Case No: E30YM763

IN THE COUNTY COURT
SITTING AT OXFORD

Oxford Combined Court Centre
St Aldates
Oxford
OX1 1TL

Date: 12/01/2023

Before :

DISTRICT JUDGE LUMB
(sitting as a Regional Costs Judge)

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Between :

ASHOK PATEL	**Claimant**
- and -	
SUBIR KARMAKAR	**Defendant**

- -
- -

Shaman Kapoor, counsel (instructed by **Kelly Owen**) for the **Claimant/Paying Party**
Antony Whittaker, Costs Lawyer for the **Defendant/Receiving Party**

Hearing dates: 19 November 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DISTRICT JUDGE LUMB

District Judge Lumb :

Introduction and the Preliminary issue

1. This judgment concerns an important preliminary issue raised in a detailed assessment of costs that is commonly misunderstood by members of the legal profession including some of the judiciary.

2. The issue concerns the extent to which a solicitor acting for himself in litigation in which he himself or his firm are a party, can recover costs on a commercial hourly rate basis, in this case claimed at £500 in the Bill, as opposed to being restricted to the statutory hourly rate of £19 or for proved financial losses capped at the equivalent of two thirds of the costs that would have been recoverable had the party chosen to instruct an independent solicitor.

The parties and background to the dispute in the main action

3. The parties are both solicitors who had previously worked together at a former solicitors practice known as Balsara & Co which was owned by the Claimant who was the sole principal. Under the terms of his engagement with Balsara & Co the Defendant was entitled to a proportion of the monies he earned for the Claimant's firm. The sums were initially calculated on the basis of work in progress but the advanced payments made to the Defendant were ultimately converted into loans which could be subject to repayment by the Defendant in the event that there had been overpayments.

4. The subject matter of the underlying action giving rise to this detailed assessment was a claim by the Claimant for repayment by the Defendant of alleged overpayments under the terms of the remuneration agreement. That action was concluded by a successful application to strike out the claim on the grounds of limitation and the Claimant was ordered to pay the Defendants costs of the action to be assessed on the standard basis in default of agreement.

5. The Claimant remained with the successor practice to Balsara & Co. The Defendant moved to a different practice, Saunders & Partners LLP ("Saunders") where he was working at all material times during the course of this action. Although the precise status of the Defendant at Saunders remains unclear it seems possible that he was retained by them on some form of consultancy basis. It has not been clearly evidenced by him that he was a partner or equivalent at Saunders but for reasons which I shall explain his precise status is immaterial to determination of the issues before the court on this detailed assessment.

6. Most pertinently, it is common ground between the parties that Saunders were never on the court record as acting for the Defendant nor is it asserted that the firm were acting for him prior to the issue of proceedings.

The detailed assessment proceedings

7. The parties' respective arguments with regard to the preliminary issue as to whether or not the Defendant is restricted in his recovery of costs to those of a litigant in person

are set out in detail in the Points of Dispute of the Claimant who is the paying party and in the Reply to those Points of Dispute served by the Defendant.

8. These pleadings in the detailed assessment proceedings refer to a number of authorities and copies of those authorities have been provided to me. In addition, the court has been provided with a skeleton argument on behalf of the Claimant from Mr Kapoor and I heard lengthy oral submissions from him and from Mr Whittaker on behalf the Defendant.

The law

9. The outcome of this case turns upon the correct construction of the meaning of CPR 46.5 which defines who should be regarded as a litigant in person for costs purposes.

CPR 46.5 (6) states:

6) for the purposes of this rule, a litigant in person includes –

(a) a company or other corporation which is acting without a legal representative; and

(b) any of the following who acts in person (except where any such person is represented by a firm in which that person is a partner) –

(ii) a solicitor;

(iii) a solicitor's employee

10. The editorial note of the White Book 2022 at page 1614 observes that *"a litigant in person may now include a company or other corporation acting without a legal representative and a barrister, Solicitor, solicitors' employee or other authorised litigator acting for themselves. A solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm's name, is not, for the purposes of the CPR, a litigant in person (r.46.5(6)(b)"*

11. The editorial note continues at page 1616 under the heading **"solicitors acting on own account"** to consider the development of the law from the common law position where solicitors acting for themselves were limited to recovery of out-of-pocket expenses only to **London Scottish Benefit Society v Chorley [1883-1884] LR 13 QBD 873** where profit costs were recoverable albeit at a lower hourly rate than the commercial rate, to the position post-CPR in **Malkinson v Trim [2002] EWCA Civ 1273** which confirmed that the Chorley principle did survive the CPR and reaffirmed the principle that "*a partner who is represented in legal proceedings by their firm incurs no liability to the firm, but suffers a loss for which, under the indemnity principle, they ought to be compensated because the firm, of which they are a member, expends time and resources which would otherwise be devoted to other clients."*

12. The editorial note also confirms that a firm of solicitors which acts for itself is not a litigant in person: **Halborg v EMW Law LLP [2017] EWCA Civ 793** nor are sole practitioners, sole principals and limited liability partnerships.

13. In the course of submissions, both parties took me to details of the judgments in **Chorley, Malkinson and Halborg**, the latter two of which are binding upon me in interpretation of the applicable principles post-CPR.

14. In addition, I was taken to a number of other first instance decisions where interpretation has been considered and in particular the cases of **JMH v CFH and SAP [2020] EWCOP 63**, a decision of HHJ Evans-Gordon, sitting in the Court of Protection and **Poole v Scott-Moncrieff and Associates (unreported) Case No SC-2020-BTP-000299** decided by Costs Judge Rowley sitting in the SSCO.

A summary of the parties' submissions

15. Mr Kapoor on behalf of the Claimant submits that the construction of CPR 46.5 is easy and straightforward. The Defendant is a litigant in person unless he was (and is) represented by a firm of solicitors in which he was a partner.

16. He emphasises that representation by the firm is an essential first hurdle that the Defendant has to overcome before the court considers whether or not he was a partner in the firm.

17. The term "partner" now is potentially open to wider interpretation as is demonstrated by the Court of Appeal's approach in **Halborg** to include members of LLPs, sole practitioners and the like as not being litigants in person for the purposes of CPR 46.5.

18. In any event, Mr Kapoor submits that the precise status of the Defendant within Saunders is immaterial as the firm were not representing him in defending the claim.

19. An examination of the court file shows that all the correspondence from the Defendant to the court even if sent via his Saunders email address was signed by the Defendant in person and Saunders were never on the court record as acting for him. Indeed, up until the fourth witness statement in the proceedings served by the Defendant he maintained that he was a litigant in person including his description in the bill itself where he has signed the certificate of accuracy in his personal capacity. The same is also true of the certificate of compliance with the indemnity principle on the N260 statement of costs filed in the strike out application. The exception in the fourth witness statement of the Defendant arises from consideration of Cost Judge Rowley's decision in **Poole** which is expressly referred to in that statement and arguing that the factual circumstances of the Defendant are identical to those of the successful receiving party in **Poole** who was held not to be a litigant in person for the purposes of CPR 46.5.

20. Mr Whittaker submits that the proper interpretation is rather more nuanced and requires a purposive approach rather than a literal one. He relies upon the strong criticism made by the then Master of the Rolls, Sir Terence Etherton, of the paying parties argument in **Halborg** that a sole practitioner was not a partner and therefore could not be within the exception set out in 46.5 (6). The MR had dismissed these arguments as being *"a slavishly literal interpretation which would produce an absurd and plainly unintended result".*

21. In the modern world of legal practice, the term partner is somewhat outmoded and there are now all sorts of forms of legal practice including limited liability partnerships, consultancies and the like. Mr Whittaker sought to emphasise that it is the public policy

rationale behind the application of relevant professional skill and labour by the solicitor in the conduct of the litigation and in the course of his practice which is measurable, that is the important factor here and the Defendant who had the relevant professional skill to conduct litigation was exercising precisely that skill and should therefore be able to recover a commercial hourly rate. The Defendant's Replies to the Points of Dispute contain lengthy quotations from **Halborg** and **Malkinson** purportedly in support of this contention. However, these passages stop short of quoting what I consider to be the crucial part of the judgment of Chadwick J in **Malkinson** in paragraph 22 as follows:

22. *"One effect of CPR 48.6 (6)(b)* [now CPR 46.5] , *read in conjunction with section 52.5 of the practice direction, is that there is now more clearly recognised a distinction between the solicitor litigant who provides, in connection with his own litigation, professional skill and knowledge in the course of his practice as a solicitor – that is to say, who* ***"is represented by himself in his firm name"*** [my emphasis] – *and the solicitor litigant who provides skill and knowledge in what might be described as "his own time" – that is to say, outside the course of his practice as a solicitor and (typically) outside the office. The latter is treated as a litigant in person for the purposes of [the rule]; and so is subject to the restrictions imposed by that rule, including the two thirds restriction imposed by sub- rule (2). The former is not. Nor is there any reason, consistent with the need to provide an indemnity, why he should be. Further there is no reason, consistent with the need to provide an indemnity, why he should not recover the cost of providing professional skill and knowledge through employees of his practice."*

Can the Defendant bring himself within the exception to the definition of litigant in person in CPR 45.6 (6)?

23. In my judgment, it is the requirement to be represented by the firm that is crucial for the Defendant to bring himself within the exception in what is now CPR 46.5.

24. I find support for that analysis in the decision of Master Leonard in **Zakirov v Newmans Solicitors [2012] EWHC 90222 (Costs)** in paragraphs 48 et seq and in particular at paragraph 52 *" a solicitor is a litigant in person, like any other litigant in person, if he is on the court record as acting for himself. If the record shows that he is represented by a firm of solicitors, he is not. That is the case whether or not he is a partner in or employee of the firm on the court record."*

25. It is for precisely that reason that I conclude that the precise status of the Defendant with Saunders is immaterial and therefore I do not need to make a formal determination of his status.

26. Further support for this conclusion can be found in paragraph 24 of the judgment of HHJ Evans-Gordon in **JMH** *"in all the reported cases the solicitor litigant was acting through his own practice or firm or had instructed the 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 of the professional rate without being able to establish personal loss."*

27. I also agree with the analysis of HHJ Evans-Gordon that to allow otherwise would require an extension to the Chorley Principle. It is not for first instance judges below

the Court of Appeal to extend the Chorley Principle by interpreting the provisions of CPR Part 45.6 in any way other than the plain and ordinary meaning of those words. If the position is to change then this would most likely have to come from a change made by the Civil Procedure Rule Committee or at the very least by the Court of Appeal itself.

28. I recognise than in coming to this conclusion my view differs from that reached by Cost Judge Rowley in **Poole**. **Poole** is heavily relied upon by Mr Whittaker and although he acknowledges the decision is not binding upon me, he submits that it is highly persuasive given Cost Judge Rowley's status as a specialist judge in the SCCO and that he is one of the co-authors of one of the leading costs textbooks, Cook on Costs.

29. Whilst the facts and status of the receiving party in **Poole** would appear to be on all fours with the status of the Defendant in the present case, I respectfully disagree with the analysis and conclusion. Having read the judgment carefully, nowhere has Costs Judge Rowley considered the distinguishing features in **Poole** from the other decisions post-CPR namely the absence of the requirement that the receiving party was acting through his firm evidenced by them being on the court record for him.

30. This apparent oversight appears to have arisen from the way in which the case was argued before him judging by his summary of the submissions made to him in paragraphs 22 et seq of the judgment.

31. The proposition from the paying party in **Poole** appeared to be limited to the need for the receiving party to have his own practice as a solicitor either as a sole practitioner or in partnership with others. That contention was only dealing with part of the test as set out in CPR 45.6 and the accompanying practice direction. The reference to the need to be represented by the firm appears to have been completely overlooked. Instead, Costs Judge Rowley allowed himself to be distracted into considering the position of non-practising solicitors as being ones who would be caught by CPR 45.6.

Conclusion

32. For these reasons, I prefer the submissions of Mr Kapoor on behalf of the Claimant paying party and conclude that for the purposes of CPR 46.5 the Defendant is a litigant in person.

33. The mere assertions by the Defendant that he could have spent more of his time working on matters for clients whether during the working day or otherwise is insufficient to establish that he has suffered a financial loss let alone the extent of that loss for the purposes of CPR 46.5(4)(a). It is therefore impossible to apply the cap under CPR 46.5 (2) of two thirds of what an instructed solicitor on the record would have been able to recover. The Defendant will therefore recover on the standard basis for work which had been reasonably undertaken and is reasonable in amount at the default litigant in person rate of £19 per hour.