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Time to assess disputed solicitor's bill starts running only when a final bill with full narrative is delivered

Dr Rahimian and Scandia Care Ltd v Allan Janes LLP [2016] EWHC B18 (Costs)

Article by David Bowden

Senior Costs Judge Master Gordon-Saker sitting in the High Court's Senior Courts Costs Office has ruled that the time to assess disputed solicitor's bill starts running only when a final bill with full narrative is delivered. Here solicitors had delivered bills in relation to litigation over a 3 year period. The retainer was later terminated. Only 3 of the bills had any narrative setting out what work had been done. The client had paid the bills, took possession of the files and instructed new lawyers to act. The Costs Judge construing s70 of the Solicitors Act 1974 strictly said that no compliant bill had yet been delivered. In default of agreement, the solicitors will now need to deliver a fully itemised bill and this will then need to be assessed by the SCCO.

Dr Rahimian and Scandia Care Ltd v Allan Janes LLP
[2016] EWHC B18 (Costs) 4 August 2016
High Court of Justice, Senior Courts Costs Office (Senior Costs Judge Master Gordon-Saker)

What was the underlying litigation about?
The case of *Ottercroft Ltd v Scandia Care Limited and Rahimian* went to the Court of Appeal. Its unreported judgement of Lord Justices Laws, Tomlinson and Lewison was handed down on 6 July 2016. Scandia Care and its director Mr Rahimian appealed against a decision of HHJ Tolson QC to grant a mandatory injunction in respect of a staircase which was infringing Ottercroft's right to light.

Scandia Care and Ottercroft had occupied adjoining properties. Scandia Care had commenced work on constructing a storeroom and a staircase without serving notice on Ottercroft under the Party Wall etc, Act 1996. Ottercroft began proceedings to restrain any works which interfered with its right to light. Dr Rahimian (Scandia Care's director) gave a personal undertaking which was later followed by an undertaking from Scandia Care. Despite this a metal fire-escape staircase which obstructed Ottercroft's window was built.

Judge Tolson QC held that the staircase infringed Ottercroft's right to light and that Scandia Care had acted in breach of undertakings, without notice or planning permission. Although the judge observed that:

- the infringement was minor,
- no significant damage had occurred, and
- the damage could be measured in money,

he still found that the breach of binding undertakings was an overwhelming reason to grant an injunction.

Judge Tolson QC held that Dr Rahimian had:

- acted badly throughout,
- acted in a high-handed manner,
- kept his neighbours in ignorance of his plans, and
- with the knowledge that his plans might infringe a right to light.

Judge Tolson found Dr Rahimian not to be a truthful witness and on 26 January 2015 in Oxford County Court he ordered the removal or alteration of the staircase and awarded costs to Ottercroft.

Scandia Care's appeal to the Court of Appeal was unanimously dismissed for these 3 reasons:

- Judge Tolson had conducted a correct balancing exercise to determine whether to grant an injunction to reverse the infringement,
- Whether a company director was a joint tortfeasor was a question of whether he had exercised control of the company through its constitutional organs. The judge found that Dr Rahimian had been personally instrumental in pushing plans through and was a tortfeasor. That was not wrong, and
- Judge Tolson deliberately had not exercised his power to order costs under the 1996 Act. The costs order was well within the judge's jurisdiction.

What are the facts relevant to the delivery of the solicitor's bills?
On 8 September 2011 Dr Rahimian ('the client') consulted the Allan Janes LLP ('the solicitors') in relation to Ottercroft's claim. By letter dated 15 September 2011 the solicitors wrote to their client recording the advice that had been given and the terms of the retainer. That letter was surprisingly succinct setting out only the hourly rate to be charged by the author and an estimate of the costs of the action which is said '*was between £15,000 and £25,000 plus VAT and disbursements'*. It added that an application by Ottercroft for an interim injunction might add '*costs of between £5,000 and £10,000 plus VAT'*.

The first invoice numbered 153059 and dated 30 September 2011 was sent by the solicitors to their client. It was for £5,220.40 and the narrative of the bill simply said: '*Re: Claim by Ottercroft Limited – Interim*

account for the work undertaken on your behalf in respect of this matter to the date hereof.' There was no further indication in that invoice as to what work had been done.

A further 20 similar invoices were sent to the client at irregular intervals (mainly monthly) until 22 July 2014 when invoice number 158270 in the sum of £2,073.60 was sent. The narrative in that final bill said: '*Re: Claim by Ottercroft Limited – Final Account for the work undertaken on your behalf in respect of this matter to the date hereof*.'

Only the last 3 bills contained any narrative explaining the work that had been done in the period covered by the invoice. As at 22 July 2014 the client had no description of the work that had been done from 8 September 2011 to 28 February 2014. All the invoices had been signed by the solicitors. Dr Rahimian's assistant sent an email on 21 July 2014 to the solicitors asking them to '*stop any further work…and transfer all papers and files*' to the direct access barrister they had instructed to act for them. The client paid all the solicitor's bills.

What happened in the first set of costs proceedings?
The client started a claim against the solicitors under s70 of the 1974 Act in the SCCO on 23 July 2015. The client asked the court not to serve the claim form saying he would do so. The claim form was not served within 4 months of issue but was served a few days late. Although the SCCO had set a hearing date for 25 January 2016, this hearing was vacated when the clients discontinued the claim.

What was the second set of costs proceedings about?
These 2nd set of proceedings were started by the client against their former solicitors on 12 February 2016. As these proceedings were issued more than 12 months after payment of the invoices, the court does not have the power to order an assessment of those invoices because of s70(4) of the 1974 Act. So only if the client can show that the invoices that had been delivered were not '*bills*' for the purposes of the 1974 Act could there now be an assessment (following an order for delivery of a bill).

Where does the court's jurisdiction over solicitor's bills come from?
Section 68 of the Solicitors Act 1974 provides as follows:

> **'68 Power of court to order solicitor to deliver bill, etc.**
> *(1) The jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs, and for the delivery up of, or otherwise in relation to, any documents in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the High Court.'*

Whilst section 70 (as amended) provides:

> **'70 Assessment on application of party chargeable or solicitor.**
> *(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*.'

What does the solicitor's former client as paying party say about the bills?
He says that only 3 of the bills contained any narrative as to what work was done. He paid all the bills. Following payment of the bills the solicitor's file was transferred to him. As the majority of the interim bills contained no narrative he has never been in possession of sufficient information from his former solicitors that satisfies s68 and 70 of the 1974 Act. Although he now has the solicitor's file and can see what was done, that is irrelevant because the 1974 Act has not been complied with.

What does the solicitor firm as receiving paying party say about the bills?
They say that the invoices delivered were chapters culminating in a final bill. The final bill dated 22 July 2014 was a final bill that is compliant with the 1974 Act.

Are there any prior authorities of relevance?

Vlamaki v Sookias and Sookias **[2015] EWHC 3334 (QB)** (Walker J with Master Haworth)
In proceedings for detailed assessment under s70 of the Solicitors Act 1974, ambiguities in the solicitor's terms and conditions as to whether bills delivered had been interim bills on account of a final bill or interim statute bills were to be resolved in favour of the client. Accordingly, as none of the bills which the client had received had been statute bills, her time for applying for detailed assessment of them had not begun and it followed that the proceedings for assessment under the 1974 Act were premature.

Chamberlain v Boodle & King **[1982] 1 WLR 1443** Court of Appeal (Lord Denning MR, Dunn & O'Connor LJJ)
Whether solicitor's bills were 4 separate bills or whether they were one bill. If they were 4 separate bills, the client would have to demand taxation of each within a month of receipt. If they were one bill, divided into separate parts, as long as he demands taxation within a month of the final account, then he has a right to taxation. 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. Over a short time frame (November 1978 to May 1979) this was one continuous dealing and work done by a solicitor, not dividing itself naturally or otherwise into any breaks at all. When the bills were delivered, they were delivered each time as part of the account rendered being carried on in each to the next. This should be regarded as one bill in respect of one complete piece of work, although divided into parts. As this is one bill, and the client demanded taxation within the month, he is entitled to have the whole of it taxed.

Bari v RA Rosen and Co **[2012] EWHC 1782 (QB)** High Court, QBD (Spencer J with Master Simons and Mr Greg Cox as assessors)
An appeal as to whether a retainer permitted a solicitor to issue interim statute bills and if so whether a costs judge was entitled to conclude that those bills could be properly treated as a series of bills culminating in a final statute bill so that all bills could be subject of detailed assessment. It was held that the interim bills were not statute bills but were sufficiently compliant to form part of a qualifying series of bills culminating in the final statute bill. The Master below had also been right to find special circumstances to justify detailed assessment outside the one month time limit.

Ralph Hume Garry v Gwillim **[2002] EWCA Civ 1500** Court of Appeal (Ward, Mance LJJ and Sir Martin Nourse
*As a matter of both good practice and principle a gross sum bill in contentious business was required to contain an adequate description of the work done to justify the charge. The burden on a client to establish that such a bill was not '*bona fide complying with this Act*' within the meaning of s69 of the 1974 Act was satisfied if he showed that there was insufficient narrative in the bill to identify what he was being charged for and that he did not have sufficient knowledge from other documents in his possession or from what he had been told reasonably to take advice on whether to apply for that bill to be assessed. The sufficiency of the narrative and of a client's knowledge would vary from case to case. An issue as to whether a client's knowledge would be sufficient to supplement a lack of full narrative is one of fact and degree. Since the claimant had shown a real prospect of establishing at trial that the defendant knew all he needed to know about the work done and the basis of charging reasonably to be able to exercise his right to seek taxation, the judge, having reviewed the evidence, had been entitled to refuse an order to strike out the claim.*

What assessment of the parties and their evidence did the Senior Costs Judge make?
Unusually for a costs case, the solicitors firm required their former client to attend the hearing in the SCCO for cross-examination. Not surprisingly Dr Rahimian told the court he found the solicitor's billing to be confusing. Cross-examination appears to have been a fruitless exercise because Master Gordon-Saker said '*nothing much emerged'* from it. He did go on to say that he accepted Dr Rahimian's evidence '*completely*'

Master Gordon-Saker said he found the position of both sides here to be '*unattractive*'. He ruled that Dr Rahimian knew that the solicitor's bill dated 22 July 2014 was to be its last one and that once Dr Rahimian

had received the solicitor's file, he had all the information he needed if he wanted to seek an assessment. For this reason the Master ruled that Dr Rahimian's position is '*rather unattractive'*.

No such qualification was reserved for the Master's assessment of the solicitor's firm where he says: '*the Defendants' position is also unattractive in that they rendered invoices for substantial sums without providing any proper particulars of the work undertaken*.'

What did Master Gordon-Saker rule?
He said that the only real issue is whether the bill dated 22 July 2014 is a final bill of a kind similar to that in *Chamberlain.* Taken at face value alone the Master said he would have no difficulty in concluding that it is not. A bill must contain sufficient information to enable the client to obtain advice as to its detailed assessment (*Ralph Hume Garry v Gwillim*). Of the 22 invoices delivered in the present case, only the last 3 contained any information about the work that had been done.

If one were to view the 22 invoices as constituting one final bill delivered on 22 July 2014, that bill did not contain any information of the work done between 8 September 2011 and 28 February 2014 so as to constitute a bill complying with the 1974 Act. The question is whether the client had sufficient knowledge from other information in his possession to take advice on whether or not to seek detailed assessment. There is nothing to suggest that the client had the necessary information before 15 August 2014 when the solicitor's files were transferred to his new counsel.

The court should not draw an inference as to the client's state of mind at the time that he received the last invoice. Once the client had received from their former solicitors:

- Their final bill, and
- the solicitor's files

he had the information necessary to seek an assessment if he wished. The only reason why an order for assessment was not made is that the client's failed to serve the 1st set of costs proceedings in time.

The question remains whether the solicitor's 22 July 2014 invoice should be treated as a final bill. Given that it did not, (whether viewed in isolation or together with the other 21 bills), contain sufficient narrative and given that the client did not, **at the time of that invoice**, have other knowledge which could have enabled him then to seek advice on whether to apply for assessment, the answer to this question must be '*no*'. The fact that the client had that knowledge subsequently when he received the solicitor's files cannot convert the final invoice into something that it was not as at the date that it was received.

The solicitors rendered invoices for substantial sums without providing any proper particulars of the work undertaken. The solicitors have accordingly not yet rendered a final bill. The claim must succeed to the extent that the client is entitled to an order that the solicitors now render him a final bill.

What will happen next with this case?
The solicitors will need to render a final bill with a detailed narrative as to what has been done. Of course they will be in difficulty in doing this because as their former client has paid the bills, he now has their files. Master Gordon-Saker said he hoped that an order could be agreed which would allow the solicitors '*access to their old files to enable them to provide a detailed breakdown'*. Once that bill with narrative has been delivered then Master Gordon-Saker will be able to assess those charges unless of course the two sides come to an agreement as what is properly due in the meantime.

What lessons can be learned from this case?
An interesting reminder of the effect of the Solicitors Act 1974 in relation to solicitor and own client bills. The solicitors appear to have made a rod for their own back in not delivering any narrative. Over a 3 year period a client is entitled to expect to know what he has paid for. Whilst the letter confirming the retainer said that costs would be more if an application was made for an injunction, that could not have contemplated that this case would also have gone on appeal to the Court of Appeal. Finally the words of Lord Justice Ward should ring in solicitor's ears. In *Ralph Hume Garry v Gwillim* he lamented that:

> '*Surely in 2002 every second of time spent is recorded on the account department's computer with a description of the fee earner, the rate of charging and some description of the work done. A copy of the printout, adjusted as may be necessary, could so easily be rendered and all the problems that have arisen here would be avoided*.'

5th August 2016