Neutral Citation Number [2024] EWHC 1704 (SCCO)
Case No: SC-2022-APP-000305

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 02/07/2024

Before :

COSTS JUDGE WHALAN

- -

Between :

Mr Guiliano Davide Stella	**Claimant**
- and -	
Hodge Jones & Allan LLP	**Defendant**

- -
- -

Mr John Churchill (instructed by **Gunnercooke LLP**) for the **Claimant**
Mr Stephen Innes (instructed by **TMC Legal Services Ltd**) for the **Defendant**

Hearing dates: 19 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2nd July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE WHALAN

Costs Judge Whalan:

Introduction

1. This judgment determines a number of preliminary issues raised in an action brought by the Claimant against the Defendant under s.70 of the Solicitor's Act 1974 ('SA 1974').

2. Page references in parenthesis refer to a Bundle which, although filed in two volumes, has a continuous pagination (1-923).

Background

3. The Claimant retained the Defendant in September 2017 in a dispute concerning a property known as 49A The Chase, London, SW4 0NT ('the Property'). Initially the action concerned a dispute with the Claimant's landlord about unpaid service charges, but it expanded to include a claim for disrepair, allegations of harassment and a disagreement with a neighbour about overhanging trees.

4. Between 12th October 2017 and 18th November 2021, the Defendant delivered to the Claimant 34 invoices totalling £225,697.60, of which £198,635 was paid.

5. On 29th April 2022 the Claimant issued a Part 8 claim against the Defendant, seeking a SA 1974 detailed assessment of 8 invoices delivered between 30th April and 18th November 2021, in the total sum of £85,140.70. The parties agreed that these invoices should be subject to a detailed assessment in a Consent Order dated 29th September 2022.

6. On 31st May 2023 the Claimant issued an Application Notice requesting a detailed assessment of the other 26 invoices, delivered between 12th October 2017 and 31st March 2021, in the total sum of £140,492.20. The application sought a 'consolidation' with the Part 8 claim pursuant to CPR 3.1(b), but it could as easily (and perhaps more accurately) be construed as an application to amend the statement of case in the Part 8 claim.

Issues

7. This judgment is concerned primarily with the Application issued on 31st May 2023 and it addresses a number of core issues relevant to the proceedings:
   (i) Is there a procedural bar to a consideration of the Application in the context of existing Part 8 proceedings?
   (ii) Were the invoices delivered by the Defendant to the Claimant interim statute bills, or were they a series of interim invoices delivered as part of a 'Chamberlain' bill which became 'final' with the delivery of the last invoice in November 2021?

(iii) Can the Claimant demonstrate the existence of 'special circumstances' pursuant to s.70(3) of the SA 1974?

(iv) Should the court exercise its discretion to order a detailed assessment of the disputed invoices?

(v) Various ancillary issues, including whether the Claimant is entitled to a 'common law assessment' of the 26 invoices cited in the Application?

Procedural issues

8. The Defendant submits that the Claimant's Application issued on 31st May 2023 should be dismissed as a procedural irregularity. The Part 8 claim issued in April 2022 is limited specifically to 8 invoices delivered between April and November 2021. A detailed assessment was conceded in September 2022 when the parties agreed a directions timetable pursuant to CPR 46.10. Points of Dispute and Replies had been prepared, exchanged and filed, at some cost, and a directions hearing (to consider the listing of various preliminary points of principle) had been listed on 25th January 2024. Then, having proceeded for almost a year on the assumption that only 8 invoices would be subject to assessment, the Claimant has attempted to add another contested 26 invoices (with the earliest dating to October 2017), via the unorthodox mechanism of an Application Notice and a request for consolidation. The Application, submits the Defendant, is simply "too late" and it prejudices the fair and proportionate determination of the existing proceedings.

9. The Claimant, in reply, points out that the Part 8 action issued on 29th April 2022 was a 'protective claim' and that the draft order filed with the Claim Form stated explicitly that the Claimant sought a delivery of the bill "in all matters in which the Defendant had acted for the Claimant". Assessment of the 'other invoices' was then debated further in "disputatious correspondence" exchanged prior to the Consent Order in September 2022. The Claimant's consent to the Order was predicated on the fact that he "reserved the right…[to argue] that other invoices should also be subject to assessment" (28th September 2022, 295-6). The Defendant apparently acknowledged and consented to this reservation (29th September 2022, 295). When, therefore, the Claimant expressed a clear intention to seek an assessment of the remaining 26 invoices in correspondence dated 13th February 2023 (353), the Defendant was neither taken by surprise not prejudiced. The Application of 31st May 2023 was issued after further exchange of correspondence in which the Claimant's intention was outlined clearly.

10. I am satisfied that the Application should be heard and considered substantively and I reject the Defendant's submission that it should be dismissed on procedural grounds. Subsequent amendment/consolidation of the Part 8 by an Application Notice may be unorthodox (even undesirable), but I am satisfied, on the particular facts of this case, that the procedure adopted by the Claimant is permissible. It was clear, in my view from the outset, that the Claimant disputed (or at least challenged potentially) the entirety of the Defendant's billing. This is tolerably clear from the claim issued in April 2022. The intention to seek assessment of the remaining 26 invoices was cited repeatedly in correspondence throughout 2022-3 and, in my assessment, the Defendant has repeatedly understood and acknowledged this intention, notwithstanding that it opposes the detailed SA 1974 assessment of the disputed

invoices. Aside from submitting that the Claimant's application "is too late", the Defendant has never specified precise grounds for a procedural dismissal of the Application Notice. I interpret the Claimant's Application of 31st May 2023 to effectively be an application to amend the Part 8 statement of case issued on 29th April 2022. For reasons already outlined, I am satisfied that this should be granted and that, accordingly, the substantive claim requests a detailed assessment of all 34 invoices delivered by the Defendant to the Claimant. For all these reasons, the Application should proceed on the substantive, preliminary issues.

Interim Statute bills or a 'Chamberlain' bill?

11. The parties broadly agree three general propositions that are relevant to the construction of the Defendant's contractual retainer with the Claimant. First, the burden of proving that the retainer provides for the delivery of interim statute bills, in contrast to requests for interim payments generally, falls on the receiving party. Second, when construing the retainer, it is necessary to refer to the relevant contractual provisions as a whole. Third, in determining whether a retainer does allow the solicitor to render interim statute bills, the court should resolve any fundamental ambiguity against that construction. These principles are re-affirmed by Walker J in Vlamaki v. Sookias and Sookias [2015] 6 Costs LO 827 and are summarised in *Friston on Costs* (4th Ed.) at 27.49.

12. The retainer is dated 25th September 2017 and contains the following provisions relevant to interim bills and payments on account:

> **Costs on Account**
> It is normal practise to ask clients to pay sums of money from time to time on account of the charges and expenses which are expected in the following weeks or months. This helps to avoid delay in the progress of the case. …We may request further payments on account for charges and expenses to be incurred if the matter progresses. When we put these payments towards your bill we will send you a receipted bill. We will offset any such payments against your final bill but it is important you understand that your total charges and expenses may be greater than any advance payment.
>
> If for any reason this matter does not proceed to a conclusion we will charge you for the work done and expenses incurred up to the date that our instructions ended.
>
> **Billing Arrangements**
> We will send you interim bills regularly, usually every month, so that you will keep up-to-date with your legal costs. The bills will be for work done by us and the expenses incurred (often called disbursements) such as barristers or doctors' fees. We usually then ask for further money on account of costs.
>
> We will send you a final bill after completion of the work. Payment is due to us within 14 days of us sending you a final bill. ..

13. The Defendant, in summary, submits that the contractual retainer preserves expressly an entitlement for the Defendant to render interim statute bills. The section headed

'Billing Arrangements' is at clear variance to that headed 'Costs on Account'. The retainer, in other words, draws a positive distinction between interim bills and requests for monies on account.

14. Further, or alternatively, the retainer should be construed as an implied agreement that the Defendant could render interim statute bills. In Davidsons v. Jones-Fenleigh [1980] WL 149540, Roskill LJ held:

> There is now no doubt, I venture to think, what the law is in a case such as the present. A solicitor is entitled to select a point of time which he regards as an appropriate point of which to send in a bill. But before he is entitled to require that bill to be treated as a complete 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. Then of course one looks to see what the client's reaction. If the client's reaction is to pay the bill in its entirety without demure it is not difficult to infer an agreement that the bill is to be treated as a complete self-contained bill of costs to date.

The disputed invoices cited in the Application Notice were paid by the Claimant.

15. The Defendant notes that six of the invoices were sent with covering letters which began with the words: "We enclose our interim statute bill for the work done on your case for the [relevant period]" (5th May 2019, 422, 7th June 2021, 423, 6th July 2021, 424, 12th August 2021, 426, 14th September 2021, 428 and 5th October 2021, 430). Further, Chun Wong, a Partner at the Defendant, has stated (30th June 2023, 365-81), that the Claimant "was fully aware that the invoices rendered to him were statute bills and not just requests for payments on account" (367), as this point was cited repeatedly in correspondence from the firm beginning in 2018. Extracts from the relevant letters and e-mails are set out at paragraphs 8-26 of her witness statement.

16. Insofar as the retainer comprised an express or implied agreement that the solicitor was permitted to render interim statute bills, the Defendant submits that the bills rendered did satisfy the statutory requirements. The bills delivered were signed and set out in sufficient detail, and they were self-contained and complete demands for payment for the relevant period. Every invoice cited the client's entitlement to apply for a detailed assessment under ss.70-2 of the SA 1974.

17. The Claimant, in summary, submits that on a straightforward, 'orthodox' construction of the retainer, the wording invokes the solicitor's right to claim interim payments on account prior to the delivery of a 'final' statute bill. Under 'Billing Arrangements', the fact that the reference to asking "for further money on account of costs" comes immediately after the provision for the delivery of interim bills, militates against the conclusion that these bills were interim statute bills. Indeed, the succeeding reference to "sending you a final bill" endorses the conclusion that the retainer anticipated and provided for periodic, particularised requests for payments on account of costs prior to the delivery of a final statute bill. It is submitted that the relevant wording adopted in the Defendant's retainer is strikingly similar to that in Vlamaki (ibid) (para. 14), where Walker J upheld CJ Campbell's conclusion that the solicitors had delivered interim bills on account and not statute bills. At the very least, submits the Claimant,

the retainer is ambiguous, in circumstances where such ambiguity must be construed in favour of the paying party.

18. In reply to the submission that the retainer conferred on the solicitors an implied entitlement to deliver interim statute bills, it is noted that such a conclusion would not be consistent with a contractual interpretation that upheld an express agreement for the delivery of interim payments on account followed by a 'final' statute bill.

19. Turning to the Defendant's evidential indicators, the Claimant notes that whilst six of the covering letters sent by the Defendant refer to "interim statute bills", the rest (the majority) make no such reference. Indeed, the letters which accompanied the interim bills usually refer simply to "interim bills" in the context of a request for a further payment on account in a sum that was often greater than that cited in the invoice. Ms Wong's citation of the correspondence passing between the parties is, moreover, selective and misleading. None of the Defendant's correspondence quoted refers expressly to statute bills and the Claimant's periodic request for an "account statement" is consistent with an understanding that there would be a 'final bill', in which all payments would be reconciled. The Claimant himself is clear (statement, 2nd August 2023, para. 16, 563) that he was expected to make regular payments on account prior to receiving "a final bill once the litigation came to an end".

20. Insofar as the Claimant accepts that he paid the interim bills rendered by the Defendant, he did so on the understanding they were not to be final. This point was considered recently by CJ Leonard in Ivanishvili v. Signature Litigation LLP [2023] EWHC 2189, (SCCO). In that case, the solicitor, citing Abedi v. Penningtons [2000] EWCA Civ. 86 and Davidsons v. Jones-Fenleigh (ibid), argued that where a client acquiesces to the delivery of interim bills in a requisite form, one may properly imply an agreement to the effect that they were interim statute bills. In Ivanishvili, however, the court referred to the 'insurmountable difficulty…in pursuing this line of argument' in circumstances where, on the proper construction of the retainer, interim bills were delivered on the provision that they were not to be final. As CJ Leonard concluded: 'Payment without demur, under those circumstances, cannot be taken as evidence of an agreement to the contrary'.

21. Before outlining my own analysis and conclusions, it seems fair to note that, in the context of modern legal practice, this type of dispute should rarely if ever come before the court. A solicitor/client retainer requires – or at least should invoke – the application of straightforward legal drafting. Any relevant uncertainties, twists or pitfalls have been considered exhaustively in the contemporary jurisprudence. There is no real excuse for imprecision, uncertainty or ambiguity. If a solicitor wants to provide for the demand and payment of interim statute bills, then the retainer should express an unequivocal provision to this effect. The profession's consistent failure to do so is, frankly, baffling.

22. I am satisfied that on an uncomplicated construction of the retainer in this case, the invoices delivered by the Defendant to the Claimant were interim bills on account and not statute bills. Accordingly, as none of the bills were statue bills, the time for applying for a detailed assessment under s.70 of the SA 1974 did not begin until the delivery of the final bill on 18th November 2021.

23. First, on a straightforward contractual interpretation, I am satisfied that the retainer provided expressly for the delivery of interim bills on account followed by a final statute bill. Under 'Billing Arrangements' the reference to 'interim bills' is made in the immediate context of the 'usual' request 'for further money of account of costs'. The subsequent reference to sending 'a final bill after the completion of the work' endorses the conclusion that it was this final invoice that triggered the statute bill.

24. Second, insofar as it could be argued that the wording of the retainer is ambiguous, any such ambiguity must be resolved in favour of the Claimant, the paying party. It has been noted that this retainer adopts a wording that was very similar to that cited in Vlamaki (ibid), which the High Court found to be ambiguous. Again, as Walker J held in Vlamaki, where an ambiguity on a fundamental aspect of the terms and conditions of the retainer requires to be resolved, then the ambiguity is to be determined against the solicitor.

25. Third, the Defendant cannot rely on the submission that there was an implied agreement that it could render interim statute bills. Such an interpretation could not, in my conclusion, co-exist with my finding of an express provision for the delivery of interim payments on account followed by a final statute bill. Alternatively, the evidential indicators cited by the solicitors actually favour the Claimant over the Defendant. Although some of the covering letters refer to the delivery of an 'interim statute bill', the majority did not. Indeed, these letters, along with the wider correspondence, endorse the conclusion that the parties understood that the solicitors would request, and the Claimant would make, regular payments on account, prior to the delivery of a final statute bill. I accept the evidence of the Claimant on this point in preference to the interpretation of Ms Wong.

26. Fourth, the Defendant cannot rely on the fact that the Claimant made regular payments on account as a basis for inferring, from this conduct, an agreement for the delivery of interim statute bills. Given that the retainer did not provide for the Defendant's periodic invoices to be interim statute bills, when adopting the reasoning of CJ Leonard in Ivanishvili (ibid), there is no basis upon which I can infer from the fact of payment any agreement to the contrary.

27. Ultimately, the bills rendered by the Defendant in October 2017 constituted a series of invoices which requested interim payments on account. They could not properly be regarded as forming a single bill until delivery of the final bill in November 2021. This was, in other words a 'Chamberlain bill', per Chamberlain v. Boodle & King [1982] 1 WLR 1442. Accordingly, the Claimant's time for applying for a detailed assessment of the bills did not begin until the delivery of the final bill in November 2021.

Special Circumstances

28. It is common ground between the parties that the Claimant must also demonstrate the existence of 'special circumstances' pursuant to s.70(4) of the SA 1974.

29. In Falmouth House Freehold Co. Ltd. v. Morgan Walker LLP [2010] EWHC 3092 (CH), Lewison J, having reviewed the case law relevant to special circumstances, stated (para. 13):

> Whether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified, and despite the restrictions contained in Section 70(3).

30. Special circumstances do not have to be exceptional circumstances. As CJ Rowley confirmed in Masters v. Charles Fussell & Co. LLP [2021] EWHC B1 (Costs) (para. 60), they can be established by something out of the ordinary course, sufficient to justify departure from the general position under s.70 of the SA 1974. The assessment requires invariably a consideration of the circumstances of the particular case.

31. In Raydens Ltd v. Cole [2021] 7 WLUK 539, CJ Leonard, in citing with approval the guidance of Lewison J in Falmouth, added (para 20):

> In many ways, a helpful test is to consider whether there is something in the fees claimed by the invoices, or the circumstances in which they were charged, which "calls for an explanation". If they do call for an explanation or further scrutiny, that is a strong indication that there should be an assessment. This is not the time for the explanation to be given and evaluated in detail. That is the purpose of the assessment procedure and the scrutiny it provides.

32. The Claimant, in summary, cites two special circumstances, defined as (i) the 'Estimates Issue', and (ii) the 's.74(3) SA 1974 Issue'.

33. On the question of estimates, the Claimant avers that the Defendant failed to provide him with adequate costs information and, specifically, failed to provide estimates in accordance with its statutory and professional obligations. The last estimate was set out in a letter dated 5th October 2021 (430), in which the solicitor stated:

> The current estimate given to you for the completion of your case is £150,000 to £175,000 plus VAT. This estimate is still correct but we will of course continue to review the situation and keep you fully informed if this changes.

This estimate repeated that set out almost a year earlier in correspondence dated 2nd December 2020 (417). It is noted that the estimate referred to 'the completion of your case'. Pursuant to the 34 disputed invoices, the Defendant charged the Claimant a total of £225,697.60 (including VAT), to a point where witness statements, any expert reports, further CCMC/CTR, trial preparation and trial were yet to occur.

34. The estimates issue is complicated further, submits the Claimant, by the fact that the Claimant was a 'consumer' within the Consumer Rights Act 2015. It is submitted that "this appears to be the first solicitor/client costs case which seeks to address the issue of "estimates" through the prism of s.50 of the 2015 Act" (Claimant's Skeleton Argument, para. 49).

35. Turning to the 's.74(3) SA issue', the Claimant submits that as this was a contentious County Court action, the Defendant was subject to a statutory prohibition that limits the amount payable by the Claimant to a sum which could have been allowed in respect of an item on inter partes assessment. This fact, submits the Claimant, does not appear to have been acknowledged or recognised by the Defendant in its invoices/billing.

36. The Defendant, in summary, submits that the Claimant was "provided with proper costs information" in that "numerous costs update letters [were] sent, as well as the regular invoicing" (Defendant's Skeleton Argument, para. 26). Looking at the table of relevant correspondence set out in the Defendant's Skeleton Argument, however, it seems common ground that the last relevant letter was that sent on 5th October 2021 and that the last estimate provided by the Defendant to the Claimant was £150,000 - £175,000 (plus VAT) to completion. With regard to the s.74(3) SA 1974 point, the Defendant points out that the costs bill to the Claimant "did not exceed the estimated costs in the budget", with the consequence that the issue is unlikely to be of practical relevance on assessment.

37. I am satisfied, on the particular facts of this case, that the Claimant has demonstrated the existence of special circumstances. Two broad points of principle are raised and these factors should be considered in aggregate, rather than individually. While I do not, of course, purport to analyse or assess the 'estimates' and/or the 's.74(3)' issues, it is clear that either or both distinguish this matter from the run of the mill case. Indeed, these issues are listed (by consent) for determination (at the hearing adjourned from 25th January 2024) as preliminary issues in the assessment of the final 8 invoices. The fact that a detailed assessment is agreed in respect of the 8 invoices is not of itself a factor that would justify a finding of special circumstances in respect of the remaining 26 invoices. However, the fact that the parties have already identified these issues as preliminary, overarching points, is a relevant factor in determining whether there are aspects in the fees charged which "call for an explanation". I note, moreover, that the apparent provision of inaccurate estimates has been held to constitute special circumstances in other cases; per CJ Rowley in Eurasian Natural Resources Corpn Ltd v. Dechert LLP [2017] EWHC B4 (Costs).

Discretion

38. S.70 SA 1974 then requires the exercise of a general discretion, so that the court can (or not) order an assessment 'on such terms as [it] thinks fit'.

39. The Defendant, in summary bemoans "excessive delay in this case", referring again to the fact that the Claimant's action issued in April 2022 only sought assessment of the 8 most recent invoices. Echoing the evidence of Ms Wong (380), it was submitted that the Defendant has been prejudiced by this delay, in terms of cost protection in seeking an assessment of the earlier invoices now, belatedly ordered.

40. The Claimant, in summary, points out that the 1974 Act imposes the (fairly onerous) test of 'special circumstances', and that, as CJ Leonard stated in Raydens Ltd (ibid), the court had to be alert to the risk of imposing a double penalty for delay (para. 29). In this case, in fact, the Claimant was clear from the outset that he intended to challenge the entirety of the Defendant's billing, and that this desire was considered repeatedly in correspondence prior to the Application issued in May 2023. A detailed assessment – requiring the determination of several preliminary points of principle – is required in any event. Given, moreover, payments made by the Claimant account for over 85% of the overall billing, the Defendant has not been substantively deprived of funds and there is, contrary to the solicitor's submission, no scope (at least at this stage) for a further payment on account and/or any form of wasted costs order.

41. I find that a detailed assessment should be ordered of the outstanding, disputed 26 invoices (i.e. all 34 invoices in total), without the imposition of any additional terms. It will now, of course, be necessary to list a further Directions Hearing, subject to the parties being able to agree directions.

Common law assessment?

42. Given the court's conclusions outlined in this judgment, it is not necessary for me to determine the Claimant's (novel and contentious) arguments as to an entitlement to a common law assessment of the bills.

Summary of conclusions

43. I order a SA 1974 detailed assessment for the 26 disputed invoices delivered by the Defendant to the Claimant between 12th October 2017 and 31st March 2021. This case will be listed for a further Directions Hearing, subject to any agreement reached between the parties.