Neutral Citation Number: [2022] EWHC 325 (QB)

Case No: E90SE017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY

The Combined Court Centre, Oxford Row, Leeds

Date: 16/02/2022

Before :

HIS HONOUR JUDGE GOSNELL
(sitting as a Judge of the High Court)

- -

Between :

RICHARD SLADE AND COMPANY PLC **Appellant**

- and –

ANDREW ERLAM **Respondent**

- -
- -

Mr Benjamin Williams QC (instructed by Richard Slade and Company) for the Appellant
Mr Robin Dunne (instructed by Checkmylegalfees.com) for the Respondent

Hearing dates: 20th January 2022

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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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HIS HONOUR JUDGE GOSNELL

His Honour Judge Gosnell :

1. Introduction

On 7th February 2018 the Respondent issued a Part 8 Claim against the Appellant seeking an order for assessment of a bill of costs representing the invoices rendered to him for legal services and in the alternative, if the court found that there was no bill capable of assessment, an order for delivery of such a bill. On 22nd November 2019 District Judge Batchelor concluded this process by finding that there was no bill capable of assessment and so she ordered the Appellant to prepare a final statute bill pursuant to s 68 Solicitors Act 1974. It is this decision which the Appellant seeks to appeal. On 20th January 2022 I heard the appeal and this is my reserved judgment in respect of it.

2. The factual background

The Respondent and three others brought a petition in the Election Court to challenge the election of Mr Lutfur Rahman as Mayor of Tower Hamlets. They were successful in the petition and awarded their costs, including an order for a payment on account of costs of £250,000. They instructed the Appellant solicitors to attempt to assess and enforce the costs order against Mr Rahman. A meeting took place between the Respondent and one of the other petitioners and Mr Slade of the Appellant company in which he gave an estimate of the likely costs involved in enforcing the costs order of £50,000 - £80,000. In the event, the attempts at enforcement became more complicated than anticipated with the Appellant company also having to deal with an application for a freezing injunction, charging orders, a Judicial Review, a costs assessment, Mr Rahman's bankruptcy and a challenge by his wife in respect of her beneficial interest in one of the properties. No revised estimate of costs was provided subsequently although the Appellant company did provide revised estimates for separate pieces of work thereafter.

3. Funding arrangements

The Respondent entered into a retainer with the Appellant dated 27th April 2015 the terms of which are in writing but the legal meaning of which is in dispute. Certain invoices were tendered to the Respondent during the period that this retainer applied. On 25th January 2016 the parties entered into a subsequent retainer on a Conditional Fee Agreement ("CFA") basis which was retrospective in scope from 27th June 2015. Again this document is in writing. There was no success fee involved and the trigger condition for payment was to the extent of recovery of funds from Mr Rahman. Further invoices were submitted during the currency of the CFA. The CFA included a provision that the client could terminate the retainer at any time whereupon the client would become liable for the Appellant's basic costs and disbursements. The Respondent did in fact terminate the retainer on 15th June 2016 triggering the liability to pay costs. The Respondent continued the litigation using new solicitors.

4. The history of these proceedings

Sadly, the history of these proceedings is not straightforward either, but I will only give a brief summary so far as it is germane to my decision. The Respondent issued Part 8 proceedings on 7th February 2018 seeking an assessment of the bill in terms of the various invoices which had been rendered to him. The assessment was listed before District Judge Bellamy who was a Regional Costs Judge. He found that the bill could not be assessed because it contained invoices which purported to be Interim Statute Bills but he found that they could not be treated as such because the charges for the Appellant's profit costs and disbursements had been billed separately on different invoices. The Appellant appealed this decision and in the meantime the Court of Appeal resolved this issue in *Richard Slade and Company v Boodia* [2018] EWCA Civ 2667 finding that there was nothing inherently wrong in billing costs and disbursements separately. As a result the appeal was compromised on the basis that the decision of District Judge Bellamy would be set aside and a new assessment ordered before a different District Judge.

5. The case was allocated to District Judge Batchelor who is also a Regional Costs Judge. She made the very sensible suggestion that the parties should attempt to compromise by reaching agreement on the quantum of the bill but they failed to accept her advice. She heard a Solicitor Advocate for the Appellant and a Costs Lawyer for the Respondent at the hearing below on 5th September 2019 and gave judgment at a separate hearing on 19th November 2019. An appeal was brought against this decision and permission to appeal was given by Mrs Justice Lambert on 14th October 2021 releasing the appeal to me to try. Regrettably, the progress of the appeal was substantially delayed at Sheffield County Court before it was eventually referred to this Registry in the summer of 2021.

6. The skeleton argument for permission to appeal and the Respondents skeleton opposing the same were both drafted by the advocates who appeared below. At the appeal before me Mr Williams QC appeared for the Appellant and Mr Dunne for the Respondent. Both of them chose to make submissions which bore no real relation to the skeleton arguments which had been served no doubt because they wanted to argue the case in a different way. Both of them complained that the other had sought to put arguments before the appeal court which had not been made below and I suspect these complaints may well have some force. I did not have the skeleton arguments which had been deployed before District Judge Batchelor, nor did I have a transcript of the hearing (other than the judgment) and so I was not able to properly resolve these disputes. I do not ask for, or intend to read those documents now. I did, however, suggest to both counsel that this was not a helpful way to conduct an appeal from my point of view.

7. **The work done by the Appellant and the bills rendered**

The Appellant conducted the following matters for the Respondent and his fellow clients. The abbreviations are those which appear on the invoices to distinguish the different strands of work:

(1) Lutfur Rahman Enforcement of Judgment (LUTRAH): this was the file on which the main work of enforcing the costs order was carried out, including the freezing injunction, the charging orders and the trial.

(2) Judicial Review (JUDREV): this was the file on which the work of resisting Mr Rahman's application for judicial review was carried out.

(3) Possession and Sale of 3 Grace Street (POSAND): this was the file on which the work of organising the sale of the one property over which the Petitioners obtained a final charging order was carried out.

(4) Costs Assessment (COSASS): this was the file on which the work of assisting with the preparation of the Petitioners' bill of costs was carried out. The Petitioners retained a costs lawyer, Shirley Dean, directly, on A's recommendation.

(5) Bankruptcy – Rahman (BANRAH): this was the file on which the work of preparing for and attending the creditors' meeting and interaction with the trustee in bankruptcy was carried out.

8. The Appellant raised eighteen bills totalling £236,607.83. The bills are linked to the individual matter files by the six letter file codes mentioned above:

Lutfur Rahman Enforcement of Judgment

(1) IN801701-FF (3.6.15). Concise bill for fees for April and May 2015. £6,000.

(2) IN801717 (3.6.15). Bill for disbursements. £280.

(3) IN801750-FF (7.7.15). Concise bill for fees for June 2015. £4,800.

(4) IN801760 (7.7.15). Bill for disbursements. £635.

(5) IN801908 (18.9.15). Bill for disbursements. £4,916.

(6) IN801922-FF (6.1015). Concise bill for fees for 29 June to 9 July 2015. £4,250.

(7) IN802027 (5.1215). Bill for disbursements. £626.08.

(8) 4836 (18.2.16). Detailed bill for fees for 10 July 2015 to 31 January 2016. £109,173.60.

(9) IN802187 (20.2.16). Bill for disbursements. £44,479.39.

(10) IN802322 (5.5.16). Bill for disbursements. £1,389.68.

(11) 4986 (23.6.16). Detailed bill for fees, 1 February to 26 May 2016. £10,212.96.

(12) IN802451 (5.7.16). Bill for disbursements. £3,780.

Judicial Review

(1) IN801809 (5.8.15). Bill for disbursements. £270.48.

(2) 4837 (18.2.16). Detailed bill for fees for 20 July 2015 to 1 February 2016. £12,488.64.

Costs Assessment

(1) 4838 (18.2.16). Detailed bill for fees for 3 August 2015 to 28 January 2016. £6,055.20.

Bankruptcy

(1) 4985 (23.6.16). Detailed bill for fees for 21 December 2015 to 25 May 2016. £15,655.20.

Possession and Sale of 3 Grace Street

(1) IN802159 (3.2.16). Bill for disbursements. £480.

(2) 4987 (23.6.16). Detailed bill for fees for 28 January to 1 June 2016. £11,115.60.

9. **The Judgment below**

Whilst the Judgment is expressed to be an extempore judgement it is clear that the Judge had prepared the judgment in advance as it is comprehensive, well-drafted and runs to some ten pages of single-spaced text. I will set out her reasoning in more detail in when analysing the Grounds of Appeal. A brief summary of her decision is as follows:

a) the first retainer did not permit the rendering of interim statute bills and so the first four bills rendered could not, for that reason, be interim statute bills;

b) the CFA did not permit the rendering of interim statute bills until R's termination on 15.6.16 and so the bills rendered in the course of the CFA could not, for that reason, be interim statute bills;

c) the bills rendered on the termination of the CFA were not interim statute bills;

d) the last of the bills rendered in each of the five series (each series being the bills rendered on each of the five separate

matter files) did not have the character or effect of a Chamberlain bill;

e) for these reasons, no bill had been rendered and so the correct course was for the Court to make an order for the delivery of a bill or bills now, which is what she did;

f) obiter, even if that was not correct, there were special circumstances which would have permitted an assessment out of time under s.70(3) of the Act of the unpaid bills

10. The importance of whether the invoices were interim statute bills or requests for payment on account (which cannot be assessed by a court) is relevant to the time limits which are set out in the Solicitors Act 1974 for a client to challenge a Solicitor's bill of costs. The effect of the District Judge's order is that a new comprehensive bill will have to be served which will then give the Respondent an untrammeled right to seek a detailed assessment of all the bills by the court. If the Judge had found that any of the bills were interim statute bills or final statute bills then the time for requesting assessment would have started running from the date of the delivery of that individual bill. Some understanding of the provisions of the Solicitors Act 1974 is therefore required.

11. **The relevant statutory provisions**

Solicitors Act 1974

"69.— Action to recover solicitor's costs.

(1) Subject to the provisions of this Act, 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 those costs is delivered in accordance with the requirements mentioned in subsection (2); but if there is probable cause for believing that the party chargeable with the costs—

(a) is about to quit England and Wales, to become bankrupt or to compound with his creditors, or

(b) is about to do any other act which would tend to prevent or delay the solicitor obtaining payment,

the High Court may, notwithstanding that one month has not expired from the delivery of the bill, order that the solicitor be at liberty to commence an action to recover his costs and may order that those costs be [assessed].

(2) The requirements referred to in subsection (1) are that the bill must be–

…

(2F) A bill which is delivered as mentioned in subsection (2C)(c) is to be treated as having been delivered on the first working day after the day on which it was sent (unless the contrary is proved)."

"70.— [Assessment] 1 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.

12. **The Law relating to appeals**

I should first record that as this is an appeal and the test is set out at CPR 52.21 as follows:

> ***"52.21***
>
> *(1) Every appeal will be limited to a review of the decision of the lower court unless—*
>
> *(a) a practice direction makes different provision for a particular category of appeal; or*
>
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
>
> *(2) Unless it orders otherwise, the appeal court will not receive—*
>
> *(a) oral evidence; or*
>
> *(b) evidence which was not before the lower court.*
>
> *(3) The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong; or*
>
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."*

13. Where the court below is exercising a discretion in making a decision the threshold test for interfering with that exercise by the appeal court is set out by Lord Woolf MR in *Phonographic Performance Ltd v AEI Redifusion Music Ltd* [1999] 1 WLR at 1523:

> "*Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale"*

Another way of putting this would be that the judge has " *exceeded the generous ambit within which a reasonable disagreement is possible*" Lord Fraser in G v G (Minors; custody appeal) [1985] 1 WLR 647 HL.

14. **The Grounds of Appeal**

The Grounds of Appeal are commendably brief and read as follows:

1) The District Judge was wrong to find that the Appellant's retainer agreement and CFA did not provide for the rendering of interim statute bills to the Claimant;

2) The District Judge was wrong to find that the Appellant's bills were not interim statute bills;

3) Alternatively, The District Judge was wrong to find that the Claimant's bills were not a Chamberlain bill or multiple Chamberlain bills;

4) The District Judge was wrong to find that in any event there were special circumstances which would have justified an assessment outside the periods at section 70 (3) of the Solicitors Act 1974.

15. The District Judge took the view that when the Respondent signed the CFA in January 2016 backdated to 27th June 2015 it terminated the original retainer. She therefore dealt with the two retainers separately when deciding whether the retainers permitted the Appellants to render interim statute bills. It makes logical sense to consider the original retainer first as it does not have the complication of being a CFA.

16. **Does the retainer dated 23rd April 2015 authorise the delivery of interim statute bills ?**

Both counsel appeared to accept that there are only three ways that a Solicitor can legally deliver an interim statute bill to a client: if it is authorised by the retainer; if such authority can be implied; or if there is a natural break in the proceedings. Any bill which is not an interim statute bill is merely a request for a payment on account which will not set time running under the Solicitors Act. All parties appear to have accepted throughout that no issue about implied provisions or natural breaks apply in the current case. The Appellant has contended throughout that the retainer authorises the delivery of interim statute bills and the Respondent has denied that it is effective in law to do so.

17. The relevant provision in the retainer letter is as follows:

> "*Bills are rendered monthly in arrears. Our bills are detailed bills and are final in respect of the period to which they relate, save that disbursements (costs and expenses which we incur on your behalf) are normally billed separately and later than the bill for our fees in respect of the same period."*

18. District Judge Batchelor decided that this provision was inadequate to authorise the Appellant to render interim statute bills to the Respondent. In addition to pointing out that the bills are rendered for a specific period and are final she found that the solicitor must explain to the client what rights were being negotiated and dispensed with by the agreement to permit interim statute bills. In particular she found that the client was entitled to an explanation what the consequential effect was of receiving an interim statute bill, namely that the client's time for challenging the bill runs from the date that the invoice is served, not the conclusion of the litigation. She found that the Claimant's terms and conditions which stated (inter alia) " *The client may be entitled to have*

Richard Slade and Co's charges reviewed by the court in accordance with the provisions set out in the Solicitors Act 1974" was insufficient to provide the necessary information. She also pointed out that if the client followed the Appellant's complaints procedure it was anticipated that this procedure would take 28 days to reach a resolution and the first time limit in the Solicitors Act bit after one month, perhaps only two or three days extra to challenge the bill. The District Judge reached this decision relying on submissions made by the costs lawyer for the Respondent and the authorities submitted in support of the same.

19. Those same authorities were relied on by Mr Dunne for the Respondent in the appeal. The main authority relied on by Mr Dunne is a decision of Mr Justice Fulford (as he then was) in *Adams v Al Malik* [2003] EWHC 3232 which although a reasoned decision, was a refusal of permission to appeal. This is somewhat surprising given that the *Practice Direction (Citation of Authorities) [2001]* paragraph 6.1 states that decisions on applications for permission to appeal shall not be cited unless it clearly indicates that it purports to establish a new principle or to extend the present law. I am not convinced that this judgment passes that stringent test, nevertheless I shall review it as requested.

20. Mr Dunne relies in particular on the following passages of the judgment:

> "*In particular the party must know what rights are being negotiated and dispensed with in the sense that the solicitor must make it plain to the client that the purpose of sending the bill at that time is that it is to be treated as a complete self-contained bill of costs to date (see the judgment of Roskill LJ in Davidsons v Jones-Fenleigh [1980] 124 SJ 204)".*

Mr Dunne submits that the rights being negotiated and dispensed with are the client's rights to seek an assessment of the bill at the conclusion of the litigation as opposed to what he was agreeing to accept , namely a time limited right to request an assessment pursuant to the provisions of the Solicitors Act.

21. The prejudice involved in receiving interim statute bills rather than requests for payments on accounts was recognised by Mr Justice Jacob in *Harrod's (Buenos Aires) Ltd v Another* [2014] 6 Costs LR 975:

> *"Much more significantly, it fails to take into account the modern practice of solicitors of sending bills on a regular basis which are complete bills, not interim bills. That causes difficulty when you have litigation which is ongoing. The client is called upon by these provisions to challenge an interim bill within one month, if he wants to do it as of right; and if he does not challenge it within twelve months then he has to show "special circumstances" to challenge his solicitors' bill. That puts him in an impossible position. Either he challenges his solicitors' bill – the very solicitor who is now acting for him – and continues using that solicitor at the same time; or he has to change solicitor, all in the middle of litigation when he is facing another enemy. It may well be that the court would regard ongoing litigation as, itself, "special circumstances".*

22. In *Masters v Charles Fussell and Co* (unreported) Costs Judge Rowley recognised the same problem:

> *"The Draconian nature of the time periods in limiting a client's ability to obtain as assessment of a solicitor's statute bill has led the courts to require solicitors to "make it plain" to their clients if they intend each bill to be a self-contained bill for a period and for which the time limit for challenge begins to run immediately"*

At Mr Dunne's suggestion Master Rowley relied on the passage from Mr Justice Fulford in *Adams v Al Malik* as authority for this finding.

23. Mr Williams submitted that the contra preferentem rule, which would suggest that in the case of any ambiguity, the issue should be resolved against the solicitors, does not apply in this case as the retainer is not ambiguous about the right to submit interim statute bills. In her judgment below District Judge Batchelor relied on the authority of *Dr Vlamaki v Sookias and Sookias* [2015] EWHC 3334 (QB) as authority for the proposition that although a bill may have the appearance of an interim statute bill the *"lay client needs to have a concept of what that means."*. Mr Williams submits that the Vlamaki case is an example of a case where there was ambiguity in the retainer letter and both the Master and the Judge on appeal found that the retainer did not say that each interim bill would be a final bill for the period it covered. There was no additional finding that the client needed to know what the legal effect of that was.

24. Mr Williams also submitted that *Adams v Ali Malik* was not a case about whether there was a contractual right to submit interim statute bills. That was a case about whether the bill had been submitted during a natural break in the proceedings. He also submits that this is not a reliable authority anyway because it is a decision purely on whether to give permission to appeal rather than a full hearing.

25. **Discussion and decision**

The Solicitors Act 1974 is legislation of some antiquity and does not appear to have been amended substantially over the years other than to replace "taxation" with "assessment". In particular it does not appear to have undergone the sort of transformation which is common when consumer rights are brought into the equation. When dealing with a client's right to seek an assessment of costs from his or her solicitors the Act seeks to strike a balance between allowing a reasonable time for a client to question the quantum of costs whilst protecting solicitors from having to deal with stale allegations of overcharging. Whilst the Act purports to regulate those rights it does not go so far as to oblige the solicitor to advise the client of these provisions in terms, nor to explain in plain English what the actual consequences of the application of those terms are for the client. I am personally sympathetic to the argument that it probably should.

26. Both counsel advised me that there are no regulations either connected with the Solicitors Act or Code of Conduct, arising from their obligations as a Solicitor, which would oblige solicitors to explain to clients that the effect of the service of an interim statute bill (properly authorised by the retainer) would be to start the clock running for a potential Solicitors Act assessment and that there are different time limits depending on the circumstances.

27. I am not convinced that the decision of Mr Justice Fulford (as he then was) in *Adams v Ali Malik* is a sufficiently firm foundation to base the proposition that a solicitor has an obligation to his client not only to advise a client of his rights under the Solicitors Act to ask for an assessment but also to explain what the legal consequences of the service of an interim statute bill would be. This was a decision handed down in 2003 which, as it was a decision on permission to appeal , is not a legally binding authority. It also does not appear to have attracted any notoriety until comparatively recently. The issue which the Judge was considering was whether it was arguable that the Master had misapplied the law as to natural breaks. The high water mark of the Appellant's case on this issue is the passage set out in paragraph 18 above which says the solicitor must make it plain to the client that the purpose of sending the bill at that time is that it is to be treated as a complete self- contained bill. The Judge does not go on to say that the solicitor should also tell the client that if a complete self-contained bill is delivered then this starts the clock running for the purposes of a Solicitors Act assessment.

28. I fully accept that Costs Judge Rowley in *Masters v Charlies Fussell* appears to suggest that a solicitor does bear this additional obligation but I am not convinced that Mr Justice Fulford's decision in 2003 is sufficient authority to support the proposition. I fully accept the practical difficulties for the client in applying for an assessment of his own solicitor's costs whilst still instructing him in the underlying litigation as identified in paragraph 19 above. Perhaps this would be a good reason for amending the legislation or for the Solicitors Regulation Authority to amend the Code of Conduct or introduce regulations to like effect. In the absence of such amendment however the situation remains that there is no statutory or regulatory obligation to advise a client what the legal consequences are likely to be for him or her when a solicitor serves an interim statute bill. It is not normal for provisions explaining the legal consequences of contractual terms to be implied into a contract unless there is some additional statutory or regulatory obligation to do so as a result of a perceived need for consumer protection. Whilst there may be such a need here it has not resulted in any changes to the Act or relevant regulatory reform. In the absence of such, I take the view that if there is a clear contractual term reserving the right of a solicitor to deliver interim statute bills then he is entitled to do so, without having to spell out what the legal consequences of such an act would be for the client.

29. In this case the provision reserving the right to deliver interim statute bills is set out in paragraph 15 above. The wording is clear , and in my judgment, contains no room for ambiguity. It makes it clear that they "*are detailed bills and are final in respect of the period to which they relate"* which is sufficient explanation to justify the delivery of an interim statute bill in my judgment.

30. **Does the CFA lite authorise the delivery of interim statute bills ?**

The District Judge found that the CFA could not authorise the delivery of interim statute bills. She concluded that an interim statute bill is a self-contained and final bill for the period it covers. It is payable on delivery and time for applying for assessment under the Solicitors Act starts to run. This is not consistent with the terms of a CFA which is likely to state that there is no obligation to pay any bill for costs until the pre-condition for payment produces the defined success necessary to crystallise an actual liability to pay. Another event might be the termination of the agreement. The Judge found that the trigger for payment was the termination of the agreement on 15th June 2016.

31. She relied on the authority of *Sprey v Rawlinson and Butler LLP* [2018] EWHC 354 QB which found that bills delivered during the currency of the of the CFA could not be interim statute bills. She therefore determined that any bills delivered before termination of the CFA were effectively requests for payment on account.

32. Mr Williams QC for the Appellant concedes that the CFA is not well-drafted. It is clearly taken from the Law Society draft agreement for personal injury claims. There is no success fee and the quantum of profit costs was limited to the total sums recovered from Mr Rahman. Disbursements however, had to be paid irrespective of success. Mr Williams sought to identify success during the proceedings by reference to the results of particular hearings but he was not able to tie up particular invoices with receipts of funds from Mr Rahman. He did, however, point out that three of the costs invoices rendered during this period were delivered after the termination of the agreement on 15th June 2016. He conceded that the bills sent in February 2016 were sent before there had been a recovery so that liability for payment had not then been triggered.

33. Mr Williams sought to argue that the CFA did not terminate the original retainer, but operated as a variation of it, as there were a number of terms in the original retainer which were not in any way varied by the CFA. It was fairly clear that he made that submission in response to a submission made by Mr Dunne to the effect that the CFA was a new agreement which contained no provisions authorising the Appellant to render interim statute bills. This does not seem to have been an issue before District Judge Batchelor as she concluded that the CFA effectively terminated the original retainer without giving any indication that this proposition had been disputed in the original hearing. It also did not feature in either party's skeleton arguments.

34. Whilst the Appellant's skeleton argument sought to distinguish *Sprey v Rawlinson and Butler LLP* from the current case this was not an argument pursued by Mr Williams at the appeal hearing. Mr Williams did however seek to argue that there was no reason why the seven bills for disbursements only delivered during the currency of the CFA could not be interim statute bills as liability for their payment arose immediately even though the condition for payment of profit costs had not yet arisen.

35. Mr Dunne relies on the fact that the CFA makes no mention at all of the right to deliver interim statute bills. He described the agreement as a "complete mess" in that an agreement drafted for personal injury claims had been clumsily amended to cover five different categories of work. He submitted that the CFA was intended as a new agreement and there was no variation of the original retainer.

36. **Discussion and decision**

The first issue is whether the CFA is a variation of the original retainer (which contained authority to render interim statute bills) or is intended to be a new agreement. This is an issue which was not argued below , nor was it argued in the Appellant's skeleton argument. The District Judge below appears to have assumed that it was a new agreement and it does not appear that she was challenged on that finding. There is some support for her finding in an email sent by Ms. Turner on 6th July 2015 where she states:

" The new agreement will be such that we will be paid only when we recover fees from Lutfur Rahman"

It would also be correct to record that it is not stated anywhere in the CFA that the intent of the agreement is to vary the original retainer. The main purpose of the change to a CFA was of course to reassure the Respondent and his colleagues that they would not have to pay the Appellant's costs until they had secured a recovery from Mr Rahman. This obviously needed a significant change in the contractual provisions regarding billing which is what the CFA was intended to achieve. In my view, the provisions of the original retainer under the heading " payment terms" are not consistent with the payment terms under the CFA. If it had been intended preserve any of those rights in the CFA then that document should have so stated in terms. The clause giving the Appellant the right to deliver interim statute bills in the original retainer was not carried forward into the CFA and in my view is inconsistent with the terms of the CFA. I am in agreement with the District Judge on this issue.

37. Whilst the argument that *Sprey v Rawlinson Butler* did not apply in this case was not pursued on the appeal I should deal with it briefly. I accept in that case there was an added complication that the solicitors hourly rate increased if the condition which triggered the success fee applied. Not surprisingly Mr Justice Nicklin found that an interim bill at the lower hourly rate could not be an interim statute bill because it was not a self-contained and final bill for that period. I would also question whether a bill rendered during the currency of a CFA can be an interim statute bill when there is no liability to actually pay it (and there may never be a liability if the condition is not met). It would be wholly wrong if interest were allowed to run and the clock for assessment allowed to start running before there was actually any liability to make any payment.

38. I find therefore that there was no written contract to enable an interim statute bill to be delivered after the CFA was brought into effect on 27th June 2015 and so all the bills delivered before it was terminated would be requests for payments on account in law.

39. **If interim statute bills were delivered was there bona fide compliance with the Solicitors Act ?**

The District Judge helpfully set out the law on this topic in paragraph 29 of her judgment which both counsel agreed was an accurate summary. In order to be valid a bill must be signed, delivered and "bona fide complying with the Act" . This is a reference to *Ralph Hulme Garry v Gwillim* [2003] 1 WLR 510 which made clear that the bill should contain sufficient narrative for the client to see what he is being charged for. There is a presumption in favour of the solicitor so the client bears the burden of showing that the bills are not bona fide in compliance with the Act. The client will not be able to do so where, quite apart from the content of the bills, he otherwise has sufficient knowledge about the solicitor's charges to take advice on whether to apply for assessment of the bill.

40. The District Judge was critical about the content of some of the bills in this case and found that in respect much of the billing the Respondent would not have had sufficient information to challenge the bills. She found that they lacked sufficient detail and clarity to enable the claimant to decide whether he should seek to have them assessed. She recorded that the Solicitor for the Appellant, Mr West, had conceded before her that the invoiced marked FF ("Fixed Fee") did leave the Respondent without sufficient information to be classed as interim statute bills and were accordingly payments on account.

41. Mr Williams seeks to challenge whether Mr West did indeed concede that the FF bills were to be treated as payments on account. He submitted that they were gross sum bills and the Respondent had the right to ask for a detailed bill within three months of receipt of it. His overall submission is that the bills were tolerably clear , and when coupled with the knowledge which the Respondent already had from emails and telephone calls it could not be successfully asserted that he did not have the knowledge to enable him to decide whether or not to take advice about challenging the bill . Although the Respondent had filed two witness statements he has not actually stated in terms that he did not have sufficient information to enable him to decide whether to challenge the bills.

42. Mr Williams also introduced a new point that it is difficult for the Respondent to argue that he does not have sufficient information to challenge the bills when he has in fact done exactly that by issuing a Part 8 claim form seeking an assessment of all the bills.

43. Mr Dunne correctly pointed out that this argument had not been raised below or in the Appellant's skeleton argument. He submits that the Respondent has always wanted the bills assessing by the court but his Part 8 claim form makes clear in the alternative that he seeks an assessment of the final bill or an order for delivery of a bill.

44. The Respondent submits that the issue about whether the bills contained sufficient information was determined by an experienced Regional Costs Judge and should be afforded considerable respect on appeal.

45. **Discussion and decision**

There are eighteen invoices in total which, in my view, fall into three categories:

a) Disbursement bills;

b) Fixed fee bills;

c) Detailed bills.

Of the eighteen bills, nine of them are for disbursements only.

46. I do not accept the general point made by Mr Williams that the Respondent must have had sufficient information to decide whether to take advice about applying for the bill to be assessed because that is what he in fact did. A fair review of the Respondent's part 8 claim form shows that he was seeking an assessment of those bills which were capable of assessment and an order for delivery of a bill in the alternative. Realistically, the Respondent wants all the bills to be assessed. Only when the Appellant argues that he is out of time under the Solicitors Act 1974 does the Respondent then need to argue that some or all of the bills are not interim statute bills so that time would not begin to run.

47. The disbursement bills are mainly for modest amounts with the description of the particular disbursement being clear and an invoice for the disbursement being attached to the bill. The exceptions are Invoice IN802187 for £44,479.39 and IN8022451 for £3,780. The latter invoice is in respect of work done by barrister Simon Johnson. His fee note is attached and contains a breakdown of the work done and individual charge for each item. The former invoice incorporates both the work done by Mr Johnson and

another barrister Francis Hoar. Both of their fee notes are attached with full particulars and the Respondent would know that Mr Johnson was brought into the case only to deal with the challenge of Mrs Rahman which ended with the trial before Master Marsh. In my view the disbursement bills , when combined with the invoices attached to them are clear and contain enough information to enable the Respondent to decide whether to challenge them.

48. The Fixed Fee bills are not in fact fixed bills but are capped bills and there is no evidence that the Respondent agreed the figures before the invoices were sent. I cannot successfully resolve the dispute between the parties about whether Mr West conceded below that they should be treated as payments on account. The burden is on the Appellant however to convince the appellate court that the District Judge was wrong and he cannot do so in the absence of a transcript of the hearings themselves.

49. Mr Williams sought to argue that they are gross sum bills but this was not contended below and so the District Judge never had chance to consider it. The only possible authority for them to be interim statute bills is the original retainer and which clearly states *"our bills are detailed bills and are final in respect of the period to which they relate"*. This means that the authority to render interim statute bills is specifically referenced to detailed bills. The FF bills can in no way be described as detailed bills and I find that they cannot be treated as bona fide bills because they were conceded as payments on account in the hearing and only detailed bills are authorised by the retainer agreement.

50. The remaining category is detailed bills of which there are six. All of them were delivered either during the currency of the CFA or after its termination. Given my earlier findings it does not therefore matter whether they pass the test set out in *Garry v Gwillim.* For the sake of completeness however I have looked at the bills individually. Of the six bills four of them encompass the whole work done for one of the five categories of work I set out earlier in this judgment. The other two both relate to the main file which was concerned with enforcement of the judgment. Each bill clearly states at the beginning which category of work it relates to and there are no bills which confuse the categories. Whilst there is no generic narrative at the beginning there is a detailed description of all time spent with a short description for each item saying what work was done. This is clearly taken from the Appellant's time billing system. With the information which the Respondent is likely to have possessed I find that he would have sufficient information to take a decision whether or not to take advice on whether to challenge the individual bills.

51. I recognise that District Judge Batchelor has reached a different conclusion but I can only assume that the bills were not well demarcated in the three lever arch files of documents she had. I had one paper bundle and all the bills were in the last divider in date order. I would also respectfully suggest that I perhaps had better quality submissions than she received below. The issue whether the bills bona fide complied with the Solicitors Act is a mixed finding of fact and law and not the exercise of a discretion. I find that the bills for disbursements and the detailed bills pass the test set out in Garry v Gwillim but the fixed fee bills do not for the reasons I have given.

52. **Was there a Chamberlain Bill or Bills?**

The editors of Cook on Costs describe Chamberlain bills in the following way :

> *" Alternatively , courts have been prepared to conclude that the disputed bills , particularly when the retainer has clearly ended and there would be no benefit in the solicitor having to serve a variation upon his previously rendered bill to comply with a statutory requirement. Such bills are sometimes called "Chamberlain" bills following the decision in Chamberlain v Boodle and King (a firm) [1982] 3 All ER 188"*

53. District Judge Batchelor found that there was no Chamberlain bill in this case. She said that the court must be satisfied that that the totality of the bills in the series can properly be viewed as final statute bill. She referred to the authority of ***Rahimian v Alan Jones LLP*** [2016] EWHC 818 (costs) where the senior costs judge held that a series of bills could not be a Chamberlain bill because it did not contain sufficient information to enable the client to seek advice as to its assessment. In the current case she found that the Respondent had said that he found the billing " *confusing and difficult to follow*". This was exacerbated by the fact that there were separate disbursement and costs invoices.

54. The District Judge also criticised the fact that the invoices did not identify which retainer they were delivered under. She found that it was impossible to ascertain which of the five categories of work the invoice actually related to. In relation to the Fixed Fee invoices she criticised the lack of narrative but acknowledged that the Appellant contended that the Respondent had enough information in any event from the many detailed emails he had received. The District Judge was also critical of the lack of narrative in the bills. She found that the invoices could not be treated as a series, which, when taken together , can be treated as a final statute bill which the court could assess or upon which the Respondent could have sought advice as to assessment.

55. Mr Williams for the Appellant relied on the same submissions he had made in relation to the previous ground of appeal to argue that the bills, together with the information already in the Respondents possession were together sufficient to show him what he was being charged for and to enable him to seek advice whether or not to challenge the bill. Whilst the District Judge criticised the fact that there are separate invoices for disbursements and costs this has already been confirmed by the Court of Appeal as no barrier to a finding of a statute bill ***Richard Slade v Boodia*** [2018] EWCA Civ 2667. It was submitted that it is obvious which retainer relates to which bill as the second retainer started on 27th June 2015. Whilst it is accepted that the detailed bills contain no narrative they do contain a description of each chargeable item of work with a one line summary of what was done. It was submitted that the fixed fee invoices should be considered with the accompanying emails which confirmed the work done.

56. Mr Dunne for the Respondent reminded the court that this was the decision of an experienced Regional Costs Judge. Mr Dunne submitted that there is no authority which confirms that a Chamberlain bill can deprive a client of his statutory rights to an assessment. So , if , as in this case , the part 8 claim form has not been issued until 12 months after the delivery of the last bill , the finding that the last bill is a Chamberlain bill will deny the client of the right to an assessment unless special circumstances are found. He submitted that there are five disparate strands of work and so it cannot be a series of bills which run after each other. He sought to support the District Judge's finding that the billing was confusing and difficult to follow and the lack of clarity meant that the client did not have enough information to have it assessed.

57. **Discussion and decision**

Whilst affording considerable respect to the experienced District Judge below I find that I disagree with her overall conclusions that the bills are confusing and lack clarity. Whilst I accept that there are separate bills for disbursements and costs this is clearly permissible following the Court of Appeal decision in *Richard Slade v Boodia* (above). Whilst I accept that some of the earlier invoices and the disbursement invoices do not make clear which retainer is involved it is clear that any invoices relating to work or expense after 27th June 2015 can only be related to the CFA. As far as I can see all of the invoices identify which of the five categories of work is involved by the use of the codes set out in paragraph seven of this judgment. In my view the lack of a detailed narrative on the bill is not fatal where the bill itself contains a detailed breakdown of all the work done from the Appellant's computerized time billing system. The author of Friston on Costs provides guidance on computer print outs as follows:

> *"A computer printout may, in appropriate circumstances, either be a narrative or supplement a narrative. In a case in which the narrative merely referred to "general matters" , Nourse LJ found that the printout provided all of the necessary detail"* [1]

58. In *Rahmanian v Allan James LLP* the Senior Costs Judge found that the series of bills could not be treated as a Chamberlain Bill because of the lack of detail on the bills. This is not surprising as the narrative to the bills were in the following form:

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

59. In this appeal nine of the eighteen bills are bills for disbursements only and many have the invoice for the individual disbursements attached, such as counsel's fee notes. Three of the rest are fixed fee costs bills which are said to have been accompanied by emails confirming the work that was done. Of the remaining six bills all are for costs and all contain extracts from computer print outs showing how the time was spent and work done. Of the five categories of work , in four categories there is only one costs bill which sets out all of the work done on that file. Only the original enforcement of judgment file has two detailed bills. Three of the six detailed bills were rendered after the termination of the second retainer by the Respondent and on any view, the Appellant would be entitled to render final bills at that point.

60. I do not think it matters that the work was split up into five categories, particularly when in four of the five categories there was only one costs bill, and in two of those four categories no linked disbursement bill. I also do not accept that a court cannot treat a series of bills as Chamberlain bills if the consequence of that decision is that the client needs to establish special circumstances in order to apply to the court for an assessment. The need to establish special circumstances has arisen as a consequence of the client failing to apply to the court within twelve months of deliver of the final bill rather than as a result of the court deciding that it is fair to treat a series of bills which were not themselves statute bills as one final statute bill rendered at the conclusion of the retainer.

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[1] *Eversheds (a firm) v Osman* [2000] 1 Costs LR 54

This is by no means unfair and still allows the client the fall back position of special circumstances.

61. For the reasons I have indicated I conclude that the District Judge should have found that the series of bills tendered taken together with the final bill should be treated as a Chamberlain bill dated on the same date as the final bill.

62. **Did special circumstances exist?**

The District Judge did not strictly need to consider this issue but, helpfully, she did so in case of a possible appeal. She correctly identified the appropriate test under s 70 (3) Solicitors Act 1974 as set out in *Falmouth House Freehold Company Ltd v Morgan Walker* [2010] EWHC 3092 Ch:

> *"Whether special circumstances exist is essentially a value judgment. It depends on comparing a particular case with a run-of -the-mill case in order to decide whether a detailed assessment in a particular case is justified, despite the restrictions contained in s 70(3)"*

63. The District Judge said that if the bill called for an unusual charge for a large amount or the bill "*called for an explanation*" because it was difficult to follow those might be special circumstances. She recorded how even the lawyers in the case before her were struggling to marry things up clearly and coherently.

64. She also relied on the fact that an original costs estimate was given of £50,000-£80,000 and that the eventual costs claimed were over £200,000. No further overall estimate was given although some separate estimates were given for the individual matters. An estimate is usually considered a "useful yardstick" by which the reasonableness of the costs claim can be measured. She found that large bills require an explanation and that this was a significant bill. There were five related matters and the complexity of the billing created confusion to the lay client which all justified a finding of special circumstances.

65. Mr Williams submitted that whilst the District Judge below and perhaps the advocates also found the bills confusing in fact they are not when analysed properly. Whilst an estimate for £50-80,000 had been given initially it was not anticipated that there would be need to defend a judicial review, defend a claim by Mr Rahman's wife or that the application for the freezing injunction would be contested. No updates of the estimate were given because the operation of the CFA meant that there was no concern about costs by the Respondent. It is not accepted that the bill was large, in the context of High Court litigation conducted in London with five different facets to it. Although an estimate was provided and exceeded, it was submitted that the increase in fees was more than justified by the unexpected amount of additional work.

66. Mr Dunne reminded the court that the District Judge was exercising a discretion and it is often said that an appellate court should be reluctant to interfere with a decision as to special circumstances[2]. He relied on the District Judge's findings that the bills were

[2] Re Cheeseman [1891] 2 Ch 289 CA

confusing and contrasted the original bills with a bill which had been recently drawn by the Appellant in detailed assessment proceedings. He also supported the conclusions that the bills were large and exceeded the estimate by some distance

67. **Discussion and decision**

There was some debate between counsel during the hearing about whether this issue is a review of the decision of the District Judge or a decision of the appeal court de novo, due to the fact that the District Judge made this decision obiter, in order to assist the parties and the appeal court. I am grateful to both counsel for agreeing that the correct approach is as follows:

> "*the court should proceed on the footing that, at least in this case – where the DJ's "fallback" finding resulted from full argument and was itself fully reasoned – the DJ's alternative determination will stand unless it fails the applicable appellate test*"

68. The decision whether to find that special circumstances do, or do not, exist is either the exercise of a discretion (Respondent) or an exercise in evaluation and judgment (Appellant). In either event, the result is the same and I refer back to my analysis of the law in relation to appeals at paragraph thirteen above.

69. Mr Williams says that the District Judge failed to take into account the switch to the CFA Lite when considering the issue of the exceeded estimate. I am not convinced that the existence of the CFA should have much relevance. Whilst it meant that the client would not have to pay as the case went along and would not have to pay at all if the claim failed he would still have costs to pay up to the extent of recovery and so it would have been helpful to him to be aware at various stages how the original estimate had changed in the light of developments as they occurred. I fully accept that on a detailed assessment the Appellant may well be able to convince a Judge that despite the costs having risen from £80,000 to £236,607.83 the District Judge was entitled to take into account at this stage the fact that the billed costs had substantially exceeded the estimate (although there was an explanation for this).

70. The District Judge described the bill as "significant" in amount and said that large bills require explanation. Mr Williams may be right in saying that a bill of £236,607.83 is not large in the context of London litigation but I take into account this is an experienced Regional Costs Judge who sits in Sheffield and she considered the bill significant enough in size to be a factor worthy of taking into account and placing in the balance. I cannot say she was wholly wrong to do so.

71. The District Judge took into account the confusing nature of the billing. Whilst I have found that it is not so confusing that it cannot amount to a valid Chamberlain bill I have to accept that there are elements of the individual bill that make them difficult to follow, for the example the absence of a narrative on the detailed bills and the limited narrative on the fixed fee bills. I cannot find that the District Judge should not have put this issue into the balance, even if it was limited to the Respondent's evidence that he found the billing "*confusing and difficult to follow*"

71. My experience of applying this test accords with the experience of most Costs Judges. It is not a threshold which is considered to be particularly onerous. The underlying reason for this can perhaps be explained by the knowledge of the court that it is very difficult for a client to complain about the size of bills submitted during the lifetime of the case whilst still retaining the same solicitor. Judges are also aware that a Solicitor is under no duty to advise the client in terms of the time limits in for applying to the court for an assessment. It might be said that the court's underlying sympathy may sometimes lie with the client, depending on the circumstances.

72. This was not the strongest case for special circumstances but District Judge Batchelor identified the correct legal test and set out those factors which had persuaded her to find that special circumstances existed. I suspect that a significant cohort of other Cost Judges might have reached the opposite conclusion but, in my view, there would still be a large number of other Cost Judges who would have reached the same view that she did. Her decision is well within "*the generous ambit within which a reasonable disagreement is possible"* and I find that she was not wrong to find that special circumstances existed.

73. **Disposal**

I will set out my decisions in summary form which should allow both counsel to discuss the matter and agree an order:

Ground One: The appeal is granted in relation to the original retainer but dismissed in relation to the CFA;

Ground Two: The appeal is granted in part limited to the disbursement and detailed bills only;

Ground Three: The appeal is granted in full

Ground Four: The appeal is dismissed.