Case No: SC-2021-APP-000450

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, WC2A 2LL

Date: 29/09/2021

Before :

COSTS JUDGE NAGALINGAM

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Between :

Salim Yasin	**Claimant**
- and -	
Whitmore Law Solicitors	**Defendant**

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Mr Jacob (instructed by **Edwards Duthie Shamash**) for the **Claimant**
Miss Nash (instructed by **Whitmore Law Solicitors**) for the **Defendant**

Hearing dates: 25/06/2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

1. This is the Claimant's application for "An order in the standard form for the detailed assessment of the bill dated 22 February 2019 delivered by the Defendant to the Claimant and Mrs Shaheen Yasin (deceased)." Assessment is sought pursuant to section 64(3) of the Solicitors Act 1974.

2. The Claimant's application is dated 6 April 2021 and was electronically filed with the court on this date. The application was made following a claim issued by the Defendant in the county court for payment of the delivered bill in the sum of £67,880 plus interest. The deemed date of service is 7 March 2021 and in this regard the Claimant's application was made before the expiration of one month from the service on the Claimant of the Defendant's claim for payment. This is not in dispute.

3. I am advised that following a conversation between counsel for the parties on 22 June 2021, it was agreed that the bill delivered to the Claimant is a gross sum bill within the meaning of section 64 of the Solicitors Act 1974.

4. The issue to be decided therefore is whether the Claimant is entitled to an order for assessment of the bill under section 64 of the Solicitors Act 1974 (the Claimant's case) or whether such an assessment is precluded by section 70 of the Solicitors Act (the Defendant's case). Further to that issue is which court the bill ought to be assessed in and whether that assessment should be a common law assessment of damages or a detailed assessment of costs.

Mr Jacob's submissions:

5. Mr Jacob submits that section 64(3) of the Solicitors Act 1974 provides the court with no discretion.

6. He says the Defendant is arguing that a section 70 restriction within the Solicitors Act 1974 overrides the application of section 64(3), an assertion which Mr Jacob invites the court to reject. Mr Jacob submits there is no limiting restriction within section 64(3) as to how or when that section operates, and that nowhere within section 64 is it said that operation of the same is subject to section 70, or subject to provisions elsewhere.

7. Mr Jacob submits that section 70 of the Solicitors Act 1974 confers on the court, in part, a discretion, to include the making of conditional orders, and in certain instances a need to require a party to show special circumstances. However, he observes that section 70(3) is drafted in such terms that it only applies to circumstances arising under section 70(2). Mr Jacob submits that the Claimant has not made an application pursuant to section 70(2) of the Solicitors Act 1974 and, as a consequence, the provisions of section 70(3) do not apply.

8. Mr Jacob references section 64(4) of the Solicitors Act 1974 as being instructive. Section 64(4) provides:

> "If a gross sum bill is assessed, whether under this section or otherwise, nothing in this section shall prejudice any rules of court with respect to assessment, and

the solicitor shall furnish the costs officer with such details of any of the costs covered by the bill as the costs officer may require."

9. Mr Jacob invites the court to observe reference to the ability to have a gross sum bill assessed under section 64 "or otherwise". He acknowledges the "or otherwise" could be the seeking of an assessment under section 70. However, he questions how does the Defendant balance the mandatory provisions under section 64(3) with the fact that there is, in certain circumstances, no right to an assessment under section 70(3)?

10. He submits that section 64(3) would be obsolete if it can be overridden by section 70(3), notwithstanding section 64(3) being drafted in terms which afford the court no discretion.

11. Mr Jacob sought to draw the distinction between sections 64 and 70.

12. Putting matters starkly, he observed that section 70 deals with the court's power to order an assessment from the moment a bill is delivered, up to decades after that bill has been delivered, and summarised how assessment can take place at various points of time after a bill has been delivered. He contrasts this with section 64 which is much more constrained in circumstances where a gross sum bill has been delivered.

13. As to paragraph 15 of the Defendant's skeleton argument, which says "C appears to be contending that no matter how egregious the client's delay, the solicitor cannot take any meaningful steps to recover fees without exposing himself to a full Solicitors Act assessment. That cannot be the purpose of s.64.", Mr Jacob asks why not?

14. Section 64(3) is limited to gross sum bills and it is the solicitor's choice as to what type of bill to deliver or serve on their client. Detailed bills are addressed under section 70. Gross sum bills are addressed under section 64. Either way, by different paths, a right to assessment arises in the specified circumstances dealt with under those sections.

Miss Nash's submissions:

15. Miss Nash, with reference to the Claimant's supplemental skeleton argument, accepts that any part 7 proceedings in this matter will ultimately be transferred to, and heard in, the High Court. However, she submits that any subsequent assessment should be an assessment of damages, i.e. a common law assessment, in the Defendant's already issued part 7 proceedings.

16. With respect to section 64(3) of the Solicitors Act 1974, Miss Nash accepts it was at the Defendant's option to serve a gross sum bill, and accepts that gives the Claimant a right to request a detailed assessment.

17. As to the meaning of which court is referred to within section 64(3), Miss Nash submits that references to court "obviously" must mean the court seized of the existing proceedings, in this case the court seized of the Part 7 proceedings. In making this observation, she invites the court to consider the terminology of "request" rather than 'application' within 64(3).

18. Miss Nash also submits that section 70(2) does not say that it doesn't apply to an application under section 64.

19. Miss Nash submits the Claimant has had ample opportunity to contest the bill and relies on the chain of correspondence ending at page 24 of the bundle to demonstrate this. These show the Defendant has repeatedly invited the Claimant to commence proceedings to have the bill assessed.

20. Miss Nash submits that the Solicitors Act 1974 must be read as a whole. In this regard, whilst she accepts that section 64 does not specifically reference section 70, she submits that it can be read as being subject to section 70(2).

21. If she is wrong about that, and I conclude that section 64 operates independently of section 70, Miss Nash submits that two consequences follow. Firstly is an acceptance that the time limits under section 70 will not apply, but secondly that any assessment under section 64(3) will be, in effect, an assessment of damages in the Defendant's existing claim.

22. Thus the Defendant's case is that in any event the Claimant should have applied under CPR Part 23 in the existing proceedings. Miss Nash further submits that the reference to court under section 64(3) of the Solicitors Act 1974 means the court in which the originating proceedings, in this case the part 7 proceedings, have been issued.

23. Miss Nash also points to the wording of section 64(4), which recognises that a gross sum bill may be assessed under section 64 "or otherwise".

24. I asked Miss Nash for her views as to what the legislation meant by the term "if so requested" in section 64(3). Miss Nash observed that this was 1974 legislation and reference to a request suggests informality rather than the need to issue new proceedings. She also relies on part 67 of the Civil Procedure rules for guidance.

Mr Jacob's response:

25. In response, Mr Jacob observed that section 64(3) of Solicitors Act 1974 does not define which court the request needs to be made in. He stresses the relevance of this by drawing comparison with section 61(6) of the same act, in which "court" is defined under different sets of circumstances. He submits this is instructive as to the intention of the act where a court is not specified.

26. He also submits that the rules of court dictate the Claimant's approach. In particular he cites CPR 67.3(1), noting the Claimant's claim does not concern contentious business in the county court and in any event exceeds the limit under CPR 67.3(1)(a)(ii), such that CPR 67.3(1)(b) applies thus dictating that the Claimant's claim had to be made in the High Court.

27. Mr Jacob thereafter refers to CPR 67.3(2) in the following terms:

> "A claim for an order under Part III of the Act must be made –
>
> (a) by Part 8 claim form; or

(b) if the claim is made in existing proceedings, by application notice in accordance with Part 23."

28. He accepts that CPR 67.3(2)(b) would apply if the underlying circumstances fell within the definition of CPR 67.3(1)(a). However, Mr Jacob submits the underlying circumstances do not fall within the definition of CPR 67.3(1)(a) and accordingly CPR 67.3(1)(b) applies, placing a mandatory burden on the Claimant to issue his claim in the High Court.

29. Mr Jacob submits that section 64(3) of Solicitors Act 1974 is a right to assessment under that act, and therefore incapable of being a common law assessment of damages.

30. Mr Jacob further submits that there is no basis to argue that section 64 or section 70 are different when they refer to assessed or assessment. In neither case does the act refer to a common law assessment, but rather to a statutory right to detailed assessment.

31. Prior to making my decision, I had regard to the skeleton arguments of Miss Nash and Mr Jacob, Mr Jacob's supplementary skeleton argument and all supporting evidence filed by both parties.

Decision

32. This is a preliminary hearing in the Claimant's Part 8 claim for detailed assessment of the Defendant's bill dated 22 February 2019, pursuant to section 64(3) of the Solicitors Act 1974. There are concurrent Part 7 proceedings for recovery of the sums in the bill, commenced before the Part 8 proceedings were started.

33. The Defendant initially resisted the Claimant's Part 8 claim on the basis that they had delivered a final statute bill, as opposed to a gross sum bill, and that accordingly section 70 of the Solicitors Act 1974 applied, and additionally in such terms that it would give rise to an absolute bar to the Claimant's right to an assessment.

34. By the time of the hearing, the Defendant had accepted they had delivered only a gross sum bill. However, the Defendant in any event submits that section 64(3) of the Solicitors Act 1974 is bound by the time limits set out in section 70 of the act.

35. The Defendant's alternative position, if they are wrong about that, is that the Claimant ought to have brought their application for assessment within the existing Part 7 proceedings as part of an assessment of damages exercise. In those circumstances dismissal of the Part 8 claim is sought.

36. However, where the court is minded to order a detailed assessment of the bill then the Defendant seeks an order in terms that it is in any event treated as an assessment of damages hearing with the one-fifth rule disapplied.

37. The Defendant advances the argument that section 64 is not a self-contained provision permitting the assessment of costs in specified circumstances, but rather is instructive only as to the type of bill a solicitor serves, and thereafter dictated by section 70 as to the time limits for an assessment of costs.

38. Whilst it is right to observe that section 64 is titled "Form of bill of costs for contentious business", it is not right to say that section 64 deals only with the type of bill a solicitor may serve. That is the preserve of section 64(1) only, which explains that a solicitor's bill "may at the option of the solicitor be either a bill containing detailed items or a gross sum bill."

39. The Defendant in this case elected to deliver a gross sum bill and that is not in dispute.

40. Section 64(2) proceeds to set out to a client's right to "require" their solicitor to deliver "a bill containing detailed items" in lieu of the gross sum bill received. This will have the effect of rendering the gross sum bill of no longer having any effect. It also means the more detailed, replacement bill may in fact be greater than the gross sum bill previously delivered.

41. It is common ground that section 64(2) is not at play because the Claimant has not requested a bill containing detailed items. However, it is important to note the time limits under section 64(2) in that the Claimant is now statute barred from requiring the Defendant to deliver to him "a bill containing detailed items". Further, the time limits under section 64(2) cannot be varied by section 70.

42. Section 64(3) provides "Where an action is commenced on a gross sum bill, the court shall, if so requested by the party chargeable with the bill before the expiration of one month from the service on that party of the writ or other originating process, order that the bill be assessed.".

43. Thus section 64(3) deals with the specific circumstances at play here. The Defendant has commenced an action on a gross sum bill. Under the terms of section 64(3) the court has no discretion but to order that the gross sum bill in question be assessed where, as is the case in this matter, the request is made before the expiration of one month from the service of the originating process (in this case the Defendant's Part 7 claim).

44. Whilst I acknowledge that section 64(4) recognises that a gross sum bill may be assessed under section 64 "or otherwise", I see nothing in either section 64 or section 70 that would dictate that the time limits under section 70 are imposed on an application for assessment under section 64. Further, section 64(4) deals with the situation that arises once the hurdle of ordering assessment has been overcome. It begins "If a gross sum bill is assessed...", and thus is not relevant to the question of whether or not a gross sum bill may be assessed.

45. Section 70(1) of the Solicitors Act 1974 does not apply because more than one month has passed since the bill was delivered. Section 70(2) does not apply either because no application for assessment was made by the Defendant or the Claimant under the provisions of section 70.

46. Accordingly, the Defendant having elected to delay taking any action to recover their fees, and having at all times elected to deliver and rely on a gross sum bill only, the only time limit which applies is that under section 64(3) of the Solicitors Act 1974 within which the Claimant has brought their claim in time.

47. Having concluded that an assessment under section 64(3) of the Solicitors Act 1974 ought to be ordered, the question arises as to which court ought to conduct that assessment and on what terms?

48. There is no dispute that the Defendant has "commenced an action on a gross sum bill", or that the Claimant has requested (albeit that request is by way of a formal Part 8 claim) that the bill be assessed.

49. Section 64(3) does not specify whether a detailed assessment or an assessment of damages should be ordered. However, whilst the Claimant has argued that the time limits under section 70 do not apply to section 64, my decision in relation to the primary question is that section 70 generally does not apply to an application or request made under section 64(3), dealing as they do with different types of bills in specified circumstances.

50. Further, CPR 67.3 is instructive, dealing as it does with proceedings under Part III of the Solicitors Act 1974. The Claimant's claim does not fall within the requirements of CPR 67.3(1)(a), and accordingly the Claimant had no choice but to bring his claim in the High Court by operation of CPR 67.3(1)(b).

51. Further, CPR 67.3(2) conferred a choice on the Claimant to bring their claim under Part 8, being the alternative to bringing the claim in the existing Part 7 proceedings by making an application under CPR 23.

52. Paragraph 1(7) of the practice direction supplementing CPR 67 provides that the "Practice Direction applies to ...the following type of claims under Rule 67.3 and Part III of the Solicitors Act 1974", including "where an action is commenced on a gross sum bill, an application under section 64(3) of the Act for an order that the bill be assessed".

53. As such, paragraph 2 of the practice direction applies, which provides:

> "2.1 Where a claim to which this practice direction applies is made by Part 8 claim form in the High Court in London –
>
> (1) if the claim is of a type referred to in paragraphs 1(1) to (5), it must be issued in the Costs Office;
>
> (2) in any other case, the claim may be issued in the Costs Office.
>
> 2.2 A claim which is made by Part 8 claim form in a district registry or by Part 23 application notice in existing High Court proceedings may be referred to the Costs Office."

54. Accordingly, I consider the proper venue for the request to be the SCCO. I further conclude that the Claimant has exercised a discretionary right to pursue their claim under Part 8 as opposed to under Part 23 within the Part 7 proceedings (which in any event would have seen the assessment exercise transferred to be dealt with by a costs judge).

55. Having concluded the Claimant had a discretionary right to bring their section 64(3) claim under Part 8, I conclude that the assessment shall be a detailed assessment.

Further, having concluded I have the discretion to "order… otherwise" pursuant to section 70(9)(b) having taken into account the circumstances of this case, the one fifth rule shall not apply to the outcome of the assessment.

56. I have not addressed the questions set out in the Defendant's skeleton argument as to whether there is a binding agreement to pay the fixed sum of £51,000 plus VAT in respect of fees incurred up to 24 January 2017 because I consider that to be a matter for detailed assessment, nor have I addressed the issue of whether the court should order an interim payment on the basis that the Defendant has already received monies on account and in any event I did not record receiving oral submissions as to the amount I ought to order.

Further directions

57. A directions order will be circulated upon the handing down of this judgment, such order being consistent with Precedent L of the Schedule of Costs Precedents, with the costs of the preliminary issue hearing to be paid by the Defendant in any event, to be summarily assessed if not agreed.