Case No: CL 1501613

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date:20/05/2019
Amended on 19 June 2019 under CPR 40.12

Before :

MASTER LEONARD

- -

Between :

Vivek Rattan	**Claimant**
- and -	
Carter-Ruck Solicitors	**Defendant**

- -
- -

Ian Beeby (instructed by **Philip Smart & Associates**) for the **Claimant**
James Newman (instructed by **Carter-Ruck**) for the **Defendant**

Hearing dates: 13 February 2019

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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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MASTER LEONARD

Master Leonard:

1. This is an assessment of costs between solicitor and client. The bills in question total £340,000. I am dealing with two applications. The Defendant has applied to strike out the Claimant's application for the assessment of two bills of costs delivered in December 2011. The Claimant has applied for an extension of time to request a detailed assessment hearing under CPR 46.10.

2. The case has a long history.

The Underlying Proceedings

3. Between about February 2008 and July 2011, the Claimant took advice from two firms of solicitors, Marriott Harrison and Fladgates, in relation to a potential mis-selling claim against a bank which had provided to him financial advice and investment management services. (For reasons of confidentiality the bank is not named, and is referred in this judgment and in quoted correspondence only as "the bank"). The Claimant says that he incurred pre-action costs of £144,822 with those two firms.

4. Between July and August 2011 the Claimant approached the Defendant for advice and the Defendant thereafter represented him in a claim against the bank, issued on 13 May 2013. The Defendant acted under a Conditional Fee Agreement ("CFA") incorporating a success fee of 100%, as did counsel, Mr Dov Ohrenstein. ATE insurance was provided by Temple.

5. A Case Management Conference was held on 7 March 2014. The Claimant's costs budget (which incorporated the Defendant's pre-action costs of £28,523.25 but not any costs of previous solicitors) was reduced by Males J from £848,915.5 all to £762,695.50 and the bank's from £1,190,516 to £770,000. Males J, according to the Claimant, observed that he had attempted to reduce the parties' costs budgets to proportionate figures, but that the case would be expensive to fight and cried out for mediation.

6. The claim settled on 8 December 2014. Under the terms of that settlement, the Claimant received US $500,000. An additional payment of £340,000, for costs, was paid direct to the Defendant.

7. I have been referred to contemporaneous correspondence recording the negotiations that led to that settlement, and the advice given in respect of it.

8. On 18 August 2014, the Defendant on behalf of the Claimant made a Part 36 offer to the bank. The offer was to accept from the bank the sum of US $500,000 in damages, plus costs to be assessed on the standard basis if not agreed.

9. The offer was not accepted. Subsequent settlement discussions were referred to in email correspondence between the Claimant and Alasdair Pepper, a partner in the Defendant firm who was negotiating with the bank on his behalf.

10. The email chain I have seen starts with an email from Mr Pepper to the bank's representatives on 26 September 2014. The email followed an inconclusive mediation

in August, and offered on the Claimant's behalf to accept US $500,000 by way of compensation (described as "not negotiable") and costs of £480,000.

11. The bank's response, sent on 30 September, was that the figure of US $500,000 could be agreed, subject to agreement being reached on costs. The bank was not willing to pay costs of £480,000, which was £130,000 over a figure discussed in the mediation. £300,000 was offered, in what was described as a "last-ditch attempt to resolve the proceedings…"

12. On 30 September 2014 Mr Pepper emailed the Claimant, referring to settlement of costs:

> *"*... I am proposing to try to get the bank to increase their offer to £300,000 plus VAT (£360,000) and, if they were to do this, Dov and this firm (and I am sure Temple) are prepared to accept this recovery in full and final settlement of costs/premium-without seeking any further contribution from you. This is although it is less than our base costs and without any success fee.
>
> If we were to take this approach, please confirm that you would: a) accept $500,000 (without deduction) in relation to compensation; and b) seek no recovery from this firm/Dov and/or Temple in relation to the costs and disbursements you incurred before instructing this firm…
>
> I add also that as far as Dov is concerned, $500,000 represents an extremely good recovery from your point of view, having regard to the very considerable difficulties and risks of the action…"

13. The Claimant replied on 2 October to the effect that he had understood from the Defendant that he would be able to recover his pre-action costs ("of £144,820") excluding reading-in costs in the region of £10,000, and that he had relied upon that representation when he signed the CFA. He complained that the Defendant had, without his consent, excluded those pre-action costs from the cost budget put before the judge at the CMC and the figures put to the bank for the purposes of the mediation. He asked Mr Pepper to justify the increase of £130,000 as a figure representing his pre-action costs.

14. Mr Wescott, a partner in the Defendant firm who has given evidence for the purposes of these applications, says that the Defendant's settlement advice took into account an allegation by the bank to the effect that the Claimant had fabricated a note of a meeting, the contents of which were demonstrated to be false by documents disclosed by the bank. That seriously affected the Claimant's credibility. In the Defendant and Mr Ohrenstein's view, this gravely weakened his claim against the bank and strongly militated in favour of the settlement recommended to him. This puts the following email from Mr Pepper, in response to the Claimant on 2 October 2014, into context:

> "You are in a perilous position in this action with a high chance of losing- this is Dov's view as well as mine… Even if you were to win the action… There is a significant prospect that you will still end up out of pocket

> because of costs orders that may be made against you and your unrecovered costs-and I make clear that where you have the possibility of settling this action with a substantial payment of $500,000 and you are advised that this represents a very good settlement for you, if you refuse to instruct us to settle on the basis Dov and we will seek a full entitlement to costs from you should you secure a "win" as defined in the CFA and this will include entitlement to a success fee…
>
> I repeat that the bank have not and I am confident will not accept the Part 36 offer, because it will mean paying this firm and Dov a 100% success fee and Temple substantial ATE premiums. Were they to accept the Part 36 Offer I would be delighted and there would be some prospect of recovering some costs in relation to your previous solicitor's charges-however, given the very considerable size of the costs, the approved costs budget and new rules as to "proportionality", I doubt the recovery would be very great and, again as previously advised, it would almost certainly be less than our unrecovered costs because of the reductions the Judge made when approving the cost budgets…
>
> In being prepared to accept £360,000 costs, this firm and Dov would be accepting a discount of at least 100% on our full costs entitlement. We are prepared to do this because $500,000 is a substantial recovery for you, because of the weakness in the case and to avoid a high chance of a disaster…
>
> The costs budget and your previous solicitors costs are really a red-herring as explained, for example, at the mediation. This is because we are dealing with what can be negotiated on the settlement. To try and make a settlement happen, we have indicated that we would accept £360,000 costs-if there is a settlement it will be your liability and we will be entitled to deduct these costs from the sums recovered from the bank or seek them from you…
>
> even if the bank were to offer say £450,000 costs, you would still recover $500,000 damages… And then you would recover the $500,000 without deduction only because of the willingness of Dov, Temple and this firm to reduce your liabilities to us. I therefore, again I ask for the instructions I have requested from you…"

15. Mr Pepper added in a further email, sent about 20 minutes later:

> "I might add… that if I thought the bank would offer say £400,000 costs, I would have course be wanted to seek this. This is because it would mean the recovery of another £40,000… In relation to Dov, Temple and our fees/premium. However I do not believe that they will offer this and I put what I perceive as your interests in securing a settlement of this action at $500,000 compensation, above trying to negotiate more on costs and increase the risks of a settlement not been achieved… Of course, we could go on with the action, but I am not confident that it will be possible to negotiate better terms for you or this firm/Dov/Temple than now. I also add that there is no guarantee on all of the bank been willing to offer even £360,000 costs-we may find that they stick at their current offer. "

> There appears to have been no reply. On 6 October Mr Pepper sent another email:
>
> "As it currently seems that you will not settle this case on terms which the bank are likely to offer, may I remind you that witness statements are due for exchange on 7 November.… As your statement will take a lot of preparation, can you please send me your completed draft on or before 17 October. This will then give Dov and us 3 weeks to go through it and for it to be finalised… You should also be aware that the longer we leave reverting to SH with regard to settlement, the more the bank's costs will be and the more difficult achieving a settlement may become. In relation to this, if you wish me to revert seeking $500,000 compensation and more than £360,000 costs, I will do so (but please understand that the costs recovered will be taken against your costs/premium liability to this firm, Dov and Temple)."

16. The Claimant replied on the same date:

> "Thank you for your emails of 2 October 2014, where you make several points, some of which I do not necessarily agree with. However, I do not wish to delve into these at this juncture in order for us to move forward… My final position is as follows… As per your advice, I am willing to settle for the $500,000 being offered by the bank provided (a) there is no recourse from further payments or disbursements from this amount, to either your firm any other party (b) The sum of $500,000 is paid by the bank directly into my bank account (c) all disbursements made by me to date, for court fees and mediation costs are reimbursed by your firm. On this basis, you are free to negotiate any costs amount acceptable to your firm, Dov and Temple, in order secure the damages described above, on an all included/net basis for me."

17. That was the basis upon which the matter settled on 8 December, the final cost figure agreed being £340,000. Payment of US $500,000 was made by the bank into the Claimant's bank account and £340,000, representing costs, was paid direct to the Defendant. Under cover of a letter dated 11 December 2014 the Defendant rendered to the Claimant two bills (and accompanying credit notes) settling all costs, disbursements and VAT at £340,000. £200,000 represented the Defendant's professional charges, £42,905 counsel's fees and £26,500 the ATE premium. The covering letter confirmed that the Defendant had received the sum of £340,000 from the bank.

The Part 8 Proceedings

18. On 11 March 2015 the Claimant issued a Part 8 application for assessment, under section 70 of the Solicitors Act 1974, of the two bills delivered by the Defendant on 11 December 2014. On 23 April 2015, Master Simons made a standard (Precedent L) order for assessment. The order provided for the Defendant to serve, by 29 May 2015, a breakdown of costs including a cash account; the Claimant to serve Points of

Dispute by 29 June 2015; and (optionally) the Defendant to serve a Reply within 21 days of the Points of Dispute.

19. The order also provided (again, in standard form) that after points of dispute had been served, either party might file a request for a hearing date on payment of the appropriate fee and filing a time estimate: but that any request for a hearing must be made within three months of the date of the order; in other words, by 23 July 2015.

The Breakdown and the Points of Dispute

20. The Defendant served its breakdown on 12 June 2015, two weeks later than provided for by Master Simons' order. The breakdown claims profit costs of £627,641.58, disbursements of £125,885.87 and VAT of £181,271.89: a total of £934,799.34. Of the profit costs figure, £401,910.50 represents the Defendant's 100% success fee. Of the disbursements, £42,905 represents counsel's 100% success fee.

21. Mr Wescott says that the Claimant's Points of Dispute were served on 15 September 2015. They do bear that date but appear to have been signed by the Claimant on 8 October 2015, so that is the more likely date of service. That is almost four months after service of the breakdown, and over two months after Master Simons' time limit for applying for a hearing.

22. The Points of Dispute start with a complaint about the inclusion in the Claimant's breakdown of the Defendant's success fee, given that the Defendant had agreed to waive it. This misses a fundamental point about detailed assessment between solicitor and client. A solicitor is (subject to the permission of the court to amend) bound by the bill rendered and cannot ask for payment beyond what has been billed. On the assessment, however, the solicitor's breakdown is not limited to the costs actually billed. The breakdown may demonstrate the reasonableness of a bill by showing that a higher charge could have been justified.

23. A rather better point is made in the Claimant's objecting to the inclusion of counsel's success fee of £42,905. Given that that cannot have been passed on to the Defendant, it is likely (subject to argument) that I would on assessment conclude that it should, along with VAT of £8581, be eliminated from the Defendant's breakdown, reducing it to a claimed figure of £883,313.84. That is still over two and a half times the sum actually billed.

24. There is also a complaint to the effect that the Defendant has not served a cash account in accordance with the order of Master Simons of 23 April 2015. The Defendant's breakdown explains that by reference to the definition of a cash account at Practice Direction 46 paragraph 6.6(b). That is to show money received by the solicitor to the credit of the client and sums paid out of that money behalf of the client, other than payments out in satisfaction of the bill or of any items in it. The Defendant says that the Defendant did not receive any money to the credit of the Claimant.

25. Strictly speaking it seems to me that that that is incorrect. Monies received by the solicitor from a third party to settle costs, albeit properly taken (as here) in settlement of a bill, are received to the credit of the client. In this case however the point is immaterial. The Defendant's bills of costs are fully itemised and the receipt of

£340,000 was reported to the Claimant. A cash account would add nothing to the information already available. In fact, the Defendant's letter to the Claimant of 11 December 2014 functions as an adequate cash account for all practical purposes, and the Claimant received that almost five years ago.

26. The Points of Dispute move on, to allege, at considerable length, failings in the conduct of the bank litigation by the Defendant. Those allegations are considered in more detail below. Otherwise, the Points of Dispute tend to go to specific items of cost, and it is not necessary to review them here.

The Negligence Claim

27. Following service of the Points of Dispute, no procedural step was taken in the assessment proceedings until 13 December 2018, when the Defendant issued its application to strike out the detailed assessment proceedings. That was four years after delivery of the bills and just over three years after service of the Points of Dispute. This is what happened over that period.

28. The Claimant says that he had intended, since the settlement of his claim against the bank on 8 December 2014, to bring a claim against the Defendant firm in negligence. A letter before action appears to have been sent to the Defendant on 1 September 2016, but proceedings were not issued (in the Queen's Bench Division) until 13 April 2018. The claim ("the QB claim") was served in August 2018 by the Claimant's current solicitors, Philip Smart & Associates ("PSA"). I have seen a copy of the Particulars of Claim, considered below.

29. On 4 October 2018, the Defendant wrote to PSA referring to the detailed assessment proceedings and indicating that the Claimant was now over three years and three months late in requesting a hearing. In the letter the Defendant contended that the detailed assessment proceedings were ill-conceived, misguided and arguably an abuse of process from the outset, referring (among other points) to the fact that the Claimant authorised the Defendant to accept costs of £340,000 pursuant to an agreement with the Defendant that it would seek no further costs or disbursements from him. The letter complained that points raised, three years earlier, in the Claimant's Points of Dispute were repeated in the QB claim, so that the Claimant was running the same allegations in two different forums. The Defendant invited the Claimant to discontinue the costs proceedings and pay its costs, failing which an application would be made for dismissal.

30. The issues were not resolved in correspondence. The Defendant issued its application to strike out on 13 December 2018, and in response the Claimant applied, an application received on 7 January 2019, for an extension of time for requesting a detailed assessment hearing.

31. Before filing that application, PSA filed a notice of change of legal representative. This was received at the SCCO on 21 December 2018, under cover of a letter dated 7 December explaining that the Claimant had been acting in person, until very recently seeking their advice on the detailed assessment proceedings. The letter enclosed amended Points of Dispute, to which I shall refer below.

The Points of Dispute and the Particulars of Claim

32. I will do my best to summarise economically, the issues raised in the Points of Dispute in relation to the Defendant's conduct of the claim against the bank. I start, of necessity, with the unamended version served in October 2015.

33. The Claimant says that having incurred costs of £144,822, he thereafter elected to instruct the Defendant firm to bring the litigation primarily due to the fact that they were prepared to run the case on a full CFA basis. He had at that point obtained advice from counsel including that he should make a part 36 offer in the sum of $526,000 plus interest. In July 2011 the Defendant advised the Claimant that subject to duplication, costs already incurred should prove recoverable in the event that the case succeeded. However those costs were subsequently excluded from the Claimant's costs budget without his authority.

34. The Claimant says that after the CMC of 7 March 2014, the Defendant appeared to change its attitude, as its ability to recover costs had been curtailed by the budgeting exercise, and was more focused on extricating itself from the litigation. It insisted that the prospects of success, given the allegation of falsification of a document, had been seriously damaged notwithstanding that the Claimant provided comprehensive explanations. Notwithstanding that Mr Ohrenstein had advised that the claim was worth $500,000 plus interest, the Defendant advised that a Part 36 offer should be made at the lesser figure of $500,000.

35. The Correspondence with the Defendant of October 2012 made it futile, says the Claimant, for him to continue to seek his pre-action costs because any recovery would only go to meet the costs and disbursements of the Defendant. The Claimant had the impression that the Defendant expected the bank to have "set a reserve" so that any increase in damages would result in a corresponding reduction to the costs of settlement, and felt that his damages claim was "held artificially low with no real effort being made by the Defendant firm to seek the maximum recovery on his behalf".

36. Referring to fiduciary duty, the Claimant submits that during the period of the settlement negotiations, the interests of the Claimant and the Defendant were in manifest conflict and that in seeking to achieve betterment of its own position in respect of the costs settlement, the Defendant put pressure on the Claimant to persuade him to settle his damages claim at an undervalue. Accordingly, the Defendant should not be allowed its costs for any period when was acting in breach of fiduciary duty. Alternatively, the Defendant and Mr Ohrenstein between them effectively added nothing to what had been achieved by previously instructed legal representatives and the cost should be capped at, at most, £50,000 including counsel's fees.

37. The Claimant also criticises the Defendant's approach to the issue of document falsification, which (he says), if as important as contended for by the Defendant, should have been engaged with as soon as it was pleaded, saving seven months' costs. In any event, he says, the Defendant wrongly characterised the document in question as contemporaneous. The problem was concocted by, alternatively overstated by, the Defendant. The Defendant should be denied all costs of dealing with the issue.

38. The Particulars of Claim, served almost three years later on 6 August 2018, do raise some of the same issues. They allege that the Defendant assured the Claimant that he

should recover his pre-action costs; that it was the duty of the Defendant to seek recovery of those costs; and that the Defendant included, in the Precedent H produced for the purposes of the proceedings against the bank, only its own pre-action costs of £28,000, missing out almost £145,000.

39. The same complaint is made about the correspondence of October 2014, as is the complaint of breach of fiduciary duty. The loss claimed is of the opportunity to recover the Claimant's pre-action costs and the opportunity to continue to litigate the mis-selling claim.

40. I note that the Particulars of Claim include an assertion that had the full (£173,000) pre-action costs figure been included in his Precedent H, Males J might have allowed the Claimant a lower sum for future costs. I expect that he would have done, quite possibly by the full extra £145,000 that the Claimant wanted to claim as pre-action costs. In effect the Claimant complains about losing the opportunity to have his future costs, as recoverable from the bank, reduced.

41. The Amended Points of Dispute filed in December 2018 do remove some of the elements of duplication between the Points of Dispute and the Particulars of Claim in the QB action. Some of the detail about the Claimant's ability to recover his pre-action costs is removed, as is some of the detail of the references to the correspondence of October 2014. Specific references to fiduciary duty are removed, leaving broad references to breach of duty.

42. None of that seems to me to change the picture significantly. Any failure by the Defendant to assist the Claimant in recovering his pre-action cost gives rise to a claim in damages. It was never going to be the subject-matter of a detailed assessment. The general complaints about the Claimant's conduct are not substantially altered by eliminating some of the detail of the relevant correspondence and taking out specific references to fiduciary duty. If anything, the Claimant's case in those respects becomes less clear.

43. A substantial overlap with the QB claim remains. The Claimant is quite right, in principle, to say that the same complaints that may found a claim for compensation may justify the disallowance of costs. The point is, however, not to try the same issues in two different forums at the same time. That is why detailed assessment proceedings between solicitor and client are often stayed until the determination of a claim for professional negligence.

Other Evidence and Submissions: The Claimant

44. The Claimant says that up until November 2018, he was acting in person, save for instructing direct access counsel from time to time and brief instructions to solicitors, limited to what was necessary to make the initial application for detailed assessment of the Defendant's bills. He fully intended to proceed to detailed assessment but personal and family issues arose. A brother became ill in late August 2015, and passed away in New York. Being the only family member available, it was necessary for the Claimant to make the necessary arrangements and deal with his state. There was then an ongoing dispute, between December 2015 and November 2016, with an ex-wife regarding contact with his daughter. Then, in 2018, the Claimant's mother became ill and he had to spend a great deal of the time flying to India.

45. The Claimant accuses the Defendant of sitting back and waiting for him to fail. His case is that it is incumbent upon both parties, pursuant to the overriding objective, to move the detailed assessment forward. Master Simons' Order (as does CPR 46.9) provides for either party to request a detailed assessment hearing. Given that he was acting in person, he assumed that the Defendant would request a hearing. Due to his family difficulties he became oblivious to the consequences of time slipping away. The delay has caused no prejudice to the Defendant in any event. No essential evidence has been lost. The matter is ready for hearing and (says Mr Beeby for the Claimant) could be disposed of within a day.

46. The Claimant refers to *Haji-Ioannou v Frangos & Ors* [2006] EWCA Civ 1663 in support of the proposition that non-compliance with a rule, practice direction or court order is the only jurisdictional requirement for the exercise of the court's power under CPR 44.11. In that context, says the Claimant, it is usually appropriate as a matter of discretion to consider the extent of any misconduct which has occurred in the course of such non-compliance. Only in the event of a breach of a rule which could properly be categorised as misconduct would it usually be appropriate to use the power to disallow costs. The court should be hesitant to reduce otherwise allowable costs where the relevant rule not only gives to the party at the receiving end of the delay the option of preventing further delay by himself taking the initiative, but also spells out the normal sanction for penalising such delay (as do CPR 47.8, dealing with delay in commencing detailed assessment proceedings, and 47.14, dealing with delay in requesting a detailed assessment hearing between parties).

47. I am also referred to *Less & Ors v Benedict* [2005] EWHC 1643 (Ch) in which Warren J distinguished between a failure to proceed with the speed the rules required and acting in deliberate disregard of the rules (or with a view of never bringing the matter to a hearing). He refused to penalise a receiving party following delays on the receiving party's part, over a similar period. Here, the Claimant says, he has given his reasons for the delay.

The Defendant's Submissions

48. The Defendant seeks to strike out the detailed assessment proceedings on two grounds. The first is that, pursuant to CPR 3.4(2)(c), there has been a failure to comply with a court order. The second is that, pursuant to CPR 3.4(2)(b), that the continuation of the detailed assessment proceedings would be an abuse of the court's process.

49. As for failure to comply with the court's order, Mr Newman for the Defendant says that the rules and authorities relied upon by the Defendant are not to the point. This is not an application under CPR 44.11, which deals only with the financial consequences of a breach and empowers the court to disallow costs. It has no bearing upon the court's power to grant relief for the breach of an order. The question is whether the court should grant an extension of time. If it does (and does not strike out) then CPR 44.11 may have some bearing, but not until then.

50. The Defendant points out that the Claimant's application is an application for extension of time made after the time limit has expired: an "out of time" application. In consequence, says the Defendant, it is governed by the "implied sanction" doctrine identified in *R. (Hysaj) v Secretary of State for the Home Department* [2014] EWCA

Civ 1633 and in *Sayers v Clarke Walker* [2002] 1 W.L.R. 3095. In both cases the Court of Appeal has made it clear that where an application for an extension of a time limit specified by a rule, practice direction or order is made after the relevant time limit has expired and the relevant rule or order does not expressly state what sanction applies if the step in question is not taken in time, then the law and practice applying to an application for relief from sanction under CPR 3.9 should be applied.

51. It follows that although a party's inability to take the relevant procedural step once the time limit has expired does not amount to an express sanction, for the applicant applying out of time for an extension of the time limit, the consequences are the same as if it did.

52. The Claimant's application for an extension of time, accordingly, must (says the Defendant) be treated as an application for relief from sanction, and the criteria identified by the Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906 must be applied.

53. The court must, accordingly, consider first whether the breach of order is serious or significant. A delay of over three years after the time limit set for applying for a hearing date in accordance with the order of Master Simons is described by the Defendant as excessive in the extreme. It is, very obviously, both serious and significant.

54. The next question is whether there is good reason for the delay. The reasons given by the Claimant are, says the Defendant, wholly inadequate. He says nothing about why he was able to instruct legal representatives to prepare and issue a claim for professional negligence whilst failing to make a simple application for the hearing of a detailed assessment which he himself says is ready to be heard.

55. The court must then consider all the circumstances of the case, including the efficient conduct of litigation at proportionate cost and compliance with rules, practice directions and orders, as emphasised by CPR 3.9(1). The Defendant makes these points.

56. The Defendant's costs are, in accordance with CPR 46.9, to be assessed on the indemnity basis. The Claimant expressly agreed the terms of settlement, including the sum that the Defendant would accept by way of a substantial reduction of the costs to which it was contractually entitled. It would be appropriate, on that basis, to assess them at the billed figure.

57. Further, even if the agreement between the parties were to be ignored and he were to win on every Point of Dispute, the outcome would be to reduce the Defendant's recoverable costs to a few thousand pounds below the agreed figure. Even then he would have to repay it to the bank, as under the indemnity principle he is allowed only to recover the money he is due to pay to his solicitors.

58. The Points of Dispute are inadequately particularised. A good deal of the lengthy narrative leaves it entirely unclear exactly what the Claimant is asking the court to rule upon. The vague reference to unspecified breach of duty is unsatisfactory. The duplication of issues between the costs proceedings and the QB proceedings incurs

unnecessary costs and raises a significant risk of conflicting judgments. This is wholly inconsistent with litigation being conducted efficiently and at proportionate cost.

59. It is evident that the Claimant instructed solicitors in the QB claim by the time of his letter before action dated 1 September 2016, but he did not instruct solicitors in relation to the costs proceedings until after the Defendant wrote to them 4 October 2018. This, the Defendant contends, demonstrates a conscious decision by the Claimant not to apply for a detailed assessment hearing. His claim that he expected the Defendant to do so is nonsensical: this is the Claimant's challenge to the Defendant's costs. The Defendant has had no reason to apply for a hearing on his behalf. Even his application for an extension of time was not made until three months after the Defendant wrote to his solicitors warning them that it would seek to have the costs proceedings dismissed.

60. As to abuse of process, the Defendant refers to *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75 and the observations of the Master of the Rolls (at paragraph 54 and 69) as to the disproportionate use of court resources in proceedings pursued for minimal benefit. His submission is that the Claimant's allegations against the Defendant would require witness evidence and the hearing of between two and three days. The court has to consider what that is likely to achieve, if anything, for the Claimant.

Conclusions

61. The first question to be decided is whether to grant the Claimant the extension of time he seeks for requesting a detailed assessment hearing. If an extension is not granted the Claimant will lose his challenge to the Defendant's bills. The Defendant's strike-out application will be otiose.

62. With regard to the extension of time, I agree with Mr Newman that the provisions of CPR 3.9 are more to the point than the authorities relied upon by the Claimant.

63. That is first because, as he says, an application for an extension of time to request a hearing (albeit made many years after the relevant time limit has expired) does not engage CPR 44.11. A refusal is likely to have have costs consequences, but that is true of all applications.

64. That is one crucial distinction between this case and *Haji-Ioannou v Frangos & Ors* and *Less & Ors v Benedict*. There are others, common to both parties' applications. The first is that both of those cases were decided years before the Civil Procedure rules were amended, in April 2013, to place much more emphasis upon the importance of complying with rules, practice directions, and court orders, and before the Court of Appeal, in *Denton*, gave its guidance upon the relevant principles.

65. Another, almost as important, is that those cases concerned delay in pursuing detailed assessment proceedings between opposing parties in litigation, not between solicitor and client. The receiving parties in *Haji-Ioannou v Frangos & Ors* and *Less & Ors v Benedict* had the benefit of an order for costs. The position was broadly comparable to the delayed enforcement of the judgment, rather than the delayed pursuit of a claim. As between solicitor and client, the issues may (as in this case) be quite different.

66. Further, the court in *Haji-Ioannou v Frangos & Ors* and *Less & Ors v Benedict* was considering the effect of CPR 47.8 and CPR 47.14. Both provisions fall within the part of CPR 47 that apply, expressly, to costs payable by one party to another, meaning costs recoverable under an order. They prescribe the remedies available to a paying party where a receiving party fails in good time to serve a notice of commencement of detailed assessment proceedings or request a hearing. They are inconsistent with, and have no application to, a solicitor/client assessment governed by CPR 46.

67. As to whether it is right to treat the Claimant's application for an extension of time as if it were an application for relief from sanction, in this case it seems to me that it is. I have also concluded that even if it were not, it would still be wrong to grant the quite exceptional extension of time sought by the Claimant.

68. In *Mark v Universal Coatings & Services Ltd* [2018] EWHC 3206 (QB) Spencer J found that the "implied sanction" doctrine does not apply the principles of CPR 3.9 to every instance where the rules provide that something "must" be done. The question will turn upon the significance of the consequences of non-compliance. On that basis, it seems to me that it is right to apply the doctrine in this case.

69. The Claimant is challenging costs that have already been paid to the Defendant. He is, in effect, seeking money from the Defendant. He has obtained an order from the court that allows him to do so provided that certain criteria are met, including that a hearing of the issues be requested within three months.

70. His position is comparable to that of a party suing for a sum of money, who knows that the court has ordered that an application must be made for the hearing of his claim within a specified period. It is for him to protect his position either by applying for a hearing within the period prescribed by Master Simons' order, or by making a timely application for an extension of time. He has done neither.

71. I turn to the *Denton* criteria. The Claimant's delay over a period of over three years is self-evidently serious and significant.

72. It is wrong to say that the case is ready for hearing. The Defendant is quite right to say that the criticisms of the Defendant's conduct, as set out in the Points of Dispute, are in a number of ways prolix and unclear. There are also significant concerns about their merits, which I will come to. However, if they were to be heard directions would be required, for example, for witness evidence and they would probably have to be determined as preliminary issues. The assessment would have to be heard over a number of days.

73. Further, the Defendant is quite right to say that it is highly unsatisfactory that the Claimant now seeks to determine the same issues, simultaneously, in two different courts. If it were right for the detailed assessment, at this very late stage, to proceed at all it would probably be right to order a stay until the QB claim had concluded. That could add years to the process, and even without a stay it would take many months to resolve.

74. The Claimant has given no good reason for his delays. Whilst I am sorry to note that he has had family difficulties, they would not come close to explaining his inaction

even if he had not taken it upon himself, during that period of delay, to instruct solicitors to pursue a different claim against the Defendant.

75. I do not accept that the Claimant's status as a litigant in person has any bearing upon the matter. It would not furnish any justification for ignoring an order of the court in any event. Requesting a detailed assessment hearing requires only the completion of a form, the filing of some papers and the payment of a fee. On the evidence the Claimant could have done that at any time, just as he could have instructed solicitors if he needed to. He did not act until he was effectively forced to do so.

76. It was not incumbent upon the Defendant to file the required papers and pay the required hearing fee in order to allow the Claimant to pursue his claim. Nor do I accept that the Claimant expected the Defendant to do so. That is not credible.

77. As for the importance of enforcing compliance with court orders, even if the conduct of the Claimant did not demonstrate a deliberate decision not to pursue the costs proceedings (and in my view it does) his delays, in the absence of good reason and both before and after the Defendant challenged his failure to act, would be wholly unacceptable.

78. If it is not right to treat this application as if it were an application for relief from sanction, then it seems to me that the simple question is this. Leaving aside the *Denton* criteria, is it consistent with the overriding objective to allow the Claimant the very exceptional extension of time he seeks? It seems to me that the answer must be "no". That is partly because of the conduct of the Claimant to which I have referred and partly because of the force of the Defendant's submissions (duplication of proceedings aside) in relation to abuse of process.

79. In order to consider those submissions it is necessary for me to take a broad, preliminary view on the merits of the Claimant's case. Even on that basis it is clear that he faces major, if not insurmountable obstacles to reducing the Claimant's chargeable costs and disbursements to a figure below the sum billed.

80. The first, and biggest obstacle in that respect is that the Claimant wishes to use the detailed assessment proceedings to reduce the Defendant's costs below a sum authorised by him in an agreed arrangement from which he benefited by some US $500,000 and avoided a potential bill from the Defendant for a much larger sum than has actually been billed. The Claimant's complaint about the inclusion of the Defendant's success fee in its breakdown (albeit misconceived) shows that he himself, rightly, understands that arrangement to be binding.

81. The Claimant's answer to that is that the Defendant was, in recommending that arrangement, in breach of duty, and effectively preferring its own interests over his. That contention does not stand up to examination, for reasons I will come to. The only real concern I have been able to identify in the September/October 2012 correspondence between Mr Pepper and the Claimant was Mr Pepper's early attempt to incorporate into the settlement arrangement confirmation from the Claimant that he would not pursue a complaint about the Defendant's failure to include in his Precedent H, or the figures used for negotiation purposes, the £144,822 incurred by him in pre-action costs before instructing the Claimant.

82. Mr Pepper's attempt to mix the resolution of that issue with advice on settlement might well have given rise to a conflict of interest, but he did not pursue the point. The arrangements approved by the Claimant did not incorporate any agreement to abandon his complaint about pre-action costs.

83. The Claimant was not forced into approving those arrangements. The Defendant was not threatening to cease to act. On the contrary, Mr Pepper made it clear that if advice on settlement was not accepted the Defendant would continue to pursue the case on his behalf. The Claimant had already expressed his reservations about the Defendant's view of the merits of this case, and his complaints about its management of recoverable costs. If he did not agree with Mr Pepper's advice or the settlement arrangements proposed on the basis of that advice, he did not have to accept either of them. He could have carried on with the litigation, and gone to other solicitors if he wished.

84. He did, however, agree. In consequence, it seems to me that by far the most likely outcome of any detailed assessment between the Claimant and the Defendant is that the Defendant's costs would be assessed at the amount freely agreed to by the Claimant in October 2012.

85. If that proves not to be the case, then I believe that the Defendant is right in saying that the Claimant is still unlikely to achieve any significant reduction in the Defendant's billed costs. I say that for these reasons.

86. First, as I have observed, the Claimant does not seem to have understood that detailed assessment is not simply a process of reducing the Defendant's billed costs. It is aimed at establishing a reasonable chargeable figure, which may be substantially above the billed figure. The Claimant's task in this case is to show that a claimed costs and disbursements figure of £883,313.84 should be reduced below £340,000. That looks unlikely, particularly given that most of his complaints about the Claimant's conduct of the proceedings against the bank are manifestly weak and/or misconceived.

87. His assertion, for example, that the costs budget limits imposed by Males J on 7 March 2014 limited the Defendant's capacity to recover costs is entirely wrong. It did not limit the Defendant's capacity to recover costs from the Claimant. It limited the Claimant's capacity to recover costs from the bank. That he does not understand the difference is reflected in his remarkable complaint, made in the QB claim, that he lost the opportunity to have his budgeted, recoverable future costs reduced by Males J. The proposition that the Defendant lost interest in pursuing the case as a result of limitations on the Claimant's cost budget is, for the same reason, insupportable.

88. The claim that the bank had set a fixed reserve for of the claim, from which costs and damages were to be divided, (or more accurately, that that is what the Defendant thought), is not only speculative but at odds both with the specific correspondence I have seen, which shows that they were, in accordance with established principles, considered and quantified separately. The suggestion that the Defendant deliberately advised him to settle at an undervalue, based as it is upon that proposition, appears to me to be both unfair and, again, insupportable.

89. Of the other criticisms levelled at the Claimant's management of the claim against the bank only the Defendant's omission of full pre-action costs from Precedent H and costs negotiations has any evident substance, but it has no bearing on recoverable costs.

90. His complaints about the weight attached by the Defendant to the issue of document forgery are, on the evidence, also weak. Documents disclosed by the bank showed that a note of a meeting prepared by the Defendant cannot have been accurate. It cannot be right to say that the Defendant should have realised the full significance of the problem as soon as it was pleaded. The Claimant's vague allegations to the effect that the Defendant misjudged or in some way invented the problem are, notably, not repeated in the QB claim, which would be the obvious place to make them in support of his claim for a loss of opportunity to continue with the litigation. The obvious implication is that the Claimant has no confidence in them. In any event the issue would affect only a fraction of the Defendant's total costs.

The Interaction Between the QB Claim and the Detailed Assessment

91. The Claimant's solicitor, Mr Smart, has said that the Claimant has been advised that in order to make a claim in negligence or breach of contract, he first needs to have the Defendant's costs assessed. No explanation is given of the basis for that advice. However I think that the point must be that his complaint that the Defendant should have recovered from the bank up to another £144,822 from the bank by way of pre-action costs, may be met by the response that any more costs recoverable from the bank would just have gone to pay the costs and disbursements payable to the Defendant, above the £340,000 the Defendant was willing to accept within the settlement arrangement which the Claimant approved. So, he wants to use the detailed assessment proceedings to identify the extent to which that might be the case.

92. If that is the point, I disagree with the Claimant's approach, for two reasons. The first is that the Claimant could (and should) have brought these detailed assessment proceedings to a conclusion years ago. He seems rather to have abandoned the detailed assessment in favour of the QB claim, only to be told that he needs to pursue the assessment after all. That is not a good reason for requesting an extension of time.

93. The second is that it that the issues arising in the QB claim can, and should, be addressed by the court in the QB claim without the parties duplicating costs in two sets of proceedings. That is all the more so given that these detailed assessment proceedings are likely to end with the court certifying that the Defendant's costs should be assessed at a figure already agreed by the Claimant. The court would not, in that event, undertake a hypothetical assessment of what the Defendant might have been able to charge above the agreed amount.

Summary of Conclusions

94. The Claimant's application for an extension of time to apply for a detailed assessment hearing must be refused. He has delayed in doing so for a period of over three years. On the evidence he chose to do that, giving priority to other matters including the conduct of litigation against the Defendant in another forum. Were I to grant the extension of time he seeks, the consequences would most probably be to extend these proceedings for months, and possibly years, in order to accommodate several days of

hearings from which it is highly unlikely that the Claimant will derive any material benefit.

95. It follows that the outcome of these detailed assessment proceedings must be that the Defendant's costs will be assessed as billed.

96. Under the circumstances, it is not necessary to address the Defendant's strike-out application, although for the reasons I have given that application would have been likely to succeed.