matters for Part 8 proceedings.

Discussion & Decision

14. It is commonplace for challenges by clients to their former solicitors' bills of costs to traverse a fine line between complaints about matters such as a failure to adhere to estimates on the one hand and being professionally negligent on the other. Costs judges are regularly told that the matters in issue would be better served by being dealt with via Part 7 proceedings in other courts. I agree with Mr Williams that the cases referred to do not attempt to delineate an exact line save, I would suggest, in respect of matters

that clearly concern professional negligence. Where such matters exist, cases involving Solicitors Act proceedings are conventionally stayed until those professional negligence proceedings are concluded. Other than for such cases, however, I would respectfully suggest that some of the dicta in the cited cases potentially muddies the waters rather than clarifies them. For example, in the Drukker case, the claimant had pursued the pre-action protocol in relation to professional negligence but then not actually pursued any court proceedings. Instead, "wholesale" allegations of professional negligence were put in the points of dispute in the Solicitors Act proceedings and in the circumstances the costs judge was correct to decline to deal with them. That, I would suggest, is the conventional route.

15. But the judge described there being "such wide-ranging criticisms of the solicitors' conduct" that it affected not "just individual items in the bill of costs" but "went to the heart of the retainer."

16. Since the advent of the so-called "costs wars" at the beginning of this century, allegations regarding retainer issues which potentially knock out the entire claim have regularly been dealt with in costs proceedings, both between the parties and between solicitor and client. As such, I would suggest that matters which go to the heart of retainer are no longer a reliable indication of the sort of case which ought to be dealt with in the High Court. Similarly, some of the issues identified by Teare J in Stephenson Harwood are commonly dealt with in costs proceedings. Matters such as a breach of fiduciary duty are regularly being dealt with by costs judges and indeed district judges in district registries before sometimes being appealed to High Court Judges and above.

17. This is perhaps not surprising given that the relationship between the solicitor and client is fundamentally a contractual one and the "retainer" is based on a contract, albeit with various duties, fiduciary, statutory and otherwise being implied within its terms. In the circumstances, it does not seem to me to be obvious that an argument that a contract should be set aside should of itself ring alarm bells suggesting that proceedings ought to be dealt with in a Chancery Court via a different procedure. This is all the more so given the express requirement of "costs officers" to examine non-contentions and contentious business agreements to determine whether they are fair and reasonable. Depending upon that determination, the (Non-)CBA would either be upheld or set aside under the Solicitors Act.

18. There are clearly boundaries beyond which costs proceedings will not be appropriate as a forum to deal with contractual and equitable remedies. As is often the case, the decision as to the suitability of the court and its procedure is very much fact dependent.

19. In this case, for example, Mr Williams made great play of the elements needed to demonstrate economic duress and the extent of the disclosure required from the claimant to show how that had occurred and the extent of the losses that would be claimed. It may well be that, as a general approach to such claims, Mr Williams is right. But in the context of this claim, it is plain that the claimant says she accepted the agreement on the basis that, if she did not do so, she would be exposed to a rather greater costs liability from the defendant. It does not seem to me that the extent of disclosure et cetera required to support that argument is beyond the scope of supportive documents that are often exhibited to witness statements in preliminary issues hearings on matters such as reliance on estimates. Indeed, it may be that all of the documents upon which

the claimant wishes to rely have already been exhibited to the statement of Mr Carlisle made on behalf of the claimant in response to this application.

20. Similarly, Mr Williams submitted that the purpose of section 70 Solicitors Act proceedings was to have an assessment of the defendant's bill. He described the remedy claimed of rescission of the contract of compromise were a million miles away from an assessment. If the claimant were seeking equitable remedies as a result of setting aside the contract, then again I think Mr Williams would have been on firmer ground with this argument. But the only purpose of seeking to set aside the compromise is so that the claimant can then have the defendant's bill of costs assessed under section 70. It is no more than an obstacle on the way to that assessment. In such circumstances I do not see that the remedy sought in relation to the contract is one which requires a specialist Chancery Court to determine it. In this context, I refer to Foskett on Compromise at paragraph 12-02 which, under the heading "Setting aside a compromise agreement" says the following:

> "The procedure for seeking a judicial rescission of the compromise agreement is identical to that required in relation to any other contract. A fresh action is needed seeking an order setting aside the agreement with consequential directions."

21. The authors of that paragraph described the principal remedy sought as being either a declaration of invalidity or an order setting aside the agreement. It is precisely that latter remedy which is sought here. The terminology of the procedure being the same as is required "in relation to any other contract" suggests that it is not a jurisdiction closely held by one part of the judicial structure.

22. If proceedings had been commenced in, for example, the Chancery Division, to set aside the contract of compromise, then there is no prospect of those proceedings having been transferred to the SCCO simply because the context of the agreement is one relating to costs. But this is very much a case, in my view, where a number of judges in various courts could equally have been properly seised of the case. I note, in passing, that the parties were content with this case being transferred to a cost judge at the SCCO and, indeed, prior to the hearing before DJ Bellamy, the suggestion was that directions should be dealt with by the master who was going to hear the preliminary issues. The defendant is clearly entitled to change his mind having seen the way the claimant puts her case but, given that the wording of the preliminary issues has not altered, it seems to me to be an uphill battle to suggest that those issues can no longer be dealt with in the court previously agreed upon between the parties.

23. Notwithstanding Mr Williams' customary eloquence on his client's behalf, I do not consider that the nature of the claim and the remedies sought are ones outside this court's jurisdiction (and I note that there is nothing in Mr Williams' submissions which actually points to a formal lack of jurisdiction). Nor do I consider that he has pointed to procedural shortcomings in the Solicitors Act proceedings which require Part 7 proceedings elsewhere to decide matters concerning the agreement that is at the heart of this case.

24. Disagreements as to who said what to whom are grist to the mill in Solicitors Act proceedings. They do not by any means have to amount to the serious misconduct described by Mr Williams. They also relate to disputes regarding the contractual

arrangements between the parties and not simply issues with the bill that has been delivered. There is no significant difference between a contract of compromise and a contract of retainer – particularly one for a fixed sum – in my view.

25. For these reasons I do not think that it would be appropriate to strike out any part of the claimant's Points of Claim, even if they were formal pleadings which I think is open to some doubt. The Points of Claim are intended to be expository and they appear to have assisted the defendant in understanding the claimant's argument on the preliminary points which I have no doubt was the intention behind DJ Bellamy's direction.

26. Further clarification, if it is needed, should arise from the witness evidence and, subsequently from the skeleton arguments. New dates will be required for these procedural steps. DJ Bellamy ordered mutual exchange of witness evidence. I express the view, provisional though it is in the absence of any argument from the advocates, that the usual order of claimant first and then defendant appears to be the more appropriate in this case in relation to the witness evidence. Anticipatory comment, dressed up as evidence, is very unlikely to assist in the disposal of this case.

27. Finally, Mr Williams scented a potential recasting of the Points of Claim. I should say that, in my view, amendment of a document specifically ordered by the court in proceedings does not fall within the usual ability of parties to amend, for example, points of dispute and replies, without requiring the court's permission under PD47 paragraph 13.10. There has been some reliance in this judgment on the scope of the claimant's arguments and if they were to be altered materially, then that would require approval of the court.

28. The Defendant's application is therefore dismissed.