

IN THE COUNTY COURT AT LIVERPOOL

Case No: H27YJ853

Courtroom No. 3

35 Vernon Street
Liverpool
L2 2BX

Thursday, 20th April 2023

Before:
DISTRICT JUDGE JENKINSON

B E T W E E N:

ANTHONY SEPHTON

and

ANCHOR HANOVER GROUP
(A registered charity)

NO APPEARANCE by or on behalf of the Claimant
MR LYONS appeared on behalf of Defendant
MR PRIOR appeared on behalf of the Respondent

JUDGMENT
(Approved)

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DJ JENKINSON:

1. I am dealing this afternoon with an application by the defendant for non-party disclosure against the respondent, Target Medical Solutions Limited who, for ease of reference, I will refer to from this point as “the agency”.
2. I have had the benefit of hearing submissions this afternoon from Mr Lyons who represents the defendant on this application and from Mr Prior who opposes it on behalf of the agency and of considering skeleton arguments submitted by both counsel, for which I am grateful.
3. The underlying claim brought by the claimant, Mr Sephton, against the defendant, does not need to be addressed in any detail for these purposes, save to identify that it was a public liability claim which settled by way of Part 36 offer after the issue of proceedings. It is common ground that the claimant is entitled to recover from the defendant fixed costs and disbursements in accordance with the provisions of Part 3A of CPR Rule 45.
4. The issue that has arisen in those costs proceedings between the claimant and the defendant appears to arise, at least from the statement in support of this application, from the fees submitted by the agency who were instructed by the claimant’s solicitors, in respect of obtaining various medical reports. In essence, it is the defendant’s case that the claimant is only entitled to recover the actual costs paid to the medical practitioners and not any additional charge paid to the agency. This is an argument that is vogue at the moment, the paying party referring to the judgment of Deputy District Judge Akers, as he then was, in the case of *Powles v Hemmings* [2021]. In that case, he disallowed the medical agency fees and in essence, took the view that when a solicitor delegates some work which he has a responsibility to undertake on behalf of the client, to an outside agent, then the costs of that work fall within the fixed costs that the solicitor is entitled to recover, and should not be considered a disbursement.
5. As is stated at paragraph 20 of the witness statement of Louis Bailey in support of this application, subsequent to the decision in *Powles v Hemmings* [2021], there has been considerable argument about this issue in different courts. In order to pursue the argument that was successfully pursued by the paying party in the case of *Powles v Hemmings* [2021], the defendant wishes to obtain a breakdown of fees, so that they can extract the agency element. According to paragraph 17 of the witness statement in support of this application, this application is pursued because the defendant believes that this information is only in the possession of the agency, and not in the possession of the claimant’s solicitors. I add here for the sake of completeness, that the claimant in the underlying claim has indicated that they do not want to be heard in relation to this application for non-party disclosure against the agency.
6. Within the application made, the defendant originally sought disclosure of documents relating to five invoices submitted by the agency in respect of obtaining medico-legal reports. However, as is clarified by paragraph one of the skeleton argument of Mr Lyons, they today seek disclosure only of one particular invoice relating to the MRI scan undertaken on the claimant. Essentially, the defendant wishes to see how much the provider of the MRI actually charged the agency.
7. The non-party disclosure provisions are dealt with at CPR 31.17. By reference to CPR 31.17(3) and to paraphrase the position, I may only make an order for disclosure against the agency if I am satisfied that the documents sought are likely to support the defendant’s case or adversely affect the claimant’s case in respect of the underlying cost dispute between the parties, and that disclosure is necessary to fairly dispose of that issue or to save costs. Even if both of those criteria are met, then I have a discretion as to whether or not to make such an order, such an order is an exception to the rule, but is not exceptional.
8. In order to consider whether or not the criteria are met and if so, whether or not it is

appropriate for me to exercise my discretion to make a non-party disclosure order, it is necessary for me to consider to a degree the merits of the defendant's contention in the underlying case with regards to agency fees.

9. I have been referred to various cases and the case that I found most useful in that regard is the decision in this court of His Honour Judge Wood KC of *Beardmore v Lancashire County Council* [2019]. Whilst I accept that this is a county court authority that is, strictly speaking, not binding on me, it is extremely persuasive as firstly, an authority from the designated civil judge in this court and secondly, an authority that would appear to be on the very issue.
10. His Honour Judge Wood KC considered the rule and the authorities in detail and points out at paragraph 51 of that judgment the difficulty in relying upon previous case law. Considering however the exact rule applicable in the underlying case, he expressed the view at paragraph 55 that CPR 45.29I(2) allows for recover of the medical agency fees in public liability cases as disbursements, with the correct approach being the reasonable and proportionate costs of obtaining, in that case, medical records although it is clear that the same approach would apply in respect of expert medical reports because both are addressed using the same terminology, namely "the cost of obtaining", at 2A of that rule.
11. Founding myself on the decision of His Honour Judge Wood KC and for the reasons that he explains in *Beardmore v Lancashire County Council* [2019], I would not have ordered disclosure of the invoices in relation to the medico-legal reports, which I emphasise are no longer sought, on the basis that the breakdown as between agency and practitioner would neither support the defendant's case or undermine the claimant's case within the meaning of CPR 31.17(3) because quite simply, that breakdown is irrelevant when the Court is assessing the extent of recoverable disbursements by reference to them being reasonable and proportionate, rather than by consideration of how that charge is apportioned between practitioner and agency.
12. It is therefore necessary for me to consider whether or not there is distinction to be drawn insofar as the cost of obtaining the MRI scan is concerned, because the manner in which the argument was addressed by Mr Lyons this afternoon is slightly different to that which was addressed in the witness statement of Mr Bailey in support of this application. In other words, should I adopt a different approach when dealing with a disbursement of this nature than when dealing with medical records or medical reports in the way considered by Judge Wood in the case of *Beardmore v Lancashire County Council* [2019]. Essentially, Mr Lyons says that the MRI scan should be considered not under subparagraph (a) but under subparagraph (h) which deals with a disbursement reasonably incurred due to a feature of the dispute. The distinction may be relevant, he says, because subparagraph (h) does not include words such as "the cost of obtaining" which featured in the decision of Judge Wood in his determination in respect of the issue when dealing with medical records. In that regard, at paragraph 13.4 of his report dated 4 December 2020, the orthopaedic surgeon, Mr Siddiqui, specifically recommended that an MRI scan should be obtained. It was obtained, further to that recommendation, entirely for medico-legal purposes, not for any treatment purposes. In other words, it was obtained so that Mr Siddiqui could finalise his medical opinion. It seems to me that if, for example, Mr Siddiqui had the facilities to arrange an MRI scan as part of his medico-legal examination on that day and thereafter finalise his report, it would be difficult to argue that this was not part of the cost of obtaining that expert's medical report. The crude analogy that I discussed this afternoon was the situation whereby audiometric testing is undertaken on behalf of an ENT surgeon at the time of medico-legal examination, and the costs of such testing included as part of the costs of the expert's report.
13. In my judgment, the costs of obtaining the MRI scan falls to be considered as part of the cost of obtaining the medical reports from Mr Siddiqui rather than falling distinctly within 2(h)

as another disbursement really incurred. As such, applying the reasoning of His Honour Judge Wood KC in *Beardmore v Lancashire County Council* [2019] and for the same reasons, it is recoverable to the extent that it is reasonable and proportionate, and the Court simply does not need to know any apportionment between the provider and the agency. However, even if I am wrong in that regard and, as submitted by Mr Lyons, the MRI falls to be considered by reference to subparagraph (h), we effectively reach the same point. The defendant does not seek to argue that the costs of the MRI scan is not recoverable.

14. It has to be assessed on a standard basis with the benefit of the doubt being given to the paying party on the basis of what is reasonable and proportionate, effectively the same test the judge would apply in relation to medical records and by implication, medico-legal reports when dealing with subparagraph (a). If the scan had been obtained directly by the claimant's solicitors without the use of an agency, it is not the case that the defendant would have to pay whatever that scan cost. They only have to pay what is reasonable and proportionate. That is a matter for the assessing judge with the benefit of doubt going to the paying party. The paying party in those circumstances could choose to make representations reliant upon the judge's general experience on the cost of such scans or, as is often the approach when dealing with less commonly seen disbursements such as this, they could produce evidence as to what the going rate for an MRI scan is in the area, either by reference to direct quotes or as Mr Lyons indicated, perhaps by producing the cost of MRI scans that they have paid for in other cases. That is a commonly seen approach in costs assessments.
15. For that reason, I am not satisfied that the breakdown between the actual scan provider and the medical agency is of any more relevance under subparagraph (h) than it is under subparagraph (a). The claimant is only entitled to recover the reasonable costs. How that is apportioned between the provider and the agency is of limited, if any, relevance and in those circumstances, referring back to the provisions of CPR 31.17, I do not take the view that that this is a document which is likely to support or adversely affect the respective parties' cases on this particular issue or that disclosure is necessary in order to fairly dispose of the claim.
16. It is not necessary because the defendant has other means, being the above summarised more usual means of challenging this particular disbursement. In any event, I turn to the third limb of the test, which is the exercise of my discretion in relation to an application for non-party disclosure. If I am wrong on the first two limbs, I take the view that I should not exercise this discretion on the basis that it is not appropriate to endorse the approach of non-party disclosure applications being made against medical agencies to achieve the aim of establishing the reasonable and proportionate cost of (here) an MRI scan, which can easily and more proportionately be established by producing quotes, as indeed would have to be the case in a matter that did not involve the scan being obtained via a medical legal agency.
17. For those reason, the defendant's application for non-party disclosure is dismissed.

End of Judgment

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This transcript has been approved by the judge.

