



Neutral Citation Number: [2022] EWHC 3199 (KB)

Case No: QA-2022-000090

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2022

Before :

THE HON. MR JUSTICE BOURNE

MASTER BROWN

Between :

MR DEAN MENZIES

**Claimant/
Appellant**

- and -

OAKWOOD SOLICITORS LIMITED

**Defendant/
Respondent**

Gemma McGungle (instructed by **JG Solicitors**) for the **Appellant**
Craig Ralph (instructed by **Oakwood Solicitors Limited**) for the **Respondent**

Hearing dates: 23 November 2022

Approved Judgment

This judgment was handed down remotely at 10am on 14 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Hon. Mr Justice Bourne:

1. This is an appeal from a decision of Costs Judge Rowley on 11 April 2022, ruling that the Appellant’s application for detailed assessment of costs was time-barred by section 70(4) of the Solicitors Act 1974 because it was made more than one year after the relevant costs had been paid. The alleged payment occurred when the Appellant’s solicitor, who was holding monies received from the other party to a claim brought by the Appellant, calculated what sum was owed to him for his costs bill and then reimbursed the balance to the Appellant. The question is whether and when there was a payment within the meaning of section 70(4). Costs Judge Rowley granted permission to appeal, observing that the point may arise in many cases and that there is no modern authority which gives a clear answer to the question.
2. To hear this appeal, I sat with an Assessor, Costs Judge Brown, for whose assistance I am very grateful. The purpose of an Assessor is to provide expert assistance but the decision on the appeal is for me alone.
3. On 29 November 2015, the Appellant suffered serious injuries in a road traffic accident. The Respondent was instructed to act for him to pursue a claim for damages for personal injury against the other party (“the Defendant”). The Appellant and Respondent entered into a conditional fee agreement (“the CFA”) on 17 December 2015. Its provisions included the following:

“Paying us

If you win your claim, you pay our basic charges, our disbursements, and a success fee together with the premium for any insurance you take out. You are entitled to seek recovery of some of our basic charges and our disbursements from your opponent, but not the success fee or any insurance premium. You will pay the balance of our basic charges and our success fee out of your compensation. The success fee that you will pay is itself subject to a maximum limit, which is detailed in the accompanying “Conditional Fees – what you need to know” document which forms part of this agreement, but in addition we agree to limit the amount you will be liable to pay in respect of the balance of our basic charges and the success fee to a maximum of 25% of your damages as defined in the “Conditional Fees – what you need to know” document.

It may be that your opponent makes a formal offer to settle your claim which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer. If this happens, we will not add our success fee to the basic charges for the work done after we received notice of the offer or payment. You would also be liable for your opponents costs should this happen, but usually only up to the amount of any award.

If you receive provisional damages, we are entitled to payment of our basic charges, our disbursements and a success fee at that point. If you receive interim damages, we may require you to pay our disbursements at that point and a reasonable amount for our future disbursements, but will seek to recover these from your opponent at the conclusion of the claim.

If you lose you do not have to pay our charges at all, although you may have to pay any expenses or disbursements we have incurred on your behalf, although you can take out insurance against this risk. If you lose your opponent cannot seek to recover their costs from you unless a judge concludes that your claim was fundamentally dishonest.

The Success Fee

The success fee is set at 25% of basic charges. None of this percentage relates to postponement of payment of our fees and expenses. The total amount of the Success Fee cannot exceed 25% of your damages as explained within the “Conditional Fees – what you need to know” document. For further details in relation to the Success Fee, see the “Conditional Fees – what you need to know” document.”

4. The CFA also referred to and attached a document entitled “Conditional Fee Agreements: ‘What You Need to Know’” which was said to form part of the agreement. It reiterated the above terms and also provided:
 - “1.5 You agree to pay into a designated account any cheque received by you or by us from your opponent and made payable to you. Out of the money, you agree to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT. You take the rest.
 - 1.6 Whilst there is no maximum limit in relation to our Basic Charges, to give you certainty as to the maximum amount that you can be charged, we agree with you that, if you win, we will limit the total amount we will charge you for Basic Charges, Success Fee and Disbursements to a maximum of 25% of all the compensation you receive after deducting any fees and expenses recovered from your opponent. This does not include any insurance premium for any policy that you choose to take out which has to be paid in addition. The amount payable in respect of any Success Fee shall never exceed 25% of the amount of your damages as set out below.”
5. On 4 March 2019 the Appellant accepted an offer from the Defendant to settle the claim for the sum of £275,000 plus reasonable costs.
6. The chronology of the ensuing events is taken from the witness statement of Katie Bell, a solicitor employed by the Respondent.
7. On 18 March 2019 the Respondent received the balance of the Appellant’s damages totalling £210,004.85, net of £39,995.15 paid to the CRU and interim payments of £25,000.
8. The chronology at the start of Ms Bell’s statement says that £56,465.29 was retained by the Respondent, out of which it could be paid, while the Respondent also paid disbursements of £1,643.69 and the ATE insurance premium of £2,167.50. In the body of Ms Bell’s statement she says that the Respondent retained £58,340.29 to cover the potential shortfall in costs. I do not know the explanation for that figure. Meanwhile, a bill from the Respondent which is referred to as an Interim Statute Bill puts the total

retention at £58,632.79. That sum, less the ATE insurance premium of £2,167.50, yields the total of £56,465 referred to in Ms Bell's chronology.

9. Whichever is the right sum, this money initially remained in the Respondent's Client Account. On 25 March 2019 it seems that, from the retained sum, £25,000 was transferred to the Respondent's Office Account. It is not clear why that transfer took place or why it was in that sum, and it does not appear that the Appellant was told about the transfer.
10. On 18 April 2019 Mr Paul Shemwell of the Respondent wrote to the Appellant, enclosing an "Interim Statute Bill" showing the Respondent's total costs, an "Opponent Bill of Costs" showing the amounts potentially recoverable from the Defendant and a "Claimant Bill" showing non-recoverable costs of £2,797.20.
11. Ms Bell stated that that Claimant Bill included the ATE insurance premium of £2,167.20, and this can also be seen from the Interim Statute Bill. Mr Shemwell's letter gave a potentially confusing indication that the premium – which he said was £1,921.73 – was in addition to the Claimant Bill.
12. Mr Shemwell explained that the amount payable by the Defendant for costs was usually determined by negotiation. He said that if the Appellant did not indicate to the contrary within 7 days, he would assume that he was authorised to negotiate an agreement with the Defendant as to costs. There was no response from the Appellant.
13. Mr Shemwell's letter also stated that the Respondent would retain 25% of the damages on account pending conclusion of negotiations, and that it would pay the ATE insurance of £1,921.73 from the sum retained.
14. The Interim Statute Bill showed that the total costs were £83,711.20. That included a £10,000 court fee in respect of which the Appellant was entitled to fee remission, leaving a net total of £73,711.20.
15. The Respondent then negotiated a settlement of the costs recoverable from the Defendant. The sum recovered was only £38,000. That left a shortfall of £35,711.20. When that sum was deducted from Ms Bell's figure of £58,340.29 for the sum retained by the Respondent, a balance of £22,629.09 was owing to the Appellant. I note in passing that if the correct retention figure was £58,632.79, this was a slight under-payment.
16. The Respondent returned that sum to the Appellant on 11 July 2019. I have not been told whether or when the shortfall was transferred from the Respondent's Client Account to its Office Account.
17. On the same date Mr Shemwell sent the Appellant a further letter, enclosing a further bill headed Final Statute Bill. That document reproduces the figures from the Interim Statute Bill but also deducts the £10,000 court fee and shows a credit for the £38,000 received from the Defendant. It identifies the shortfall of £35,711.20 and then gives a figure for fees retained which, excluding the ATE premium, totals £58,340.29. Subtracting the shortfall from the sum retained, it arrives at the total of £22,629.09 to be returned to the Appellant.

18. The Appellant said in evidence that he was confused about the basis for this repayment and had thought the agreement was that his solicitors would take 25% of his compensation. He trusted them to have worked out the payment sum correctly. He also experienced health problems and was then preoccupied by family matters, and did not challenge the calculation at that time.
19. However, on 1 April 2021, more than 21 months later and now represented by new solicitors, he commenced proceedings against the Respondent seeking an assessment of the Final Statute Bill.
20. A preliminary issue of whether the claim was time barred was heard by Costs Judge Rowley on 20 January 2022. He ruled that the claim was barred by section 70(4) of the 1974 Act because it had been brought more than 12 months after payment of the bill.
21. Counsel for the Appellant had referred the Costs Judge to *Re Ingle* (1855) 25 L.J.Ch. 169 (to which I return below) for the proposition that payment from monies retained must occur by agreement and “on the settlement of accounts between [the client] and his solicitor.”
22. Counsel submitted that in the present case the Respondent had not proved an agreement for it to take payment by retaining a specific sum. However, the Costs Judge referred to the CFA, the surrounding correspondence and the Appellant’s witness evidence, which showed that the Appellant expected (incorrectly) to pay 25% of his compensation. He concluded:

“31. I do not need to consider whether the description of the success fee that can be taken is accurately described by the claimant. It is enough in this context to accept that the claimant was clear as to how much he thought his solicitors were entitled to charge him. In fact, the shortfall sum is considerably less than a quarter of the claimant’s compensation at the end of the case. In my judgment, the communications between the claimant and the defendant at the time of settlement of the claimant’s claim provided the agreement of the claimant for the payment of the defendant’s invoice up to a quarter of the claimant’s compensation.

32. Upon receipt of the invoice in July 2019, the claimant was fully entitled to challenge the fee actually charged by the defendant if he did not agree with the bill that was delivered. It appears that the defendant did nothing upon presentation of the invoice which would suggest that it was in line with his understanding of the agreement with the defendant.

33. At some point later, the claimant took advice from his new solicitors and, quite understandably given the invoice provided, sought to challenge its contents. As I have said earlier, neither the claimant nor his new solicitor have indicated when such advice was taken and the only date that is relevant is when proceedings were commenced under the Solicitors Act i.e. April 2021. That date is well outside the 12 months in which the claimant was entitled to challenge the bill that had been delivered and in my judgment the claimant’s claim is therefore statute barred by s70(4) Solicitors Act 1974.”

23. In short, the Costs Judge held that payment took place at the time of the settlement correspondence by way of a pre-authorised deduction from the money held by the Respondent.

24. Section 70 of the Solicitors Act 1974 provides:

“70 Assessment on application of party chargeable or solicitor

(1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.

(2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—

(a) that the bill be assessed; and

(b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.

(3) Where an application under subsection (2) is made by the party chargeable with the bill—

(a) after the expiration of 12 months from the delivery of the bill, or

(b) after a judgment has been obtained for the recovery of the costs covered by the bill, or

(c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill,

no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.

(4) The power to order assessment conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill.”

25. In my judgment the relevant principles of law are as follows:

i. Section 70 allows assessment of a bill of costs as of right if application is made within one month of delivery of the bill. Assessment may be ordered on such terms as the court thinks fit if the application is made after that time but within 12 months of delivery, before any judgment on the bill and within 12 months of any payment of it. If any of those events has passed, assessment may be ordered only in special circumstances. And, by subsection (4), there is a long-stop time limit of 12 months from payment of the bill after which assessment cannot be ordered.

ii. Retainer by a solicitor of his costs out of money in his hands belonging to the client can amount to a “payment” under the legislation, but only if there has been a settlement of account between the parties: *Re Foss, Bilborough & Co* [1912] 2

Ch 161 at 164 per Neville J, applying what was then section 41 of the Solicitors Act 1843.

- iii. That proposition is also supported by *Re Ingle* (1855) 21 Beav 275. Here a solicitor sought to argue that taxation was precluded by an agreement with the client that the solicitor could recover his costs from the proceeds of sale of some shares. In response, the client argued that there had been no payment, citing *In re Bignold* (845) 9 Beav 269. There, on somewhat analogous facts, Lord Langdale MR had referred to the need for settlement of account in terms which would be echoed in *Foss*, and drew a distinction between settlement of account and mere statement of account. In *Ingle*, Romilly MR said at 278-9:

“As to payment, there was none; the solicitor was to retain, out of money to be received by him, the amount of his bill. Payment must either be actual payment in money, or an agreement by the client, on the settlement of accounts between him and his solicitor, that the amount shall be retained.”

- iv. An example of how settlement of account may occur is seen in the decision of the Court of Appeal in *Harrison v Tew* [1989] QB 307 (unchallenged in the subsequent appeal to the House of Lords) where Dillon LJ, deciding that payment by retention did amount to payment for the purpose of section 70(4), said at 314-5:

“I have no doubt, however, that what is proved by Mr. Tew is that, when his firm received moneys into its client account on Mr. Harrison's behalf:

(i) Mr. Harrison and Mr. Tew sat down in Mr. Tew's office and prepared a handwritten statement written by Mr. Tew in Mr. Harrison's presence, setting out how the moneys received should be paid out. If moneys were to be paid to Mr. Tew's firm in respect of costs, this would be discussed, agreed, and written down with the other matters to be paid.

(ii) When the details had been agreed, and Mr. Harrison was still in Mr. Tew's office, the handwritten statement would be typed up and a copy of the typed version, together with Mr. Tew's firm's bill for any costs of the firm which Mr. Harrison had agreed were to be then paid, would be handed to Mr. Harrison in Mr. Tew's office, since Mr. Harrison had given express instructions that such statements and bills were to be handed to him physically, and not sent by post.

(iii) A few days later, or on occasion even later the same day, Mr. Tew would make the agreed payments out of his firm's clients' account on Mr. Harrison's behalf, including the necessary transfer to the firm's own account of any agreed costs of the firm as set out in the bill agreed and handed to Mr. Harrison.

On these facts I have no doubt that there was a settled account between Mr. Harrison and Mr. Tew on each occasion, and each of the bills was paid by Mr. Harrison in that Mr. Tew made the transfer of the appropriate sum to his firm's account with the prior agreement and authority of Mr. Harrison and

after the relevant bill of costs had been delivered to Mr. Harrison. The point taken in the respondent's notice therefore fails.”

- v. Because the section 70 time limits relate to an application for assessment of a bill of costs, there can be no “payment” for this purpose until a bill of costs is delivered: see *In re Street* (1870) L. R. 10 Eq. 165 per Lord Romilly MR at 167, as applied in *Re Foster* [1920] 3 KB 306.
 - vi. However, if payment is made before the bill is delivered, subsequent delivery of the bill can then cause time to run for the purposes of section 70. In *Re Thompson* [1894] 1 QB 462, a client agreed in writing that a sum paid by him to the solicitor could be taken as payment of an agreed sum for his costs, and the solicitor then delivered a written cash account showing the respective debit and credit sums. This was held to be a “payment” for the purposes of section 41 of the Act of 1843 because (per Pollock B at 465) it was “payment followed by the delivery of a bill of costs to which the payment could be referred”.
26. Ms McGungle, counsel for the Appellant, did not really take issue with any of those principles. She submitted that in the present case there was no sufficient informed agreement between the Appellant and the Respondent for payment to take place. There was in effect a general agreement that payment would come out of monies retained by the Respondent and that it would not exceed 25% of the Appellant’s damages, but no agreement to the specific payment of the Respondent’s final bill.
 27. Ms McGungle further pointed out that the explanation of how the Respondent’s recoverable costs, including its success fee, would be calculated was at best unclear, and that the Appellant’s responses to Mr Shemwell’s correspondence suggest that he did not properly understand it. She also observed that the transfer of funds to Office Account on 25 March 2019 did not comply with the Solicitors Accounts Rules S4.3, which require a “bill of costs, or other written notification of the costs incurred” to be given to the paying party before money is transferred from a client account.
 28. Mere acquiescence to a retainer of money by the solicitor, Ms McGungle submits, was not sufficient to amount to payment for the purposes of section 70. As in *Ingle*, there was no agreement by the Appellant on the settlement of accounts between him and his solicitor and no agreement to payment of “the amount” in the solicitor’s bill.
 29. For the Respondent, Mr Ralph of counsel queried the need for informed consent to the retention of a specific sum before a retention could amount to a payment. That requirement, he argued, would prevent section 70(4) from operating as the effective long-stop that it is intended to be. Instead, clients could prevent the time limit from accruing by taking issue with informed agreement or by refusing to engage with a request for agreement, effectively compelling solicitors to sue for their fees. *Ingle*, he suggested, is an old case based on a different statute which should be confined to its own facts.
 30. In this case, Mr Ralph pointed out that there was, first, an agreement in principle for a capped payment by deduction, and second, a foreshadowing of the final calculation in the Interim Statute Bill and correspondence on 18 April 2019, and third, a Final Statute Bill whose validity is not in question on this appeal and which, as in *Thompson*, could

make an earlier retention of monies amount to “payment” for time limit purposes. That final bill, he submits, was sufficient to effect the “settlement of account” which the cases have held to be necessary.

31. In my judgment, on the facts of this case, the retention of monies by the Respondent did not amount to a payment by the Appellant for the purpose of section 70(4) because there was no sufficient settlement of account between them. I reach that conclusion with due deference to the experience and expertise of Costs Judge Rowley, who gave a careful and detailed judgment, but it seems to me that the concept of “settlement of account” may not have been fully explored before him.
32. The problem is not that the retention of £35,711.20 pre-dated delivery of the Final Statute Bill. Applying *Re Thompson*, payment could be followed by delivery of a bill to which it could be referred. Mr Ralph suggested that in those circumstances it would be logical for the time limits to run from delivery of the bill rather than from the date on which the solicitors took payment. That would make practical sense although it sits uneasily with the wording of section 70. In my judgment the authorities do not clearly answer that question and it does not fall for decision in the present case.
33. Nor, in my judgment, was retention prevented from amounting to payment by a failure to comply with the Solicitors Accounts Rules. A breach of those rules might have regulatory or other consequences, but it seems to me that the failure to give the Appellant written notice of a transfer of money to Office Account was eventually remedied by no later than 11 July 2019.
34. What is missing, in my judgment, is a settlement of account rather than a mere statement of account.
35. The account was stated by the Respondent in the Final Statute Bill and the covering letter of 11 July 2019.
36. Payment by retention of money from damages had been authorised in principle by the CFA. The Respondent now needed to obtain the Appellant’s agreement to payment of the actual shortfall of £35,711.20 in order to demonstrate that the account was settled. If the Appellant had objected to that sum, settlement of account could not have been said to have occurred.
37. In that situation, I do not consider that the client could prevent payment from occurring simply by ignoring the Respondent’s bill and letter. It must in my judgment be possible for a solicitor to give a client a reasonable time in which to notify any dispute, after which agreement can be assumed if there is no reply.
38. The problem in this case is with the terms in which the solicitor expressed the position. In his letter of 11 July 2019 Mr Shemwell said:

“If you wish to challenge the deduction sought from your damages in relation to costs, you have 30 days from receipt of this letter to file your complaint. A copy of our Complaints Procedure is available upon request. You have the right to have your charges reviewed by the Court. This is called “assessment”. The procedure is set out in s.70, 71 and 72 of the Solicitors Act 1974.”

39. That paragraph did not clearly identify that the Appellant had a choice between (1) declining to agree the deduction, in which case the Respondent might apply for its own bill to be assessed, and (2) agreeing to the deduction, in which case the Appellant could still apply for assessment of the bill if he wished.
40. On the contrary, the letter introduced the separate topic of the Respondent's complaints procedure. It stated or at least implied that the Appellant could not challenge the deduction without resorting to that procedure, which was contained in an external document not in the Appellant's possession. The paragraph also appeared to elide that process with the option of assessment under the 1974 Act, not making clear that the two were separate.
41. On the facts of this case, I therefore conclude that the Respondent did not inform the Appellant with sufficient clarity that he could object to the deduction with a reasonable time, failing which it would be taken to be agreed subject to his statutory assessment rights.
42. In those circumstances I have concluded that payment was not effected by a settlement of account. The appeal will therefore be allowed.