Case No: G80SE214

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LIVERPOOL DISTRICT REGISTRY

35 Vernon Street
Liverpool
L2 2BX

In the matter of Section 70 of the Solicitors Act 1974

Hearing Date: 24th November 2021
Handed down: 11th January 2022

Before:

DISTRICT JUDGE BALDWIN

(sitting as a Regional Costs Judge)

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Between:

GRAZYNA SZELGIEWICZ **Claimant**

-and-

LL BARROWCLIFF LTD

Defendant

- -
- -

Miss Gemma McGungle (instructed by Clear Legal Limited t/a Checkmylegalfees.com) for the Claimant
Mr Andrew Hogan (instructed by the Defendant) for the Defendant

JUDGMENT (Approved)

Introduction and background – solicitor and client costs – detailed assessment

1. These proceedings come before me within my jurisdiction as a costs judge, by way of CPR Part 8 and pursuant to r. 67.3, for a client (the Claimant) requested assessment of the bill of costs dated 10th May 2017 raised by her former solicitors (the Defendant) and arising out of their representation of the Claimant in a claim for damages for personal injuries, said to have been sustained in the course of her employment on 28th August 2014.

2. I will refer to the bundle page numbers by means of square brackets [ ]. I thank counsel for their skeleton arguments and helpful oral submissions.

3. Pursuant to the Court's powers under s. 70(6) of the Solicitors Act 1974, this assessment is restricted, consensually, to an assessment of the success fee charged by the Defendant, in relation to which the Claimant, through these proceedings, seeks an order for a partial refund thereof.

The issue

4. This is pleaded by way of Point 4 of the Points of Dispute served on 22nd April 2021 and the subject of a Reply served on 14th May 2021.

5. The Claimant argues that the success fee payable by her to the Defendant is amenable to assessment by the Court in the absence of evidence of informed consent to the level of success fee set at 100%. The Claimant criticises the absence of any risk assessment on the file and/or evidence as to how such success fee came to be calculated. As such, in the absence of informed consent, the Court is asked to consider substituting its own figure as to the success fee. Should such an argument find favour, the Claimant prays in aid the pre-Jackson reforms fixed success fee matrix, which would equate to a 35% success fee in

this type of claim / situation. Beyond that, I also ruled, at the outset of the hearing, that my discretion to impose my own lower level of success fee, should I be persuaded that such a discretion exists in this case, would not be fettered by the suggestion of a 35% success fee in Point 4 and, accordingly, Miss McGungle maintained a best case argument for a substitution of a 20% success fee.

6. The Defendant replies by way of reference to the recent case of relevance, *Herbert v HH Law* [2019] EWCA Civ 527, distinguishing the underlying facts, namely that in *Herbert* the success fee was set by reference to a business model and without reference to any risk in any individual case, this latter point not being conveyed to the client in advance of entering into the CFA. The Defendant argues that there is nothing unusual in the retainer in this case and that the presumption of reasonableness should be maintained on the basis of the express or implied consent of the Claimant, especially in the context of the clear identification of the cap by way of percentage reduction from relevant damages in any event. The Defendant argues that there is no contemporaneous evidence of any lack of understanding on the part of the Claimant, indeed quite the opposite.

7. Insofar as it is necessary, the Defendant relies upon the evidence in and attached to the witness statement of Nigel Barrowcliff, Solicitor and MD of the Defendant, of 14th May 2021 and maintains that the setting of a 100% success fee was reasonable in any event.

8. By way of evidential response, the Claimant relies upon two witness statements, her own dated 2nd June 2021 and that of Kerry-Anne Moore, of her current solicitors, of the same date. However, as Mr Hogan points out (and Miss McGungle acknowledged without attempting to argue that I should not be influenced by such an observation), that the evidence adduced by the Claimant in the main attempts to focus the Court's attention on the potential impact of the Polish/English language barrier upon the viability of the Claimant's apparent consent, which is not a pleaded issue.

The law

9. As identified in *Herbert*, the relevant parts of the CPR are as follows:-

> "***46.9 Basis of detailed assessment of solicitor and client costs***
> …
> *(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed-*
> *(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;*
> *(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;*
> *(c) to have been unreasonably incurred if -*
> *(i) they are of an unusual nature or amount; and*
> *(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.*
> *(4) Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.*

In addition, para. 6 of CPR PD 46 concerns the assessment of solicitor and client costs and relates to, among other things, CPR r 46.9:-

> *6.1 A client and solicitor may agree whatever terms they consider appropriate about the payment of the solicitor's charges. If however, the costs are of an unusual nature, either in amount or the type of costs incurred, those costs will be presumed to have been unreasonably incurred unless the solicitor satisfies the court that the client was informed that they were unusual and that they might not be allowed on an assessment of costs between the parties. That information must have been given to the client before the costs were incurred.*
> *6.2 Costs as between a solicitor and client are assessed on the indemnity basis. The presumptions in rule 46.9(3) are rebuttable.*

10. In terms of clarification of any evidential burden, at para. 38 of *Herbert*, Sir Terence Etherton MR said this:-

> "*We consider that where, as here, the client brings proceedings under section 70(1) of the Solicitors Act 1974, it is for the client to state the point of dispute and the grounds for it. If the solicitor wishes to rebut the challenge by relying on the presumption in CPR r 46.9(3)(a) or (b), the burden lies on the solicitor to show that the precondition of the presumption, informed approval, is satisfied. Once the solicitor has adduced evidence to show that the client gave informed consent, the evidential burden will move to the client to show why, as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent. The overall burden of showing that informed consent was given remains on the solicitor.*"

The facts

11. It would seem that the Claimant sought the Defendant's assistance in September 2014, completing an Employers Liability Questionnaire [43 – 47] and providing instructions such that the solicitor, Paul McNulty, formed the view that there was a claim with reasonable prospects of success, despatching a client care letter dated 16th September 2014 to that effect [75 – 79], recommending a "no win, no fee without insurance" funding model and including a CFA [567 – 576] for signature, utilising the assistance of one Kamil Mrozinski of Free Accident Helpline Ltd in terms of direct contact with the Claimant for the purposes of, amongst other things, signing up and translation, see the Defendant's letter to him of that date [98]. All documents are in English only.

12. The client care letter explained the following:-

    (i) The main benefit of the recommended model ("the CFA") was that there would be no charges for the work if the claim was lost;

(ii) If the claim was won, there would only be a small contribution to the Defendant's fees payable by the Claimant, "limited to 25% of your compensation and in most cases…less";

(iii) Using a CFA would mean a success fee would be charged if the case was won;

(iv) The success fee reflected the risk of the solicitors not getting paid at all if the case were lost and the solicitors' burden of paying disbursements and expenses for the Claimant up front;

(v) The Claimant's responsibility for the success fee was subject to a cap;

(vi) The maximum the success fee could legally be set at was 100% and capped at 25% of compensation for the injury element of the claim and past losses;

(vii) Unlike some solicitors, there would be no residual liability to pay disbursements and/or any balance of costs outstanding as unrecovered from the employer, win or lose;

(viii) There would never be a requirement to contribute more than 25% of any compensation, e.g. if compensation were £4,000, the "absolute maximum" success fee would be £1,000 inclusive of VAT;

(ix) All disbursements would be paid by the solicitors as they fell due.

13. The conditional fee agreement, which was based upon the Law Society approved post-Jackson model (save for some modifications, as Mr Hogan points out, essentially in the Claimant's favour) and which the Claimant signed on 23rd September 2014, included the following:-

(i) "If you win your claim, you pay our basic charges, our expenses and disbursements and a success fee… You are entitled to seek recovery from your opponent of part or all of our basic charges and our expenses and disbursements, but not the success fee…"

(ii) "The overall amount we will charge you for our basic charges, success fees, expenses and disbursements is limited as set out in Schedule 1…"

(iii) "It may be that your opponent makes a formal offer to settle your claim which your reject on our advice and your claim for damages goes ahead to trial where you recover damages that are less than that offer. If this happens, we will not claim any costs for work done after we received notice of the offer…"

(iv) "The success fee is set out in Schedule 1"

(v) "Details of our basic charges are set out in Schedule 2".

14. Schedule 1 contained the following:-

(i) "The success fee is set at 100% of our basic charges…"

(ii) "The success fee percentage reflects the following:

a) the fact that if you lose, we will not earn anything;
b) our assessment of the risks of your case;
c) the fact that if you win we will not be paid our basic charges until the end of the claim;
d) our arrangements with you about paying expenses and disbursements;
e) the arrangements about payment of our costs if your opponent makes a Part 36 offer or payment which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment;
f) any other appropriate matters."

(iii) "The Success Fee cannot be more than 100% of the basic charges in total."

(iv) "Cap on the amount of Success Fee which you will pay us in the event of Success…

That maximum limit in your case is 25% of the total amount of any:

i. general damages for pain, suffering and loss of amenity;
ii. damages for pecuniary loss, other than future pecuniary loss;

which are awarded to you…"

(v) " "Overall Cap" …

Although by law the 25% cap stated above need only apply to the success fee… we go further than this, and promise that (so long as you keep to this agreement) we will never deduct more than 25% of your compensation to pay our unrecovered charges and disbursements… This means that… you will always receive at least 75% of your compensation, and in many cases our clients will receive considerably more than this."

15. Schedule 2 contained the following:-

(i) "Fixed Fees
…In cases where CPR Fixed Costs apply, the Success Fee will apply to Fixed Costs." (and the relevant tables were replicated)

(ii) "Basic charges
Where fixed fees do not apply, we charge at an hourly rate basis…"

16. It is not in dispute that the settlement of the original claim came at the stage between issue and pre-allocation and therefore that the basic charges would amount to the fixed costs (EL) of £2,630 + 20% of damages plus VAT. Damages were agreed by way of acceptance of a Defendant's Part 36 offer on 24th April 2017 in the sum of £17,750. Total chargeable and recoverable basic charges were therefore £7,416. A 100% success fee would thus amount to £7,416. Applying the 25% cap to £17,750, this reduces the £7,416 to £4,437.50 or the equivalent of a gross success fee of 59.8% of basic charges.

17. The Claimant was accordingly charged £4,437.50, achieved by payment to her out of the agreed settlement sum of £17,750 of the balance of £13,312.50. To that extent, it is difficult to understand the assertion at paragraph 6 of the Claimant's witness statement that "*I submitted a complaint to LLB solicitors regarding the 25% costs related to the case because the costs taken by them exceeded the value of the case*", because the total costs (not including disbursements) recovered by the Defendant by way of fixed costs from the original defendant and success fee from the Claimant amounted to £11,853.50, less even than the net amount paid to her after deduction of the success fee.

Claimant's argument – no informed consent

18. This centres, as it has to do, given the nature of the Point of Dispute raised, on the absence of a case specific risk assessment, which, it is argued, renders any consent given to be less than sufficiently informed.

19. It is right that no such risk assessment has been identified on the file. What the file reveals is a file note from Mr McNulty dated 16th September 2014 and timed at 17.10 hours,

> "(sic) *Consideration of accident circs reading all paperwork carefully considering funding options risk assessment level of success fee insurance requirements and a general early assessment of prospects and strategy.*"

20. In providing evidence to explain the prevailing circumstances at the time, by way of his witness statement, Mr Barrowcliff has spoken to Mr McNulty and feels that he (Mr Barrowcliff) is the better person to give such evidence, being able to comment more generally about the firm's approach to risk in PI work.

21. Mr Barrowcliff confirms [37 – para. 3] that it is the practice of the Defendant always to perform individual risk assessments. Mr McNulty could not account for the absence of such a risk assessment here but theorises that, because of the late hour, the initial assessment may have been noted in a notebook, since confidentially shredded.

22. Miss McGungle by way of her skeleton argument (paras 10 – 12) argues that it is virtually unarguable that there was informed consent here, as Mr Barrowcliff's evidence does not assert that the Claimant agreed to a 100% success fee "notwithstanding risk". This is a little hard to follow, I must confess, given the general tenor of the Claimant's position, namely that this was

a low risk case, but I suspect that "irrespective of risk" may in fact be what was intended here. Whatever is in fact meant, it cannot be ignored, it seems to me, that the Claimant did sign a CFA informing her that the 100% success fee reflected the matters at para. 14(ii) above including (b), "*our assessment of the risks of your case*".

23. Indeed, by way of oral submissions, the Claimant's approach to this issue appeared to be modified to not arguing that there was no agreement at all, but rather arguing that any agreement was not sufficiently informed, because the factors identified by the solicitors prior to obtaining the signature of the Claimant were not sufficiently detailed and required fleshing out, in particular in terms of identifying the nature of the risks of not getting paid by way of actually conveying the assessment of the prospects of success and also being critical of the inclusion of the broad catch all, "*f) any other appropriate matters*".

24. In essence, I believe, in addition, Miss McGungle argues that the evidence of individual risk assessment is not credible, because of the inherently low risks on liability on the alleged facts of the case, namely an employee injuring herself on an old poorly maintained window which she had been asked to open in the course of her cleaning duties [44 - NB1] .

Defendant's argument – informed consent

25. Mr Hogan argues that the information supplied was entirely sufficient to amount to a full and fair explanation of the factors underlying the success fee, such that the presumptions at rr. 46.9(3)(a) and (b) are not rebutted by the Claimant.

26. He contends that the level of information contended for by Miss McGungle is at too "granular" a level, to use his word, and reminds the Court both that the parties had freedom to contract with each other and also that the terms of the contract were essentially those of the Law Society approved model, amended only so far as to benefit the Claimant, which similar terms, he submits, were not the subject of any criticism from the Court of Appeal in *Herbert*, the issue there being one of an unusual model, i.e. one not taking into account risk, as opposed

to the held to be conventional industry-wide "factoring in of risk assessment" approach continuing to prevail, post-Jackson.

27. Mr Hogan emphasises the clarity of the explanation given to the Claimant, in particular in setting out a "worst case scenario" type example as to the sort of deduction by way of capped success fee that might come to be made at the maximum 25% level. Contrary to what the Claimant argues, he maintains the CFA does indicate to the client that there was an individual assessment of risk, which state of affairs is confirmed by the Defendant's witness evidence, despite the physical absence of a written document amounting to the same, and as such there has been a full and fair explanation, without there needing to be any further granularity by way of mathematical explanation of the weight attached to each of the component parts to allow a 100% success fee to emerge.

28. The Defendant asks the Court, in essence, to accept the evidence as credible that an individual risk assessment was carried out, supported by an ex post facto example provided by Mr Barrowcliff which demonstrates how he would have approached an individual risk assessment, with the same headline result. In particular, the Court is asked to note that there was a difficulty in getting the Claimant, a native Polish speaker, to explain precisely how she came to be injured and that the only witness did not actually see the accident and had not confirmed that they would support the claim. Thus, an example success fee of 67% on a ready reckoner approach based upon 60% prospects of success would fit entirely credibly with other commercial factors entitled to be taken into account, resulting in a notional 102% success fee, capped by statute at 100%. The solicitor has also claimed 5 units of time for the original exercise noted on the file note.

29. In addition, submits Mr Hogan, the Claimant was entirely at liberty to ask for clarification and there is no real persuasive evidence before the Court, should the court be concerned, that there was any real difficulty with understanding English in this case, bearing in mind the lack of apparent need for interpreter support elsewhere.

Discussion – informed consent

30. I am entirely satisfied that the Claimant was informed that there would be a 100% success fee payable by her, should the case be won (capped at a maximum of 25% of relevant damages) and that the 100% success fee reflected a comprehensive number of factors, as set out at Schedule 1 to the CFA, including an individual assessment of the risks of the case. That much is clear from a plain reading of the signed documentation. I am not satisfied on the pleaded case that it would be appropriate to entertain any arguments as to any supervening effect of any language barrier, but in any event I would not have been persuaded, on the balance of probabilities on the evidence as a whole, that any significant language difficulties of any relevance to understanding written English had been shown to exist, for the reasons argued by Mr Hogan.

31. Having considered the evidence carefully and in the light of the submissions made, I accept as proved on the balance of probabilities that it was the Defendant's normal practice in fact to carry out individual risk assessments and that Mr McNulty did so on this occasion. His file note says that he did so and time was recorded as being spent which would be consistent with such a state of affairs. I am fortified in that conclusion by the example given by Mr Barrowcliff, which demonstrates to my satisfaction that Mr McNulty could realistically have reached a conclusion which I find he did on a risk assessing exercise, which would lead to an overall conclusion of a supportable 100% success fee. For all the reasons identified by Mr Barrowcliff in reaching his notional assessment of the prospects of success, I reject any contention by the Claimant that such any approach could not sensibly fit within a range of assessments which any reasonable solicitor in Mr McNulty's position could have come to. A less risk averse solicitor might have concluded a higher prospect of success, but there is nothing before me which persuades me to reject the Defendant's evidence that Mr McNulty did carry out such an assessment and did reach a 100% success fee conclusion as a result.

32. Is further detail or granularity a pre-requisite in such circumstances for the Claimant to have been sufficiently comprehensively informed? In that the CFA

utilised is in essence in the model Law Society format, which has stood the test of time without relevant judicial criticism, it seems to me that that usage and format should at the very least be sufficient to discharge the burden upon the Defendant in these circumstances, the burden as clarified by the Court of Appeal at para. 38 of *Herbert*. Thereafter, the burden shifts to the Claimant to show why, "*as a result of having been given insufficiently clear or accurate or comprehensive information by the solicitor or for some other reason, there was no consent or it was not informed consent.*"

33. It is noteworthy, in my judgment, that the Claimant's witness statement makes no reference to any issue at all focussing upon the setting of the success fee at 100%. Insofar as there is a complaint that the Claimant should have been told that the 25% cap was up for negotiation, I have seen no evidential basis for this assertion being correct, i.e. that the Defendant would have been prepared to lower the cap and, in any event, I am singularly unpersuaded that that sort of information, even if it were applicable or accurate, should be required to be notified up front, as it carries with it a degree of commercial illiteracy or "hand showing", in my view. Insofar as there is a complaint that the "fee" or the "charge (of) 25% for winning" "was overstated", putting to one side my findings as to the Claimant's observations in para. 6 of her statement, I find that the success fee (if such is intended to be referred to here) of 100% was not overstated, but rather an accurate representation of the success fee in fact arrived at by Mr McNulty after taking into account the factors identified up front.

34. As such, I conclude that the Defendant has discharged the burden of showing that the Claimant did give informed consent to a liability, upon winning, to pay the Defendant a success fee of 100% capped at a maximum of 25% of the fixed fees recoverable upon winning from the defendant to the original claim, which conclusion is not displaced by any evidence adduced by the Claimant. Consequently, the success fee paid remains presumed to be reasonable in amount and no refund is payable.

35. In such circumstances, there is no need for me to proceed to any quantification exercise.

District Judge John Baldwin
Regional Costs Judge

29th November 2021