England and Wales High Court (Senior Courts Costs Office) Decisions

SOR/CLIENT FINAL BILL - CLIENT MUST BE GIVEN PARTICULARS IF NOT KNOWN ALREADY

Neutral Citation Number: [2016] EWHC B18 (Costs)
Case No: AGS 1600903

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC1A 2LL
04/08/2016

Before:

MASTER GORDON-SAKER

Between:

(1) DR MEHRDAD RAHIMIAN	
(2) SCANDIA CARE LIMITED	**Claimants**
- and -	
ALLAN JANES LLP	**Defendants**

Mr Robin Dunne (instructed by Deep Blue Costs) for the Claimants
Mr Nicholas Cropp (instructed by Allan Janes LLP) for the Defendants

Hearing dates: 21st June 2016

HTML VERSION OF JUDGMENT APPROVED

Master Gordon-Saker :

1. By Part 8 proceedings commenced on 12th February 2016 the Claimants seek an order pursuant to section 68 Solicitors Act 1974 that the Defendants, a firm of solicitors in High Wycombe, deliver to them a final statute bill or bills in relation to proceedings brought against the Claimants by Ottercroft

Limited.

2. Section 68 provides:

> (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.

The background

3. The First Claimant, Dr Rahimian, is a director of and shareholder in the Second Claimant. On 8th September 2011 Dr Rahimian consulted the Defendants in relation to a claim issued in the Central London County Court against the Claimants. The claim involved allegations of trespass and infringement of a right to light arising out of the redevelopment of a property in High Wycombe [see *Ottercroft Ltd v (1) Scandia Care Ltd (2) Rahimian* (CA unrep. 6 July 2016)]. On 15th September 2011 the Defendants wrote to the Claimants recording the advice that had been given and the terms of the retainer. In relation to the terms, the 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. The estimate was "between £15,000 and £25,000 plus VAT and disbursements". An application by the opponent for an interim injunction might add "costs of between £5,000 and £10,000 plus VAT".

4. On 30th September 2011 the Defendants submitted their first invoice to the Second Claimant, numbered 153059, in the sum of £5,220.40. It was explained in the invoice that it was:

> Re: Claim by Ottercroft Limited – Interim account for the work undertaken on your behalf in respect of this matter to the date hereof.

5. There was no further indication in that invoice as to what work had been done. A further 20 similar invoices were sent to the Second Claimant at irregular intervals, although largely monthly, until 22nd July 2014 when invoice number 158270 in the sum of £2,073.60 was sent. It was explained in that last invoice that it was:

> Re: Claim by Ottercroft Limited – Final Account for the work undertaken on your behalf in respect of this matter to the date hereof.

6. The only difference of significance between this and the earlier invoices was that it was expressed to be "Final" rather than "Interim".

7. It is common ground that of the 22 invoices, as exhibited at RCH1 to the first statement of Mr Harriman on behalf of the Defendants dated 9th May 2016, only the last 3 contained or were accompanied by a narrative explaining the work that had been done in the period covered by the invoice (30th May 2014, 30th June 2014 and 22nd July 2014). So, as at 22nd July 2014, the Claimants were provided with a detailed description of the work that had been done from 1st March 2014 to 22nd July 2014. They had no description of the work that had been done from 8th September 2011 to 28th February 2014.

8. A number of the invoices were accompanied by statements of account. The last, dated 22nd July 2014 is a curious document because, although it appears to list all 22 invoices, only the last 3 are legible wherever this document had been reproduced in the evidence available at the hearing. It does show that the total invoiced was £76,153.14 of which the Claimants had then paid £50,491.34. I have not checked the accuracy of the mathematics. It is not in issue that the Claimants have since paid the balance of £25,661.80.

9. During the hearing an issue arose as to whether the invoices had been signed on behalf of the Defendants. That could not be answered at the hearing and I asked that it be addressed after the hearing. The second statement of Mr Harriman, dated 6th July 2016, exhibits signed copies of the

invoices and also the first legible copy of the statement of account.

10. The termination of the Claimants' retainer came about as the result of emails passing between the parties on 21st July 2014, the day before the final invoice. At 12.30 Moira Gomes, Dr Rahimian's assistant, wrote to Mr Harriman:

> Following our meeting with you and Mr Hitchen last week, we would ask you to stop any further work in the above matter and transfer all papers and files to Mr Simon Butler, the barrister now instructed by Dr Rahimian, upon discharge of your fees to date. …
>
> For the avoidance of doubt, Dr Rahiminan does intend to continue his complaint regarding the way in which this matter has been conducted.

11. Mr Harriman replied at 12.49:

> … I note that you do not wish to pursue your complaints against this firm or me … I am preparing files for this transfer. I will also prepare a final account for payment so my fees and counsel can be discharged as you direct so that the papers can be sent to Mr Butler …

12. Ms Gomes responded at 14.36:

> I am sorry, but you appear to have misunderstood my email content.
>
> Dr Rahimian **does** intend to continue his complaint against the way the conduct of this matter has been handled. In particular the question of costs. We therefore await hearing from you with your final invoice so that the file may be transferred as soon as possible please.

13. On 23rd July 2014 Mr Harriman wrote at 17.50:

> I enclose a final bill, statement of account and narrative so this firm's accounts can be discharged and the files transferred to your new Counsel.

The first proceedings

14. On 23rd July 2015 the Claimants commenced Part 8 proceedings against the Defendants in the Senior Courts Costs Office in which they claimed:

> Pursuant to s.70(2) Solicitors Act 1974 there be an Order in standard form for the detailed assessment of the series of on account invoices commencing on 30th September 2011 and culminating in a final bill numbered 158270 dated 22nd July 2014 delivered by the Defendant to the 2nd Claimant on 23rd July 2014.

15. Unfortunately the Claimants' new solicitors requested the Court not to serve the claim form, indicating that they would effect service themselves. They failed to do so within 4 months of issue. It was served a few days late.

16. The hearing of that claim had been listed for 25th January 2016, following the service of a "Defence" on 8th December 2015. In a witness statement dated 11th January 2016 Mr Carlisle, on behalf of the Claimants, sought to extricate them from their procedural difficulty. He explained that proceedings had been issued before the judgment of Walker J. in *Vlamaki v Sookias & Sookias* [2015] EWHC 2224 (QB). As a result of that decision it was thought that the court might conclude that no final bill had been delivered and that there was nothing capable of a detailed assessment. Accordingly "to the extent that it is necessary" the Claimants sought permission to amend the claim form or to issue a new claim form seeking either an order for delivery of a final statute bill pursuant to s.68 or an order for assessment, should the court find that a final statute bill had been delivered.

17. In the event, not surprisingly, those proceedings were discontinued before the hearing.

The current proceedings

18. The current proceedings, seeking only an order for the delivery of a final bill, were issued on 12th February 2016. It is common ground that as those 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. That is the effect of section 70(4) of the 1974 Act: the power to order assessment is not exercisable after the expiration of 12 months from the payment of the bill. Thus only if the Claimants can show that the invoices that have been delivered are not "bills" for the purposes of the Act can there now be an assessment (following, first, an order for the delivery of a bill which can be assessed).

The evidence

19. In the present proceedings witness statements were served by both parties. The Claimants served statements of Dr Rahimian, Mr Carlisle and Ms Moore. Dr Rahimian's statement was very short. He explained that he had no understanding of the legal meaning of a final statute bill. In paying the Defendants in full, his intention was simply to secure the release of his papers in the underlying litigation. The final invoice looked no different to the earlier bills. At paragraph 7 he stated:

> It is therefore perplexing to see how the Defendants can assert that by me paying the last in a series of bills for the sole purpose of obtaining my file of papers an inference can be drawn that I had agreed or in fact understood that a final statute bill, or a final bill of any sort, had been delivered.

20. Mr Carlisle and Ms Moore are respectively a Costs Draftsman and a Costs Lawyer and their statements consist largely of submissions.

21. The Defendants served a statement of Mr Harriman, in which he submitted that the bills should be treated as a series comprising a single bill delivered at the date of the last.

22. The Defendants required Dr Rahimian to attend the hearing for cross-examination. Nothing much emerged from that. Dr Rahimian told me that he found the billing confusing. He reiterated that the only thing that he was interested in was obtaining his papers. Insofar as it may turn out to be relevant, I was given no cause at all to disbelieve anything in Dr Rahimian's oral evidence and I accept that evidence completely.

The nature of the invoices

23. A solicitor's retainer is an entire contract and, save in two circumstances, solicitors are not entitled to payment on account other than for disbursements. The exceptions are, first, where there is a natural break in protracted litigation and, secondly, where there is an agreement that the solicitor can submit interim statute bills.

24. It is not suggested by the Defendants in the present case that there was an agreement, either expressly or by conduct, that they could deliver interim statute bills. Nor is it contended that there were natural breaks. Rather they contend that the invoices that they delivered were chapters culminating in a final bill.

25. Mr Cropp on behalf of the Defendants relied on the decision of the Court of Appeal in *Chamberlain v Boodle & King* [1982] 1 WLR 1443. In that case the terms of the Defendants' retainer did not allow for self-contained interim bills, but did allow for regular "statements". The retainer lasted for 6 months over the course of which they delivered 4 bills to the Claimant. The court concluded that there had been no natural breaks, but that the bills "should be regarded as one bill in respect of one complete piece of work, although divided into parts". As the Claimant had demanded taxation of the last within one month, he was entitled to have the whole of it taxed.

26. In *Bari v Rosen* [2012] 5 Costs LR 851, the Defendant submitted 12 bills to his client over a period of 10 months, all of which were paid promptly. On an application for an order for assessment the Master concluded that the Defendant had no contractual right to issue interim statute bills. It was not suggested that the bills had been issued at natural breaks and so the bills should properly be treated as a

series comprising a single bill, delivered at the date of the last in the series. That decision was upheld on appeal.

27. In *Vlamaki v Sookias & Sookias* [2015] 6 Costs LR 827 the Master concluded that a series of bills rendered by the Defendants should be regarded as a single bill delivered on the date of the last. On appeal Walker J decided that there had been no final bill. A letter from the Defendants to the effect that they would not render any further invoices did not change the nature of the bills. Accordingly the application for an order for detailed assessment was premature.

28. As counsel's submissions developed it became apparent that in the present case the only real issue is: Is the bill dated 22nd July 2014 a final bill of a kind similar to that in *Chamberlain*?

29. Taken at face value alone I would have no difficulty in concluding that it is not.

30. A bill must contain sufficient information to enable the client to obtain advice as to its detailed assessment. In *Ralph Hume Garry v Gwillim* [2003] 1WLR 510, the Court of Appeal considered whether a series of bills submitted by the claimants to the defendant complied with section 69 of the Solicitors Act 1974. Ward LJ summarised the authorities:

> 63 I accept the principle expressed in Lord Campbell CJ's judgment in *Cook v Gillard* 1 E & B 26 , 36–37 that:
>
> > the defendant who undertakes to prove that the bill is not a bona fide compliance with the Act cannot found an objection upon want of information in the bill, if it appears that he is already in possession of that information … a client has no ground of objection to a bill who is in possession of all the information that can be reasonably wanted for the consulting on taxation.
>
> In *Eversheds v Osman [2000] 1 Costs LR 54* , 61–63 Nourse LJ posed this test in not dissimilar terms, viz: is the client unable to judge as to the justice of the amount of the fees which are charged?
>
> …
>
> 64 Thus I would accept the proper principle to be that there must be something in the written bill to indicate the ambit of the work but that inadequacies of description of the work done may be redressed by accompanying documents (as in *Eversheds v Osman* where it was doubtful whether the bill on the face of it would have been sufficient) or by other information already in the possession of the client. That, it seems to me, would serve the purpose of the Act to give the client the knowledge he reasonably needs in order to decide whether to insist on taxation. If the solicitor satisfies that then the bill is one bone fide complying with the Act.
>
> …
>
> 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.

31. Of the 22 invoices delivered in the present case, only the last 3 contained any information about the work that had been done. The last 3 invoices did not contain any details of the work done in the

periods covered by the first 19 invoices.

32. If one were to view the 22 invoices as constituting one final bill delivered on 22nd July 2014 , in my view, without more, that bill did not contain sufficient information, or indeed any information, of the work done between 8th September 2011 and 28th February 2014 so as to constitute a bill complying with the 1974 Act.

33. Did the Claimants have sufficient knowledge from other information in their possession to take advice on whether or not to seek detailed assessment? There is nothing to suggest that they did at the time that they received the Defendants' last invoice. Dr Rahimian described the Defendants' billing as confusing. It is clear that the Claimants were concerned about the Defendants' charges at the time that the retainer was determined in July 2014 to the extent that Dr Rahimian intended "to continue his complaint" as indicated in the email from Ms Gomes to Mr Harriman dated 21st July 2014 timed at 14:36. But there is nothing to suggest that they had the necessary information before 15th August 2014 when the Defendants' files were transferred to their directly-instructed counsel. I get that date from the email from Mr Harriman to Mr Carlisle dated 24th November 2015.

34. It is clear that the Claimants did instruct other solicitors in relation to the Defendants' fees and those other solicitors considered it appropriate to issue proceedings in July 2015 for an order "for the detailed assessment of the series of on account invoices commencing on 30th September 2011 and culminating in a final bill numbered 158270 dated 22nd July 2014".

35. On behalf of the Claimants, Mr Dunne submitted that the court should not draw an inference as to the Claimants' state of mind at the time that they received the last invoice from what their solicitors did a year later when they issued proceedings for an order for assessment.

36. I accept that entirely. However it seems to me clear that the Claimants knew that the invoice delivered on 22nd July 2014 was to be the Defendants' last invoice. Ms Gomes had requested a "final invoice so that the file may be transferred as soon as possible". Mr Harriman's email dated 23rd July 2014 enclosed "a final bill". There is nothing to suggest that the Claimants expected any further bills.

37. Once the Claimants had that final bill and the Defendants' files they had the information necessary to seek an assessment if they wished; as indeed they did. The only reason why an order for assessment was not made is that the Claimants' new solicitors failed to serve the proceedings in time. Had the proceedings been served in time, the issues that have been raised in the second proceedings would simply not have arisen.

38. To that extent the Claimants' position is rather unattractive. But unattractive or not, the question remains of whether the 22nd 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 to explain what work had been done since 2011 and given that the Claimants did not, at the time of that invoice, have other knowledge which could have enabled them then to seek advice on whether to apply for assessment, the answer must be "no". That the Claimants had that knowledge subsequently, when they received the Defendants' files, cannot, it seems to me, convert the final invoice into something that it was not as at the date that it was received by the Claimants.

39. While the Claimants' position is unattractive, the Defendants' position is also unattractive in that they rendered invoices for substantial sums without providing any proper particulars of the work undertaken.

40. Accordingly, in my judgment, the Defendants have not yet rendered a final bill to the Claimants and the claim must succeed to the extent that they are entitled to an order that the Defendants now render a final bill. I would hope that the parties will be able to agree a suitable form of order, including directions for assessment which may well require the Claimants to give the Defendants access to their old files to enable them to provide a detailed breakdown.