49/2014

IN THE COUNTY COURT AT LIVERPOOL

2YM06351

The Queen Elizabeth II Law Courts
Derby Square
Liverpool
Merseyside
L2 1XA

Monday, 1st September, 2014

BEFORE:

HIS HONOUR JUDGE GRAHAM WOOD QC

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MR EDMONDSON appeared on behalf of the claimant.

MR TAYLOR appeared on behalf of the defendant.

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1st Floor, Paddington House, New Road, Kidderminster. DY10 1AL
Tel. 01562 60921; Fax 01562 743235; info@caterwalsh.co.uk
and
Transcription Suite, 3 Beacon Road, Billinge, Wigan. WN5 7HE
Tel. & Fax 01744 601880; mel@caterwalsh.co.uk

JUDGMENT
(As Approved)

Monday, 1st September, 2014

HH JUDGE WOOD QC:

1. This court is concerned with an appeal from District Judge Woodburn in relation to a decision which he gave on the 4th of April 2014 when he confirmed the assessment of the receiving party's costs at nil following a request for an oral hearing in relation to a detailed assessment which had been provisionally dealt with on the papers pursuant to CPR 47.15.

2. The simple basis for so doing was that there had been a failure to comply with the practice direction for detailed assessments (including the provisional stage), in particular 47 PD 13.2(i) in respect of the documents which were to be filed with the court when a request was made for a detailed assessment; specifically, where as here the liability on the receiving party to pay costs to the legal representative have been called into question, any agreement, letter, or other written information which had been provided by the legal representative to the receiving party.

3. The receiving party's case before the District Judge, as indeed it has been before me, but expanded in several respects, is that the requirement can be interpreted broadly in relation to written information in the practice direction, in so far as the CFA's existence is clearly set out in the narrative to the bill of costs, and the bill is the subject of a signed statement of truth; that, it is said is sufficient and nothing more is required to ensure compliance with the practice direction. It is also said that the District Judge was wrong to stipulate that the practice direction required evidence of a document which was sent to the receiving party. The purpose which lay behind the requirement was that the assessing costs judge in dealing with the matter provisionally on the papers, could be satisfied that there existed a liability to pay, and a point raised in the disputed bill was effectively a non-point.

4. Permission to appeal was granted by His Honour Judge Parker on the 6th of June of 2014 on the basis that the points advanced on the appeal raised novel arguments on relatively new statutory rules, giving rise to the need for clarity and consistency. The matter was reserved for my consideration as Designated Civil Judge dealing with most of these appeals.

5. As well as challenging the learned District Judge's assessment of his interpretation of the practice direction as fundamentally wrong, Mr Edmondson, on behalf of the receiving party, also contends that the oral hearing requested following a provisional assessment is not an appeal or review as such but a fresh hearing at which the court is entitled to accept evidence which should have been provided at time the filing of the N258. It is axiomatic that if the signed CFA agreement which was proffered to the District Judge had been accepted by him then there would have been evidence of a liability to pay costs and an explanation of the charges in so far as that was necessary, even though there had not been strict compliance with the practice direction. The point is made that if the purpose of the practice direction was to enable the assessing judge to be satisfied where points were raised on dispute, it would be addressed by this documentation shown to him at the oral hearing, but otherwise withheld, of course, from the paying party's legal representative.

6. It is necessary to deal with a little bit of the background to the appeal. This claim to costs effectively arose from an accident that occurred in February of 2012.It was a claim which was originally within the RTA Ministry of Justice portal until liability was challenged and then it proceeded outside the portal in a fairly conventional way having been issued out of Northampton County Court with defence filed and allegations of negligence made against the receiving party. The matter proceeded I believe almost to the door of the court but a few days before the hearing, there was an offer made and the matter settled.

7. Because CFA is relevant to this case and it is asserted and I accept that this was a case proceeding on a CFA, the fact that it settled without getting to trial meant that the uplift available to the receiving party's solicitors was one of 12.5 percent. I will come back to the question of a CFA in a moment. But let me deal with the procedure that occurred thereafter, because it would seem that the parties, having established the terms of the settlement in again fairly conventional orders that the claimant would be entitled to costs to be subject to detailed assessment if not agreed, there was an unsuccessful attempt to obtain that agreement. This was doubtless because of the size of the bill which was unpalatable to the paying party's solicitors and insurance company. Accordingly the receiving party, by her solicitors, drew up a bill and the process for detailed assessment on the basis of that bill. It was in fairly standard form, containing, in addition to an itemised description of the work done, a schedule

showing the work breakdown, various pieces of correspondence supporting disbursements and certificates, and it also, in its detailed narrative, set out the precise basis upon which the CFA was pursued. There was an extract of the CFA agreement dealing with the definition of a win, a definition of loss, as well as the receiving party's liabilities in respect of certain eventualities.

8. It is important to stress, as Mr Edmondson has in this case, that because the claim was CFA funded there was otherwise no liability on the receiving party to pay costs outside the CFA agreement, and therefore this is not a case where a retainer/client care letter would have been provided.

9. Points of dispute were served by the defendant paying party, with the first, and only relevant dispute relating to a point of principle being the entitlement of costs for the receiving party. Of course this relates to the satisfaction of the indemnity principle, as I say, either with the provision of a statutory compliant retainer, or an effective CFA which is signed and valid. Now Mr Edmondson tells me, and I accept, that this is a point variously taken by paying parties who of course are not obliged to pay any costs in the absence of a validly signed CFA as there is no liability on the part of the receiving party.

10. In those circumstances, in the "old days", if I could put it that way, this matter might have proceeded by way of a detailed assessment and no doubt the use of significant resources on the part of the court. Detailed assessments notoriously are protracted and drawn out, sometimes involving many, many months or even years between the lodgement of the bill and the following of the necessary procedure and eventual resolution. But as for those cases that were commenced after 1st April 2013, or at least where the detailed assessment commenced after that date, there was a new provisional assessment procedure introduced, and this is covered by the new CPR 47.15. Effectively what it means is that the assessment is dealt with on paper once the points of dispute have been presented, and a document called an N258 has been filled in allowing the court to go through such process for those cases where the bill of costs does not exceed £75,000. And that is precisely what happened in this case. It came before District Judge Woodburn in the first instance, some time prior to April 2014, but the District Judge, having considered the papers and indeed considered the form N258, was concerned about non-compliance with the practice direction of 47PD13 and the requested N258 accompaniments which did not include, under

13.2(i), and this has been the focus of this court, *where there is a dispute as to the receiving party's liability to pay costs to the legal representatives who acted for the receiving party, any agreement, letter or other written information provided by the legal representative to the client explaining how the legal representative's charges are to be calculated.*

11. It is a little difficult to make the correlation between the liability to the receiving party and an explanation as to how the legal representative's charges are to be calculated because one seems to refer to liability itself, whereas the other seems to refer to rate, but no point has taken on that and no doubt those more experienced in dealing with detailed assessments would be able to elucidate if it was of any relevance.

12. That, according to District Judge Woodburn when he assessed the costs on paper, meant that the receiving party had failed to comply, and therefore the bill of costs was assessed at nil. Understandably, Mr Edmondson, the solicitor advocate who seems to have been handling this case throughout, was somewhat put out by that because he was fairly confident that he had complied with 47 13.2(i). So he decided that he would ask for an oral hearing, as he was entitled to under the procedure which exists where a party is dissatisfied with an initial provisional assessment, and he went through the necessary process to achieve that.

13. In many instances the detailed assessment which takes place on an oral hearing would be one where the court is being asked to address certain items in the bill, which is why the rules provide for the review of those items specifically. Of course where the bill has been assessed at nil it is the whole process that has been the subject of consideration by the court on an oral hearing. But there is no doubt, and it has not been challenged by Mr Taylor, counsel appearing for the paying party, that there was such an entitlement to ask for an oral hearing.

14. So the matter came before District Judge Woodburn on 4th April of this year, and he decided to uphold his initial decision on the basis that he did not agree with the interpretation of Mr Edmondson on the approach of the practice direction. He was also unimpressed with the suggestion that he could receive a copy of the CFA there and then because no additional material was or had been provided between the date of the original lodgement of the bill and the filing

of the form N258 and the oral hearing which was proceeding before him. He concluded that he was bound, because this was effectively a review of his original decision, by the material that was before him at first instance.

15. Mr Edmondson, on behalf of the receiving party, makes several points. The first and most substantial of these relates to the interpretation of the practice direction and the terminology *written information provided by the legal representative to the client* in subparagraph (i). He submits that the learned District Judge was wrong to say that this required evidence in the form of copy documentation which was sent to the client - it was satisfied by the narrative in the bill of costs which was attested to by a statement of truth and which made it abundantly clear that the client was funded by a CFA. This was essentially what was required and even though the narrative didn't actually confirm, as might have been preferable, that it was a signed CFA, this court, he says, can take cognisance of the fact that a solicitor would not have acted so unprofessionally as to proceed in a manner where he had no entitlement to pursue costs against the paying party because that would effectively be fraudulent as well as breach of the various solicitor's rules.

16. And he says that by application of the Pamplin procedure a court can be satisfied of the entitlement to costs based upon the indemnity principle without sight of the signed CFA agreement, which would be a privileged document, and there otherwise being no need for proof of indemnity the court could and should have inferred that there was such a valid entitlement. It is not is issue that the court can nevertheless look at documents which are not shown to the other side in this process. I do not think it is necessary for this court to explore in any more detail some of the case law following the decision in **Hollins v Russell and others [2003] EWCA 718** because this appeal falls to be decided, in my judgment, on different principles.

17. As far as the form N258 is concerned, the fact that the judge was influenced by a failure to tick the box that referred to a client care letter, says Mr Edmondson, provides some support for his argument that the Judge may have misdirected himself because the reference to ability has nothing to do with the corresponding subparagraph in the rule which talks about liability. In the form N258 the tick box has in square brackets "[*Where there is a dispute as to the receiving party's ability to pay] the client care letter delivered to the receiving party*

or the legal representative's retainer." This is not a reflection of the sub-rule although it appears to have some degree of parallel with the rules itself; this relates, he says, to the situation of the impecunious client, that is the opposite to the Naomi Campbell-type client, who has no other means of funding and is faced with a substantial bill which might suggest that the indemnity principle cannot be satisfied. Thus, he says, the Judge had misled himself if he was looking for a client care letter, and this may reflect the way he proposed to go about the balance of his interpretation.

18. In any event he points out practice direction 13.13 which provides that the court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will, in the first instance, be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document or whether to decline disclosure and instead rely on other evidence. He says that is classic reference, of course, to the situation which might prevail where a **Pamplin** procedure is appropriate. He points to the fact that under the practice direction 47.14, this particular subparagraph is not excluded and is specifically open to the court when dealing with provisional assessments, not simply those matters which proceed to detailed assessment.

20. Finally, he says that when he offered the CFA agreement for consideration by the court, which was declined, he says that the judge was wrong to say that he was constrained in considering that as this was a review hearing and he had no power, or at least was unable to make his decision other than on the basis of the material that was originally before him. Mr Edmondson says this was the wrong approach and for reasons of fairness and proportionality he should have asked for sight of the CFA.

21. On behalf of the paying party Mr Taylor seeks to uphold the decision of the District Judge who is an experienced regional costs Judge who was giving the words in the practice direction their ordinary and natural meaning. He says it was not simply the written information that was necessary, but proof that it was provided to the client, when one looks at the purpose of the practice direction and also the wording itself. And the court was entitled to be satisfied, either as to the basis of a retainer, or the existence of a CFA agreement; it was inconceivable, he says, that a narrative in the bill of costs achieved

this particular end. He did accept some ambiguity in the words of the form N258 but pointed out that the paragraphs did indeed, for the most part, correspond to the paragraphs in the practice direction.

22. In relation to the status of the hearing he referred to the rules and the practice directions for the procedure whereby there is a request for an oral hearing which refers clearly to review of items, that this is essentially the nature of what is happening on a "post-provisional" hearing, which is the word that the parties have used. He says the word 'review' is important and it should be distinguished from a true fresh hearing, or re-hearing, where there may be more flexibility in the material received. The rule, he says, does not provide for any other documentation than that which had been lodged at the time of the original request for a detailed assessment to be dealt with provisionally, and if it was intended that this would effectively be starting again or that everybody has a second bite of the cherry, one might expect that the rules would provide some procedure which could be followed in those circumstances.

23. So those are the respective arguments. What are my conclusions? And I have to say I haven't found this an easy case in which to come to a resolution, not least because as an appellate Judge I only dip into these costs cases where there have been detailed assessments and provisional assessments proceeding between the parties when things appear to go wrong, but I can apply my experience of statutory rule construction in arriving at my conclusions. The first thing that I need to do is to look at the practice direction itself and to arrive at an appropriate interpretation to determine whether or not the learned District Judge was right or wrong.

24. I do not believe that Mr Taylor persists in an argument that this very first principle is a matter within a discretionary range, because he was either right in saying that the narrative was non-compliant, or he was wrong, and I can substitute my own decision on the basis of simply a question of law. I have to confess here in my interpretation I find the words in the subparagraph 13.2i somewhat unhelpful and certainly open to two separate interpretations, and one can see how a broad interpretation might arrive at a conclusion that written information is not necessarily written information in

the form of a document that is provided to the client, but a replication in some way or another as to what it was that the client was being told as to the basis for which any liability for costs arose or charges were to be calculated. It seems to me it would have been more helpful if the word '*documentation*' was used instead of '*information*', because 'information' does lend itself to the interpretation that has been advanced, and hitherto pursued by Mr Edmondson in his other presentations of bills for detailed or provisional detailed assessment.

25. For what it is worth I accept the genuineness of Mr Edmondson's experience that he, and indeed perhaps many other solicitors, have proceeded on the basis that it is unnecessary to provide the CFA to the court in these circumstances but simply confirming that there is a signed CFA agreement in existence.

26. I have to say when I first looked at this provision I was prepared quite quickly to come to the conclusion that the only way that it could be interpreted, was that there needs to be evidence of the material that was actually given to the client by the legal representative. I then heard arguments and considered in more detail the purpose which this practice direction is intended to achieve. This has led me to a different conclusion, not one arrived at easily, but one which I hope does justice to the situation, and that is that what really is required when a point is raised as to the receiving party's liability to pay costs is an answer to that point in the form of information or evidence. Is there a distinction between information and evidence? The rule does not seem to make that entirely clear, but what the District Judge needs to know when making his assessment on the paper, it seems to me, is whether or not this is a validly funded CFA case or not. And if a solicitor purports to contend that it is a validly funded CFA case one might say arguably the purpose behind the rule is being achieved.

27. If the expression had been '*written documentation*', then I would happily have concluded that the District Judge was absolutely right in saying that what this required was evidence, physical evidence of the form in which it had been provided to the client, but where a

solicitor has purported to say, "*Well, this is what was in our CFA agreement, and I tell the court that it is the truth and that is that in these eventualities the costs would not have to be met by the client because he was effectively represented under a CFA and in the circumstances would only be liable to the paying party's costs,*" that, it seems to me, is tantamount to a replication of the written information provided by the legal representation to the client. Therefore I am more inclined to come to the conclusion, on reflection, that Mr Edmondson's broader basis for interpreting sub-rule 13.2(i) is to be favoured rather than the stricter and more limited interpretation.

28. However, having said that I accept that I might be wrong about that, in my judgment this appeal is not to be determined necessarily by interpretation of that sub-rule which is effectively subparagraph in the practice direction, which is somewhat ambiguous. Its particular interpretation however was made by the District Judge who, in my judgment, was probably influenced by the wording in the form N258, which it seems to me, again suggesting some degree of vagueness, cannot possibly refer to the liability of the receiving party to pay costs. Unless there has been a woeful typographical error that has been perpetuated in a form which is now in existence presumably on the internet, and is available to anybody who requires one for printing out purposes and certifying their notice of the commencement for detailed assessment. It is astonishing that the question of ability to pay would not have been pointed out to the court service, HMCTS, whoever is responsible for drafting this document, the Civil Procedure Rules Committee, whoever it happens to be, that there is such an extraordinary mistype. I accept Mr Taylor's argument that there appears to be some sort of parallel association almost with the subparagraphs of the practice direction, but I think that is more accidental than deliberate and I am prepared to accept Mr Edmondson's interpretation that this really does deal with those situations where there is an extraordinary disparity, if one likes, between the ability to pay on the part of the receiving party and the bill which is being tendered, which might suggest that the indemnity principle cannot be satisfied.

29. However, this particular form, as indeed the sub-rule itself, is open to alternative interpretation and there is no doubt that whatever the outcome of this appeal, these are matters that should be the subject of representation to the Civil Procedure Rules Committee, and I intend to do that for my part at some stage.

30. It then leaves this court in the situation as to how this appeal should be approached as to its balance. I could say that the Judge was wrong to come to the conclusion that he did on his interpretation. That would be a bold conclusion because I have to say that I do not approach my own interpretation with huge confidence. But it seems to me that there is a simple and more direct way in which this appeal can be resolved and that concerns something on which I do have rather more confidence, and it is the nature of the hearing itself. Reference has been made to this being a review hearing in the sense that the Judge was bound by the material that was before him at first instance and that therefore if there was other material available he would not be in a position to consider it. Not only because that appears to fly in the face of common sense, fairness, and indeed the overriding objective, where it is necessary to consider fairness and proportionality, but also because it appears to be inconsistent with the practice direction paragraph to which this court has been referred under 13.13, and that is the power of the court to direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision.

31. I had been somewhat concerned when I was first referred to this paragraph because it had not been the subject of any reference or submission before the District Judge at first instance. However, that has to be considered in context. Mr Edmondson very properly concedes that he, as indeed other costs lawyers and general practice lawyers are on a learning curve in relation to these new rules, and he perhaps should have referred the court to 13.13, but having identified the fact that the CFA was in existence and the court could consider it, if it wished to be satisfied that this was a case where there was an clear liability on the receiving party, or an absence of liability, as the case may be because this is a CFA agreement.

32. The learned Judge in those circumstances, because he had that power, was faced with a situation where he had to make a choice: either he received that documentation in compliance with his powers or he declined it, and that was a discretionary exercise. The problem was that he excluded any such discretion, he said, "*I simply don't have the power to do that.*" I do not agree with that conclusion; I think he did have the power to do it. That is plain from 13.13, and knowing District Judge Woodburn as I do, I am quite sure that he was in the same position as many other practitioners and judges were at the time with a fairly novel and new procedure in view of the fact that it was not directly pointed out to him there might be some mitigation, but nevertheless he still misdirected himself and was constrained in a way which by law he was not so constrained.

33. Therefore if there had been an application made to him to consider his power under 13.13 what would he have done? It would be easy for me to say now in view of the fact that it is clearly a discretionary power and there had been failure to comply with the rules, and Mr Edmondson had persisted in an argument which was not going to find favour, that he was entitled to come to the conclusion that he did come to, namely that he should not now receive the CFA agreement evidence. If, for the purposes of this particular part of the appeal I am wrong in my interpretation, nevertheless that would not have been an acceptable exercise of his discretion in all the circumstances.

34. This was a case where plainly Mr Edmondson had been proceeding on the basis of his own interpretation as to what was required to prove either the retainer or a CFA agreement, and if he had been wrong about that, proportionality and fairness, in my judgment required that he be given an opportunity to put that right and to go about it in a different way.

35. Therefore I have come to the conclusion, whether this is approached on the basis of a 13.13 exercise of a discretion, or whether Mr Edmondson should have been afforded an opportunity to apply for relief from sanctions for non-compliance which would have satisfied the test now established in Denton it would have been incumbent upon the court to afford the claimant and the receiving

party that indulgence. If I am wrong in my interpretation of the practice direction, I have come to the conclusion that when addressing the question as to the manner in which the hearing was proceeding before him, not only was it open to the Judge but it was also incumbent upon him for those reasons to accept evidence of the CFA , and to be satisfied that this bill could be properly assessed in a particular sum rather than nil.

36. That is my judgment and it must follow that that the appeal should succeed; but I will just add this by way of a footnote. I come to the conclusion in relation to the interpretation, as I have indicated, not with great confidence. I do not know whether this matter is ever going to be considered at a high level or whether the rules are ever going to be drafted differently with different practice directions. It seems to me sensible that to avoid the situation arising again a party who is submitting his or her form N258, should take greater steps to ensure that the alternative interpretation cannot be one that would challenge his or her entitlement to costs. Simply providing, but on the basis that this is not going to be disclosed to the paying party, the CFA, or at least the client care letter, or indeed preparing a letter that could be used to ensure satisfaction with the alternative interpretation in 13.2(i) would avoid the need for further arguments in these circumstances.