



Neutral Citation Number: [2023] EWHC 1075 (SCCO)

Case No: SC-2022-BTP-000858

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 5th May 2023

Before :

SENIOR COSTS JUDGE GORDON-SAKER

Between :

ANN FRANCIS IKIN & others

Claimants

- and -

SHAWBROOK BANK LIMITED & others

Defendants

Mr Dominic Finn (instructed by **Parkerwall Limited**) for the **Claimants**
Mr Paul Hughes (instructed by **Eversheds Sutherland**) for the **Defendants**

Hearing date: 28th March 2023

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.

.....
SENIOR COSTS JUDGE GORDON-SAKER

Senior Costs Judge Gordon-Saker :

1. At the hearing on 28th March 2023 I indicated that the order I would make would be:
 - i) Pursuant to rule 44.11(2)(a) of the Civil Procedure Rules 1998, 40 per cent of the Claimants' costs as otherwise assessed or agreed are disallowed.
 - ii) Pursuant to rule 44.11(2)(b) of the Civil Procedure Rules 1998, the Claimants' solicitors shall pay 75 per cent of the Defendants' costs of the detailed assessment proceedings (including the costs of the Defendants' application dated 14th April 2022) assessed summarily on the indemnity basis in the sum of £¹ (after reduction to 75 per cent).
2. Given the subject matter and the lack of time available, I also indicated that I would give the reasons for these decisions in writing and that the time to appeal the order would not run until the handing down of this judgment.
3. This judgment sets out the reasons for those decisions.

The detailed assessment proceedings

4. The Claimants are entitled to their costs of proceedings for damages for misrepresentation and the rescission of finance agreements entered into with the defendant finance companies for the installation of solar panel systems. The Claimants were all represented by Parkerwall Limited, solicitors based in Liverpool, ("Parkerwall").
5. As I understand it, Parkerwall also act for, and have acted for, other claimants with similar claims for solar panel misselling against the Defendants.
6. By an application dated 14th April 2022, the Defendants applied for an order that all existing and future costs claims against the Defendants by claimants represented by Parkerwall be transferred to the Senior Courts Costs Office.
7. Nine claims had been concluded. One bill, that of Mr Keith Kinder, had been listed in the County Court at Liverpool for assessment by the Regional Costs Judge, District Judge Baldwin. In the remaining 8 cases², all County Court proceedings but at different hearing centres, 2 bills had been served and bills were anticipated in the other 6.
8. Three reasons were advanced for the application:
 - i) Concerns about counsel's fees.

There were apparent discrepancies in the claims for counsel's fees. In the *Kinder* claim, counsel's fee for an interlocutory hearing had been increased in a subsequent fee note and a fee note which purported to have been issued by counsel's chambers appeared not to have been issued by them. The day before the detailed assessment hearing the Claimant's solicitors indicated that they

¹ The final figure of the summarily assessed costs is still to be agreed between the parties.

² Those of Ms Ikin, Mr Walsh, Ms Scott, Mr Fox, Mr Guymer, Mr King, Mr Keith, and Mr Cuddehay

would seek to have the bill assessed at nil and would pay the costs of the detailed assessment. The same counsel was instructed in the other claims.

ii) Concerns about the expert's fees

The expert instructed on behalf of the Claimants had issued a VAT invoice in the *Kinder* case, despite not being registered for VAT. No receipted invoices had been served and the Defendants had concerns that the expert's fees may be contingent.

iii) Concerns about profit costs

In the 2 bills that had been served, *Ikin* and *Walsh*, there were 18 identical entries, not only in the wording, but also in the time recorded. For example:

“Considering all relevant information and evidence received to date and undertaking review of quantum, considering case law and judicial guidelines and preparing quantum value of case.”

It is difficult to understand what “judicial guidelines” could have been considered.

The other concern about the profit costs was the hourly rate. Although lower rates were claimed in the bills, Parkerwall had confirmed that the rate agreed with the claimants was £400 for all grades of fee earner.

9. It seemed to me that it would be appropriate for all of the costs claims in the concluded proceedings (apart from *Kinder*, in which the bill had been assessed at nil) to be decided by the same judge and, following a hearing of the Defendants' application on 30th May 2022, I directed that the 8 claims should be transferred to the Costs Office.

10. In their points of dispute, the Defendants produced a schedule of further examples of identical entries between the 8 bills. In their replies, the Claimants' position was:

... that these are nothing more than estimates of time spent. The Claimant's Solicitor has used the same costs draftsman throughout. They have estimated time in accordance with their opinion as to how long tasks consistently take. There is nothing more sinister than the same draftsman estimating the same (or similar) work at the same or similar times.

11. The Defendants served a Part 18 request, to which the Claimants responded on 21st October 2022. In answer to a question whether items in the bills, other than those identified in the schedule as identical, were also estimated, the Claimants replied somewhat elliptically:

The Defendant has produced a schedule of the items which are identical. Those which are not identical are the matters not contained within the Defendant's schedule.

12. However, in answer to the following requests, the Claimants confirmed that time had been estimated, according to the opinion of the draftsman of the bills, where there were no file notes and that “estimated time is claimed in every claim for costs before the court”. In response to a request that the Claimants identify all of the estimated time in the bills to be assessed on the first 2 days of the hearing, the Claimants replied that this would be onerous but that they would endeavour either to produce marked schedules for the hearing or to identify those items supported by file notes. In the event, neither was done.
13. In answer to the question whether Parkerwall used “an automated time recording system”, the answer was:

No. Time recording (if any) is carried out by the fee earner working on the file. Where no time recording exists, but it is apparent work has been undertaken, the time is estimated.
14. The answer to the request that the Claimants disclose their automated time records, was “N/a”.
15. The first bill to be assessed, Scott, was assessed line by line over 2 days in October 2022. There were serious problems with the bill. No time records were produced and no time was recorded in the Claimants’ solicitors’ file, save for one attendance note. It was conceded on behalf of the Claimant that, with this one exception, all of the time claimed in the bill had been estimated. Of greater concern, it also became apparent that some of the work was completely unsupported by the file.
16. If there is a letter in the file drafted by the receiving party’s solicitor and no record of how long it took to draft, the bill draftsman has little option other than to estimate how long it would probably have taken. However, the convention is to mark estimated time in a bill with an (e). Estimated time is always viewed with circumspection: *Brush v Bower Cotton & Bower* [1993] 4 All ER 741 at 754.³
17. Where it is possible to infer that work had probably been done, but no record or evidence that it had actually been done (such as the letter in the previous example), it is rather more difficult to claim it. If a statement of case or expert’s report is received from the opponent, it may be reasonable to infer that a fee earner will have considered it. However, even greater circumspection will be required and the receiving party is at peril, especially when the assessment is on the standard basis, of being allowed either the minimum possible time or no time at all.
18. Where there is no record or evidence that work had been done and no reason to infer that work had been done, then, clearly, no work should be claimed.
19. In the case of Scott not only was virtually all of the time estimated, and not identified as such, but in a number of instances there was simply nothing in the file to enable the conclusion that the work had been done, even by inference. For example, at item 40, 54 minutes was claimed for reviewing an offer from the Defendant. On the same day, at item 41, 1 hour was claimed for:

³ “In my judgment, in the light of the approach of Parker and Evans JJ in more recent cases, claims such as this are likely to be viewed with very considerable care and it would only be in an unusual case that any substantial allowance would be made for unrecorded time”: per Brooke J (as he then was).

Undertaking detailed review of quantum in light of offer on behalf of Defendant, considering relevant case law and judicial guidelines and preparing initial quantum valuation of case.

20. While one might infer that an offer from the Defendant would have been considered (item 40) even in the absence of any record that such work was done, there was simply no evidence in the file to suggest, even by inference, that a detailed review of quantum (item 41) had been carried out. Nor was there anything to suggest that “relevant case law” or “judicial guidelines” had been considered. If an “initial quantum valuation” had been prepared, it is strange that it was not in the file. This is imaginary work or, as I apparently described it in the hearing, “just fiction”.
21. There are similarly worded items in the bills in Walsh and Ikin (items 129 and 133 respectively) where 30 minutes was claimed for each.
22. The result of the assessment of the Scott bill was that £9,172.60 was allowed as against £27,819.60 claimed. That is 32.97 per cent.
23. My concerns about the bill were such that I ordered Parkerwall to file and serve a witness statement explaining why the bill in this case contained misdescriptions of the work done and why the Claimant’s solicitor had certified the bill as accurate.
24. Following service of the statement of Ms Suzanne Wall, a Solicitor and the sole director of Parkerwall, upon the Defendants’ application, I ordered Ms Wall to attend the adjourned hearing to be cross-examined.
25. In her witness statement dated 14th November 2022, Ms Wall explained that Parkerwall had no experience of dealing with costs in this type of claim and so had instructed KE Costs (“KEC”), a firm of costs lawyers, “who indicated they had experience of dealing with similar costs arising out of solar claims in the North East”. KEC were sent the papers for each case electronically “and asked ... to prepare a bill of costs based upon the file”.
26. In relation to the circumstances in which the bills were signed, Ms Wall explained:
 - 8 ... Upon reviewing the bill, I considered the electronic file. I re-read the pleadings, case management directions, interim application, witness statement, etc. and noted the stage at which proceedings had settled and noted how tenaciously and vigorously the Defendants had defended the claim.
 9. I readily admit that I did not consider each individual item and cross-reference that item, line by line, with the hard copy file of papers. I appreciate that in hindsight I may have been wrong to do so. I was acutely aware of the fact that the same may have been considered disproportionate given the fact we had already instructed a specialist costs draftsman to prepare the bill.
 10. As a final check, I considered the totality of the bill and the issue of proportionality. Whilst I completely apprehend that I

am ultimately responsible for certification of the bill, taking into account the checks I did, relying on the expertise of the costs draftsman and my experience of dealing with claims of this nature, my view was that they appeared to be in good order. Having now seen the point that has been made by the Learned Judge in relation to the fact that work has been misdescribed, I understand and accept that this is correct. Whilst I am happy to confirm that the work was undertaken but the description of the work that was undertaken in the bill could and should have been more precise.

27. In cross-examination, Miss Wall confirmed that her firm used Proclaim, a time recording system. However she did not know why it had not been used to record time in these cases. It was clear from her evidence that she was not directly involved in the instructions to the costs lawyer to draft the bills. That had been dealt with by Mr Farrow, a paralegal at Parkerwall.
28. Miss Wall said that she had assumed “that the descriptions given [of the work recorded in the bill] were fair representations of the work that had been done”. When checking the bill before signing it, she made sure that all the disbursements had been included and “that each stage of the case has been accurately identified”. However she did “not sit there and look at every single line individually and check the accuracy of every single line, because that just seems disproportionate”. She had relied on the expertise of the people she was instructing.
29. On the last working day before the adjourned hearing, the Claimants served amended bills in the 7 remaining cases. The sums claimed and the time claimed were unaltered. The descriptions of some of the work had been changed. The amended bills had not been certified and so it was agreed that Miss Wall should have the opportunity to consider the bills and certify them before her cross-examination. A certificate covering all of the amended bills was provided over the lunch adjournment and Miss Wall was cross-examined in the afternoon. She explained in cross-examination that she had about 2 hours to consider the amended bills before certifying them and that she had access to all of the files. She had read “around half” of the files before certifying the bills. She had not cross-referenced them line by line against the file.
30. The amended bill in Ikin was assessed at the adjourned hearing. Although the descriptions of some of the work had been altered, the time claimed had again been estimated, rather than recorded. The result was similar to Scott. The bill, claimed in the sum of £29,774.90, was allowed at £9,250 (31.07%).
31. The remaining 6 bills were listed to be assessed over a further 2 days, but the parties reached a settlement before the hearing, on the basis that this would be without prejudice to the Defendants’ application under CPR 44.11:

Claimant	claimed	agreed	%
Keith	£17,959.38	£4,555.57	25.37%
King	£14,235.92	£4,632.48	32.54%
Guymer	£25,250.20	£8,534.65	33.80%
Walsh	£21,794.80	£7,070.16	32.44%

Cuddehay	£13,391.00	£4,751.98	35.49%
Fox	£31,348.40	£9,873.67	31.50%

Misconduct

32. CPR 44.11 provides that:

- (1) The Court may make an order under this rule where –
 - (a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
 - (b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.
- (2) Where paragraph (1) applies, the court may –
 - (a) disallow all or part of the costs being assessed; or
 - (b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused the other party to incur.

33. The importance of a solicitor's signature on a bill of costs was emphasised by the Court of Appeal in *Bailey v IBC Vehicles Ltd* [1998] 3 All ER 570:

Order 62 Rule 29(7)c (iii) requires the solicitor who brings proceedings for taxation to sign the bill of costs. In so signing he certifies that the contents of the bill are correct. That signature is no empty formality. ... The signature of the bill of costs under the Rules is effectively the certificate by an officer of the Court that the receiving party's solicitors are not seeking to recover in relation to any item more than they have agreed to charge their client under a contentious business agreement.

The Court can (and should unless there is evidence to the contrary) assume that his signature to the bill of costs shows that the indemnity principle has not been offended.

....

For the avoidance of doubt, I also agree that the taxing officer may and should seek further information where some feature of the case raises suspicions that the whole truth may not have been told. And the other side of a presumption of trust afforded to the signature of an officer of the Court must be that breach of that trust should be treated as a most serious disciplinary offence. (per Henry LJ)

34. In *Gempride Ltd v Bamrah* [2018] EWCA Civ 1367 Hickinbottom LJ set out a number of propositions in relation to the court's exercise of its powers under r.44.11 [at para 26]:

i) A solicitor as a legal representative owes a duty to the court, and remains responsible for the conduct of anyone to whom he subcontracts work that he (the solicitor) is retained to do. That is particularly so where the subcontractor is not a legal representative and so does not himself owe an independent duty to the court.

ii) Whilst "unreasonable" and "improper" conduct are not self-contained concepts, "unreasonable" is essentially conduct which permits of no reasonable explanation, whilst "improper" has the hallmark of conduct which the consensus of professional opinion would regard as improper.

iii) Mistake or error of judgment or negligence, without more, will be insufficient to amount to "unreasonable or improper" conduct.

iv) Although the conduct of the relevant legal representative must amount to a breach of duty owed by the representative to the court to perform his duty to the court, the conduct does not have to be in breach of any formal professional rule nor dishonest.

v) Where an application under CPR rule 44.11 is made, the burden of proof lies on the applicant in the sense that the court cannot make an order unless it is satisfied that the conduct was "unreasonable or improper".

vi) Even where the threshold criteria are satisfied, the court still has a discretion as to whether to make an order.

vii) If the court determines to make an order, any order made (or "sanction") must be proportionate to the misconduct as found, in all the circumstances.

Was there unreasonable or improper conduct?

35. Claiming the cost of work where there was no evidence in the file that the work had been done and nothing to allow a reasonable inference that the work had been done is, in my judgment, both unreasonable and improper for the purposes of r.44.11. It permits of no reasonable explanation (so is unreasonable) and has the hallmark of conduct which the consensus of professional opinion would regard as improper.

36. I have referred to one such item in paragraph 19 above (which was repeated in two other bills). However, over the course of the assessments, there were other examples. Some are identified in a document prepared by the Defendants⁴, such as:

⁴ Examples of identical claims by description and time across bills of costs (bundle p.408). Not all of the items listed in that document would have had no basis in the file.

Engaged considering initial instructions and evidence received.
Risk Assessment - considering limitation dates liability risks
and prospects of success. Considering additional advice to be
given and further evidence to be obtained.

37. One hour was claimed for that work in each of the 8 bills. Doubtless the solicitors will have considered each matter when they were instructed. However 42 minutes had also been claimed in each bill for “perusing the initial enquiry” and opening the file.
38. There was no evidence that detailed instructions had been given to the bill draftsman (for which 30 minutes were claimed in 5 bills) nor that the file had been reviewed and prepared for sending to the costs draftsman (for which 42 minutes was claimed in 5 bills). KEC were instructed by a short email and the file was made available to them electronically, with no review or preparation carried out. That this work had not been done would have been known to the draftsman.
39. Taken by itself, a failure to state in a bill that the time claimed for one or a number of items was estimated rather than recorded, is unlikely to lead to a finding of unreasonable or improper conduct. However, in these cases, virtually all of the time claimed in each of the bills had been estimated. That was not stated in any of the bills. Nor was it stated in the replies to the points of dispute or in the answers to the Part 18 request. The impression given, up until the first day of the detailed assessment, was that some only of the time claimed had been estimated.
40. The draftsman of the bill and the fee earners who did the work would have known that virtually all of the time had been estimated. It is difficult to avoid the conclusion that, had Miss Wall considered her firm’s files before signing the bills, she would also have been aware that virtually all of the time claimed had been estimated.
41. I remain of the view, expressed during the course of the assessments, that the bills are intentionally misleading in that time was claimed for work which was not done (and for which there was nothing that could lead to a reasonable inference that it had been done) and in that the impression was given that only part of the time had been estimated.
42. It is not in issue that Parkerwall is responsible for the conduct of KEC to whom they subcontracted the work that they (the solicitors) were retained to do: see *Gempride* at paragraph 26(i).
43. One hour was claimed in each bill for checking and signing it.
44. Precedent F in the schedule of costs precedents sets out the certificates which are required by paragraph 5.21 of Practice Direction 47: a certificate that the bill is accurate and a certificate that “the costs claimed herein do not exceed the costs which the receiving party is required to pay me/my firm”.
45. For the reasons set out above, the bills were not accurate and claimed costs which the Claimants would not have been liable to pay to Parkerwall. Had Miss Wall checked the bills sufficiently to enable her to sign the certificates, she would have known that they contained entries for which there was no basis in the files. She would also have seen that the time claimed had not been recorded, which should have caused her to

check that the time claimed was reasonable. If she did not check the bills sufficiently, she should not have signed the certificates. The signatures required are “no empty formality”: *Bailey*.

46. In my judgment, in certifying the accuracy of the bills, Miss Wall acted both unreasonably and improperly.

The appropriate order

47. This is an appropriate case in which to disallow costs under r.44.11(2)(a). The Claimants’ legal representatives have claimed costs to which their clients were not entitled and have attempted to mislead the Court.
48. In *Gempride*, the Court of Appeal substituted an order that one half of the profit costs otherwise payable under Part 1 of the claimant’s bill should be disallowed. That followed findings that the claimant solicitor had certified a bill which claimed an hourly rate in excess of the rate that she was obliged to pay and had wrongly stated in her replies that BTE insurance was not available to her. There was no finding of dishonesty.
49. It seems to me that the present cases are comparable. Eight bills have either been reduced significantly or have been agreed in significantly reduced amounts as a result of the misleading entries and the overestimation of time. As the parties have agreed global figures for profit costs and disbursements in the six unassessed cases, rather than disallow one half of the profit costs I would disallow a smaller proportion of the total figures.
50. The total costs that have been allowed or agreed in the eight cases is £57,841.11. 40 per cent of that would be £23,136.44. In my judgment that would be a proportionate sanction for the misconduct.

The costs of the detailed assessment

51. Clearly this is a case where the court should make a different order to the usual order that the paying party pays the costs of the receiving party (CPR 47.20(1)). The conduct of the receiving parties’ solicitors reasonably required investigation. That led to a significant lengthening of the detailed assessment hearings. But for that investigation, the hearings might have been avoided completely. The conduct has been found to be wanting, and the bills have been reduced substantially.
52. Without an order under r.44.11(2)(b), the appropriate order under r.47.20 would have been that the Claimants should pay at least a proportion of the Defendants’ costs of the detailed assessment proceedings. As between the Claimants and their solicitors, the latter should bear those costs.
53. Some time was spent investigating the fees of counsel and the experts, which, in the event, did not lead to significant reductions. Whatever apparent irregularities there were in billing, the work had been done and the claimants were entitled to recover the costs of that work. The Claimants should be entitled to the costs of those issues, but they were a relatively small part of the whole. The appropriate order under r.47.20 would have been that the Claimants should pay 75 per cent of the Defendants’ costs.

54. The fault however lies at the door of the Claimants' solicitors, rather than the Claimants, and so the appropriate order is that the Claimants' solicitors should pay those costs under r.44.11(2)(b).
55. On any view the conduct of the Claimants' solicitors has taken these cases "out of the norm" and it is appropriate that the costs should be assessed on the indemnity basis.