Neutral Citation Number: [2019] EWHC 355 (Comm)

Case No: LM-2017-000132

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CIRCUIT COMMERCIAL COURT (QBD)

Rolls Building
Fetter Lane
London, EC4 1NL

Date: 1 March 2019

Before :

HH JUDGE RUSSEN QC

(Sitting as a Judge of the High Court)

- -

Between :

RICHARD JOHN SLADE (t/a Richard Slade & Company)	**Claimant**
- and -	
DEEPAK ABBHI	**Defendant**

Sebastian Kokelaar (instructed by **Richard Slade and Company Plc**) for the **Claimant**
Stephen Robins (instructed by **Birketts**) for the **Defendant**

Hearing date: 4 February 2019

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Approved Judgment

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HH JUDGE RUSSEN QC

HH Judge Russen QC:

1. By my Judgment dated 24 September 2018 ("the Judgment") I gave judgment in favour of the Claimant, Mr Slade, against the Defendant, Mr Abbhi, pursuant to the oral agreement which, so I found, Mr Slade had established they had made in July 2011: see *Slade v Abbhi* [2018] EWHC 2039 (Comm).

2. The Judgment concluded by anticipating a further hearing at which the damages payable under the agreement, together with any interest payable by Mr Abbhi, would be assessed. Although its final paragraph (paragraph 121) envisaged that the further hearing over quantum would concern an assessment of "damages", the prayer for relief in Mr Slade's Particulars of Claim (claiming a liquidated sum in the first instance and damages in the alternative) caused me also to contemplate, at paragraph 116, that the value of Mr Abbhi's broken contractual promise might be expressed as "debt or damages".

3. The Judgment explained the basis of Mr Abbhi's liability (though he contends there is a real prospect of establishing on an appeal that it is a flawed one) and the circumstances in which a further hearing to address quantum and interest would be required.

4. The quantum hearing took place on 4 February 2019. The parties' oral submissions, preceded by written submissions, with both making extensive reference to authority, occupied an extended court day and left no time for an *ex tempore* judgment. At the conclusion of the hearing, I indicated that I would provide a written decision with the reasons in support of it expressed as concisely as the range of argument between the parties might permit. Subsequent reflection upon their arguments has resulted in a significantly longer written judgment than I had envisaged.

5. Despite the intended purpose of the quantum hearing and the relative length of this judgment, this latest determination by me does not amount to a definitive ruling on the quantum of Mr Slade's claim. That is primarily because of a point taken by Mr Abbhi upon the suggested effect of the Solicitors Act 1974 (in the light of the way in which I expressed myself in the Judgment). Argument over that point and its interplay with the finding to the effect that he is "primarily liable" to Mr Slade – one which Mr Abbhi wishes to challenge on an intended appeal against the Judgment (or, rather, any Order that comes to reflect it) - occupied most of the court day. There was no time left for

anything like an assessment conducted by reference to the bills upon which Mr Slade relies, though Mr Robins for Mr Abbhi did flag the existence of points which, he submitted, meant his client could not be liable for certain costs even if the Judgment stands unchallenged. The absence of such a definitive outcome on the quantum hearing might also be said to be in part attributable to the fact, as I noted during the hearing, that there had been no directions in anticipation of it. I had not, for example, directed that the hearing take place by reference to a schedule and counter-schedule of loss, or any equivalent certification and impeachment of Mr Slade's losses.

6. But, first and foremost, and as Mr Abbhi cannot sensibly contest in the light of the stance he adopted at the latest hearing, the inevitability of a yet further step in the proceedings before me or, possibly, a Costs Judge - and for the present I ignore the prospect of a successful appeal and any stay pending such appeal - arises out of Mr Abbhi's argument on the Solicitors Act 1974 ("the 1974 Act"). That point is reinforced when I bear in mind that, on 6 December 2018, Mr Slade sent to Mr Abbhi's solicitors copies of the invoices (upon which Mr Slade relies in quantifying his claim) which Mr Abbhi first received during the course of "the Action" (as described in the Judgment). Although there was no outstanding direction requiring him to do so, Mr Abbhi did not avail himself of the opportunity to take issue with particular aspects of the fee notes.

7. Instead, his submission is that the true quantum of Mr Slade's claim is "nil".

8. I return below to both the availability and the merits of that argument, and the reason why Mr Abbhi puts his case on "quantum" like that, as well as to the further topics of a common law assessment of Mr Slade's claim (as it might be described, independently of any jurisdiction under the 1974 Act) and Mr Abbhi's application for permission to appeal against my anticipated Order reflecting the Judgment.

9. However, to guard against the risk of being blinded by the obvious, I think it important first to note the circumstances in which Mr Slade, the successful party under the Judgment, finds himself in the position of facing an argument that, in truth, this Claim, commenced in August 2017 and brought to trial in July 2018, is of no value to him at all. Indeed, that his success would be illusory, if Mr Abbhi is correct, is made plain by the suggested consequence (as appears from draft Order proposed by Mr Robins on behalf of Mr Abbhi) that he, Mr Slade, should pay Mr Abbhi's costs of the Claim. An

obvious question arises, therefore, as to how it is that Mr Slade's success under the Judgment is, in effect, now sought to be unwound by Mr Abbhi. What are the circumstances in which Mr Slade's claim, which is all about the recovery of money, and nothing at all to do with his ability now to deliver solicitors bills to Mr Abbhi, four years after the death of his client Mr Singh, is at this stage met with the argument that the liability which was established under the Judgment is in fact nothing of the sort?

10. The answer begins to appear from consideration of paragraphs 4 to 9, 40 and 67 to 70 of the Judgment. In August 2017, Mr Slade sued Mr Abbhi on an oral agreement reached in July 2011. For the reasons given in the Judgment, I found that agreement had been reached and that it was not a guarantee which fell foul of the Statute of Frauds. Mr Abbhi repudiated his liability under the agreement in April 2014, once the Action had failed. In these proceedings, he continued to deny the existence of *any* agreement with Mr Slade, to meet the legal costs of the Action, at least until the glitch in his version of events which emerged in his testimony in July 2018. Although Mr Abbhi's Defence had, by way of a fall-back argument, taken the point that any agreement which Mr Slade might establish (against Mr Abbhi's own case on the facts) was in the nature of a guarantee of Mr Singh's liability as client, he had not thought to take the point under the Solicitors Act upon which he now relies. In short, he did not think to have an alternative fall-back defence to cover the scenario – which has emerged – of him being liable to Mr Slade otherwise than as a guarantor. Nor, for that matter, did he think to take a point about the potential implications of section 71 of the 1974 Act on the basis that he was found to be a guarantor.

11. Mr Abbhi's Defence did, as Mr Robins points out, take the point at paragraph 47 that none of Mr Slade's bills in respect of the Action had been addressed to or rendered to Mr Abbhi. Given the lines of defence adopted by Mr Abbhi – that there had been no agreement to pay and, even if any such agreement was reached, it took the form of an unenforceable guarantee – I read that part of the pleading as being relied upon to bolster the first line of defence. Mr Robins accepted that the plea did not focus on the concept of "delivery" of the bills which is at the heart of the statutory provisions now relied upon. But, if I am wrong in my assumption, and a 1974 Act point was lurking within paragraph 47, then the full suggested legal consequences of the point ought to have been expressed in the Defence.

12. Mr Robins urged me not to go too far with the point that the 1974 Act has not been pleaded by Mr Abbhi. He says that it is an elementary proposition that there is no obligation to plead the legal consequences of facts established in the proceedings (at least so far as the need to plead English law is concerned) and there was no issue between the parties that the bills had not been addressed to or rendered to his client. At the level of principle, that submission cannot stand unqualified. Obviously, it would not have been necessary or appropriate for Mr Abbhi's Defence to have contained references to the authorities cited by Mr Robins at the hearing. But CPR 16.5(2) requires a defendant to state his reasons for denying an allegation made against him and as often as not they will be legal reasons. The point that such legal reasons might sometimes rest upon a statutory provision is illustrated by paragraph 49 of Mr Abbhi's Defence which did plead the Statute of Frauds to cover the eventuality of him being found to have stood as Mr Singh's guarantor.

13. Both section 69(1) of the 1974 Act and section 4 of the Statute of Frauds are to the effect that "no action shall be brought" without certain formalities having been satisfied; though the "before" (or, one might say, "until") language of the first - compared with the "unless" language of latter - means that it protects against proceedings being brought precipitately, rather than brought at all. Just like a limitation defence, identifying the relevant statutory provision relied upon by the defendant, the court would expect to see any reliance upon the 1974 Act signalled in the Defence.

14. I was required by the parties' pleaded cases to address in the Judgment the resulting issue over the Statute of Frauds and did so even though it was of no significance in the light of my primary finding. The inescapable reason why I was not required to address any issue under the 1974 Act is because it had not occurred to Mr Abbhi to create one (by way of a further alternative fall-back to his primary defence that no agreement had been reached). This was despite the fact that he faced a pleading in paragraph 7(b) of the Particulars of Claim that "he would pay such fees and disbursements [incurred in connection with the Action] on Mr Singh's behalf".

15. Had I considered there to be something in Mr Abbhi's point on the Solicitors Act, I would have been very troubled about the implications of him being able to rely upon it at this late stage. When I read Mr Robins' skeleton argument before the hearing (which set out sections 69 to 71 of the 1974 Act) my thoughts immediately turned to the

principle in *Henderson v Henderson*. An action had been brought against Mr Abbhi, in the face of the provision now relied upon, and successfully so. As Mr Kokelaar on behalf of Mr Slade submitted, if the point was there to be taken by Mr Abbhi then it should have been taken in his Defence at the outset and (given that no solicitors' bills had been delivered to him) probably manifested itself in a strike-out application. As I have already noted by reference to Mr Robins' submissions, there was no issue between the parties that bills had not been delivered to Mr Abbhi so (unlike the question of compliance with section 4 of the Statute of Frauds) there was no issue of fact between the parties, in relation to compliance or non-compliance with section 69, worthy of being aired at a trial.

16. It is, of course, for the parties to identify the issues for trial through their pleaded cases. As Mr Robins reminded me, the potential ramifications of the 1974 Act were in fact first mentioned by me during his opening submissions on the first day of the trial in July 2018. It is clear from the transcribed exchange, with my reference to an avowedly hazy recollection of what the Act provided, that I had in mind the statutory time limits applicable to any *assessment* of Mr Slade's bills that Mr Abbhi might be able to seek if he was held to be primarily or secondarily liable to pay them, on the assumption that the provisions were relevant to his position (and he was able to establish grounds for overcoming any applicable time-limits). Paragraph 118 of the Judgment was to the same effect.

17. Mr Robins is of course correct to say that the relevant passage in the transcript, and other references at trial to the 1974 Act, show that the parties agreed to defer further consideration of the potential impact of it to a further hearing after Judgment.

18. Now that the provisions have been researched on behalf of Mr Abbhi, their suggested impact finds expression in his submission that the quantum of Mr Slade's claim is "nil". That final position has not been reached without equivocation on both sides between the handing down of the Judgment and the hearing on 4 February 2019. On 19 September 2018, Mr Abbhi's solicitors said that the time limits in section 70 of the 1974 Act "*do not apply in this case since Mr Abbhi does not come within the ambit of those provisions*." Their letter went on to refer to the court's inherent jurisdiction under the common law to assess a solicitor's costs, whether recoverable as a debt or as a head of loss and damage. Against that, Mr Slade had said in a letter the following day that

Mr Abbhi "*falls squarely within those provisions*" (the inference being that it was therefore far too late for Mr Abbhi to challenge the amount of the bills) but Mr Kokelaar's submission to me was that neither section 70 nor section 71 applies on the unusual facts of this case.

19. For Mr Abbhi, his resting place (quoting from paragraph 105 of Mr Robins' Skeleton Argument) is: "*In the present case, as a result of s. 69(1) of the Solicitors Act 1974, the consequence of the non-delivery of bills is that the amount recoverable by Mr Slade is nil.*"

20. As Mr Robins also has to recognise, because it is what section 69 says, the basis for that submission is, per his paragraph 102, that "*if a solicitor brings an action against a party chargeable before delivery of a bill to that person, the solicitor's claim for a money judgment must be dismissed*."

21. To meet the point that an assessment of Mr Slade's recovery at nil sounds awfully like a repudiation of the Judgment establishing liability in his favour, Mr Robins said it is nothing of the sort. He said that the Judgment establishes that Mr Abbhi is primarily liable to pay the bills and, on that basis, it confirms that Mr Slade is now in a position to deliver the bills to Mr Abbhi on the basis that he is "the party chargeable" with them for the purposes of section 70 of the 1974 Act. Indeed, in the draft order I have mentioned above in connection with the proposed costs order against Mr Slade, Mr Abbhi also proposes that it be declared that the oral agreement established by the Judgment imposes primary liability on the part of Mr Abbhi (though the focus of it is upon the inapplicability of section 4 of the Statute of Frauds rather than the language of section 70 being triggered). But, as I said during the course of counsel's submissions, the idiom of dancing on the head of a pin comes to mind, when (as I have already noted) the present Claim has only ever been about the recovery of money and not whether the court might sanction the future delivery of bills upon Mr Abbhi.

22. If the previously unpleaded point (and, I note without placing too much store by it, still unpleaded) about the impact of the 1974 Act is correct then, plainly, it would undermine the Judgment and any sensible attempt to act, in these proceedings, upon what I said in its final paragraph.

23. I therefore now turn to the merits of Mr Abbhi's argument on the application of section 70.

The 1974 Act

24. I have already mentioned that section 69(1) of the 1974 Act provides that "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 costs is delivered in accordance with the requirements mentioned in s. 69(2). For the sake of completeness, I note that section 69 does recognise an exception where there is probable cause for believing that the bill payer is about to abscond, become bankrupt or compound with his creditors or (and here I summarise) take some other act which is likely to frustrate payment. In such cases, the High Court may permit an action to be brought within the month (and, I assume, might well be prepared to exercise its general jurisdiction to grant interim relief in support of the proceedings – certainly in the first and last situation – that might ring-fence the monies which s. 70(1) says do not have to be formally "secured" when an assessment is sought promptly).

25. I have also mentioned that it is common ground (made clearer still in correspondence since the parties served their statements of case) that none of the bills relied upon by Mr Slade in support of his money claim were delivered to Mr Abbhi.

26. Section 69(2C) specifies the different ways in which a bill may be delivered but the key point for present purposes is that the recipient is "the party to be charged with the bill personally" (later referred to in the context of the alternative modes of delivery as "that party").

27. Mr Abbhi contends, on the basis of the finding in the Judgment that he is "primarily liable" to Mr Slade and did not therefore assume the liability of a guarantor, that he is the "party chargeable with the bills" relied upon by Mr Slade. Therefore, if and when delivered to him at some future point in time, Mr Abbhi would have the right to seek an assessment of them. If he were to do that within one month of their delivery then section 70(1) would give him an unqualified right to have them assessed (the language of the subsection is that "the High Court shall …", which is to be compared with the

discretionary language of section 71 on the application of a third party liable in respect of the bill). And, again, if Mr Abbhi were to exercise that right, "no action shall be commenced" on the bill until the assessment is completed.

28. In my judgment, there are four interconnected reasons why Mr Abbhi is not within the language of section section 70(1) and his argument that my finding he is "primarily liable" to Mr Slade involves an impermissible leap to the conclusion that he is "the party chargeable" with Mr Slade's bills.

29. The first is that the agreement established by the Judgment quite deliberately did not involve bills being delivered to Mr Abbhi as if he was the party (or one of the parties) chargeable with their payment. As appears from paragraphs 28, 53 to 55 and 63 of the Judgment, Mr Abbhi was and (to the extent revealed by the Judgment) perhaps remains concerned about his potential section 51 exposure to Jasminder by reference to his funding of the Action. Delivery of the bills direct to him would have been anathema to the protection against his exposure to a costs order that the existing arrangement for discretionary loans, by him to Mr Singh, was designed to achieve. It is noteworthy that even Mr Abbhi's revised position at trial (see paragraphs 67 to 70 of the Judgment) involved the notion of him funding the action through capped lending to Mr Singh, not by making payments direct to Mr Slade as if he was the bill-payer.

30. The agreement was therefore that Mr Abbhi would fund the Action through Mr Singh. His promise to Mr Slade was therefore to provide the funding in the second of the ways described in paragraph 7(b) of the Particulars of Claim. Although the first way *might* have seen the bills being delivered to Mr Abbhi (in addition to the client Mr Singh as compliance with Mr Slade's retainer would no doubt have required) the second certainly did not. Only Mr Singh was to receive the bills and, if Mr Abbhi had kept fully to his promise, he would have made payments in addition to those mentioned at paragraph 31 of the Judgment which would have found their way to Mr Slade via Mr Singh.

31. At the last hearing, Mr Robins took me to over twenty transcript references where Mr Slade (or sometimes Mr Kokelaar on his behalf) had stated at trial that the agreement was that Mr Abbhi would "pay my bills", or words to that effect. Indeed he did, but the material question is as to *how* Mr Abbhi was to do so.

32. At paragraphs 92 and 94 of the Judgment I concluded that Mr Slade's four-step breakdown of the circumstances and nature of the agreement reached with Mr Abbhi was one which neatly encapsulated the basis of his claim. The third step is one that is echoed in the other references relied upon by Mr Robins: "*Mr Abbhi said he would pay*." But that cannot be read in isolation from the fourth: "*Mr Abbhi said there was a slight complication in that he did not want to pay me directly because he considered, on the basis of previous advice, that that might expose him more than necessarily [sic] to an application under section 51 by Jasminder, and so the precise way in which he would pay me would be by providing his funds so that Mr Singh could write a cheque and deliver it to me*." Under that arrangement, the bills only had to be delivered to Mr Singh.

33. In making the payments mentioned in paragraph 31 of the Judgment and promising further ones – in round sums (sometimes in dollars) and therefore not tied to the amount of specific bills as opposed to Mr Slade's estimate of October 2013 - Mr Abbhi never suggested (either before or after he repudiated his agreement with Mr Slade in April 2014) that the relevant bills should first have been delivered to him as the (or a) party chargeable with them.

34. That said, Mr Abbhi had an idea of the amount of Mr Slade's bills as the Action progressed, as is apparent from paragraphs 89 and 117 of the Judgment. Mr Kokelaar also drew my attention to a passage in Mr Abbhi's testimony in which he accepted that he may have approved counsel's fee notes. Again, lest the obvious be overlooked, the first time the court became aware of what really amounts to a complaint by Mr Abbhi that the bills had not been formally delivered to him was upon reading Mr Robins' skeleton argument dated 28 January 2019.

35. Therefore, there was no question of the July 2011 agreement providing for the delivery of bills to Mr Abbhi as "the party chargeable" with them (sections 69 and 70) just as there was no question of his promise to provide funds to Mr Singh, under the Loan Agreement, leading to the conclusion that he was "liable to pay a bill either to solicitor or to the party chargeable" (section 71).

36. The second reason why Mr Abbhi does not, in my judgment, come within section 70(1) is related to the first but goes further because it rests upon the fundamental nature and

purpose of his promise to Mr Slade. It would have been directly contrary to the funding agreement he reached with Mr Slade to contemplate that he would be entitled, independently of the right enjoyed by Mr Singh as the client, to enjoy the protection of the subsection. Mr Abbhi's obligation was to fund the Action, by lending the monies to Mr Singh, albeit that the amount of that funding actually received by Mr Slade through Mr Singh would depend upon the amount he had billed his client, as recognised in paragraph 100 of the Judgment. That said, it should not be overlooked that, even as between Mr Slade and Mr Singh, the Retainer Agreement stated: "*we will always, without exception, require a payment on account of costs at the outset of a retainer and/or a new matter and top-up payments on a monthly basis*." In fact (see paragraphs 97 and 99 of the Judgment) Mr Slade did make a real exception in favour of Mr Singh and, in reliance upon Mr Abbhi's obligation and indications that he would perform it, extended much more than a month's worth of credit to his client.

37. Although I recognise that, as against Mr Singh, the 1974 Act did not prevent a contractual liability arising on his part (the Act instead operates to restrict precipitate action being brought upon the bills), a prompt challenge by Mr Singh to the amount of a particular bill would have meant that he would neither have to pay it, nor pay money into court pending the assessment of it. Again, I should note that the terms of the Retainer Agreement would have entitled Mr Slade to terminate the retainer if a requested payment on account was not made by Mr Singh and I imagine that he would probably have done so if the situation had been not one of promised advances by Mr Abbhi but actual advances retained by Mr Singh pending such assessment. However, one might imagine the reaction of Mr Slade to any suggestion *by Mr Abbhi*, made during the period between July 2011 and April 2014 in apparent recognition of a concluded agreement with Mr Slade, that he too was entitled to similar protection under section 70(1) should he decide to seek an assessment of bills independently of Mr Singh. In other words, that separate compliance with the formalities of section 69(2)-(2D) - vis-à-vis Mr Abbhi - was a necessary pre-condition to the performance of his obligation under their oral agreement to advance sums to Mr Singh; and that, until those formalities were complied with, his funding obligation was forestalled (even though the client Mr Singh might have been pressed for a payment on account).

38. Of course, no such suggestion was ever made by Mr Abbhi (nor any challenge to delivered invoices made by Mr Singh) before he repudiated the agreement in the Spring of 2014 and, although he substantially defaulted on his promise to fund the Action, it is to be noted again that the payments he made and was proposing to make during that period were not conditional upon Mr Slade's bills being separately delivered to him.

39. Mr Robins' skeleton argument (in the part written in support of his application for permission to appeal the finding of primary liability in the Judgment) made a number of references to Mr Slade's inability to bring proceedings against Mr Abbhi under the oral agreement until the expiry of Mr Singh's time for payment under the Retainer Agreement. I questioned why that should follow when I can see no reason why Mr Slade could not have sued Mr Abbhi for damages for a repudiatory breach of their oral agreement if he had (either before or after the delivery of the relevant bill for fees and disbursements recently incurred) announced he no longer intended to honour it. Mr Slade's action for damages would not have been inhibited by the restriction in section 69 and (subject to any section 70 challenge to the relevant bill by Mr Singh) the amount of the damages recoverable would reflect the value of his then unfunded and unpaid fees and disbursements.

40. In relation to the nature of Mr Abbhi's obligation, Mr Kokelaar submitted that, even if Mr Abbhi came within the scope of section 69, then there must be implied into the oral agreement between him and Mr Abbhi a term that he would not rely on the section "*because otherwise the agreement would literally be unworkable because it would be wholly unenforceable by Mr Slade and that cannot be the intention of the parties*."

41. However, Mr Robins submitted that public policy considerations prevent a solicitor contracting out of the 1974 Act. He said that Mr Kokelaar's implied term reasoning could not stand in the face of the authorities which clearly established that such contracting out is not permitted. Mr Robins took me to a number of authorities, beginning with the decision of Eldon LC in *Sougall v Campbell* (1826) 3 Russ. 545. The Lord Chancellor there appears to have been addressing the court's general jurisdiction to review a solicitor's bills (or what I have described as a common law assessment) and his decision pre-dated the Solicitors Act 1843 which is mentioned in the decision in *Re Park* (1889) 41 Ch. D 326 addressed below. In any event, he said

that if a solicitor were to tell a client that he would not act for him if his bill was to be taxed, or that he would only continue to act if they were not to be taxed, then (at 550):

> "I think it my duty to say, that the judges of the land will not permit him to be a solicitor in any other cause. I do not believe that any judge would allow a solicitor, who had so acted, to continue on the rolls: and I will not permit it to be intimated, that a solicitor will act, if his bills are not to be taxed, but will not act, if his bills are to be taxed."

42. Mr Robins relied upon further authority (English and Commonwealth) including *Philby v Haze* (1860) 3 C.B. (N.S) 647 where, in addressing section 37 of the Solicitors Act 1843 which was to like effect as section 69 of the 1974 Act, Erle CJ said (at 651):

> "…… it appears to me that an attorney, before he can sue for business done by him as such, must deliver a bill which is so framed and drawn so as to enable the client to have it taxed. Regard being had to the words of the enactment, and to the policy of the law, which had in view the protection of the client against the attorney's greater knowledge of professional charges, it seems to me to prohibit attorneys from making arrangements like this with their clients, to this extent, that the attorney cannot be allowed to take advantage of the agreement where it would give him more than the law would have given him, that is, more than would have been allowed him by the master on taxation."

43. There can be no doubt, therefore, that a solicitor may not lawfully seek to contract out of the protection afforded to the party chargeable with the bill (within the meaning of section 70 of the 1974 Act) or to any other person who (by reference to section 71) may proceed as if he is chargeable with it because he is liable to pay the bill either to the solicitor or to the party truly chargeable. I recognise that any attempt to do so would be contrary to public policy.

44. That said, despite what Lord Chancellor Eldon said in *Sougall v Campbell*, solicitors are permitted to continue in business on terms which entitle them to stipulate that the client shall make payments on account of their taxable bills, failing payment of which they may cease to act. I have already mentioned that Mr Slade's Retainer Agreement did just that. It is to be noted that in that case in 1826 the client had made various payments on account of the solicitor's bills (in fact he had paid the balance of them but,

when doing so, had stated he would insist on having them taxed). The 1974 Act may operate to prevent precipitate legal action by a solicitor upon his bills but (as indicated by the provisos to the general rule that appear within section 69(1)(a) and (b)) the Act does not require all of the credit risk presented by the client to be shifted onto the solicitor.

45. However, in my judgment, this particular aspect of the argument between the parties simply serves to highlight further the fundamental point that the statutory provisions have nothing to do with the nature of the agreement between Mr Slade and Mr Abbhi. Mr Abbhi's promise to Mr Slade anticipated the credit risk posed by the client which, without that promise, Mr Slade was not prepared to take on by acting for Mr Singh. In my judgment, the correct analysis is not one of an implied term that, as "the party chargeable", Mr Abbhi would not rely upon sections 69 and 70. For the first reason given above, he was not the party chargeable. And the essential term of his agreement with Mr Slade was that, through the promised lending to Mr Singh, he would enable Mr Singh to make the payments envisaged by the Retainer Agreement, Although it never came to it – paragraphs 97 to 99 of the Judgment summarise the actual position where the blockage in payments began with the funder – Mr Abbhi's obligation would have extended to providing monies to fund a payment on account by Mr Singh pending any assessment that he (as the client) might have initiated. Although Mr Slade's receipt of monies from Mr Singh was to be responsive to him rendering monthly bills to his client, Mr Abbhi had to make good on his promise that would ensure Mr Singh had the funds to pay. As the Retainer Agreement did not purport to exclude the protection of the 1974 Act afforded to the party entitled to it - clause 17 of the attached Standard Terms of Business said "*The Client may be entitled to have RSCo's charges reviewed by the Court in accordance with the Solicitors Act 1974*" – the public policy argument is in my judgment a red-herring.

46. The third reason, therefore, why Mr Abbhi was not the party chargeable with the bill is because someone else was: his borrower of the moneys to pay them, Mr Singh. Just as I have held in the Judgment that the Loan Agreement does not fit within the suggestion of a creditor-debtor-surety relationship, so too there is no basis for concluding that Mr Abbhi ever considered that his recovery from Mr Singh would not be as a loan creditor but instead on the basis that he (Mr Abbhi) was jointly chargeable with the bill and

therefore entitled to recover some or all of his expenditure from his co-debtor on the basis that he (Mr Abbhi) had "paid" them. These were Mr Singh's bills and he was borrowing money from Mr Abbhi to pay them. Mr Abbhi made a direct promise to Mr Slade that he would lend the monies to Mr Singh for that purpose (it is in paragraph 96 of the Judgment where I mentioned that Mr Abbhi's recourse against Mr Singh, in respect of the monies he had unconditionally agreed with Mr Slade to advance, was under the terms of their independent Loan Agreement and not in the capacity of a surety called upon to pay Mr Slade if Mr Singh did not).

47. Whatever relevance the 1974 Act could be said to have to Mr Abbhi's position, it was not and could not sensibly be suggested that the client, Mr Singh, was not a "party chargeable" with Mr Slade's bills. Inevitably, the Retainer Agreement provided for bills to be delivered to Mr Singh (and for any moneys held on account to be applied towards them).

48. Mr Robins took me to a passage in *Friston on Costs* (3rd ed), at para. 36.09, which contains the following passage:

> "The party chargeable is usually the client (that is, the person who receives the legal services) but this will not always be the case. If, for example, a mother has entered into a contract of retainer to pay the costs incurred by her daughter, then the mother would be a party chargeable. Identification of the party chargeable will usually be a question of fact, but points of law may arise from time to time."

49. He also referred to further passages (at paras. 36.79 and 36.91) which, in highlighting the different scope of sections 70 and 71, referred to "the party chargeable" as having primary liability, whereas section 71 applies to "third parties" with secondary liability. The reference to the latter having rights comparable to persons who are "primarily liable" and, on that basis come within section 70, is made by reference to what Sir Andrew Morritt V-C said in *Pine v Law Society* [2002] 1 WLR 2189, at [27] (the textbook mistakenly attributing the remarks to Robert Walker LJ). In the light of the reference in the Judgment to the "primary" liability of Mr Abbhi, Mr Robins submitted that his client clearly falls within section 70.

50. Mr Robins also referred to the decision of Patten J in *MacPherson v Bevan Ashford* [2003] EWHC 636 (Ch) which concerned an application by the claimant for a detailed

taxation of various bills rendered by the defendant firm in respect of an intervention in the claimant's practice by the Law Society. The Law Society had appointed the firm and the firm rendered monthly bills to the Law Society. To quote from paragraph 4 of the judgment, "*the issue between the parties is whether Mr MacPherson is the party chargeable with the bill under Section 70 or a third party whose position is dealt with under Section 71*." That issue went to the Costs Judge's power to make the claimant's challenge conditional upon him paying £50,000 on account of the costs in circumstances where more than one month had elapsed since the delivery of the bills to the Law Society (before the society then delivered them to the claimant). In upholding his decision to do so, on the basis that the claimant came within section 71 rather than section 70, Patten J said (at [8]):

> "It seems to me that phrase "person chargeable with the bill" in Section 70(1) of the Act must mean the person to whom the solicitor is contractually entitled to look for payment and if necessary sue for payment of his bill. In the present case that must be and can only be the Law Society. The only contractual relationship that exists is between those two parties."

51. Although Patten J in *MacPherson* did not expressly refer to *Pine*, his reference at [9] to section 71 guaranteeing to a third party the same rights but no better rights than the Law Society which was "primarily liable" to pay the bills indicates (as Mr Robins submitted) that he had the earlier decision in mind.

52. In my judgment, these authorities only serve to highlight the absence of any contractual obligation on the part of Mr Abbhi to pay Mr Singh's bills so that, if those bills went unpaid, Mr Slade could sue Mr Abbhi on the bills as if he (like the illustration of the mother in *Friston*) had entered into the contract of retainer. Although the contractual retainer was not the only contractual relationship in the present case (so that point distinguishes *MacPherson*) the Particulars of Claim referred to the bills only in the context of them having been rendered to Mr Singh in the course of Mr Slade's retainer. In the Judgment (at paragraph 5) I made reference to the discrepancy in the pleaded date of the agreement relied upon as against Mr Abbhi but it is clear that Mr Slade was suing on an oral agreement which pre-dated the Retainer Agreement. The evidence at trial substantiated the alternative contractual obligation pleaded at paragraphs 7(b) and 20 of the Particulars of Claim. It is true that paragraph 17 and the third attachment to

the Particulars of Claim identified the bills (and the payments towards them) in the form of a statement of account. Mr Abbhi responded at paragraph 47 of his Defence by admitting and averring that the bills "*have been addressed to, and rendered to, Mr Singh and not to the Defendant*" and saying it is "*specifically not admitted that the Claimant's bills were accurate or properly claimable from Mr Singh and the Claimant is required to prove the same.*"

53. It is clear that neither Mr Slade nor Mr Abbhi regarded the Claim as being one upon the bills. If it had been, there would have been no difficulty (which each side recognises exists) with me establishing a contractual liability on Mr Abbhi's part to pay a specified rate of interest.

54. The fourth reason why Mr Abbhi is not and was not the party chargeable with Mr Slade's bills is linked to and reinforces the last reason. It emerged in the course of Mr Robins' submissions at the quantum hearing. He said that the consequence of Mr Abbhi falling with section 70(1) is that any bills subsequently delivered by Mr Slade to him would not only have be made out to Mr Abbhi but would have to exclude any charge to VAT. That is because Mr Abbhi is resident in the United States and is not liable to pay VAT. I immediately remarked that this would make his funding, under the agreement established by the Judgment, "20% light"; and that whilst my Judgment already made it clear that the liability of Mr Singh and Mr Abbhi was not co-extensive so far as their exposure to interest was concerned (as only Mr Singh had agreed a contractual rate under the terms of Mr Slade's retainer whereas Mr Slade and Mr Abbhi had not, of course, contemplated that Mr Abbhi's funding would be anything but timely) this was a submission which appeared to cast further serious doubt over any analysis that Mr Abbhi's contractual promise took the shape of a guarantee.

55. For the purposes of the argument on the 1974 Act, the notion that Mr Abbhi is entitled to the delivery of "VAT-free" bills, when Mr Singh was not, really highlights the problem in the way of his argument that he is the (or a) party chargeable with the bill.

56. During the course of Mr Robins' submissions, I asked whether *Friston on Costs* addressed the situation of more than one person being primarily liable when the extracts relied upon did not appear to address the point. I note that the language of section 70(1) appears to contemplate only one such person but that the passage from the textbook

quoted above referred to the mother being "a" party chargeable. Obviously, one can see the case where two or more persons might be jointly liable to pay a solicitor's bill (eg. the situation of a husband and wife or a number of trustees or partners retaining the solicitor). I also note that Mr Slade's Standard Terms of Business expressly contemplate that if the client is more than one person then those persons shall be jointly and severally liable for the payment of fees, disbursements and VAT. Mr Robins said that, while both Mr Singh and Mr Abbhi were parties chargeable with the bills, and on that basis the formalities of section 69 had to be observed separately in relation to each of them, theirs was not a joint liability as they had not made a joint promise to Mr Slade.

57. Whether or not section 70 (alone, without reference to section 71) covers the situation of more than one person being chargeable with a bill otherwise than by reference to a joint obligation, the notion that Mr Abbhi was also a "party chargeable with the bill", when at the same time he says he is entitled to strip out the VAT element of it, when Mr Singh could not, really answers the point against him. On Mr Abbhi's own case, two persons are said to be chargeable with the same bill, but in different sums, and Mr Slade is *not* contractually entitled to look to Mr Abbhi for payment of its VAT element. The fact that Mr Abbhi says he is not liable to pay VAT demonstrates that only the VAT-paying client Mr Singh was the party chargeable with the bills. The amount of a solicitor's bill cannot vary according to the identity of the person to whom it is addressed, whether that person is jointly liable or jointly and severally liable with another recipient of it.

58. Again, no VAT exclusive bills were rendered by Mr Slade and none of the three ever suggested they should have been.

59. In short, as emerges from these reasons, Mr Abbhi's contractual obligation to make payments resonated with only one aspect of the Retainer Agreement between Mr Slade and Mr Singh and it was the obligation to make payments on account (via Mr Singh to the debit of his father-in-law's loan account with him) unaffected by any consideration of the 1974 Act.

60. Therefore, I reject the argument that the value of Mr Slade's claim should be assessed at nil and that the most Mr Slade can get out of these proceedings is some declaratory relief that makes it plain he is now entitled to deliver the relevant bills to Mr Abbhi.

61. Had I reached a different conclusion, it would have been necessary to consider the point as to whether it is now, at the point of a judgment following what was intended to be the assessment hearing, too late for Mr Abbhi to raise the defence under section 69.

62. Mr Robins submitted that it would be a serious procedural irregularity for me to prevent his client from relying upon the section and to shut out the argument based upon the statutory provisions now, since the trial, they have been researched. He points to the exchanges in the transcript (mentioned above) which made it clear that the implications of the 1974 Act would be considered at a further hearing.

63. Of course, I have not shut out the argument on the 1974 Act. But, had I come to a different conclusion upon the application of sections 69 and 70 to Mr Abbhi, I would not have been prepared to accede to his argument - disguised in the form of the "quantum at nil" argument, as cloaked by the grant of declaratory relief that neither side had sought in their statements of case - that he has a defence to the Claim. It would have been too late for Mr Abbhi to take that defence after the trial of the Claim on liability issues.

64. In paragraph 39 above I have contemplated the scenario of Mr Abbhi having repudiated his obligation to Mr Slade at a much earlier point than April 2014, and observed that he would not have had his own defence based upon the provisions of the 1974 Act to any damages claim brought by Mr Slade. Of course, Mr Slade continued to act and to extend significant credit, without full payment by Mr Abbhi, before that actual point in time. If Mr Abbhi wished to argue to the contrary, that he did have a defence arising out of the 1974 Act, then he should have advanced it when Mr Slade did finally sue him.

65. The fact that, at that trial, I raised the possibility that the 1974 Act might be of some relevance – again, I emphasise that this was in the context of its potential impact on quantum issues – and that the parties agreed to defer consideration of it until after the trial cannot provide a justification for Mr Abbhi not having taken the defence before trial. Plainly, if he had such a defence in the face of paragraph 7(b) of the Particulars of Claim, then it is one that ought to have been raised at an earlier point in the proceedings.

66. The essential problem for Mr Abbhi, now that he has focussed upon the implications of the 1974 Act, is that his suggested reliance upon it proves too much. Had the defence which he seeks to draw out of it been a good one, I think the procedural irregularity would have been one to the prejudice of Mr Slade. He would be the party deprived of what was intended to be a final determination of issues of liability by reference to a defence that Mr Abbhi had not even pleaded. As it is, he faces a yet further round in this litigation because *the defence* based on the 1974 Act made its first appearance at the quantum hearing.

67. Therefore, had I found there to have been substance in Mr Abbhi's reliance upon section 69, I would not have accepted Mr Robins' submission that the inexorable conclusion is that the recoverable quantum is nil. Instead, I would have found that it is now – after the judgment on liability reached by reference to the parties' pleaded cases – too late for him to rely upon what that section actually provides.

68. This (obiter) conclusion that the suggested defence comes too late to warrant what in substance would be the dismissal of Mr Slade's money claim, even if I were to award him the costs of the proceedings by reference to how it came about, is, in my judgment, reinforced by the court's power to conduct a "common law assessment" of Mr Slade's claim which Mr Abbhi's solicitors had (in their letter dated 19 September 2018 mentioned above) had previously favoured over the suggested application of the 1974 Act. I now turn to that jurisdiction.

The Court's Inherent Jurisdiction

69. There was no issue between the parties that, in principle, someone in Mr Abbhi's position as defendant would be entitled to challenge the quantum of Mr Slade's claim. That would be by means of what is described as a "common law assessment" of the value of his work carried out and disbursements incurred in the Action.

70. The authorities show that the court is entitled to undertake an assessment of a solicitor's bill even where any relevant time limit under the 1974 Act has expired. Mr Robins (in the context of his argument upon the application of the 1974 Act) correctly observed that its inherent jurisdiction to do so should not be regarded as limited to those cases

where the statutory provisions could never apply. Instead, the residual common law jurisdiction may be invoked even where the party challenging the quantum of the claim had failed to apply sufficiently promptly for a Solicitors Act assessment.

71. Counsel addressed me on two principal authorities relating to this free-standing jurisdiction.

72. The first was *Re Park* (1889) 41 Ch D and the decision of Lord Chancellor Eldon which I have already mentioned above. The case concerned the ability of an executor to challenge the amount of a solicitors' bill delivered to the testator more than 12 months before his death and to which he (the testator) had made no objection. Stirling J held that the lapse of time meant there could be no taxation under the then Solicitors Act 1843. He also that the court's general jurisdiction over a solicitor as an officer of the court had no application to the present case. However, by reference to "the ordinary jurisdiction of the Court in dealing with contested claims" (the solicitors were claiming as creditors in the administration action before the court) he said, at 333:

> "The Courts of Common Law dealt with an action on a solicitor's bill of costs in the same way as they would deal with an action on an ordinary tradesman's bill containing a number of items. If it were shewn that the bill had been delivered for a considerable time, and had never been objected to by the person to whom it had been delivered; and if the bill on the face of it seemed to be fair and reasonable, a jury would no doubt be told that, in the absence of anything to contrary, it was conclusive against the person charged and that they ought in such a case to find a verdict for the plaintiff."

73. Applying the same reasoning to a solicitors' bill, Stirling J remarked, at 335, that the lapse of time in making any challenge to the bill (and still more so the making of payment on account in respect of it) would be "very strong circumstances against [the person charged] and without further explanation would probably be held to be conclusive against him." In the case before him, certain items in the bill had been identified which called for further explanation and, as it would not have been appropriate to order a general taxation of the bill in circumstances where the testator had not objected to it, he referred to the Taxing Master for his inquiry and adjudication the issue as to whether those particular items in the bill, marked by the executor in red

ink, were fair and proper and as to the amount recoverable in respect of them. His order was upheld on appeal, Cotton LJ remarking that the Taxing Master was "the usual and proper person to decide whether costs are reasonable."

74. The second authority referred to in this context was the decision of the Court of Appeal in *Turner & Co (a firm) v O Palomo SA* [1999] 4 ALL ER 353. The decision involved the dismissal of the solicitors' appeal from the decision of the judge who (reversing the master's judgment for the full amount of the claim upon their unpaid bills) had entered judgment for a sum to be assessed. The defendant client had failed to invoke the provisions of the 1974 Act but the judge had found it was nevertheless entitled to challenge the reasonableness of the unpaid bills (which were not detailed bills but gross sum bills). The Court of Appeal agreed and referring to earlier authority including *Re Park* concerning the court's jurisdiction to judge contested claims where plausible grounds of objection were raised, held it was open to the client to challenge the amount of the claim. In the case of gross sum bills, and in the absence of express agreement as to what they should be, the client was entitled to challenge their reasonableness.

75. As I have noted, Mr Kokelaar did not dispute the existence of this common law jurisdiction (indeed his instructing solicitors' letter of 10 January 2019, mentioned next, had contended for such an assessment) but his primary submission was that, by the time of the quantum hearing, Mr Abbhi had been given the opportunity in correspondence to engage with the process but had not taken it, so that it was now too late for him to challenge recoverability of damages by reference to any of the outstanding invoices. He also pointed out that Mr Slade's invoices were much more detailed than the type of gross sum bill under consideration in *Turner & Co (a firm) v O Palomo* and that Mr Abbhi had been provided with copies of them during the course of these proceedings.

76. As to the missed opportunity, by their letter dated 10 January 2019 to Mr Abbhi's solicitors, Birketts, Richard Slade and Company (referring to what they described as the volte face given what I have said in paragraph 18 above about the change in position) said:

> "*We cherish the hope that, on further reflection, you will come to the realisation that your first instinct is correct and the only path open to Mr Abbhi here is the route of "common law assessment" and, for that reason, we invite him to indicate*

any items to which he takes an objection, stating, in simple terms, the reason why. For the reason set out in our letter of 6 December 2018, the items to which Mr Abbhi could, conceivably, take an objection are not the bulk of the claim, which is comprised of disbursements which either Mr Abbhi approved in advance (Counsel's fees) or to which he could not reasonably take any objection (translators' fees and similar). Doubtless, if you provide us with a list, the disposal of this case at the forthcoming hearing will be considerably simplified and, on that basis, we look forward to hearing from you."

77. At this point of the judgment, I should refer to an issue between the parties as to what evidence was properly before me at the quantum hearing. This was of some significance given the primary submission on behalf of Mr Slade that it was now too late for Mr Abbhi to challenge any part of the invoices.

78. Shortly before the hearing on 4 February 2019, Mr Slade made a second witness statement dated 30 January 2019 which explained the manner in which he had delivered bills to his client Mr Singh, before his death on 9 February 2015. The information in that witness statement reflected what Richard Slade and Company had already said in their letter dated 10 January 2019 about the manner of their delivery. That letter had been written in response to a request from Mr Abbhi's solicitors, by letter dated 8 January 2019, that Mr Slade should provide copies of all invoices listed in the statement of account and a request that he should "*state what bills (if any) were delivered to Mr Singh and when and how those bills were delivered*" (with a further request for copies of any documents to support the answers to that question).

79. The letter of 10 January 2019 provided a summary of the method of delivery and said the invoices had all been "disclosed" (though it may be that this means that copies have been provided rather than formally disclosed by list). Mr Slade's witness statement of 30 January 2019 exhibited the invoices which were unpaid, in whole or in part, and explained that they were of two kinds: invoices for profit costs and invoices for disbursements. In relation to their manner of delivery, Mr Slade's witness statement explained how Mr Singh (who with his wife was living under the same roof as Jasminder, his adversary in the Action) was concerned that his son might open their post and obtain access to privileged and confidential information which the detailed invoices for profit costs might reveal. I note that the Retainer Agreement contemplated

that the client might indicate a preference for bills not to be delivered by post. There was no similar concern over posting invoices for disbursements to Mr Singh.

80. The resulting arrangement was explained in the witness statement and summarised and explained in Mr Kokelaar's skeleton argument as follows:

> *"28. As with much of this case, the arrangements for delivery of the bills to Mr Singh were somewhat unusual. They are explained in a letter from Mr Slade's firm to Mr Abbhi's solicitors dated 10 January 2019, and confirmed in Mr Slade's second witness statement at paras. 4 to 6. In brief, because Mr Singh and his wife lived under the same roof as Jasminder at Tetworth Hall, they became concerned that Jasminder might open their post and obtain access to their privileged and confidential information. They therefore asked Mr Slade not to send the bills for fees to them. It was agreed between the parties that the bills for fees would instead be addressed to Mr Singh at Mr Slade's offices, and that Mr Slade would hand-deliver them as and when he visited Tetworth Hall to see his client. Most of the bills were delivered to Mr Singh in this way, save for those towards the end, which were issued after Mr Slade's final visit to Tetworth Hall during Mr Singh's lifetime, which was on 19 November 2014.*
>
> *29. The position in relation to the delivery of the bills at issue in this case is as follows (see para. 6 of Mr Slade's second witness statement):*
>
> > *(1) four bills for disbursements – IN800970, IN801139, IN801169 and IN801442 totalling £251,743.83 – were sent to Mr Singh at Tetworth Hall by post;*
> >
> > *(2) five bills for fees – 3835, 3877, 393, 3988 and 4031 totalling £42,317.80 – were sent by post to 9 Gray's Inn Square and hand-delivered to Mr Singh at Tetworth Hall;*
> >
> > *(3) five bills for fees – 4162, 4165, 4206, 4243 and 4285 totalling £26,908.80 – and two bills for disbursements – IN801546 and IN801611 totalling £12,290 – were sent by post to 9 Gray's Inn Square but not hand-delivered to Mr Singh at Tetworth Hall because raised after the occasion of Mr Slade's last visit."*

30. On any view, the bills that were sent by post or hand-delivered to Mr Singh at Tetworth Hall were delivered in accordance with the requirements of section 69(2C). In financial terms, their value makes up the bulk of the claim. It is submitted, however, that all the bills should be treated as having been so delivered. But for Mr Singh's express request that he should not do so, Mr Slade would have sent the bills by post to his dwelling-house, Tetworth Hall. Instead, it was agreed that they would be despatched to Mr Slade's offices."

81. At the quantum hearing, an objection was taken on behalf of Mr Abbhi to Mr Slade relying on this evidence. Mr Robins reminded me that, at the trial in July 2018, I had upheld his objection to an informal application made by Mr Kokelaar, to rely upon certain invoices for disbursements that had not by then been disclosed and which Mr Robins submitted should for the subject matter of an application for relief from sanction. Mr Robins' position at the quantum hearing was that no such formal application had since been made. Mr Kokelaar responded by saying that the copies of the invoices had never been asked for prior to the trial and that, although I had not acceded to the application at the July trial, they had been provided to Mr Abbhi in advance of the latest hearing, first by correspondence on 6 December 2018 and then as an exhibit to Mr Slade's witness statement. In those circumstances, it was agreed that I would look at the witness statement *de bene esse* with Mr Robins reserving his right to make submissions about what might or might not be drawn from that evidence.

82. In my judgment, it is entirely consistent with the overriding objective that I should have regard to what Mr Slade has said in his second witness statement for the purpose of making the order I propose below. There can be no prejudice to Mr Abbhi in doing so when the matters addressed in the witness statement are peculiarly within Mr Slade's knowledge (in the light of Mr Singh's death in 2015) and are entirely consistent with the averment in paragraph 47 of the Defence mentioned above. Further, although Mr Abbhi chose to pursue the line that the recoverable quantum was nil, by reason of the application of the 1974 Act, the letter of 10 January 2019 had contained a clear invitation to outline the nature of any objection to particular invoiced sums.

83. When, following his argument upon the application of the 1974 Act, Mr Robins came to make submissions about the evidence of Mr Slade, he made the point that the Judgment establishes that Mr Abbhi is liable in respect of his broken promise to fund

the costs of "the Action". He said that the invoices relied upon by Mr Slade indicated that fees and disbursements were incurred in pursuing alternative funding proposals (relating to the sale of the EHL shares and the money in the Channel Islands account) as well as the proposed appeal. These, Mr Robins said, were not within the scope of the agreement reached between Mr Slade and Mr Abbhi. He also raised again the question of whether Mr Abbhi could be held accountable for the VAT element of the invoices.

84. Again, I emphasise that the nature of the argument at the quantum hearing meant that there was no opportunity to consider any of these objections in any kind of detail. Matters had not been lined up for undertaking a common law assessment of damages in the way Mr Slade's letter of 10 January had invited. Mr Kokelaar recognised that the oral agreement between the parties was such that Mr Abbhi had only agreed to fund the actual costs of the litigation, so that (even if had not previously identified the particular subject matter of the challenge) he would be entitled to dispute that he was liable in damages for Mr Slade's fees or expenditure which fell outside such costs.

85. That said, I have no difficulty in rejecting Mr Abbhi's objection to the VAT element of the invoices. The funding required of him was of the Action in which Mr Slade's client was chargeable to VAT.

86. In the event of me concluding that only a common law assessment was available to Mr Abbhi, when there had not been time to conduct it at the latest hearing, both parties invited me – as a fall-back to their primary positions respectively outlined above - to make the type of order made in *Re Park.* They each recognised that this would involve the "red ink" exercise of Mr Abbhi identifying particular invoiced items disputed by him.

87. Mr Kokelaar's submission (as an alternative to his primary position that it was now too late for Mr Abbhi to dispute any item) was that judgment should be given now for the value of the unpaid and paid disbursements. He supported that submission with the observation that Mr Abbhi had approved counsel's fees and could have no grounds for disputing the sum of approximately £5,700 paid in disbursements on such matters as court fees, translators' fees and photocopying (as identified in the letter of 6 December 2018). In relation to unpaid counsel's fees, he said that these attracted interest at the

rate of 8% above the official dealing rate of the Bank of England, for the period commencing 30 days after the delivery of each fee note. That (as explained in correspondence and Mr Slade's second witness statement) was the effect of clause 12.6 of the Bar Council's Standard Contractual Terms of 2012 and the Late Payment of Commercial Debts (Interest) Act 1998 (and secondary legislation thereunder). In fact, counsel's fee notes showed interest being charged at a straight 8% and (although Mr Kokelaar made the point that there was no indication that counsel had waived their right to charge interest for the earlier period when doing so) the period over which interest had been calculated was consistent with them having agreed – as paragraph 32 of the Judgment refers – to wait until February 2014 for payment.

88. In broad terms, and taking account of any payments received on account of the relevant invoice, the position at the date of Mr Slade's second witness statement was that his own outstanding fees totalled £69,226 and Counsel's outstanding fees relating to the Action were £251,743 (these sums being inclusive of VAT). There were further counsel's fees of £12,000 (and disbursements of £290) following the trial of the Action (which Mr Robins says cannot fall within the scope of Mr Abbhi's agreement to pay). There were also the paid disbursements of approximately £5,700 mentioned above. Mr Slade seeks to recover interest of £82,667 on the unpaid counsel's fees (at the rate of 8% calculated in accordance with the Bar Council's terms down to the date of the witness statement) and has also sought to claim the same rate of interest (under section 35A of the Senior Courts Act 1981) to his own unpaid fees in the approximate sum of £25,500. In relation to that last figure, Mr Robins submitted that the recoverable rate of interest should be nothing like 8% but instead what he submitted would be a commercial rate of interest of 1.5% p.a..

89. Having reflected upon counsel's submissions I propose to direct a common law assessment, to be undertaken by a Costs Judge, with an order that Mr Abbhi make a payment on account pending the determination of that assessment pursuant to CPR 25.7(1)(c). The interim payment shall reflect what I consider to be a reasonable proportion of the likely amount of the final judgment given the figures mentioned in the previous paragraph.

90. I set out below the terms of the Order I propose to make after addressing Mr Abbhi's application for permission to appeal in the light of the Judgment (and for which I extended time, when handing down the Judgment, to the quantum hearing).

Permission to Appeal

91. Mr Robins' Skeleton Argument for the quantum hearing explored in some detail the grounds upon which he submitted there is a real prospect of establishing that my conclusion that Mr Abbhi's liability to Mr Slade was not caught by section 4 of the Statute of Frauds 1677 was an erroneous one. As he observed, this was work that had to be undertaken in any event in anticipation of his client's intended appeal on the point (with or without my permission).

92. The fundamental point which runs through Mr Robins' argument is that my conclusion fails to reflect the points (as made, for example, in his paragraph 60) that Mr Abbhi's liability under the oral agreement was defined by reference to Mr Singh's liability under the Retainer Agreement and that Mr Abbhi would not be in default unless Mr Singh was also in default.

93. As Mr Robin's put it in his oral submissions:

> "*Your Lordship knows section 4 refers to a promise to answer for the debt, default of miscarriages of another person. So, what I wish to submit to the Court of Appeal is that a secondary liability in the nature of a guarantee falling within section 4 of the statute of frauds is essentially any liability which is defined by reference to the liability of another person. Any liability defined by reference to the liability of another person."*

94. I am not persuaded that there is a real prospect of Mr Abbhi persuading the Court of Appeal that the agreement which I have found, on the facts, to have been reached between the parties is one that can be categorised as having given rise to that type of liability. It did not involve a "secondary" liability on the part of Mr Abbhi. As I have sought to explain in the Judgment (and again in paragraphs 31 to 33 above) Mr Abbhi's liability was a primary one, existing independently of Mr Singh's in the sense that his

discharge of it would have pre-empted the need for Mr Slade to give any consideration to the liability of the supposed "principal debtor". If Mr Abbhi had performed his promise to Mr Slade (by lending to Mr Singh so that Mr Singh could pass on the monies to Mr Slade) then there would have been no unsatisfied debt, default of miscarriage by Mr Singh. If anything, the context shows that it is Mr Singh (who had signed up to the terms of the Retainer Agreement which Mr Slade was happy to agree with his client in the light of and only because of his prior oral agreement with Mr Abbhi) who became potentially answerable for the default of Mr Abbhi.

95. It was because Mr Abbhi was liable to advance monies so that Mr Singh could then pay Mr Slade - (paragraph 98 of the Judgment refers to Mr Slade's recognition of the one-month credit risk extended to Mr Singh, even if Mr Abbhi had met his obligation, because he appears to have assumed that he would not stipulate for payments on account being made by his client as the Retainer Agreement contemplated they might be) – that his liability cannot properly be said to have been defined by reference to the liability of Mr Singh. As I have held above, there was no question of Mr Slade's invoices being delivered to Mr Abbhi. And the nature of Mr Abbhi's promise was such that, as is common ground, there was no agreement between the parties upon a contractual rate of interest (or interest accrual date) of the kind specified in the Retainer Agreement. The liabilities of Mr Singh and Mr Abbhi were therefore not co-extensive. Although I have rejected it, Mr Abbhi's alternative argument about him not being liable to pay the VAT element of the invoices is an illustration of him seeking to further differentiate the extent of his own liability.

96. In my view, the subsequent argument over the 1974 Act has further illuminated the true nature of Mr Abbhi's promise to Mr Slade. Had he been a guarantor of Mr Abbhi, he would have fallen within the scope of section 71 of the Act. That is made clear by *Friston* (at para, 36.92) which identifies "*a person who has provided a guarantee for another person's costs*" as the first in a list of persons who might successfully apply for an assessment under that section. That is on the basis that a guarantor can be said to be a person who has paid or who is liable to pay the bill either to the solicitor or to the party chargeable with it. Mr Abbhi was not so liable. As Mr Kokelaar correctly submitted, he had not agreed with Mr Singh that he should be liable to pay him the amount of Mr Slade's bills. Theirs was the discretionary loan agreement (see paragraph

96 of the Judgment). Nor had Mr Abbhi agreed with Mr Slade that he should pay the amount of the bills to him (see paragraphs 92 and 93 of the Judgment).

97. Accordingly, I refuse Mr Abbhi's application for permission to appeal and for a stay pending appeal. If he wishes to, Mr Abbhi should renew those applications to the Court of Appeal in accordance with the timetable outlined below.

Decision

98. I am conscious of the delay which took place between the handing down of the Judgment in late September 2018 and the date of the quantum hearing in early February 2019. The delay was referable to the difficulties encountered in finding a date which was available to both parties and the court. I am even more aware that, because of the matters raised at the quantum hearing and required to be addressed by me, this further ruling will not produce the final determination which paragraph 121 of the Judgment envisaged. These are important considerations given that the Judgment followed a trial under the Shorter Trials Scheme under which the aspiration was that "the real issues in dispute are identified as early as possible and dealt with in the most efficient way possible" (to quote from Practice Direction 51N). Even though Mr Slade issued his Claim in August 2017 and has established liability on the part of Mr Abbhi, he still awaits recovery under it.

99. The Order I propose to make upon handing down this judgment - and the precise form of which I invite the parties to either agree or to submit with any points of disagreement identified for my consideration and approval before the formal handing down of this judgment - will therefore provide for the following (the dates below are based upon the intended formal hand-down of this judgment in the absence of the parties on Friday 1 March 2019):

    i) That there be judgment for Mr Slade for damages to be assessed.

    ii) That the further inquiry into and assessment of the damages payable to Mr Slade shall be undertaken by a Costs Judge with the following directions (made

without prejudice to any further directions the Costs Judge may make upon the inquiry and assessment):

a) Mr Abbhi shall by 4pm on 22 March 2019 serve upon Mr Slade a schedule (in the form of a Scott Schedule (or similar) containing his objections with provision for responses by Mr Slade and for any findings by the Costs Judge) setting out his objections to any items contained within the invoices exhibit at "RJS1" and "RJS3". The objection shall identify the item in question, the basis of the objection and the amount disputed by Mr Abbhi;

b) Mr Slade shall by 4pm on 12 April 2019 serve upon Mr Abbhi his response to the objections by Mr Abbhi;

c) by 4pm on 18 April 2019 the parties shall apply to the Costs Judge for any further directions for the listing and disposal of the inquiry and assessment (and shall lodge a copy of this judgment and their schedule in support of that application);

d) the costs of the inquiry and assessment shall be reserved to the Costs Judge; and

e) for the avoidance of doubt, the power to make any further order under CPR 25.8 (in the light of the interim payment ordered below) shall be reserved to the Costs Judge.

iii) That the damages determined by the Costs Judge to be payable by Mr Abbhi shall carry interest as follows:

a) in respect of those damages reflecting unpaid counsel's fees, interest at 8% p.a. from 19 April 2014 to the date of the determination; and

b) in respect of those damages reflecting unpaid fees and other disbursements, interest at the rate of 2% p.a. from 19 April 2014 to the date of determination.

iv) An order under CPR 25.7 that by 4pm on 15 March 2019 Mr Abbhi shall pay to Mr Slade the sum of £310,000 on account of the damages (and interest thereon) payable to Mr Slade.

v) The refusal of Mr Abbhi's application for permission to appeal against my finding (in the Judgment) that his liability to Mr Slade was not one to which section 4 of the Statute of Frauds 1677 applied and the refusal of stay pending any such appeal. If no application is made by Mr Abbhi for permission to appeal any further finding in this present judgment, any Appellant's Notice (including a request for the grant of permission and/or a stay by the Court of Appeal) in respect of that earlier finding shall be filed by 4pm on 22 March 2019. If such an application is made, the time for filing any such Appellant's Notice will be extended for a period of 21 days following my determination of that application (so that Mr Abbhi's presently intended appeal may encompass any further matters in respect of which permission is either granted by me or sought from the Court of Appeal).

vi) In the event of either party indicating by solicitor's letter prior to the handing down of this judgment that he wishes to appeal any finding in this present judgment, that (in accordance with the procedure identified in *McDonald v Rose* [2019] EWCA Civ 4, [21]) an application for permission to appeal shall be made to me in writing by 4pm on 15 March 2019. Any submissions in response are to be filed by 4pm on 28 March 2019. If made, the application(s) for permission shall be determined by me on the papers and the hand-down hearing shall be adjourned for that limited purpose. The time for filing an Appellant's Notice with the Court of Appeal under CPR 52.12(2)(a) shall be 21 days from the determination of any application made under this paragraph.

vii) Mr Abbhi is to pay Mr Slade's costs of the proceedings to date to be assessed if not agreed. Mr Abbhi shall by 4pm on 15 March 2019 make a payment on account of those costs in the sum of £120,000.