IN THE KINGSTON-UPON-HULL COUNTY COURT

Case No: 2YN60923

The Combined Court Centre
Lowgate
Kingston-upon-Hull

27th October 2014

Before

DISTRICT JUDGE BESFORD

ANTHONY SCOTT

-v-

HULL AND EAST YORKSHIRE HOSPITALS NHS TRUST

APPROVED JUDGMENT

APPEARANCES:

Counsel for the Claimant: MR JAMES LAUGHLAND
instructed by Rapid Response Solicitors

Counsel for the Defendant: MR KEN CORNESS
of Acumension Ltd

Transcribed from an audio recording by
J L Harpham Limited

JUDGE BESFORD:

1. This is an adjourned detailed assessment, adjourned on the 28th July, 2014 when early doors it came to light that there would appear to be two CFAs in this case, not just the expected one. Following that disclosure, the receiving party (Rapid) was put to their election to either disclose copies of the CFAs and primary documents or rely upon any secondary evidence to show an entitlement to the success fee and nature of retainer. Today is the hearing of that preliminary issue.

2. Before I consider the issue, I think it is pertinent for the purpose of this judgment to set out briefly some history of this assessment. As I understand, the receiving party lodged an original bill totalling some £112,000. That bill that was lodged with the notice of commencement. The original bill was calculated on an hourly rate of £400 per hour throughout and 100% uplift. Points of dispute and replies were subsequently filed and the matter listed for detailed assessment.

3. Shortly before the detailed assessment, the receiving party amended their bill by filing an amended bill. The amended bill superseded the original. The amendments largely relate to a reduction of the £400 per hour rate to £146 per hour and a reduction of the 100% uplift down to 54%. As a consequence, that reduced the final figure sought from £112,000 to circa £36,000.

4. As I have alluded to, at the detailed assessment it came to light that Rapid and the client had entered into two separate CFAs. This fact had not previously been highlighted. I think I am right in saying it was not specifically referred to in the preamble. Further the notice of additional liability annexed to the bill related to only one set of terms presumably from one

CFA, and, as I understand it, when the issue of a second CFA was raised in points of dispute the replies averred that there was only one CFA which was dated the 30th November 2011. That reply has now been conceded to be wholly incorrect. Further, in my view, Rapid's actions in not specifically referring to a second CFA were, I think, misleading and inappropriate. That is the background as to why the court put Rapid to their election.

5. The present position is that it is now confirmed that there were two CFAs. One was entered into on the 30th November, but that CFA was in some way and on some date terminated and a discounted CFA was entered into on the 14th November, 2012.

6. Rapid have chosen not to disclose within these proceedings the two CFA's but instead they rely upon a statement from Mr Thompson. My statement on court file is not verified with a statement of truth, but I am told that a verified copy has been served. The statement chooses not to exhibit copies of the CFA, although Rapid offers to show the two CFAs to myself. Rapid however wish to retain privilege. Today I have also had the opportunity to hear Mr Thompson give oral evidence and he has been asked questions by both his advocate and the paying party's advocate.

7. From the evidence of Mr Thompson it would appear that he was not one of the fee earners concerned with the file. It would appear that Mr Thompson was not involved with either CFA on behalf of Rapid. He has come into this action late in the day. It is unfortunate that his verified statement, contained an error, possibly typographical, as to the date when enquiries were made of BTE insurers. This error was highlighted by Mr Corness. Mr Thompson was also unable to confirm whether the CFA, either both or one of them, was limited to Hull and East Yorkshire Hospitals or Hull and East Yorkshire Hospitals and Dr Darren Wheatley. This may have relevance as to the apportionment of costs, this bill being solely against the Hospitals.

8. With the greatest of respect to Mr Thompson, when the court puts a party to their election in my experience there is usually more information provided, more candid disclosure from somebody who has intimate knowledge of the file. It is not so much a criticism of Mr Thompson. It is just what I normally see. The statement produced by Rapid on the issue of proving the validity of the CFA's, with respect does not come anywhere near the particularity normally seen.

9. Where does that leave the court? Going back to first principles, this is an assessment on a standard basis. Any doubt must be resolved in favour of the paying party. When doubt was cast on the validity of the CFA's I put Rapid to their election and it is entirely at the receiving party's discretion as to how they resolve any doubt. In particular whether they elect to disclose particular documents or whether they wish to rely upon other evidence. In this case Rapid are relying on the statement and evidence of Mr Thompson.

10. As I have already alluded to, the guidance and law concerning the disclosure of documents, and CFAs in particular is somewhat fudged and unsatisfactory. However, whilst courts have repeatedly suggested that there ought to be advance disclosure of documents, sunlight being the best disinfectant, I cannot order disclosure. Once an issue arises it is entirely up to the receiving party how they overcome the objection.

11. Returning to the present issue, has Rapid through the statement of Mr Thompson satisfied the court as to the validity of the CFAs? In the case of *Dickinson v Rushmer[2002] 1 Costs LR 128*, Rimer J said, "The situation was one which involved an issue of fact where the costs judge had to decide. It appears to me to be obvious that as soon as it became clear that the receiving party was proposing to support his own case on a point of reference to documents which he was not willing to disclose to the paying party, the costs judge should have considered whether that course was consistent with one of the most basic principles of natural

justice, namely the right of each side to know what the other party's case is and to see the documentary material that he was relying on so that he can make his own comments on it".

12. Echoing the sentiment of Rimmer J, in *South Coast Shipping v Havant Borough Council*, [2002] 3 All ER 779 Pumfrey J said, "Once the document is of sufficient importance to be taken into account in arriving at a conclusion as to recoverability, then, unless otherwise agreed, it must be shown to the paying party, or the receiving party must content itself with other evidence". In my view the CFA's which form the basis of the retainer are documents of the utmost importance.

13. It is entirely at the discretion of the receiving party, as those cases show, whether or not they wish to disclose the documents. In this particular case Rapid have chosen not to disclose documents that go to the very heart of the claim for costs by Rapid. That is their retainer.

14. The difficulty I have is that, for a number of reasons, I cannot be satisfied on the balance of probability that the signature of compliance on the bill can be relied upon. Firstly the bill was originally certified at a figure of £112,000 and then that bill was withdrawn and replaced with a substantially reduced bill. Whilst the reduction in part resulted from a reduction in the £400 hourly rate, it has now come to light from the limited documents Mr Thompson has disclosed in his statement, namely the BTE contract, and from his comments in the witness box, that, in fact, that original bill was incorrect in charging £400 per hour. That part of the bill relating to the discounted CFA contractually limited the hourly rate agreed between the client and insurers to guideline rates. The original bill was clearly miscertified.

15. I appreciate that Rapid in the substituted bill rectified the hourly rate, but that appears to have been as a result of the points of objection, not acceptance that the original rate breached the indemnity principle. The issue of the contractual rate was not addressed until today. The second bill and certificate still does not give me confidence.

16. Further, it does not give me confidence in Mr Thompson's evidence when he was not the fee earner and has not been involved in this case prior to this cost issue. It has not given me confidence that Mr Thompson, having put forward a statement as to the date BTE enquiries were made, when challenged finds the date is incorrect. It does not give me confidence when Mr Thompson was unable to say with any certainty as to whether the CFAs identification of the defendant or defendants was the same or different in each of the CFAs. It does not give me confidence that Rapid in the replies made a statement that there was only one CFA which was clearly incorrect.

17. There have been a number of flaws throughout this assessment both on the paperwork, the replies, the statement of Mr Thompson, and the oral evidence heard today. On that basis I have to say that I have a significant doubt over the position of the CFAs and retainer in this particular claim. Where there is a doubt I must exercise such doubt in favour of the paying party. In the circumstances I cannot be satisfied that there are valid retainers between Rapid and Mr Scott. To that extent, the claim for costs against the defendant has to be struck out. If there is no valid retainer, there is no right to recover costs from Mr Scott other than, and I will wait for the advocates to correct me if I am wrong, disbursements that have been incurred and have been paid prior to the assessment proceedings.

18. On that basis, I am afraid the claim is assessed at either zero or whichever disbursements have been paid.