Neutral Citation Number: [2018] EWCA Civ 2667

Case No: A2/2017/3146

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mrs Justice Slade
[2017] EWHC 2699 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2018

Before:

LORD JUSTICE NEWEY
LORD JUSTICE COULSON
and
LORD JUSTICE HADDON-CAVE

- -

Between:

RICHARD JOHN SLADE	**Appellant**
(trading as RICHARD SLADE AND COMPANY)	
- and -	
(1) JUGMOHAN BOODIA	**Respondents**
(2) DEORANEE BOODIA	

- -
- -

Mr Simon Browne QC (instructed by **Richard Slade and Company plc**) for the **Appellant**
Mr Mark Friston (instructed by **W Davies Solicitors, Woking**) for the **Respondents**

Hearing date: 8 November 2018

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Approved Judgment

Lord Justice Newey:

Introduction

1. Not every bill that a solicitor renders to his client is a "statute bill". A "statute bill" is one complying with the Solicitors Act 1974. Where a solicitor has delivered such a bill to his client, he can potentially sue on it, but he cannot subsequently charge any more for the work in question and, subject to certain time limits, the client can ask for the bill to be assessed by the Court under section 70 of the Act. Depending on the terms of the retainer, a solicitor may be able to raise statute bills during the course of a retainer as well as when he has completed the task on which he has been instructed, but interim bills may, alternatively, represent requests for payments on account. If that is the case, the time limits on applications for assessment do not bite and the solicitor cannot bring proceedings to recover his fees. On the other hand, it may be open to the solicitor subsequently to increase the amounts claimed and also to terminate the retainer if a bill is not paid.

2. The issue in the present case is whether bills that the appellant's firm, Richard Slade and Company, delivered to the respondents, Mr and Mrs Boodia, were all statute bills (as the appellant contends) or constituted a series of on account bills culminating in a final statute bill (as the Boodias suggest). Slade J, upholding Master James, Costs Judge, decided in favour of Mr and Mrs Boodia on the basis that an interim statute bill must be a complete and final account of the fees sought for the period covered by it and, hence, must encompass both profit costs and disbursements. The appellant argues otherwise.

Narrative

3. The appellant acted for Mr and Mrs Boodia between 2013 and 2016 in connection with a dispute relating to a right of way. The retainer, which Mr and Mrs Boodia signed on 30 January 2013, included this under the heading "Payment Terms":

> "Bills are rendered monthly in arrears. Our bills are detailed bills and are final in respect of the period to which they relate, save that disbursements (costs and expenses which we incur on your behalf) are normally billed separately and later than the bill for our fees in respect of the same period. Please do not assume, therefore, from a bill for our fees which does not refer to any disbursements that no disbursements were incurred during the period. The more usual situation is that disbursements will have been incurred and will be billed separately."

4. By October 2016, when Mr and Mrs Boodia terminated the retainer and instructed alternative solicitors, the appellant had delivered 61 invoices to the Boodias. 43 of these were devoted exclusively to profit costs and the other 18 only to disbursements. In total, Mr and Mrs Boodia were billed £207,609.46, comprising £141,287.70 (plus VAT) for profit costs and £31,703.80 (plus VAT) for counsel's fees and other disbursements. Payment of the final four invoices has been withheld, but the amounts claimed in the earlier invoices were paid.

5. On 17 November 2016, Mr and Mrs Boodia issued a claim form in which they asked for all the bills they had received to be assessed in accordance with section 70 of the 1974 Act. Having regard to the time limits contained in that section, Master James directed a hearing to determine the following preliminary issue:

> "whether, by virtue of them being final for the period covered by them only insofar as they relate to profit costs, the bills raised by the Defendant to the Claimants as set out in the claim form constitute interim statute bills under Part III of the Solicitors Act 1974, and if they are not such interim statute bills whether they are capable of being treated as a series of on account bills culminating in a statute bill dated as per the last in the series".

6. The matter came before Master James on 17 March 2017. She concluded that the various bills that the appellant had rendered constituted "a series of on account bills culminating with a final statute bill dated 6th October 2016" and that the date of delivery for all the invoices was the date of delivery of that final bill. On that basis, she ordered a detailed assessment of all the bills. Master James rejected the appellant's contention that the invoices represented "interim statute bills", explaining (at paragraph 3 of her judgment):

> "you cannot in my view have an interim statute bill and then come back at a later stage and say, 'Here is something else to go into that bill.' It is either a final bill for the period that it covers or it is not."

7. The appellant appealed, but without success. The appeal was dismissed by Slade J on 31 October 2016. Slade J considered that Master James had been right to hold that the bills raised by the appellant were not statute bills (see [2017] EWHC 2699 (QB), [2018] 1 WLR 2037).

The legal framework in greater detail

8. Section 70 of the 1974 Act, pursuant to which Mr and Mrs Boodia have brought their proceedings, provides as follows:

> "(1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.
>
> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—

(a) that the bill be assessed; and

(b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.

(3) Where an application under subsection (2) is made by the party chargeable with the bill—

(a) after the expiration of 12 months from the delivery of the bill, or

(b) after a judgment has been obtained for the recovery of the costs covered by the bill, or

(c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill,

no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.

(4) The power to order assessment conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill.

(5) An order for the assessment of a bill made on an application under this section by the party chargeable with the bill shall, if he so requests, be an order for the assessment of the profit costs covered by the bill.

(6) Subject to subsection (5), the court may under this section order the assessment of all the costs, or of the profit costs, or of the costs other than profit costs and, where part of the costs is not to be assessed, may allow an action to be commenced or to be continued for that part of the costs.

…

(9) Unless—

(a) the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) the order for assessment or an order under subsection (10) otherwise provides,

the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is

> reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.
>
> …
>
> (12) In this section *'profit costs'* means costs other than counsel's fees or costs paid or payable in the discharge of a liability incurred by the solicitor on behalf of the party chargeable, and the reference in subsection (9) to the fraction of the amount of the reduction in the bill shall be taken, where the assessment concerns only part of the costs covered by the bill, as a reference to that fraction of the amount of those costs which is being assessed."

9. A client thus has an unqualified right to require a bill to be assessed for a month after its delivery. After that, he can still ask for assessment to be ordered, but "special circumstances" will need to be shown if more than 12 months have passed since the bill was delivered, a judgment has been obtained in respect of the bill or the bill has been paid. Where, moreover, upwards of 12 months have elapsed since payment, no order for assessment can be made (see section 70(4)). As for the costs of an assessment, the client can expect to recover his costs from the solicitor if the amount billed is reduced by a fifth, but will otherwise normally have to bear the solicitor's costs.

10. Section 70 of the 1974 Act largely reflects much older legislation. As Ward LJ explained in *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500, [2003] 1 WLR 510 (at paragraph 19), there is, more generally, "a marked similarity in the substance of the provisions of the [Solicitors Act 1843] and the 1974 Act".

11. Several further provisions of the 1974 Act are noteworthy in the context of the submissions addressed to us. In the first place, section 65 allows a solicitor instructed on contentious business to withdraw from the retainer if his client fails to comply with a request for a reasonable payment on account. Section 65(2) reads:

> "If a solicitor who has been retained by a client to conduct contentious business requests the client to make a payment of a sum of money, being a reasonable sum on account of the costs incurred or to be incurred in the conduct of that business and the client refuses or fails within a reasonable time to make that payment, the refusal or failure shall be deemed to be a good cause whereby the solicitor may, upon giving reasonable notice to the client, withdraw from the retainer."

12. A provision in these terms appeared in the Solicitors (Amendment) Act 1974 before being incorporated into the 1974 Act.

13. Secondly, section 67 of the 1974 Act deals with the inclusion in a bill of disbursements which have not yet been paid. It states:

> "A solicitor's bill of costs may include costs payable in discharge of a liability properly incurred by him on behalf of

> the party to be charged with the bill (including counsel's fees) notwithstanding that those costs have not been paid before the delivery of the bill to that party; but those costs—
>
> (a) shall be described in the bill as not then paid; and
>
> (b) if the bill is assessed, shall not be allowed by the costs officer unless they are paid before the assessment is completed."

14. A clause to this effect was first enacted in the Solicitors (Amendment) Act 1956 and then included in the Solicitors Act 1957.

15. Thirdly, section 69 of the 1974 Act lays down certain requirements in respect of bills and provides that a solicitor cannot generally bring proceedings to recover costs until a month after a bill for those costs has been duly delivered. So far as material, the section reads:

> "(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2); but if there is probable cause for believing that the party chargeable with the costs—
>
> (a) is about to quit England and Wales, to become bankrupt or to compound with his creditors, or
>
> (b) is about to do any other act which would tend to prevent or delay the solicitor obtaining payment,
>
> the High Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the solicitor be at liberty to commence an action to recover his costs and may order that those costs be assessed.
>
> (2) The requirements referred to in subsection (1) are that the bill must be–
>
> (a) signed in accordance with subsection (2A), and
>
> (b) delivered in accordance with subsection (2C).
>
> (2A) A bill is signed in accordance with this subsection if it is–
>
> (a) signed by the solicitor or on his behalf by an employee of the solicitor authorised by him to sign, or
>
> (b) enclosed in, or accompanied by, a letter which is signed as mentioned in paragraph (a) and refers to the bill.
>
> …

> (2C) A bill is delivered in accordance with this subsection if–
>
> (a) it is delivered to the party to be charged with the bill personally,
>
> (b) it is delivered to that party by being sent to him by post to, or left for him at, his place of business, dwelling-house or last known place of abode, or
>
> (c) it is delivered to that party–
>
> (i) by means of an electronic communications network, or
>
> (ii) by other means but in a form that nevertheless requires the use of apparatus by the recipient to render it intelligible,
>
> and that party has indicated to the person making the delivery his willingness to accept delivery of a bill sent in the form and manner used.
>
> …
>
> (2E) Where a bill is proved to have been delivered in compliance with the requirements of subsections (2A) and (2C), it is not necessary in the first instance for the solicitor to prove the contents of the bill and it is to be presumed, until the contrary is shown, to be a bill bona fide complying with this Act."

16. In *Ralph Hume Garry v Gwillim*, Ward LJ explained that the origins of section 69 of the 1974 Act can be traced back to section 37 of the Solicitors Act 1843 and, even beyond that, to section 23 of the Act for the better Regulation of Attorneys and Solicitors 1729. As early as the 1729 legislation, "there had been a bar on the solicitor commencing action until the expiration of one month from the delivery of his bill" and "[e]ven then the bill had to be properly delivered and 'subscribed with the proper hand of such attorney or solicitor'" (per Ward LJ, at paragraph 17).

17. Ward LJ also observed in *Ralph Hume Garry v Gwillim* (at paragraph 18) that, while the 1729 Act did not contain any equivalent to the closing words of section 69(2E) of the 1974 Act (viz. "[the bill] is to be presumed, until the contrary is shown, to be a bill bona fide complying with this Act"), "[o]ne thing … which features in 1843 and continues to feature even now was the proviso for the client to show that the bill delivered was 'not such a bill as constituted a bona fide compliance with this Act'". In the *Ralph Hume Garry* case, it was submitted on behalf of Mr Gwillim that the bills at issue were not bills "bona fide complying with [the 1974] Act". Rejecting that argument, Ward LJ said (at paragraph 70):

> "This review of the legislation and the case law leads me to conclude that the burden on the client under section 69(2) of the Solicitors Act 1974 to establish that a bill for a gross sum in contentious business will not be a bill 'bona fide complying with this Act' is satisfied if the client shows: (i) that there is no

> sufficient narrative in the bill to identify what it is he is being charged for, and (ii) that he does not have sufficient knowledge from other documents in his possession or from what he has been told reasonably to take advice whether or not to apply for that bill to be taxed. The sufficiency of the narrative and the sufficiency of his knowledge will vary from case to case, and the more he knows, the less the bill may need to spell it out for him. The interests of justice require that the balance be struck between protection of the client's right to seek taxation and of the solicitor's right to recover not being defeated by opportunistic resort to technicality."

18. Earlier in his judgment, after considering several Victorian decisions, Ward LJ had said this (in paragraph 32):

> "Against that background the principles to be deduced from those cases appear to me to be these. (1) The legislative intention was that the client should have sufficient material on the face of the bill as to the nature of the charges to enable him to obtain advice as to taxation. The need for advice was to be able to judge the reasonableness of the charges and the risks of having to pay the costs of taxation if less than one-sixth of the amount was taxed off. (2) That rule was, however, subject to these caveats: (a) precise exactness of form was not required and the rule was not that another solicitor should be able on looking at the bill, *and without any further explanation from the client*, see on the face of the bill all information requisite to enable him to say if the charges were reasonable; (b) thus the client must show that further information which he really and practically wanted in order to decide whether to insist on taxation had been withheld and that he was not already in possession of all the information that he could reasonably want for consulting on taxation. (3) The test, it seems to me, is thus, not whether the bill on its face is objectively sufficient, but whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right *then* open to him, viz, to seek taxation reasonably free from the risk of having to pay the costs of that taxation. (4) A balance has to be struck between the need, on the one hand, to protect the client and for the bill, together with what he knows, to give him sufficient information to judge whether he has been overcharged and, on the other hand, to protect the solicitor against late ambush being laid on a technical point by a client who seeks only to evade paying his debt."

Ward LJ also said (at paragraph 57):

> "It seems to me, therefore, that the origin of the requirement that [the client] have enough information to take a decision to tax or not to tax was to preserve the right to tax and to ensure it

> was an informed decision. A client left in ignorance of what had been done should not unfairly be left at risk of paying the costs of taxation."

19. Aside from legislative interventions, a solicitor's ability to render bills depends on his contractual relationship with his client. Absent agreement to the contrary, a solicitor's retainer might be considered an entire contract allowing him to bill only once the work had been concluded. Thus, in *Underwood, Son, & Piper v Lewis* [1894] 2 QB 306 A. L. Smith LJ said (at 314):

> "prima facie the contract of the solicitor, when he accepts a retainer in a common law action, is an entire contract to carry on the action till it is finished, and he cannot sue for costs before the action is at an end".

However, it came to be recognised that a solicitor might be entitled to raise bills at "natural breaks" in proceedings (see e.g. *In re Hall & Barker* (1878) 9 Ch D 538, *In re Romer & Haslam* [1893] 2 QB 286 and *Davidsons v Jones-Fenleigh* [1980] Costs LR 70). In that connection, Lord Denning MR said in *Chamberlain v Boodle & King* [1982] 1 WLR 1443 (at 1446):

> "it is a question of fact whether there are natural breaks in the work done by a solicitor so that each portion of it can and should be treated as a separate and distinct part in itself, capable of and rightly being charged separately and taxed separately".

More importantly for present purposes, it is "open to solicitors to agree the terms of payment under their retainer and the wiser amongst them nowadays do so" (to quote from the judgment of Simon Brown LJ in *Abedi v Penningtons* [2000] 2 Costs LR 205, at 206). In fact, interim bills may be provided for "by virtue of an inferred as well as an express agreement" (per Simon Brown LJ in *Abedi v Penningtons*, at 218). In *Harrod's Ltd v Harrod's (Buenos Aires) Ltd* [2014] 6 Costs LR 975, Jacob J noted (at 981) "the modern practice of solicitors sending bills on a regular basis which are complete bills, not interim bills".

20. In the present case, of course, the retainer expressly provided for "final" monthly bills and for disbursements to be billed "separately and later" (see paragraph 3 above).

Must a statute bill include both profit costs and disbursements for the relevant period?

21. As I have already indicated, Slade J agreed with Master James that a statute bill "must include both profit costs and, where paid or payable, expenses and disbursements in respect of the period to which the bill relates" (paragraph 24 of the judgment). The Master, Slade J considered, "was bound by statute as explained in authority to hold that an interim statute bill must contain a bill of all costs including profit costs and disbursements in respect of agreed periods of time" (paragraph 56 of the judgment).

22. In arriving at that conclusion, Slade J had regard to (a) provisions of the 1974 Act, (b) a passage from *Bari v Rosen* [2012] 5 Costs LR 851 and (c) matters of practicality and policy. I shall take these in turn before also addressing, first, the decision of the Court

of Appeal in *Aaron v Okoye* [1998] 2 Costs LR 6 and, secondly, a fallback position advanced by Mr Mark Friston, who appeared for Mr and Mrs Boodia.

Provisions of the 1974 Act

23. Having recorded that the appellant had submitted that section 67 of the 1974 Act shows that the Act "regards a bill which does not include disbursements for the period as a bill within the provisions of Sections 69 and 70" (see paragraph 12 of the judgment), Slade J said that she did not accept the appellant's construction of section 67 (paragraph 28) and continued:

> "[Section 67] does not state that disbursements are not costs or that they need not be included in a statute bill. On the contrary, such payments, including counsel's fees are described as 'those costs'. The section clearly indicates that disbursements are regarded as costs for the purposes of statute bills. Further, section 67 does not render inclusion of disbursements in a statute bill optional. It provides that liability for those costs which have not yet been paid by the solicitor but incurred by him may be included in a statute bill."

24. As I read this passage, the Judge was explaining why she did not consider that section 67 lent support to the appellant's case rather than taking it to be of positive assistance to Mr and Mrs Boodia. At all events, I do not myself think that the section is of any real help to either side. It was introduced into legislation with much older precursors to allow a solicitor to bill for disbursements that have not yet been paid. It says nothing about whether a bill must, or need not, include both profit costs and disbursements.

25. Slade J also referred to section 70 of the 1974 Act. In this connection, she said (in paragraph 29 of her judgment):

> "The provisions of section 70 show that costs which are the subject of a statute bill include both profit costs and, where incurred, disbursements. Section 70(6) provides for an 'assessment of all the costs, or of the profit costs' or of the costs other than profit costs. Both profit costs and costs other than profit costs which include disbursements are therefore included in costs for the purpose of section 70."

26. Again, I do not consider that the terms of section 70 shed any light on matters. Section 70(6) recognises that a bill *can* encompass both profit costs and "costs other than profit costs", but it does not tell you whether a bill *must* include both.

27. Neither do you get any assistance from section 87 of the 1974 Act, the interpretation provision, which defines "costs" as including "fees, charges, disbursements, expenses and remuneration". This gives no indication as to whether profit costs and disbursements have to be billed together.

Bari v Rosen

28. In *Bari v Rosen*, Spencer J, in the course of a summary of "relevant principles of law and practice governing the issue and assessment of solicitors' bills of costs" (see paragraph 13 of the judgment), said (in paragraph 15):

> "[A] solicitor may contract with his client for the right to issue statute bills from time to time during the currency of the retainer. Such bills are known as 'interim statute bills'. They are nevertheless final bills in respect of the work they cover, in that there can be no subsequent adjustment in the light of the outcome of the business. They are complete self-contained bills of costs to date."

29. The reference to "complete self-contained bills of costs to date" harks back to *Davidsons v Jones-Fenleigh*. In that case, Roskill LJ concluded (at 75-76) that certain bills were interim statute bills on the basis that "there was a clear intention on the part of the [solicitors], and indeed a plain agreement to be inferred from the conduct of the parties that those bills should be treated as completely self-contained bills covering the period down to the relevant date given". A little earlier, Roskill LJ had said (at 75) that, before a solicitor is entitled to require a bill "to be treated as a self-contained bill of costs to date, he must make it plain to the client, either expressly or by necessary implication, that that is his purpose of sending in that bill for that amount at that time". Roskill LJ also spoke (at 72) of the need to make clear to the client that a bill "was intended to be a complete bill to date, which the solicitor wanted to have finally settled and that the solicitor was not, in sending in that bill, merely either telling his client how matters were going on or only seeking a payment on account towards whatever the final bill might be".

30. The phrase "complete self-contained bill of costs" was used, too, in *Adams v Al Malik* [2014] 6 Costs LR 985. Giving judgment on an application for permission to appeal, Fulford J said when addressing a submission that the Master whose decision was the subject of the application had misapplied the law relating to natural breaks (at paragraph 48):

> "the party must know what rights are being negotiated and dispensed with in the sense that the solicitor must make it plain to the client that the purpose of sending the bill at that time is that it is to be treated as a complete self-contained bill of costs to date (see the judgment of Roskill LJ in *Davidsons v Jones-Fenleigh* …)."

31. Slade J considered that "application of the principle explained in *Bari v Rosen* leads to a requirement that to constitute a statute bill it must contain all costs relating to a defined period" (paragraph 53 of the judgment). To my mind, however, that is to attribute to the words "complete self-contained bill of costs" a significance that they do not have. *Bari v Rosen* was not concerned with whether a statute bill had to extend to both profit costs and disbursements, and no such issue arose either in *Davidsons v Jones-Fenleigh* or *Adams v Al Malik*. The point being made in *Davidsons v Jones-Fenleigh*, echoes of which can be found in the later authorities, was essentially that, for a bill to be treated as a statute bill, it must be apparent that it is not merely seeking

a payment on account but is intended to be complete and final as regards its subject matter. The cases do not appear to me to assist with whether a statute bill has to include everything (profit costs *and* disbursements) attributable to the period covered by the bill.

Practicality and policy

32. Slade J observed that, if the appellant's contentions were correct, the Court could be "asked to make an assessment without knowing what disbursements had been paid or were liable to be paid by the solicitor for the same period" (paragraph 33 of the judgment) and that "to undertake an assessment of profit costs without knowing what disbursements were for the same period may deprive the client the information on which to decide whether to challenge the profit costs bill for, for example, duplication of work by solicitor and counsel" (paragraph 34). In a similar vein, Slade J said in paragraph 56:

> "The client needs to know the total costs incurred over a certain period to enable them to form an evidenced based view of whether to exercise their right under section 70 to challenge the bill. The right of a client to apply for assessment under section 70 is time limited. After expiry of the specified time limit that right is lost as is asserted by the defendant in respect of the majority of bills in this case. The treatment of incomplete bills of costs as statute bills could lead to a multiplicity of applications under section 70 merely to preserve the client's right to apply for assessment. Although this may be unlikely in continuing litigation where client and solicitor are enjoying good relations, it may be otherwise when those relations have become less amicable."

33. However, the approach adopted by Slade J and Master James would itself have unsatisfactory implications. A solicitor could not, it seems, raise a statute bill until he had himself been invoiced for all disbursements incurred during the relevant period, leaving the solicitor dependent on the cooperation of third parties. The difficulties would be the greater if work were being undertaken (say, by counsel or an expert) at the end of a solicitor's billing period. The solicitor would, presumably, be unable to render a statute bill until he knew the cost of work done up to midnight on the final day and, where work continued into the next billing period, an apportionment might be required. Mr Friston responded that the solicitor could ask for payments on account instead of raising interim statute bills (relying, if necessary, on section 65(2) of the 1974 Act), but that would deny both solicitor and client finality and also mean that the solicitor would be unable to bring proceedings to recover his fees. That would be the case, moreover, even in circumstances such as are mentioned in section 69(1)(a) and (b).

34. In any case, the 1974 Act nowhere states that a statute bill must encompass both profit costs and disbursements, and I can see no justification for such a rule in the case law either. As explained in paragraph 17 above, the Court of Appeal concluded in *Ralph Hume Garry v Gwillim* that a client could establish that a bill is not one "bona fide complying with this Act" by showing "(i) that there is no sufficient narrative in the bill to identify what it is he is being charged for, and (ii) that he does not have

sufficient knowledge from other documents in his possession or from what he has been told reasonably to take advice whether or not to apply for that bill to be taxed". Elsewhere in his judgment, Ward LJ spoke of the test being "whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right *then* open to him, viz, to seek taxation reasonably free from the risk of having to pay the costs of that taxation" (see paragraph 18 above). I would not wish to exclude the possibility of a bill restricted to either profit costs or disbursements failing this test on the particular facts of the case in question. That, however, would be the exception rather than the rule. I do not think it can be inferred that a statute bill must always, or even usually, include both profit costs and disbursements. Separate billing for profit costs and disbursements is common with modern, digital billing, and I do not accept that that need give rise to problems.

Aaron v Okoye

35. Mr Simon Browne QC, who appeared for the appellant before us but not in the Courts below, sought additional support for his submissions in *Aaron v Okoye*, a case that was not cited to Slade J or Master James. There, counsel's fees were omitted from a bill because the client was disputing them and included in a later bill once they had been agreed. A District Judge apparently took the view that "counsel's fees could not be allowed in respect of the second bill, because they had not been included in the first bill", but the Court of Appeal disagreed. Hobhouse LJ, with whom Butler-Sloss LJ agreed, explained (at 12):

> "If the matter is something which cannot be included in the first bill then the solicitor cannot be criticised for omitting it from the first bill. Indeed, it would be wrong for him to include it. If one is to draw the conclusion that he should therefore be thereafter totally debarred from recovering what otherwise would be a perfectly proper fee for disbursement, that is an unacceptable and unreasonable conclusion which is not necessitated by the premise on which one is proceeding. But, in any event, this is not a case where the paying party, the client, was in any way deceived. The first bill made it clear that counsel's fees were not being included and a covering letter adequately reminded her of the reason why that was so. So she was not deceived. She was not led astray in any way and there is no general principle which precludes the solicitor from then including the relevant item in a later bill when it is proper for him to do so."

36. Mr Friston attributed the decision to its highly unusual facts, but I agree with Mr Browne that it is inconsistent with a general principle that profit costs and disbursements cannot be billed separately. In all the circumstances, I take a different view from Slade J and Master James. I do not, with respect, agree with them that a bill cannot be a statute bill unless it includes both profit costs and disbursements for the period it covers.

The fallback position

37. Conscious, I think, of the practical difficulties to which Slade J's conclusions could give rise, Mr Friston put forward a fallback position: that, if Slade J were mistaken in thinking that a statute bill has to encompass all *work done* in the period covered by it, such a bill must include *all fee notes and invoices in respect of disbursements that the solicitor received* in the relevant period. Mr Browne observed (correctly, it appears) that this submission had not been foreshadowed either by way of respondent's notice or in the Boodias' skeleton arguments, but I do not in any event consider the point to be well-founded. As I see it, the contention is no more supported by the terms of the 1974 Act or the authorities than Slade J's approach. On top of that, it would not remove the potential for uncertainty to which Slade J referred in the passages from her judgment quoted in paragraph 32 above. The fallback position would allow a solicitor to bill his client for work undertaken by a third party (counsel or an expert, say) long before, during a period for which the solicitor had already raised an interim statute bill, if the fee note or invoice in respect of it had arrived only recently. The client would not necessarily know, therefore, what work had been carried out at the time by third parties before having to decide whether to apply for an interim statute bill to be assessed.

Conclusion

38. I would allow the appeal. It seems to me that the fact that the various bills rendered by the appellant to Mr and Mrs Boodia included only profit costs or disbursements, not both, did not prevent them from being interim statute bills.

39. I would add that I have found very helpful, not only the submissions advanced by Mr Browne and Mr Friston (who stepped into the breach at short notice), but the skeleton argument prepared on behalf of Mr and Mrs Boodia by Mr Robin Dunne, who was unfortunately unable to attend the hearing because he was unwell.

Lord Justice Coulson:

40. I agree.

Lord Justice Haddon-Cave:

41. I also agree.