



Case No: AGS/1703636

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 08/08/2017

Before :

MASTER GORDON-SAKER

Between :

TIMOTHY ANDREW AUSTIN
- and -
EAST SUSSEX FIRE AND RESCUE SERVICE

Claimant

Second
Defendant

Mr Matthew Waszak (instructed by **Goldbergs**) for the **Claimant**
Mr Craig Ralph (instructed by **Clyde & Co LLP**) for the **Second Defendant**

Hearing date: 25 July 2017

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.

A Gordon-Saker

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MASTER GORDON-SAKER

Master Gordon-Saker :

1. In the course of his employment by the Second Defendant as a Retained Firefighter the Claimant attended a fire at the premises of Alpha Fireworks Limited (“Alpha”) in December 2006. An explosion occurred in which two of the Claimant’s colleagues were killed and a number were injured. The Claimant suffered psychological injuries as a result of the explosion and its aftermath.
2. The Claimant commenced proceedings for damages for personal injuries against Alpha and the Second Defendant in November 2009. The claim was consolidated with claims issued on behalf of the dependants of the deceased firefighters (“The Wembridge Claimants” and “The Wicker Claimants”) in which claims had also been brought against Mr Martin Winter, the owner of Alpha.
3. On 11th November 2010 the Claimant obtained judgment in default against Alpha and the Second Defendant. The judgment against Alpha was not set aside. Alpha went into liquidation and took no further part in the proceedings. The judgment against the Second Defendant was set aside on 27th May 2011.
4. The trial of liability in the consolidated claims was heard by Irwin J (as he then was) over 8 days in February 2013. The Second Defendant was found liable to the Claimant, ordered to pay the claimants’ costs of the issue of liability and ordered to pay the Claimant £175,000 on account of his costs.
5. On 22nd December 2014 the Second Defendant made a Part 36 offer to settle the Claimant’s claim for the sum of £25,000. The Claimant did not accept that offer within 21 days (ie by 12th January 2015), but did accept it on 3rd July 2015.
6. Meanwhile, on 19th March 2015 the Claimant’s solicitors served a notice of commencement and bill of costs in the sum of about £720,000. Given that the claim had not then concluded and that the order of Irwin J had not provided for detailed assessment forthwith that was premature.
7. Following the late acceptance of the Part 36 offer, the Claimant’s solicitors served a further notice of commencement and bill of costs in the sum of about £755,000 on 15th September 2015. Given that late acceptance of a Part 36 offer does not lead to a deemed order for costs, that too was premature.
8. An application for an order for costs was then made to the court and the matter came before Deputy Master Leslie on 17th June 2016. The court’s order noted that “the applications relating to the notices of commencement and/or service of the Claimant’s bill of costs are matters for the Senior Courts Costs Office” and provided:
 1. The Second Defendant do pay the Claimant’s costs of the proceedings up to 12 January 2015 as against the Second Defendant only; such costs to be assessed on the standard basis by detailed assessment if not agreed.
 2. For the avoidance of doubt paragraph 1 provides that the Second Defendant pay the Claimant’s costs:
 - a) incurred exclusively against the Second Defendant;

- b) non-specific common costs; and
 - c) the appropriate share of the specific common costs as determined by the Costs Judge if not agreed.
9. The Claimant was ordered to pay the Second Defendant's costs after 13th January 2015 and the Second Defendant was ordered to pay the Claimant a further sum of £150,000 on account of costs.
10. A third notice of commencement and a bill of costs in the sum of £798,554 were served by the Claimant's solicitors on 9th January 2017.
11. The points of dispute served by the Second Defendant raise only one matter: that the Claimant's bill includes costs to which the Claimant is not entitled pursuant to the order dated 17th June 2016. First, it is said, the Claimant is not entitled as against the Second Defendant to all specific common costs. The Second Defendant contends that the Claimant should only be seeking the appropriate share of the specific common costs. Secondly, it is contended that non-specific common costs are claimed as specific common costs and *vice versa*. For example, in Part 14 of the bill counsel's fees and the costs of attending a joint settlement meeting are claimed as non-specific common costs whereas they should have been claimed as specific common costs and divided appropriately. Accordingly, the Second Defendant argues, the bill has been drawn incorrectly in that it does not enable the Second Defendant to know what is being claimed against it and the bill should be re-drawn.
12. At the hearing on 25th July 2017 I dealt with this as a preliminary issue. I decided that the bill did not need to be re-drawn and gave directions for the service of further points of dispute and for the listing of the remainder of the detailed assessment. These are the reasons for my decision.

Specific and non-specific costs

13. Perhaps the best description of these confusing terms is contained in the judgment of Jay J in *Haynes v DBIS* [2014] EWHC 643 (QB):

26. I have been advised by Senior Costs Judge Hurst that common or generic costs effectively fall into two categories. First, there are the non-specific costs such as court fees, medical reports and travel expenses which would have been incurred in any event, regardless of the number of other defendants. Secondly, there are the specific costs which are, in principle, capable of identification and division. For example, if there is a conference with Counsel concerning the liability of all ten defendants, the total fee may be envisaged as ripe for division.

Is there jurisdiction to make the order sought?

14. There is no specific provision in the Civil Procedure Rules that enables the court to order a receiving party to serve an amended bill. The points of dispute refer to my decision in *Mullan v Chief Constable of the Thames Valley Police* [2009] EWHC

90140 (Costs). The claimant had claimed damages for wrongful arrest, assault and false imprisonment. The bill served by his solicitors included the costs of pursuing a complaint to the Independent Police Complaints Commission. Having concluded that those costs could only be recoverable insofar as they were also costs of the action, I ordered the claimant to serve an amended bill which excluded the work carried out in relation to the complaint which did not fall within the scope of the costs order. I commented that the defendant was entitled to know what was being claimed against him.

15. The rules enable the court to make any order for the purpose of managing the case: CPR 3.1(2)(m). By analogy with the court's powers to strike out a statement of case (CPR 3.4) and to require a party to provide further information (CPR 18.1) it seems to me that the court must also have power, in an appropriate case, to require a party to serve an amended bill which either omits costs to which that party cannot be entitled or which identifies the basis on which the costs are claimed if otherwise there could not be a fair detailed assessment hearing.

The bill in the present case

16. The bill is divided into 19 parts. That is to some extent due to the fact that work started in 2008 and there were four different rates of value added tax in the period covered by the bill. Otherwise the parts purport to reflect (i) costs incurred exclusively against the Second Defendant, (ii) non-specific common costs and (iii) specific common costs in which only the appropriate share is claimed.
17. Mr Ralph, on behalf of the Second Defendant, drew my attention to part 14 of the bill by way of example. It purports to consist only of non-specific costs relating to quantum. However it contains counsel's fees for advising on quantum. On the face of it, these are specific common costs. The quantum of the claim against Alpha would have been the same as the quantum of the claim against the Second Defendant and there has been no attempt to divide the costs between the two.
18. Mr Waszak, on behalf of the Claimant, submitted that the bill was correctly drawn because Alpha effectively played no part in the proceedings. The reality of the situation was that virtually all of the costs were exclusively referable to the claim against the Second Defendant. Accordingly it is appropriate to claim the whole of the specific common costs as against the Second Defendant.
19. On the face of it, the Claimant is not claiming any costs exclusively referable to the claim against Alpha. In the ordinary way, in addition to the costs incurred which are exclusively referable to the claim against the Second Defendant, the Claimant would be entitled as against the Second Defendant to the non-specific common costs insofar as they have not been recovered from Alpha. As to that, there would appear to be no dispute.
20. There appear to be two areas of dispute. First, the attribution of specific common costs as non-specific common costs. The sums claimed in respect of counsel's fees in part 14 of the bill are examples of that.
21. Secondly, in relation to the specific common costs the issue is whether and, if so, how these should be divided between the claim against the Second Defendant and the

claim against Alpha. The Claimant's case is that no part of these costs should be attributed to the claim against Alpha because Alpha played no part in the proceedings. The Second Defendant's case is that all of the specific common costs should be divided. That Alpha is insolvent does not entitle the Claimant to more than the costs of the claim against the Second Defendant.

22. While clearly these issues will require resolution, it seems to me that the appropriate time to resolve them will be at the detailed assessment hearing. It may well be that some items of costs have been claimed in the wrong category. On the face of it, it is difficult to see how counsel's fees for advising on quantum could be non-specific common costs as against either specific common costs (if related to the claims against both defendants) or costs incurred exclusively against the Second Defendant. It may well be that costs are claimed as undivided specific common costs when they should have been claimed as costs incurred exclusively against the Second Defendant; for example the costs of attending the joint settlement meeting with the representatives of the Second Defendant (items 230 to 234). As Mr Ralph pointed out, it is odd that £78,347 is claimed as non-specific common costs, yet only £9,731 is claimed as specific common costs, when non-specific costs are generally much the rarer of the two.
23. I think that it would be disproportionate to require the Claimant to revise his bill yet again. This is not a case like *Mullan* where the claimant is seeking costs which he cannot be entitled to. On the face of it none of the items claimed are objectionable in principle (eg because they are solely referable to the claim against Alpha). Rather the issues are whether specific items have been correctly identified and how those which are properly specific common costs should be divided. The appropriate time for resolving those issues is at the detailed assessment hearing.
24. If that hearing is lengthened because items have been misdescribed or because excessive time is spent on dividing items which have not been divided, it may be appropriate to reflect that in the order for the costs of the detailed assessment proceedings. But as matters stand I cannot say that the way in which the bill is drafted would imperil a fair detailed assessment hearing.