Case No: CO/5700/2013

Neutral Citation Number: [2014] EWHC 1570 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2014

Before:

LORD JUSTICE MOSES
MR JUSTICE COLLINS

- -

Between:

The Queen on the Application of Bar Standards Board	**Claimant**
- and -	
Disciplinary Tribunal of the Council of the Inns of Court	**Defendant**
- and -	
Natasha Sivanandan	**Interested Party**

- -
- -

Mr Timothy Brennan QC (instructed by **Fredelinda Telfer**) for the **Claimant**
Mr Richard Wilson QC (instructed by **Natasha Sivanandan**) for the **Interested Party**

Hearing date: 27th March, 2014

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Judgment

Lord Justice Moses:

1. The Bar Standards Board seeks judicial review of a decision of the Disciplinary Tribunal of the Council of the Inns of Courts on costs.

2. There was no dispute but that it was open to the Bar Standards Board to bring these proceedings by way of judicial review since no appeal lay against the decision of the Disciplinary Tribunal to the Visitors under Regulation 25 of the Disciplinary Tribunals Regulations 2009 (amended February 2012). Such an appeal lies only against conviction or sentence, and an order for costs is not a sentence under Regulation 19. (See also Mackay J in *Connerty v BSB* [D 2004/082] 10 July 2008.) The principle in *R v Visitors to the Inns of Court ex-parte Calder* [1994] QB 1 does not apply.

3. On 6 September 2012 disciplinary proceedings were determined in favour of the interested party, a barrister not currently in practice, and not practising at the time of the complaint against her that led to the disciplinary charges. The Tribunal ordered that the Bar Standards Board should pay for her costs and appointed an assessor to determine the amount. By a decision dated 14 February 2013 Mr Post QC ordered that the Bar Standards Board should pay costs in the sum of £27,521.50. Included within that amount was a figure for the costs of the barrister's time, claimed at the rate of £120 per hour. It is important to emphasise that the number of hours she had spent resisting the allegations was 166 hours. The only dispute was as to rate.

4. It is necessary to recall the basis upon which the assessor reached a figure of £120 per hour. The starting point is Regulation 31 of the Disciplinary Tribunals Regulations 2009. By Regulation 31(1) the Disciplinary Tribunal has power to make such orders for costs either against or in favour of a defendant, as it sees fit. By Regulation 31(2) the Disciplinary Tribunal is required, either itself or through an appointee, to determine the amount of such costs. It can be seen and is agreed that the Civil Procedure Rules 1998 do not apply. Nevertheless, the assessor took the view that they were, as he put it, "persuasive" as to how he should exercise his discretion. The Bar Standards Board supports that view. But it disputes the approach the assessor adopted once he had determined that he should proceed as if the Civil Procedure Rules 1998 applied.

5. The assessor took the view that he was bound by *Miller v Bar Standards Board*, a decision of Ryder J, sitting as a Visitor, in 2012. In those proceedings, Ryder J applied the principle in *London Scottish Benefit Society v Chorley* (1884) 12 QBD 452, that a solicitor acting as a defendant in person was held entitled to reasonable professional remuneration for work which, if he had not performed it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent (see per Denman J (1884) 12 QBD 452, at 455). I shall have occasion to return to this decision and to the decision of the Court of Appeal later. Ryder J took the view that had the CPR applied:-

> "the appellant as a litigant in person would be entitled to the amount of costs for which he can prove financial loss (CPR Rule 48.6(4)(a)) and that the measure of financial loss where a barrister or solicitor is concerned is what it would have cost

> him to instruct another lawyer to carry out the work he had done for himself." [21]

6. Taking the view that he was bound by this decision, although he expressed doubts, the assessor, Mr Post QC, took the view that by reason of her status as a barrister and the fact that she conducted the proceedings herself, she had established "financial loss sufficient to allow recovery of two-thirds of the rate a solicitor would have charged" (paragraph 16 of the determination). The deduction of one-third arises as a result of the operation of Rule 48.6(2) of the CPR 1998.

7. The Bar Standards Board contends that, on a proper construction of the CPR and tutored by the decision of the Court of Appeal in *Malkinson v Trim* [2002] EWCA Civ 1273 [2003] 1 WLR 463, the interested party was entitled to no more than that to which a litigant in person would have been entitled. The expenditure of her time and skill did not amount to financial loss within the meaning of Rule 48.6(4)(a).

Civil Procedure Rules 1998 and Practice Directions

8. Under the rubric "litigants in person" Rule 48.6 of the Civil Procedure Rules 1998 applies where a court orders that the costs of a litigant in person are to be paid by any other person (48.6(1)). The costs allowed under the Rules must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative (48.6(2)). By 48.6(6):-

> "For the purposes of this Rule, a litigant in person includes –
>
> …
>
> (b) a barrister…who is acting for himself."

9. By 48.6(4):-

> "The amount of costs to be allowed to the litigant in person for any item of work claimed shall be –
>
> (a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work; or
>
> (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the costs Practice Direction."

10. Practice Direction 48.3(d) refers to Rule 48.6. It provides:-

> "52.2. Where a litigant in person wishes to prove that he has suffered financial loss he should produce to the court any written evidence he relies on to support that claim…"

By PD 52.5:-

> "Attention is drawn to Rule 48.6(6)(b). A solicitor who, instead of acting for himself, is represented in the proceedings by his firm or by himself in his firm name, is not, for the purposes of the Civil Procedure Rules, a litigant in person."

An editorial note comments:-

> "a litigant in person may now include…a barrister, solicitor, solicitor's employee or other authorised litigator acting for themselves. The previous exemption for a solicitor acting on their own behalf has been removed, although para. 52.5 of the Directions provides a way out of the difficulty. An in-house legal representative who is in possession of a Practising Certificate or equivalent authorisation will not be treated as a litigant in person, but the legal representative will be able to recover costs in the normal way."

The Principle in <u>The London Scottish Benefit Society</u>

11. The argument focussed on whether the Civil Procedure Rules 1998 altered the principle established in the *London Scottish Benefit Society* that a solicitor- litigant acting in person was entitled to costs incurred in the expenditure of his own professional skill. Mr Post QC cited the decision of the Court of Appeal in *Malkinson v Trim* and seemed to have come to the view that the provisions of CPR Rule 48.6 applied and that it did have the effect of abrogating the principle in *London Scottish* [13]. But he felt himself bound by the decision of Ryder J in *Miller* to reach the opposite conclusion. It is therefore necessary, in order to understand the effect of CPR 48.6(6), and of *Malkinson v Trim*, to start with the decision of *London Scottish Benefit Society v Chorley* in the Divisional Court (1884) 12 QBD 452 and in the Court of Appeal (1884) 13 QBD 872. The Master rejected the contention that solicitors acting as defendants in person ought not to be allowed any costs other than out of pocket costs and ordered that they should be entitled to the usual party and party costs. The Divisional Court upheld that view. Denman J said:-

> "I am not aware of any principle which ought to prevent a successful party who is a solicitor, and who does solicitor's work, from being indemnified not merely for the time he must necessarily expend as a witness in his own case, but also for the pains, trouble and skill which he has to incur and to exercise in order to bring it to a successful conclusion. There is nothing to prevent 'costs' thus incurred from falling within the fair meaning of an 'indemnity', though not actually money out of pocket, such as he would have had to pay if his action or his defence had been entrusted by him to another solicitor. The solicitor's time is valuable: he applies his skill to a suit or action in which he is obliged to spend his time and exercise his skill in consequence of the wrongful act of his opponent; and therefore it is not an unreasonable view that the word 'costs' in the sense of an 'indemnity', should be held fairly to include a reasonable professional remuneration for that work, which if he

> did not do it himself, would have had to be done by another solicitor and paid for by his unsuccessful opponent." [455]

Denman J went on to record that such a conclusion was consistent with long-standing practice described in textbooks.

Manisty J said that justice required such costs:-

> "Time is money to a solicitor; and why should he not be as much entitled to his proper costs, if he affords the time and skill which he brings to bear upon the business where he is a party to the action as where he is not a party? Again, I agree with my Brother Denman that it is for the advantage of the party against whom the judgment is given that his opponent is a solicitor, because there are many charges which the latter cannot make and which would be allowed if a claim or defence were conducted by another solicitor. Justice and reason, therefore, seem to me to favour the conclusion to which we have come." [457] (See also Watkin Williams J at 460.)

12. The Court of Appeal upheld that decision and the head note accurately records their conclusion that a solicitor who defends in person and obtains judgment is entitled to the same costs as if he had employed a solicitor except in respect of items which the fact of his acting directly renders unnecessary. Bowen LJ said:-

> "Professional skill and labour are recognised and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. It depends on the zeal, the assiduity, or the nervousness of the individual. Professional skill, when it is bestowed, is accordingly allowed for in taxing a bill of costs; and it would be absurd to permit a solicitor to charge for the same work when it is done by another solicitor, and not to permit him to charge for it when it is done by his own clerk…the costs claimed, subject to the exceptions which have been mentioned, ought to be allowed, because there is an expenditure of professional skill and labour." [877]

Bowen LJ, like Denman J before him, cited the late Lord Justice Lush as authority for the proposition that:-

> "An attorney regularly qualified is allowed to make the same charges for business done when he sues or defends in person, as when he acts as attorney for another." [877]

Fry LJ pointed out, as the Divisional Court had explained, that this conclusion was beneficial to the public because otherwise a solicitor would always employ another solicitor [877].

13. CPR 48.6(6), read with the costs Practice Direction, overturned that principle. Neither a solicitor nor a barrister acting in person can include in his proof of financial loss under 48.6(4)(a) the cost of the provision of his own professional skill and

judgment on his own case. In *Malkinson v Trim* Chadwick LJ analysed the Rule in *London Scottish Benefit Society* [11]. The question in that case was not whether a solicitor acting for himself could recover costs, but whether a solicitor represented by his own firm in a successful defence of proceedings brought against him personally was entitled to the profit costs of his firm [1]. The Court of Appeal's reasoning was that if a solicitor can charge for his own time under the principle identified in *London Scottish Benefit Society* then the position should not be different if the work is carried out by one or more of his partners or by his employees. The reasoning in *London Scottish Benefit Society* must, Chadwick LJ said, lead to the same conclusion in a case where the solicitor litigant carries on his practice as a solicitor in partnership. The cost of legal professional time and skill is not difficult to measure and there will be a saving if the work is done with a solicitor's own firm [14].

14. Chadwick LJ then considered the effect of the Civil Procedure Rules. He pointed out that the old Rules (Order 62 Rule 18 of the Rules of the Supreme Court 1965) had excluded from provisions relating to a litigant in person a practising solicitor (it should be noted that it never excluded a barrister).

15. Chadwick LJ took the view that, at least at first sight, the effect of the old Rule had been reversed by CPR 48.6(6) [19]. But where a solicitor chooses to represent himself in his firm's name, rather than acting for himself, he is not a litigant in person. Where the solicitor is represented by his firm the principle in *London Scottish Benefit Society* "remains unaltered by the provisions of CPR 48.6" [20]. He concluded [22]:-

> "One effect of CPR 48.6(6)(b), 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' – 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 purpose of CPR 48.6; and so is subject to the restrictions imposed by that rule, including the two-thirds restriction imposed by paragraph (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 costs of providing professional skill and knowledge through employees of his practice."

16. Contrary to that which appears in Ryder J's judgment in *Miller*, followed, apparently reluctantly by Mr Post QC, a barrister acting on his own behalf is not entitled to costs representing the expenditure of his own skill and time under CPR 48.6. Since he is not a solicitor coming within the Practice Direction there is no means by which he can avoid that conclusion and claim costs unless he employs someone else to act on his behalf. Accordingly, I conclude that Ryder J's interpretation of the CPR was wrong. It follows that the application of CPR 48.6, should have led to the conclusion that the

interested party was not entitled to charge for the expenditure of her own professional skill and judgement.

17. The error into which Mr Post QC was led by his belief that he was bound by Ryder J raises a further difficulty as to how this court should dispose of the case. First, it does not seem to me that Mr Post QC was bound, as he thought by the decision of Ryder J, particularly since he rightly recognised that the decision was at variance with the decision of the Court of Appeal in *Malkinson v Trim*. If he was purporting to apply the CPR, those Rules dictated the opposite conclusion.

18. But should the CPR have applied? The Bar Standards Board contends that the decision to regard them as persuasive was a matter of judgement which Mr Post QC was entitled to reach. But did the CPR have anything to do with the matter? Mr Post QC asserted that the CPR was persuasive [11]. But he gives no reasons for that conclusion other than that the interested party accepted that they were persuasive [7]. In my view, they were not even persuasive. If the Bar Standards Board is concerned to avoid having to pay the costs of a barrister's time when that barrister has successfully defended proceedings, it is open to the Bar Standards Board to provide in its rules that the CPR should apply. It has done nothing of the sort. On what basis, therefore, can it be said that the CPR should apply? After all, if a defendant barrister acting in person is going to be deprived of costs assessed on a *London Scottish Benefit Society* basis then the barrister will employ another barrister or solicitor and barrister, and claim his costs in the normal way. The successful barrister may lose a proportion, or perhaps, in an extreme case, all of those costs, if he or she has brought the proceedings on themselves. But otherwise, it seems to me that to apply CPR 48.6(6) is merely an invitation to incur extra costs which may be saved where a barrister acts on his or her own behalf. In those circumstances, and in the absence of any particular reason given by Mr Post QC as to why the CPR should be persuasive, the correct basis of assessing these costs is in accordance with the Bar Standard Board's own rules, namely, to award such costs as the tribunal thinks fit.

19. There was, I should emphasise, no dispute as to the number of hours in respect of which the interested party could claim. Nor, in the absence of CPR 48.6, is there any basis for saying that the expenditure of a barrister's own time and skill should not be compensated in circumstances where that barrister is successful. I bear well in mind the important public duty which the Bar Standards Board fulfils, but where in general should the costs lie in those cases where a barrister has been wrongly charged, has not brought the proceedings on himself, and where the charges have been dismissed? Should the cost fall on the barrister, or on the Bar at large? It seems to be there can only be one answer to that question and that the financial loss the barrister has incurred includes the expenditure of his own professional skill.

20. Mr Brennan QC argued that this particular interested party had suffered no loss because she was no longer in practice. I do not agree. The Bar Standards Board has agreed the number of hours she had spent in defending the unjustified charges against her. In those circumstances, she is entitled to the costs represented by her expenditure of professional skill. I do not think that they should be assessed at anything like the amount which Mr Post QC felt bound to award, namely, costs at the rate of £120 per hour. In my view, a reasonable figure would be £60 per hour, taking into account the fact that the interested party was not practising at the time. The hours seem extraordinarily long, but they, as I have already said, have been agreed.

21. For those reasons, I would quash the determination of Mr Post QC and substitute an award of costs calculated on the basis of a rate of £60 per hour.

Mr Justice Collins:

22. I agree.