[2020] EWCOP 63
IN THE COURT OF PROTECTION

HER HONOUR JUDGE EVANS-GORDON

CASE NO: 13319763

BETWEEN:

JMH
(by her litigation friend AB)

Applicant

and

1) CFH
2) SAP

Respondents

Owen Curry (instructed by **Lee Bolton Monier-Williams LLP**) for the First Respondent

SAP in person

Julian Reed (instructed by KSN solicitors) for KSN solicitors

Hearing dates 15 July 2020 & 23 October 2020

# JUDGMENT

1. This judgment is concerned with costs, more particularly, the costs of the second respondent.

## Background

2. The substantive case involved a dispute about the applicant's capacity to revoke an enduring power of attorney ("the EPA") made in favour of her daughter, the first respondent, and to execute a lasting power of attorney appointing the second respondent instead ("the LPA"). The second respondent is a solicitor who, at the time, was employed by KSN solicitors. The EPA was suspended by DJ Batten on 5th October 2018. The LPA could not be registered because of the dispute which led to the commencement of these proceedings. I appointed an interim deputy on 12 December 2018. There continued to be an issue about the applicant's capacity to conduct litigation.

3. At the next hearing, on 11th April 2019, it was agreed that the applicant lacked capacity to litigate and the interim deputy agreed to act as her litigation friend. At that hearing, notwithstanding her current position to the contrary, the second respondent stated that she wished to be joined as a party to the litigation for the purposes of ensuring, as she put it, that the applicant's wishes were carried out in relation to the LPA. This court did not join her as a party against her wishes or stated position as she was not, on any footing, a necessary party: the applicant's litigation friend was representing the applicant's interests. The order made at that hearing required her to file and serve a witness statement addressing any queries raised by the interim deputy in relation to the applicant's affairs and her position in relation to the LPA. At the hearing on 8 August 2019, the second respondent stated that she was disclaiming her role as attorney but wished to remain a party solely in relation to the issue of her costs.

4. By 14th April 2020, the substantive dispute had been resolved by the appointment of two independent professional deputies. It was agreed that the interim deputy/litigation friend's costs and those of the first respondent should be paid by the applicant, in accordance with the usual rule on costs in these proceedings. While the interim deputy agreed that the second respondent's costs should be paid by the applicant also, in accordance with the usual rule, the first respondent disagreed. Sadly, the applicant died on 28th April 2020. I am told that there is now a dispute as to the validity of a will executed by the applicant of which the first respondent is the residuary beneficiary.

5. A further hearing was listed on 24 April 2020 in relation to the outstanding costs issues in the hope that they could be resolved. Sadly, that optimism was misplaced and the dispute became, if anything, more complicated. On 24 April I permitted KSN solicitors to attend and argue the question of the second respondent's costs because of a conflict between their positions. The second respondent seeks only to recover her costs between 12th April 2019, when she

was joined a s a party and 24th April 2020, while KSN seeks the recovery of costs prior to April 2019. As no resolution could be achieved, directions were given and a hearing listed on 15th July 2020. The issue of the second respondent's costs arises not just because of the difference in positions between the second respondent and KSN but also because, from 11th April 2019, the second respondent was acting as a litigant in person, on her own evidence.

6. For reasons unknown to me, the half-day hearing ordered by me was listed for only 1.5 hours which was insufficient to deal with the costs issues so written submissions had to be ordered and judgment reserved. The consequence has been an unsatisfactory delay.

Representation

7. The interim deputy/deputies[1] take no part in this costs dispute. The first respondent is represented by Mr Curry of Counsel, the second respondent appeared in person and Mr Reed of Counsel appeared for KSN solicitors. I am grateful to them all for their assistance.

Submissions

8. As stated, the second respondent, SAP, asserts that the costs incurred prior to 12th April 2019 were incurred by the applicant pursuant to the applicant's retainer of KSN to act in the matter of the LPA and this litigation. If they cannot be agreed they should be referred to the Senior Courts Costs Office for assessment in the usual way: they are not *inter partes* litigation costs. As far as her costs post 12th April 2019 are concerned, SAP says she is entitled to them all pursuant to the usual order in these proceedings, as set out in the CoP rules. Further, she asserts that those costs should be assessed, up to 24th April 2020, pursuant to the *Chorley* principle (see below) as she was employed by KSN

[1] As there is a dispute over the will there is no personal representative. This hearing proceeded on the basis that, as the First Respondent is the residuary beneficiary of her mother's will, she is the only person affected by the outcome.

throughout that period while acting in the course of her employment. SAP disavows KSN's costs for attending at the hearing of 24th April 2020 and any costs incurred by them thereafter.

9. Mr Curry submits that this is a case in which there should be a departure from the usual rule because there was no necessity for SAP to become a party as the applicant's position was fully protected by her interim deputy and litigation friend and it was unreasonable for her to do so. As a litigant in person, says Mr Curry, the second respondent cannot recover solicitors' costs because firstly, she is under no obligation or liability to pay KSN anything and secondly, she was not, at the relevant times, a partner in KSN but only an employee. The *Chorley* principle does not apply in her case. He relies on CPR 46.5, notwithstanding its disapplication by CoPR 19.6(7), to demonstrate that, even under the CPR, SAP would not be able to recover. CPR 46(5) provides that a litigant in person includes a solicitor or a solicitor's employee except where such person is represented by a firm in which that person is a partner. It is common ground that SAP was never a partner in KSN. In those circumstances, says Mr Curry, she is limited to the costs of a litigant in person. He says that the purpose of the CoP rules and the disapplication of CPR 46(5) was to reduce the costs recoverable by a litigant in person therefore it would be odd if the Court of Protection were to import the *Chorley* principle (see below) and thereby increase the costs recoverable by a litigant in person. These are, in general civil litigation, limited by CPR Part 46(1)-(4) and Practice Direction 46. He does not challenge her recovery of any costs that any litigant in person could recover, as I understand it - indeed, such a challenge would be doomed to fail.

10. Mr Reed contends that all of SAP's costs should be paid out of the applicant's estate pursuant to the usual rule on *inter partes* costs. He appears to draw no distinction between the costs of the work carried out by SAP prior to 12th April 2019 and those incurred after that date notwithstanding the fact that SAP

became a party on that date and ceased to carry out any work pursuant to the KSN's retainer in the litigation. He does not adopt the *Chorley* principle but says it is irrelevant as SAP was, at all material times, employed by KSN and carrying out the work in that role. He asserts that the relationship between the applicant and the second respondent was always one of client/solicitor. KSN accept that they cannot recover any costs of 15th July 2020. This implies that they are seeking to recover costs of 24th April 2020.

Discussion and Decision

11. It seems to me that the disputed costs can be divided into three distinct periods. The first are the costs incurred prior to 12th April 2019, when a litigation friend was appointed for P; the second consists of the costs incurred between 12th April 2019 and 8th August 2019, when the second respondent disclaimed her role as attorney and remained a party solely for the purpose of costs; and, thirdly, the costs thereafter.

Pre 12th April 2019 Costs

12. Although I explored this with Mr Reed during his submissions, I cannot see the basis of his submission that the second respondent's costs prior to her joinder as a party are, in some way, litigation costs that I can award in her favour against the applicant. Prior to that date the second respondent was acting on behalf of the applicant pursuant to the latter's original retainer of KSN. In those circumstances, the second respondent was not acting independently in any way, she was acting, as Mr Reed says, as KSN's agent, or employee, in carrying out the applicant's instructions, pursuant to the retainer to act for her in these proceedings. Neither KSN nor the second respondent were parties but simply the persons through whom the applicant acted. The second respondent would have no standing to pursue the applicant for costs at that time as it was KSN who had the benefit of the retainer. The second respondent was not, at that time, instructing KSN, it was the applicant who did so. Both respondents agree that that was the position and I agree with them.

13. In the circumstances, those costs are a matter between KSN and their client or her estate. I do not know whether or not KSN have submitted a bill to the applicant's executors. If they have and there is a dispute about it they can refer it to the Senior Courts Costs Office ("SCCO"). I have no jurisdiction, in these proceedings, to address any dispute between them particularly in circumstances where the executors have not been informed of the dispute or been given an opportunity to be heard. However, in order to avoid any further time and expense, I would be prepared to remit those costs to the SCCO for assessment.

<u>Costs between 12 April 2019 and 8 August 2019</u>

14. As far as the second respondent's costs between April 2019 and 8 August 2020 (including any costs arising out of the latter hearing) are concerned, as a matter of principle, she is entitled to her costs. The second respondent was a party to the proceedings and she had an interest in the outcome in that she was the nominated attorney under the disputed LPA. I cannot see that her conduct was so unreasonable or unnecessary as to take it outside the usual rule.

15. However, the real issue is whether SAP is entitled to recover her costs on the same basis as if she had instructed KSN to act for her notwithstanding the fact that she positively did not instruct them but acted in person. At paragraph 23 of her witness statement, prepared for this hearing, [Bundle/p.215], she states in terms that "I did not instruct KSN solicitors as attorney or in any other capacity".

<u>The *Chorley* Principle</u>

16. The second respondent relies on the *Chorley* principle as set out in *London Scottish Benefit Society v Chorley* [1884] 13 QBD 872. In that case three principal solicitors successfully defended themselves and were permitted to recover their profit costs of so doing. The principle, as stated by the Court of Appeal, provides that a solicitor who uses his professional skills in his own

cause ought to recover those costs because, otherwise, he would always employ another solicitor: it would be wrong in principle to permit an unsuccessful opponent to obtain a benefit from the solicitor acting for himself. However, such costs could not include matters such as a consulting or attending on himself: that case involved, I believe, sole practitioners and, at least prior to 2002, the principle appears to have been applied only to solicitors or partners who carried out their own litigation either personally or through their clerk.

17. In *Malkinson v Trim* [2002] EWCA Civ 1273 the principle was extended to cover work done by other members or employees of the firm, not just the relevant litigant partner/sole practitioner or his clerk. It is important to note that the partner was acting through his firm. In his judgment, Chadwick LJ considered the effect of the CPR which, at the time, was in different terms to the current CPR 46.5. He concluded that the effect of the CPR was that "the position of a practising solicitor who chooses to represent himself in his firm name, or (where in partnership) to be represented by his firm, remains unaltered by the provisions of the CPR r.44.8.6". He pointed out that such a person was not a litigant in person within the meaning of the CPR and concluded as follows:

> "A partner who is represented in legal proceedings by his firm incurs no liability to the firm; but he suffers loss for which under the indemnity principle he ought to be compensated because the firm of which he is a member expends time and resources which would otherwise be devoted to other clients. The only sensible way in which effect can be given to the indemnity principle is by allowing those costs. And, as I have sought to explain, that is a solution which, for over a hundred years, the courts have adopted as a rule of practice."

18. In such cases, said Chadwick LJ, the CPR preserved the *Chorley* principle for the benefit of partners or principals and permitted them to recover the costs of the work

done by their fellow partners and other employees of the firm. Chadwick LJ drew a distinction between the solicitor litigant who provides, in his own litigation, skill and knowledge in the course of his practice and the solicitor litigant who provides skill and knowledge in his own time and, typically, outside the office: the latter being a litigant in person. If this was an extension of the *Chorley* principle, in my judgment, it was a very small extension and may be said merely to have updated the principle in light of the realities of modern legal practice.

19. The *Chorley* principle was further considered by the Court of Appeal in *Halborg v EMW Law LLP* [2017] EWCA Civ 793 in the context of limited liability partnerships. In that case EMW had issued proceedings in the SCCO against their client (coincidentally, also a solicitor) who had not paid their bill. On an interim application the costs judge awarded EMW costs summarily assessed in the sum of £17,600. Mr Halborg appealed on the basis that the costs judge had wrongly refused to treat EMW as a litigant in person and assessed their costs in accordance with CPR 46.5(2) and PD46 3.4.

20. In the only judgment, the Master of the Rolls ("the MR") set out the *Chorley* principle in the following terms:

> "a solicitor who acts for himself as a party to litigation can recover not only his out of pocket expenses but also his profit costs, but he cannot recover for anything which his acting in person has made unnecessary;"

The reason this principle applies, said the MR, is pragmatic: there has been an expenditure of professional skill and labour, that expenditure is measurable; the solicitor would otherwise employ another solicitor; and, since he cannot recover for anything which his acting in person has made unnecessary, the unsuccessful party will have the benefit of that disallowance and so would pay less than if the solicitor party had instructed another solicitor. He held that the *Chorley* principle extended to LLPs because the rationale underlying the principle (loss due to expenditure of time and resources which would have been

spent on clients) applies equally to LLPs. Further, an LLP is a corporation which is to be regarded as acting with a legal representative in the same way in which a company acting through an in-house solicitor in possession of a practising certificate or equivalent would not be treated as a litigant in person. The principle still only applied to principals, EMW being a principal.

21. Up until this point the relevant solicitor's firm, whether sole, partnership or LLP had been on the record as acting.

22. In *Robinson v EMW LLP* [2018] EWHC 1757, Mr Robinson was a consultant solicitor for Fidelity Law Ltd. He had instructed Fidelity in an insolvency matter and they were on the record as acting for him. There was a formal retainer entered into on 1 May 2015 and it had been held, as a matter of fact, that there was an agreement between him and Fidelity that the latter would not charge Mr Robinson for any work that he himself carried out but only for work carried out by members/employees of Fidelity and disbursements. The *Chorley* principle arose in relation to the work carried out by Mr Robinson himself – was he entitled to recover this notwithstanding his agreement with Fidelity that he would not be liable to them for that work.

23. Roth J found that the principle extended to circumstances "where a solicitor in practice instructs another firm to act for him, but relieves that firm from part of the work required in his case by doing it himself." He found support for this in a decision of Teare J. in *Shackleton and Associates Ltd v Shamsi* [2017] EWHC 304 (Comm) who had held that a company was entitled to recover costs for litigation work carried out by its employed solicitor advocate. Although the company did not have to pay the solicitor advocate for his work, the indemnity principle was satisfied because the company suffered a loss because the solicitor advocate was not carrying out work for other clients.

24. In all the reported cases the solicitor litigant was acting through his own practice or firm or had instructed a third-party firm and "relieved the firm of some of the work by doing it himself". The essential point to be drawn from them is that the solicitor party was not acting in person, was not a true litigant in person. There is no case that I have been taken to which permits a true litigant in person to recover costs at a professional rate without being able to establish personal loss.

25. This case is very different from those set out above. SAP was neither a partner of KSN nor had she instructed it to act for her and then relieved them of work by doing it herself. A very real and, in my judgment, major extension of the *Chorley* principle would be required in this case.

26. If this were a case where KSN simply acted for SAP and there was no evidence of any agreement that she would not be liable for their fees, I would have no difficulty in implying a retainer of them by her, even if she herself carried out most of the work: there would clearly have been a consensual arrangement notwithstanding the absence of a formal retainer. The presumption of liability would apply, absent evidence of a clear agreement to the contrary. It would be on all fours with *Robinson* and that application of the *Chorley* principle.

27. However, in this case the evidence shows that SAP never instructed KSN to act for her and has never been personally liable for any of their fees. They agree: they do not suggest that they were acting for SAP but assert, in effect, that she was acting for the applicant in her capacity as an employee of KSN. Indeed, in their letter to the court of 20th April 2020, they assert that "the [Second Respondent] and, who while employed at KSN solicitors, carried out work as a solicitor on behalf of JH, the Applicant".

28. The fact that SAP asserts that she was a litigant in person, had not instructed KSN and was never under any obligation to pay them anything, together with

KSN's position that they were not acting for SAP is, in my view, fatal to the claim to assessment under the *Chorley* principle which applies only where the solicitor litigant has instructed, expressly or impliedly, a firm, including their own firm, to act for them. She simply believed, as did they, that her profit costs would be recoverable in the usual way. SAP did not carry out the work to relieve her solicitors from some of the work nor has she suffered any loss as she got paid throughout. It is only KSN who will suffer loss and they are neither the principal nor instructed solicitors.

29. Mr Reed says that, as CPR 46.5 does not apply, the second respondent can recover the sums set out in KSN's bill because she undertook all her work as a solicitor employed by KSN and if she had not been "*undertaking work for P*" she would have been undertaking other chargeable work for KSN and she recognises that any costs recovered by her would have to be passed on to them. That, with respect, misses the point. After the appointment of both an interim deputy and a litigation friend, SAP was not carrying out any work for the applicant but for herself *qua* litigant in person.

30. Mr Reed also draws comparisons with solicitors joined to proceedings in their professional capacities. He cites examples such as a solicitor whose client loses capacity and is joined as a party to further their client's position; a solicitor property and affairs deputy or a welfare deputy; a former solicitor deputy who is subject to allegations of impropriety. I am not aware of any case where a solicitor acting for a party who loses capacity is then joined as a party in their own right 'to further their client's position'. They are sometimes instructed to act by the litigation friend, indeed, they may be the litigation friend, but that does not confer party status and they are still acting as an instructed solicitor. The other cases are simply not analogous – the solicitor must be a party if he wishes to defend his position as an attorney or defend himself against allegations of impropriety but he is not then acting as P's instructed solicitor. Further, it begs the question of whether the solicitor

litigant has either instructed their firm or is a partner of their firm in which cases, I would have no difficulty in saying that the *Chorley* principle would apply.

31. I can see no basis for ordering SAP's costs incurred between 12th April 2019 and 8th August 2019 to be assessed as if they were client/solicitor costs as between the applicant and KSN. It may be that some of the work carried out by SAP in that period arose out of her role as attorney under the LPA which, one imagines, contained a clause providing for her to be paid at professional rates. However, this would be a matter between her and the applicant's executors which would have to be referred to the SCCO if there was a dispute as to quantum. Again, I would be happy to refer these costs to the SCCO to avoid any further time and expenditure being wasted. Any other costs can only be recovered on the basis that she is a true litigant in person.

32. I can see the apparent unfairness in this from KSN's point of view as SAP carried out the work during her hours of her employment with KSN. She did nothing wrong in that her employers knew she was working on the case. The fault lies with, it would seem, a lack of internal communication or a failure to appreciate the changed position and rectify it or to put the work on a proper footing. However, to allow her profit costs in these circumstances would be wrong in principle as it could lead to any legally qualified person recovering profit costs in personal litigation on the basis that they did the work during office hours and their employers did not object. That would drive a coach and horses through CPR 45(6) and I cannot see why the *Chorley* principle should be applied differently in the Court of Protection compared with other courts, notwithstanding the disapplication of CPR 46(5) to its proceedings.

33. For what it is worth, in my judgment, as parties can always instruct a solicitor in the Court of Protection, I see no reason why the *Chorley* principle should not apply to its proceedings. Indeed, excluding it may well increase costs as those

for attendance on clients and consultation would be recoverable if third party firms were instructed.

Costs after 8 August 2019

34. It appears from the bill submitted that no work was carried out between disclaimer and the first hearing in April 2020. I see no reason why SAP should not recover her costs of that and subsequent hearings as a litigant in person. The only reason SAP undertook any work post August 2019 was because the first respondent opposed her receiving any costs.

35. It follows that the only *inter partes* costs the second respondent can recover are those that any litigant in person could recover and those are the disbursements/court fees and any time costs recoverable on a detailed assessment. I appreciate that in considering that SAP is entitled to her time costs as a litigant in person I am differing from DJ Eldergill in *London Borough of Hounslow v A Father & A Mother* Case No. 13020924. I was provided with this case the day before I handed down judgment. Having considered it, and with great respect, I am not persuaded that the effect of the disapplication of CPR 46.5 or the fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 necessarily results in a litigant in person being unable to recover time costs.

36. In my judgment, the disapplication of CPR 46.5 simply gives the Court of Protection wider discretion to deal with costs justly and proportionately in every case. In a large estate where a litigant has necessarily been required to carry out a lot of work, it may be proportionate to allow him some or all of his time costs at a rate that the costs assessor deems fit in the circumstances of the case. That may result in no time costs being allowed or the rate being limited. A blanket ban on the recovery of time costs would mean that a litigant in person could be severely disadvantaged. As DJ Eldergill noted, this would be

an extremely unfair outcome, particularly in cases where a litigant in person must undertake considerable work to defend themselves against, say, an allegation of fraud. In my judgment, such a blanket ban, if intended, would have been set out clearly in the rules.

37. The fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 is of no assistance. The Court of Protection did not exist in 1975 and there is no material before me which would indicate that a deliberate decision was made to disapply the 1975 Act in the creation of the Court of Protection with a view to preventing litigants in person from recovering any time costs – that is a leap too far. The rules applicable to deputies are not, in my judgment analogous to *inter partes* costs in litigation. Part of, if not the primary, reason for the rules regarding deputies is to prevent conflicts of interest arising and/or to avoid a fiduciary profiting from their position. Only the court can allow a deputy remuneration for time spent discharging their duties and, as far as I am aware, this power is only used in cases involving professional deputies.

38. Notwithstanding its disapplication, in my judgment CPR 46.5 and/or the 1975 Act may, nonetheless, be helpful to a costs' judge in formulating his or her approach to the quantification of SAP's costs. This is a relatively large estate and the costs involved are relatively low once one disregards the client/solicitor costs and any deputy/client costs. It seems to me that SAP is obliged to reimburse KSN for disbursements under the common law therefore they are recoverable. The period for which she can recover her costs is between April 2019 and July 2020. As the costs are payable out of the applicant's residual estate, it makes no difference to the first respondent whether the estate or the first respondent pays as the latter is the beneficiary of her mother's residuary estate. For the avoidance of doubt, I am not suggesting that the first respondent should, or otherwise would, have been ordered to pay costs personally. They will all come out of the estate.

39. Mr Reed accepted that no costs were recoverable in relation to KSN's fees post 14th April 2020 as they were neither a party nor, in any sense, acting for SAP. For the avoidance of doubt, I can see no basis for awarding KSN any of the costs incurred on its own account. It was not a party and, as matters have turned out, its involvement has not assisted in resolving the issues. I can see no reason why the estate should bear the additional burden.

HHJ Evans-Gordon

23 October 2020