

Ref. G08YJ869

IN THE COUNTY COURT AT CHELMSFORD

Priory Place
New London Road
Chelmsford

Before DEPUTY DISTRICT JUDGE JACK HARRISON

IN THE MATTER OF

OPTIMAL CLAIM LIMITED (Claimant)

-v-

MR DARIUSZ G GLAB (Defendant)

MR ALEXANDER PAYTON appeared on behalf of the Claimant
MR DANIEL LAKING appeared on behalf of the Defendant

JUDGMENT
29th JUNE 2023
(AS APPROVED)

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JUDGE HARRISON:

1. This is a detailed assessment of a solicitor/client bill in case number G08YJ869 Optimal Claim Limited and Dariusz Glab. Very helpfully set out in a points of dispute document are the issues that I must determine today. The claimant, Optimal Claim Limited, are the defendant Dariusz Glab's former solicitors in a road traffic accident claim, the claimant today represented by Mr Payton and the defendant by Mr Laking. My thanks go to both for the skill and moderation with which they have dealt with this matter today and throughout this hearing.

2. What I am going to do is give on this first point of dispute that relates to whether a success fee should form part of any order that I make, I am going to give my central reasoning on it. I have been directed by Mr Laking and Mr Payton to various sources of law starting of course with the rules in CPR 46.9, the commentary in the White Book thereafter and in particular the case of *Herbert v HH Law* [2019] 1 WLR 4253 and I take those things into account. They are set out in full in those documents and I incorporate them into my judgment. I do not repeat them here; it is not necessary to do so. The law is agreed.

3. There has been throughout this hearing so far reflecting perhaps the dynamic nature of this process a back and forth between me and both barristers and what I will say is if this matter falls to be reviewed by another court, then a transcript of the hearing should be provided and not just my reasoning. That will provide whoever is looking at the transcript with the full grappling with the issues that has taken place during this hearing.

4. The claimant contends that the CFA document, Conditional Fee Arrangement document, that I have before me in this matter, which is dated 17 April 2015, forms the basis of the claimant's claim for a hundred per cent success fee. The defendant raises two issues with that with reference to the rules and the questions I have to ask are these: Firstly, was there a consent in relation to this level of fee and secondly, is the hundred per cent properly justified and was it consented to?

5. In respect of the first question, which is whether there was a consent, this is of course relevant to the rule in 46.9(3)(c). I am not, I am afraid, satisfied that there was proper consent in this case. It is ultimately for the claimant to show that there was. I have a signed CFA and I will come to my views on that and in particular the contents of it as it is shown on its face. I have a Polish translation of that document and I have a number of emails back and forth between the defendant and his solicitor in the most superficial of terms.

6. The timeline seems to be shortly after the incident at which the defendant was knocked off his bike, suffered a head injury and was put into a medically induced coma such was the extent of the injuries he had suffered; he instructs solicitors who are the claimant. They enter into correspondence, there is a client care letter dated 17 April 2015. With the accident taking place on 3 February 2015, so about eight weeks after that event. The claimant is introduced to the file handler, someone described as a litigation executive and introduced to someone who is described as a legal director overseeing the claim. What happens then is that correspondence is entered into to firstly arrange a telephone call and secondly then to arrange for documents to be signed.

7. What I do not have is a file note of that telephone call - the initial telephone call - where a conversation will have taken place. I troublingly do not have that, and it is significant for two reasons. The first is that it is obvious from the fact that documents were

provided in Polish and that English was not the defendant's first language, it was in fact Polish, that there is an identified need for additional language support.

8. I accept that the emails that were going back and forth between the litigation executive and the defendant were in English, however they are in the most superficial of terms. They are limited to one or two lines, and they are conversational. What is being discussed in terms of subject matter here is not conversational. It is highly technical, highly nuanced matters of contract that have far reaching consequences potentially in terms of pecuniary liability for the defendant.

9. I have no evidence that steps were taken to ensure an understanding of those terms in a way that were sympathetic to the defendant's language needs. I have no evidence that a conversation about them took place at all and that seems to me to be a fatal poverty to this aspect of the claim.

10. The other troubling reason that I have alluded to, and it is not one prayed in aid by the defendant but one that I raised during Mr Payton's submissions was that this is a gentleman who suffered what seems to be a serious head injury. He was put into a coma for days. I have no evidence whatsoever that any care was taken to establish firstly if he even had litigation capacity at that point, at a future point, whether his capacity was fluctuating and the extent to which any regard was given by the claimant to identify and deal with those challenges. I do not know but it is for the claimant to prove that consent was given and that seems to me again to be a gaping hole in the evidence provided by the claimant and gives me an additional need for caution.

11. I make those observations against the background of the *Herbert* case which says very clearly where these matters are in dispute there must be evidence that there was a full and fair explanation and I have no such evidence.
My conclusions on whether there was a valid consent are unhesitatingly is I am not satisfied that there was. The level of the success fee troubles me as well.

12. I take the point made by Mr Payton that prior to 2013 the CFA document deals with what Mr Payton I think described, although I do not think he endorsed this term, but *pro forma* matters in the CFA that were contemplated by the rules. And so Mr Payton's central point is that in terms of the adequacy of the risk assessment within the CFA is that the matters on page 147 at A to F are exactly those contemplated and prescribed prior to 2013 and therefore effectively, although it is perhaps a little generic the boxes ticked in terms of the rationale for the success fee and the level of the success fee.

13. But that approach of course has developed, and the rules changed, and the Court of Appeal in *Herbert* has given these courts a useful touchstone for thinking about these issues afresh and critically. The point made by Mr Laking in my view is a good one, which is this risk assessment does not relate to this case. I have at page 147 at A to F a risk assessment in generic terms about a high-volume, low-value personal injury case. I do not have anything about *this* case, and the risks in terms of *these* parties.

14. I accept what Mr Payton says of course is very difficult at the outset of a case to provide such a personalised risk assessment and I will come to that in more detail in a moment. But it seems to me that yes while I accept that there is a difference between *Herbert* and this case because of course in *Herbert* there were no reasons provided, the reasons provided in this case are fundamentally – when one considers the facts of this case

even as they may have been known at that time – fundamentally superficial, fundamentally generic and not of anything other than generic applicability to the facts of this case.

15. The point of course that Mr Payton raised that I said I would come back to is how do you know at an early stage of the litigation what the risks are, how can you have an accurate risk assessment? And therefore, how can you formulate the success fee in anything other than generic terms? The answer to that is in risky cases one would expect an ATE premium, one would expect some sort of lien to underpin the risk. That is not done in this case.

16. Frankly, the idea that one cannot rewrite the CFA and one cannot rewrite the success fee, yes well of course, but that, in my judgment, does not justify a policy of assuming the worst case scenario because it breaks the relationship between level of fee and risk. It is the *raison d'être* of the success fee. It is there to show or to reflect the risk that is being taken by the solicitor. It is the *quid pro quo* and that approach breaks that link, and that link where this issue is concerned is sacred.

17. I am therefore very troubled by the presence of a hundred per cent success fee. I accept it was set as a maximum in the 1990 statute, although it was set as a limit and not a target. But that is why I am deeply troubled by the percentage.

18. So my conclusions, I am firstly not satisfied that the conditional fee arrangement that I have been provided with is a reliable note of the agreement that was reached between the defendant and the claimant. I struggle as I have said to see its validity. I have struggled to see that I can be satisfied that it was entered into and formed in a free way. And I struggle to see that where there are both potentially cognitive and language barriers to overcome, that there is any evidence before me that care was taken in a way that would lead me to conclude that this was entered into in an informed and free way.

19. The matters raised in Mr Laking's skeleton argument at paragraph 15 about again the poverty of evidence and the policy of evidence of explanations in terms of the meaning of pecuniary loss, future pecuniary losses, et cetera. Mr Payton said there is no evidence that was not explained but that reverses the burden of proof. The burden of proof on this matter is very much for the claimant and in my judgment, the has not been discharged. I am therefore not allowing it.

(Proceedings continued)

20. So the next point I have to determine is the appropriate hourly rate for the work that was done on this case. The claimant in its bill of costs claims an hourly rate of £400 an hour, the basis of which is set out as follows: "hourly rate applied in accordance with the conditional fee agreement, preparation and attendances £400 an hour, routine letters and telephone calls £40 an item." And so, there is a reference effectively saying that that is valid by incorporation within the CFA.

21. The fundamental problem with that submission of course is I have already expressed the view or made findings in fact that the CFA is not a reliable note of the agreement that was reached, and I have already raised significant concerns about its validity. But let's leave that aside for now and look at what is claimed.

22. Again, refer to a transcript for the law that is discussed but in a nutshell the question for me is whether these costs are of an unusual nature or amount. Most of the work in this case

was done at Grade D. The time Grade D engaged was six hours and 36 minutes as opposed to 24 minutes taken at Grade A. Grade D refers to a paralegal or a trainee. That itself covers a multitude of sins from the unqualified to the highly qualified trainee the day before their qualification. It covers work being done at the lowest level.

23. It is a good point made by Mr Payton that we are not dealing with *inter parties* costs or summary assessment, we are dealing with a commercial bill charged at the commercial rate, and so I am not tied by the guideline rates for summary assessment. But the summary assessment guideline rates do give me a touchstone of reality as to broadly what one may look towards as reasonable. They are the most reliable touchstone of that type. Even if I do not enforce them, I can at least use them as a comparison, or a comparator I should say for the singular.

24. In my judgment, to bill out an unqualified person at £400 an hour is not acceptable. I pause to remind myself that I have been provided with no information about the fee earners that were being used, but neither I am here to interrogate their CVs and see if they are worth the money. That is not my job. They are not qualified. They are subject to, or they should be subject to a high level of supervision. They are not able to do the sorts of things that solicitors are able to do. They are not able to give the sort of advice that solicitors are able to give. They do not have the knowledge and experience necessary. That is why they are billed at Grade D.

25. In my view, to bill out unqualified people at £400 an hour is borderline profiteering without any basis whatsoever, and the commercial rate is not an excuse to do that. So, I am not satisfied that £400 an hour for a Grade D fee earner is within the same stratosphere as should have been provided for in this case.

26. The other problem here is the issue of information that was given and the issue of the consent that was given. The fact that what is relied upon effectively by reference is the conditional fee arrangement, it firstly is problematic for the reasons I have already said and the findings I have already made. Secondly, it is problematic because there is nowhere in the conditional fee arrangement that I have seen an exposition of the rates that would be charged as against the experience of those charging them.

27. Frankly, any reasonable person given a piece of paper to agree to pay £400 an hour for someone who was unqualified and whose work needed supervision I imagine would end up in two pieces rather than being signed. I do not consider it to be reasonable, likely on any level that that would have been agreed to had it been explained.

28. It is obscure, it is obtuse, it is completely obfuscated in the CFA and I do not find that that is a reasonable basis to rely upon when saying effectively that the defendant has made his bed by agreeing to these rates and therefore he must now lie in it. It is a very tenuous bed and it is a very disproportionately expensive bed at that. So I am not allowing the work done to be billed or assessed at £400 an hour. That is completely disproportionate.

29. I am satisfied within the meaning of r.46.9(c), unusual in amount when I consider the facts of this case and when I consider as a comparator the guideline rates for summary assessment. I am going to assess costs based on an hourly rate of £111. That was the summary assessment figure for Grade D for a firm in Preston. This is a high-volume low-value personal injury case. It does not justify a departure from that in the way that was specified.

30. The other point to be made just in relation to the point about the time spent relating to the language difficulties, that is not in my view a reason to charge more in terms of rate, it is a reason to charge more in terms of hours because it requires the buying in of additional expertise. It is not a reason to assume that the Grade D fee earner would have to assume additional expertise or language skills to deal with this client.

31. So, I am not persuaded that the higher rate is justified by the quirks of the client in this case. I am sympathetic to the idea that that may mean that more time is spent but not that the rate should increase. Any assessment of costs in this case will proceed on the basis of £111 an hour.

(Following further submissions)

32. The next issue for me to decide then is whether the solicitors have performed the retainer. It is said on behalf of the defendant that there was a failure by the solicitors to perform the retainer and therefore they should be deprived of some or all their costs. I am pointed by Mr Laking, and no issue is taken with the description of the law by Mr Payton, to firstly base contractual principles and secondly the 1974 statute, Solicitor's Act, section 63(3) that says if the client does have reasonable grounds for changing solicitors it opens the door to say that there should be a deduction for costs based on the fact that the client has had to do that.

33. Mr Laking says that that was in play, effectively that by the time he changed solicitors the defendant was effectively running some sort of fool's errand trying to chivvy his solicitors along, doing things they should have done. Mr Payton said "Well, what did the Roman do for us?" The claimant avers: quite a lot and effectively points to a litany of documents suggesting that the claimant had in fact undertaken a significant amount of foundational work. Mr Payton effectively says that the claimant seeded the flowerbed, the solicitors after that will have collected and sold the flowers.

34. So what did Optimal do? I want to start by looking at the letter from Weightmans because there is a letter from Weightmans on 27 October entering into correspondence. It is the first from what I can see of this file only time that the defendant solicitors contacted Optimal asking if there was a police report, asking them to complete preliminary inquiries and arranging several forms of authorities, and then asking for details of medical conditions and attaching a number of forms of authorities. They were not responded to.

35. I am firstly a little concerned that Optimal, whilst they may have done other work that I will come to, did not enter into correspondence directly with the other side's solicitors which seems to me to be an important part that is lacking in this case. Secondly, they did indeed do a CNF. There is an email on 15 September 2015 at 15:55, it is page 64 in the bundle, from Joanna Olesiack to Mr Darrick saying, in this attachment I am sending a claim notification form. For your information, you do not need to sign the document.

36. The claim notification form was not responded to in the portal. We know liability was not admitted. The matter dropped out of the portal ultimately whirling its way towards Part Seven. But let's pause there and consider the importance of this document for a minute. Anyone who has ever done a road traffic accident trial knows that the claim notification form is important and often fertile area of cross-examination.

37. It is important, and claimants are routinely cross-examined on the details of that form when the consistency and reliability of their account is interrogated. The claim notification form as the case law is very clear about will often form part of the assessment about credibility and consistency. It is a key document. It is a watershed document. The relevance of that was not explained to this client in any way at all.

38. There is no correspondence from Optimal explaining the magnitude of that document and urging upon the client, the defendant in this application, to interrogate those details carefully. There is no explanation of how it may be used or what it was going to be used for. Solicitors are not form fillers. Yes, that is part of a solicitor's job, but the value of a solicitor is about advice. It is about experience. It is about knowledge. They are not just a post box and the problem with this correspondence is that it is using the defendant as a post box.

39. It is not giving the information that is essential to understanding the importance of this form in this correspondence. So yes, they did complete the CNF, but they did not do any of the things that I might expect to be accompanied in the CNF to make sure it was accurate, to make sure it was in apple pie order. All it says is, I am sending this CNF for your information, you do not need to sign this document. That, in my judgment, is a failure by the solicitors and could, as I am sure everybody in this hearing will have seen, damaged the defendant's prospects at trial if there were significant inaccuracies. None of that was explored with or explained to the defendant.

40. There is then the question of the medical experts. To go to page 95, that is the letter of instruction sent on 23 October 2015 by Optimal Solicitors to Optimal Med. It says this,
"We are instructed by the above client in relation to an accident occurring on 3 February 2015. Please could you provide us with the usual list of three experts for forwarding to the defendant insurers."

Now that is about obtaining quotes, so one is not looking at different disciplines of experts by a usual list of three experts. One is looking only at the type of expert which is then defined underneath as an A&E consultant. Let's think about this.

41. A man is hit off his bike and injures his head. What might one expect to see? A radiologist, a neuroradiologist, key to questions of diagnosis and prognosis, diagnosis relating to mechanism, prognosis relating to an effect. So a radiologist, essential; neuroradiologist, essential; neurologist, essential, haematologist, potentially essential if there is a problem with mechanism. Anyone who has ever done a case with a head injury knows that those are the experts that come up again and again and again. And they come up again because they are required to understand causation.

42. On 23 February, eight months after the accident, the solicitors ask for an A&E consultant. What that means, I do not know. But to waste time and money by asking for that when what was required at this time was critical thought, seems to me to be a fundamental degradation of the duty owed by these solicitors to this client to progress his case properly and to do so in a timely way. Because one is already facing the prospect of examining someone with a serious head injury eight months after the event.

43. That is compounded by the fact in January of 2016, three months after the decision was taken to 'get some quotes', seems to be the first time that a solicitor from this firm looked at

the file. There is no other reference to the solicitor from the firm looking at the file and given what the cost schedule says about the amount of work that was done that was 24 minutes, I suspect this is one of those few occasions.

44. But at that point, on 18 January 2016, three months after the decision was made to get quotes to instruct an expert, the solicitor looks at it and says no we will need consultants reports which will be expensive. Expensive and perhaps extensive. This is the first time that someone looks at the file and says actually no, what is required is something significantly more in depth than a singular A&E consultant's report. And that seems to have been done three months after the file handler decides that what is needed is something else. Something that would be completely inappropriate and not at all helpful to establish mechanism, to establish diagnosis and to establish prognosis: all essential aspects of pleading and valuing a claim.

45. And therefore to give even the most basic understanding of what kind of value of case we might be dealing with. It is a failure on the part of the Grade D fee earner who either does not have the knowledge, experience or wherewithal to see a case of complexity and seek advice. And it is a failure of supervision to frankly let a very serious and complex case, the sort of case that I imagine would probably find its way on to the multi-track, to be dealt with at that level by a senior judge, and important steps to be taken without supervision.

46. There are then of course the points that are made about the solicitors assuming the shouldering of disbursements *et cetera* by Mr Laking. But I am more concerned here about what seems to be a wholesale failure to identify in a timely way the sorts of experts that might be needed and for that to be reviewed. And, in fact, the fact that that was reviewed some three months after the quote request was sent off is absurd. And I am not in any persuaded that the solicitors have acted responsibly in that issue at all.

47. That does lead me to the observations about the file handler. It is right where Mr Payton says that file handlers do change in PI litigation. This is a firm set up clearly to absorb high volume low value litigation. This may be high volume but it is certainly not a low value case. It certainly had a significant human impact as one can see through the papers. I am very troubled that actually the majority of the work was done at such a low grade fee level. This with terminology through the correspondence that is just legally inconsistent, and displays a level of ignorance which concerns me greatly.

48. This is a case with serious injuries, with serious effects, that should have been on the desk of a solicitor right from the start supervising this case and guiding it, and it just was not. There was 11 months from the index accident to this case being looked at by a solicitor. So the file handlers changed does not concern me because actually this case was being dealt with at completely the wrong level within this firm. And it is no wonder.

49. I am not critical of the Grade D fee earners in this case because they I am sure were trying their best with the limited experience that they have. That they have not been properly supervised is not their fault. But there is a golden thread of irresponsibility that runs through the way that Optimal ran this file. The point about the correspondence: yes there was some correspondence back and forth. Again, the correspondence that was sent for example on page 75 where requests were made for police details, this is again a proforma letter.

50. You only need to look at the reference to police details and then read the previous correspondence to wonder why something like that was included when it was known that

there were issues with the police. It was known there was issues trying to get the accident logs. That is the only thing in fairness the defendant and his solicitor had been talking about for a significant period of time. This is a proforma letter. I am not entirely convinced that this was generated with anything more than a couple of touches of a button. And again it brings me back to wondering the level of attentiveness that these solicitors showed.

51. So the Romans, to answer Mr Payton's question, did do some things but in my view they did them very badly. They have not served the defendant well. There are a litany of mishaps, which in my view is a plain consequence of running a case that is serious at a level that is not appropriate for it. This is a Rolls Royce, and it has been run on vegetable oil. And again, no disrespect to the staff who were holding the file, but did the solicitors do justice in terms of the attention and resources they gave this client and this file? I am very clear that they did not.

52. If they had done what they had done well, I may have been persuaded that 10 or 20 per cent of the costs should be awarded to them because I accept if these things had been well we are dealing with foundational actions that Mr Payton quite rightly assumes but I think safely assumes would have formed the basis of the new solicitors taking over the file when they received what had been done. But these were not done well. These were done poorly. They were done inattentively. They were done chaotically without adequate supervision.

53. I accept that there was chasing. I accept that Mr Glab may have been difficult to engage at certain points. And I accept that some of the delays were caused by the police delays, but that provides no defence whatsoever to the inattentiveness and chaos that I have already identified that fundamentally obstructed justice being done in this case for some period. The appropriate award in my judgment is one per cent, as a nominal recognition for this.

This transcript has been approved by the Judge