Case 60
Menzies

v

Oakwood Solicitors Ltd

[2023] Costs LR 1083

Neutral Citation Number: [2023] EWCA Civ 844
Court of Appeal (Civil Division)
14 July 2023

Before:
Sir Geoffrey Vos (Master of the Rolls), Lewison LJ and Simler LJ

Keywords:
Solicitors Act 1974

Headnote

In proceedings under the Solicitors Act 1974 for detailed assessment of the bill of the defendant solicitors, the court below (see [2022] Costs LR 1793) in allowing an appeal from the decision of Master Rowley, had been wrong to hold that the claimant's application was not out of time and thus statute barred under s 70(4) because payment had been made over one year earlier. The solicitors had acted for the claimant in a personal injury action and recovered damages of £275,000 on his behalf with costs. Those costs had been agreed at £38,000 leaving a shortfall of £58,632.77 owing to a success fee claimed by the solicitors capped at 25% of basic charges and an after-the-event insurance premium. That sum had been held back from the damages which had been paid to the claimant, and used to discharge two bills by deduction. The client had been told in a conditional fee agreement and its accompanying documents that the

From Costs Law Reports Online 2023/3, published by Class Legal
www.classlegal.com

solicitors were specifically authorised to recoup their fees out of the client's compensation. Subsequently, 21 months later, the claimant, having instructed new solicitors, had issued the proceedings under the Act seeking a detailed assessment of the charges. The Master had dismissed the application as being out of time under s 70(4), but the judge on appeal had held that money belonging to a client could be retained by a solicitor and amount to payment, but only if there had been a settlement of account between the parties, which had not happened.

Held by the Court of Appeal. The client had submitted, in effect, that solicitors must obtain their clients' express consent to the precise amount of the bill they sought to deduct before that deduction would amount to "payment" so as to start time running for an assessment application under s 70. However, none of the 1974 Act nor the authorities provided any warrant for a requirement that there must be a "settlement of account" in addition to a prior agreement to payment of the fees shown in a statutory bill. Instead, "payment" in s 70 was to be construed as including the deduction of fees payable under a statutory bill with the knowledge and consent of the paying client. Whilst it would not be payment if the solicitors simply helped themselves to the money without either the client's knowledge or approval, that would not be the case where there had been a transfer of money (or its equivalent) in satisfaction of a bill with the knowledge and consent of the payer. The requirement of consent did not require that it be given after the delivery of the bill, if the client had already validly authorised the solicitor to recoup his fees by deduction from funds in his hands. What the client needed consent to, in order for payment to take place, was "the transfer of money", not necessarily the precise amount to be transferred. Since the client had authorised the solicitor to recoup fees by way of deduction, payment of the bill had taken place when, after delivery of the bill, the solicitors had made the deduction. It followed that as payment had taken place more than one year before the bill had been

challenged, the court's power of assessment was barred by s 70(4).

Cases Cited

Belsner v *Cam Legal Services Ltd and Another* [2022] Costs LR 1569; [2022] EWCA Civ 1387; [2023] 1 WLR 1043
Re Bignold (1845) 9 Beav 269
Forsinard Estates Ltd v *Dykes* [1971] 1 WLR 232
Re Foss, Bilbrough, Plaskitt & Foss [1912] 2 Ch 161
Gough v *Chivers & Jordan* (21 June 1996), [1996] Lexis Citation 1048
Ex parte Hemming (1856) 28 LT (OS) 144
Re Ingle (1855) 21 Beav 275
Re Jackson [1915] 1 KB 371
Karatysz v *SGI Legal LLP* [2022] Costs LR 1643; [2022] EWCA Civ 1388; [2023] 1 WLR 1071
Richard Slade and Company plc v *Erlam* [2022] Costs LR 489; [2022] EWHC 325 (QB)
Re Sutton & Elliott (1883) 11 QBD 377
Re West, King & Adams ex parte Clough [1892] 2 QB 102

Judgment

Sir Geoffrey Vos, Master of the Rolls, Lord Justice Lewison, and Lady Justice Simler:

Introduction

1. Section 70 (s 70) of the Solicitors Act 1974 (the 1974 Act) entitles a client to apply to the court for an assessment of a solicitor's bill. But s 70(4) provides that the power to order assessment is not "exercisable on an application made by the party chargeable with the bill after the expiration of twelve months from the payment of the bill". The question raised on this appeal is what amounts to payment of the bill.

2. That question arises in the context of a conditional fee agreement

agreed in writing on 17 December 2015 (the CFA) between the client and the solicitors some years before settlement of the client's claim. The CFA included terms by which the client agreed in advance to the deduction of the solicitors' fees. When the claim was settled in 2019, the solicitors deducted the fees shown in their final statutory bill from the settlement monies they held in their client account, before sending the balance to the client. The solicitors contend that that deduction constituted "payment" for the purposes of the provisions in s 70 restricting the time within which there can be a court assessment of their bill. Accordingly, they say that the client was barred by s 70(4), when he started proceedings in 2021, from seeking an assessment of the solicitors' bill.

3. On the other hand, Mr Justice Bourne (the judge) on the first appeal held, and the client submits in this court, that "payment" of the solicitors' costs for the purposes of s 70(4) can only take place when there has been "a settlement of account between the parties". On the facts of this case, there was, the judge held, no "settlement of account" between the client and the solicitors, so that it was open to the client to seek an assessment notwithstanding the delay between the deduction of the costs and the commencement of these proceedings. The client submits, in effect, that solicitors must get their clients' express consent to the precise amount of the bill they seek to deduct before that deduction will amount to "payment" so as to start time running for an assessment application under s 70.

4. We have decided that none of the 1974 Act nor the authorities provide any warrant for a requirement that there must be a "settlement of account" in addition to a prior agreement to payment of the fees shown in a statutory bill. Instead, "payment" in s 70 is to be construed as including the deduction of fees payable under a statutory bill with the knowledge and consent of the paying client.

5. This is another case, following the recent decisions of this court in *Belsner* v *Cam Legal Services Ltd* [2022] EWCA Civ 1387; [2023] 1 WLR 1043 (*Belsner*) and *Karatysz* v *SGI Legal LLP* [2022] EWCA Civ 1388; [2023] 1 WLR 1071 (*Karatysz*), which, in our view, highlights the inadequacy of the 1974 Act for the purposes of regulating the relationship between solicitors and clients in relation to the costs of modern personal injury disputes. The 1974 Act restricts the time during which clients can seek court assessments of their solicitors' bills. There are, of course, regulatory requirements outside

the 1974 Act, but this case highlights (as did *Belsner* and *Karatysz*) that it is for consideration whether there should be further and more up-to-date statutory safeguards to protect clients in relation to the charging and payment of solicitors' fees.

6. In this judgment, we will now deal with the essential factual background, the relevant statutory provisions, the decisions of the costs judge and the judge, other requirements in relation to statutory bills, the relevant authorities and a discussion of our reasoning.

The Essential Factual Background

7. On 29 November 2015, the client suffered serious injuries in a road traffic accident. He instructed the solicitors (Michael Lewin Solicitors Ltd, which later changed their name to Oakwood Solicitors Ltd) to act for him to pursue a claim for damages for personal injury against the other party (the defendant).

8. The CFA between the client and the solicitors 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 out 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 opponent's 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." (Emphasis added.)

9. The "Conditional Fees – what you need to know document", which formed part of the contract, stated:

"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." (Emphasis added.)

10. [15.5] of that document recorded that, before signing the CFA, the solicitors had explained the client's right to an assessment of the costs. [17.1] repeated the point made in [1.5] of the solicitors' terms of business referring to their complaints procedure; and went on to say that there might also be a right to object to the bill by applying to the court for assessment of the bill under Part III of the 1974 Act.

11. On 1 March 2019, the solicitors put to the client an offer made by the defendant to settle the claim for a global sum of £275,000. The solicitors' advice was that he should continue with the claim. But their letter said:

> "If you accept the global offer £275,000 the case will settle now. Our 25% deduction fee with apply and [we] will have to work out the CRU Benefit deductions alone with any subrogated costs payable, so that you are clear on what your final 'in hand' settlement figure will be."

12. The client replied by email on the same day:

> "I will accept their offer of £275,000 subject to your costs being deducted, can those costs be retrieved from the defendant is that correct?"

13. In answer to that query, the solicitors replied:

> "Turning to the specific figures we take 25% from the global amount awarded on all injury cases (as do other solicitor firms) – this is not recoverable back from the defendant."

14. On 4 March 2019, the client instructed the solicitors to accept the offer. On 18 March 2019, the solicitors received the balance of the client's damages totalling £210,004.85, net of £39,995.15 paid to the Compensation Recovery Unit (the CRU) and interim payments of £25,000. On 18 April 2019, Mr Paul Shemwell of the solicitors wrote to the client, enclosing an "Interim Statute Bill" (better called an interim statutory bill) showing their 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. In his letter, he said that the costs recoverable from the defendant would be negotiated. He continued:

> "While this negotiation process is ongoing, we will retain 25% of your damages on account pending conclusion of the negotiations with the

> defendant. From this amount, and as previously advised, we will pay the ATE [after the event] insurance in the sum of £1,921.73 and allocated the remainder as an interim payment towards out costs. …
>
> I have also included an Interim Statute Bill to show the current costs owed by you. A Final Statute Bill will be sent at the conclusion of [your] claim. The current interim payment sought from production of the Interim Statute Bill is 25% of your damages.
>
> Unless we hear from you to the contrary within 7 days, we will assume that you have no objection with us dealing with this aspect of your claim without taking further instructions from you."

15. The letter of 18 April 2019 was accompanied by an interim statutory bill. The client did not reply, so the bill was served on the defendant. Recoverable costs were ultimately agreed with the defendant at £38,000 in June 2019.

16. The solicitors sent the client a "Final Statute Bill" (better called a final statutory bill) on 11 July 2019. The accompanying letter said:

> "As previously agreed and for the sake of clarity, any payment required by you has been capped at the maximum contribution of 25% of your total amount of damages. The ATE amount is taken in addition to this sum and any physiotherapy charges."

The letter went on to give other figures. But the essential point that was being made was that the sum claimed (£35,711.20) was less than 25% of the damages. The final statutory bill and the accompanying letter are not easy to understand. Costs Judge Rowley, who has vast experience of these matters, described the letter and the accompanying bill as "amongst the most impenetrable documentation that I have seen". The letter went on to say:

> "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 [ss] 70, 71 and 72 of the [1974 Act].
>
> If you have any questions or queries, please feel free to contact me. Otherwise [we] confirm that [the solicitors'] instructions are now at an end and we shall arrange to close the file."

From Costs Law Reports Online 2023/3, published by Class Legal
www.classlegal.com

17. The rubric at the end of the bill itself stated that "unless otherwise stated in the covering letter, the total charge has been deducted from your damages, as agreed. It then repeated the information about the complaints process and assessment by the court. In accordance with the calculations in the bill, a balance of £22,629.09 was paid out to the client on 11 July 2019. The client took no further action at the time. In his evidence, he explained his state of mind at the time:

> "I was confused as to why this additional payment [had] been made to me. I was told at the start of my claim that the agreement with [the solicitors] meant that they could take 25% of my compensation. My understanding of this agreement was confirmed at the end of the claim by Paul [Shemwell] in an email when my damages were agreed."

The client said that he did not question the bill at the time that he had just placed his trust in the solicitors "that they had worked out the payments that were due to be paid to me appropriately". The client ultimately challenged the bill on 1 April 2021, nearly two years later.

The Relevant Statutory Provisions

18. Section 69(1) of the 1974 Act provides:

> "(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) …"

19. Section 69(2) requires the bill to be signed in accordance with s 69(2A) and delivered in accordance with s 69(2C). A compliant bill must be reasonably complete and that it must contain a sufficient narrative of the work for which the fee is being charged. In *Karatysz*, Sir Geoffrey Vos MR said at [46]:

> "Properly drawn bills ought in future to state the agreed charges and/or the amounts that the solicitors are intending by the bill to charge, together with their disbursements. They should make clear what parts of those charges are claimed by way of base costs, success fee (if any), and disbursements. The bill ought also to state clearly (i) what sums have been paid, by whom, when and in what way (i.e. by direct payment or by deduction), (ii) what sum the solicitor claims to be outstanding, and (iii) what sum the solicitor is demanding that the client (or a third party) is required to pay."

20. Delivery of a compliant bill will therefore inform the client of how much the solicitor is charging, and what they are charging for, so that the client knows their asserted liability.

21. Section 70 of the Solicitors Act 1974 relevantly provides:

"(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."

22. It was common ground that the structure of s 70 is such that the client has a series of rights to an assessment, ranging from the absolute

right under s 70(1), a qualified right under s 70(2), and a right exercisable only in special circumstances under s 70(3), to no right if the conditions in s 70(4) are satisfied. Accordingly, if the bill was paid (within the meaning of s 70(4)) before 1 April 2020 (i.e. one year before these proceedings were issued), then the court's power to assess the bill was precluded by s 70(4). So, the question before this court is whether the bill was paid before that date.

The Decisions of Costs Judge Rowley and the Judge on the First Appeal

23. Costs Judge Rowley held that the application for an assessment was barred by s 70(4). His essential reason was that the communications between the client and the solicitors at the time of settlement provided the client's agreement to the payment of the solicitors' bills in a sum up to 25% of the compensation received from the defendant. The costs judge also decided provisionally, in case he was wrong, that there were exceptional circumstances to allow an assessment under s 70(3).

24. The client appealed against that decision and the judge, sitting with Master Brown as an assessor, allowed the appeal. Having considered a number of authorities, he set out the principles of law that he derived from them. The relevant one for present purposes was as follows at [25(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 …"

Applying that principle, he said at [34] that what was missing here was "a settlement of account rather than a mere statement of account". He accepted that a client could not prevent payment from occurring simply by ignoring the solicitor's bill. He considered that it would be possible for a solicitor to give the client a reasonable time in which to notify any dispute, after which agreement could be assumed if there were no reply. But he held that the solicitors' letter of 11 July 2019 was not clear enough for that purpose, because it did not clearly identify that the client had a choice between declining to agree the deduction or agreeing to the deduction. He concluded at [41]:

> "On the facts of this case, I therefore conclude that [the solicitors] did not inform [the client] with sufficient clarity that he could object to the

> deduction with[in] a reasonable time, failing which it would be taken to be agreed subject to his statutory assessment rights."

Other Requirements in Relation to Statutory Bills

25. The right to an assessment under s 70 is to an assessment of a solicitor's "bill".

It was common ground that the reference to a "bill" is to a bill that complies with the requirements of s 69 of the 1974 Act. It was also common ground that the bill in this case was a compliant bill. We should mention at this point that it is not a statutory requirement that a bill should inform the client of their right to an assessment. In *Richard Slade and Company plc* v *Erlam* [2022] EWHC 325 (QB); [2022] Costs LR 489, HHJ Gosnell, sitting as a judge of the High Court, said:

> "25. … 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 [1974 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 [1974 Act] assessment and that there are different time limits depending on the circumstances."

26. Ms Gemma McGungle, counsel for the client, referred us to a number of paragraphs in the Solicitors' Regulation Authority Code of Conduct. But none of them deal specifically with the form of the bill. The only reference to explaining the client's right to complain about charges applies to the time at which the contract of retainer is made. Like HHJ Gosnell, and as we have already mentioned at [5] above, we consider that the law as it currently stands may fall short of adequate consumer protection.

27. Rule 4.3 of the Solicitors' Accounts Rules provides as follows:

> "Where you are holding client money and some or all of that money will be used to pay your costs:
>
> (a) you must give a bill of costs, or other written notification of the costs incurred, to the client or the paying party;
>
> (b) this must be done before you transfer any client money from a client account to make the payment; and
>
> (c) any such payment must be for the specific sum identified in the bill of costs, or other written notification of the costs incurred, and covered by the amount held for the particular client or third party."

In the present case, these requirements were complied with.

The Relevant Authorities

28. The right to an assessment of costs applies both to contentious and to non-contentious business. The meaning of "payment of the bill" must be the same for both types of business. It is important, therefore, not to set too much store by considerations that apply only to contentious business, let alone those which are unique to CFAs.

29. It is well-settled, and not disputed, that payment may, in certain circumstances, be made to solicitors where they retain monies out of a fund received on their client's behalf. It will not be payment if the solicitors simply help themselves to the money without either the client's knowledge or approval. Something more is required.

30. We were shown a number of early cases in which the courts discussed the circumstances in which solicitors were entitled to take their fee from a fund received on a client's behalf. In looking at those cases it is necessary to distinguish between cases in which the contract of retainer entitled the solicitor to recoup fees from such a fund and cases where there was no such prior contractual agreement.

31. In *Re Bignold* (1845) 9 Beav 269 (*Bignold*) a mortgagee's solicitor retained the amount of his bill out of the proceeds of sale of mortgaged property. The mortgagor's challenge to the bill asserted that he had never authorised any retention of the costs. It was in that context that Lord Langdale MR said in argument:

> "I have never, hitherto, considered that the mere retainer by a solicitor, out of monies in hand, of the amount of the bill, amounted to a payment, unless there has been settlement of the account."

32. Because there was no authorisation of the deduction, all that the solicitor had to rely on in that case was the bare statement of his bill. Lord Langdale's phrase "settlement of the account" has been picked up in subsequent cases, but without any real clarity about what it meant. It is not, of course, a phrase that appears in the statute itself.

33. *Re Ingle* (1855) 21 Beav 275 was a case where the solicitor relied on a written retainer, but Sir John Romilly MR held, in effect, that it was unenforceable as the client was illiterate, and did not understand it. For practical purposes, therefore, that was also a case in which there was no contractual retainer. Having decided that the agreement was not enforceable, Sir John went on to say (in an observation that was not necessary for his decision):

> "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."

Again, the use of the phrase "on settlement of the accounts" lacks clarity.

34. *Ex parte Hemming* (1856) 28 LT (OS) 144 (*Hemming*) was another case of mortgages and sales of estates. Again, the report does not reveal that there was any written contract of retainer between solicitor and client. Payments had been made by the client on account, and an account current delivered to him in December 1855, when the solicitors deducted their fees from the amount in hand and paid the client the balance. The client demanded a fuller bill which was delivered to him in August 1856. That bill showed fees amounting to more than the amount of the deduction. The question was whether the client was entitled to have the bill assessed (or, as it was then called, taxed) without showing special circumstances. The Court of Common Bench held that he was not. Cockburn CJ said:

> "It seems to me that what took place amounted to payment, unless there has been some gross overcharge, which would lead to a fair inference of fraud and overreaching. It appears that they had money in their hands raised by mortgage, when in 1855 they came to a final settlement, in which these bills were included. Mr Hemming submitted to those charges so made, acknowledged the account, and kept the balance in

> liquidation of the account. It has been ingeniously put that this does not amount to a payment; but it is the ordinary case of a man accepting a balance in liquidation of an account, and, I think, therefore, that these bills are paid and finally settled."

Williams J agreed. Crowder J said:

> "I think … that this is a payment of the claim, costs and charges which are made within the ordinary rule of a bill rendered and balance accepted, which amounts to a payment."

Willes J said:

> "There is nothing to prevent a man, *sui juris*, settling his attorney's account without taxing it; he may pay if he like; and if that is not to be conclusive in the case of an attorney, just as in that of a grocer or butcher, then we should have a man, after a bill had been delivered, coming here with the numerous objections which may be raised, to upset that settlement."

35. *Re Sutton & Elliott* (1883) 11 QBD 377 was a decision of this court. Again there was no written contract of retainer. During 1877 the solicitors had sent three unsigned bills of costs to the client. The solicitors deducted the amount of their fees from monies which they had in hand on the client's behalf. They rendered a further four itemised (but unsigned) bills in November 1881 together with a cash account. Sir Baliol Brett MR distinguished between the first set of bills and the second. As regards the first set of bills he held that they could be taxed, because they were neither signed nor paid. But as regards the second set, he held that taxation was not available. He said:

> "As regards the last four bills, a debtor and creditor account was handed to the client, or rather to Mr Hill, his solicitor, which is more important, and in such account, after taking into the account these four bills, a balance was shewn in favour of the client, and the amount of that balance was paid to such solicitor, who accepted the balance as correct, and took the money for it, so there was that which was equivalent to payment of these bills, and more than twelve months elapsed after such payment before application was made for delivery of a bill, and the only question now is whether that has prevented an order being made for the delivery of these last four bills, and in my opinion it has."

The Court of Appeal, therefore, held in that case that acceptance of the

balance shown to be due back to the client after deduction of fees billed was payment.

36. In *Re West, King & Adams ex parte Clough* [1892] 2 QB 102, the solicitor and client entered into an oral agreement, which was unenforceable because it was not in writing. The solicitors deducted the orally agreed fee from money in hand. Since the agreement was unenforceable, that, too, was a case in which there was no valid contract of retainer. On the question whether the solicitors were entitled to make the deduction, Cave J, giving the judgment of the Divisional Court, referred to Lord Langdale's observation in *Bignold* and said:

> "we have been able to find no case in which mere retainer has been treated as payment. It is true there are cases in which retainer by the solicitor has been treated as payment, even when no proper bill has been delivered …; but those are cases in which there was a valid agreement, which dispensed with delivery of a bill, accompanied by a settlement of account between the solicitor and the client. … But we can find, as we have said, no case in which mere retainer, apart from any settlement of accounts, has been treated as payment.
>
> In this case we find that there was no settlement of accounts, but only a mere retainer by the solicitors, and we are of opinion that that is not in any sense payment."

It is clear that the court was using the phrase "mere retainer" in the sense of a deduction from funds in hand which had not been contractually authorised. Moreover, it was a case in which no bill compliant with statute had been delivered.

37. *Re Foss, Bilbrough, Plaskitt & Foss* [1912] 2 Ch 161 was another case of no written contract of retainer. Neville J said:

> "In my opinion where clients have advanced moneys on account of costs prior to the delivery of a bill and the solicitors subsequently deliver a bill and appropriate the money of the clients in their hands in payment, this does not amount to payment of the bill within s 41 of the [Solicitors Act 1843], at all events where there has been no settlement of account."

That, too, therefore, was a case in which there had been no contract authorising the solicitors to make the deduction.

38. In *Re Jackson* [1915] 1 KB 371 the Divisional Court was unable

to decide on the facts whether the retention of funds amounted to a payment, but remitted the matter to the Master for further inquiry. But both Horridge and Rowlatt JJ considered what would amount to payment. Horridge J said:

> "But I desire to state for the guidance of the Master what, in my view, constitutes payment within the meaning of s 10. The payment must be made in such circumstances as to show that the client understands that in making the payment he is carrying out the terms of the agreement previously entered into and ratifying it."

Rowlatt J said that he was of the same opinion; and went on to say:

> "Payment is an operation in which two parties take part. If a man collects a debt due to his debtor and purports to pay his own debt in that way, it is not really a payment unless the other party knows what is being done, and agrees that the sum received in that way by his creditor shall be used in the payment of his debt."

39. *Gough* v *Chivers & Jordan* (21 June 1996), [1996] Lexis Citation 1048 (*Gough*) concerned payment to solicitors in the course of the administration of an estate. The solicitor in question was one of two trustees. The will contained a trustee charging clause. The two trustees agreed the amount of the solicitor's fees, and the issue for the court was whether they could be challenged by a beneficiary under the will. Aldous LJ said:

> "I believe this court should construe s 70(4) of the 1974 Act, the word 'payment' in my view should be construed as covering the transfer of money in satisfaction of a bill with the knowledge and consent of the payer."

In so saying, Aldous LJ approved the decision of Stamp J in *Forsinard Estates Ltd* v *Dykes* [1971] 1 WLR 232:

> "It is clear that if a solicitor without the knowledge or approbation of his client pays his own bills out of monies of his client and hands over the proceeds, that is not payment within the meaning of [s 70(4) of the Solicitors Act 1974]."

Discussion

40. The only questions in this appeal concern, as we have said, what is required by s 70(4) to constitute "payment" and whether those

requirements have been satisfied. In our judgment, the use of the phrase "settlement of the accounts" should no longer be used in this context. It is not a phrase that is used in s 70. Its meaning is unclear, and its origin lies in cases in which there was no written contract of retainer. Nowadays, solicitors and clients normally enter into a written contract of retainer, and in some cases they are legally required to do so.

41. The phrase used in the statute is "payment of the bill". We agree with the view expressed in *Hemming* that the action of payment of a solicitor's bill ought to be no different to the action of payment of any other bill. We are content to adopt the meaning proposed by Aldous LJ in *Gough*, namely that payment for the purposes of s 70 is a transfer of money (or its equivalent) in satisfaction of a bill with the knowledge and consent of the payer.

42. In order for a transfer of money to be in satisfaction of a bill, there must be a bill to be satisfied. A "bill" in this context means a bill that complies with the requirements of s 69. The delivery of a compliant bill will give the client the necessary knowledge. The requirement of consent does not, in our view, require that consent be given after the delivery of the bill, if the client has already validly authorised the solicitor to recoup his fees by deduction from funds in his hands. What the client needs to consent to, in order for payment to take place, is "the transfer of money", not necessarily the precise amount to be transferred. We reject the submission that the client must agree to a deduction quantified in pounds and pence. It is the process of assessment that fixes the precise amount that the client is required to pay.

43. The statute itself lays down the timetable, which is triggered by the delivery of a compliant bill. It is wrong in principle for judge-made law to qualify that timetable by the introduction of such indeterminate concepts as "a reasonable time" after delivery of a compliant bill. Either payment has taken place, or it has not.

44. It must not be forgotten that, even if money has been transferred with the consent or authority of the client, the client still has the right to challenge the precise amount through the medium of s 70, subject to the time limits laid down in the statutory timetable. That right exists whether or not the client has agreed the precise amount, whether before or after the transfer.

45. Whether the client has authorised the solicitor to recoup fees by

way of a deduction from funds in hand is a question of interpretation of the written contract of retainer. In our judgment it is clear that the CFA in this case, and its accompanying documents, specifically authorised the solicitors to recoup their fees out of the client's compensation, up to a maximum of 25% of that compensation. Payment of the bill took place when, after delivery of the bill, the solicitors made that deduction. It follows, in our view, that payment of the bill took place more than one year before the bill was challenged and that, consequently, the court's power of assessment was barred by s 70(4).

Conclusions

46. For the reasons we have given, we allow the appeal from the judge's decision, and restore the decision of Costs Judge Rowley.

47. This court has previously said in *Belsner* that the 1974 Act, the wording of which has barely changed in many relevant respects since the Solicitors Act 1843, is in need of reconsideration. We repeat that view. The world of 2023 is a far cry from the early days of Queen Victoria's reign. The balance between the protection of consumers on the one hand and certainty on the other needs to be re-evaluated in order to produce a system fit for the current century.

Craig Ralph and *Erica Bedford* were instructed by Oakwood Solicitors Ltd for the appellant solicitors.

Gemma McGungle was instructed by JG Solicitors for the respondent/claimant (the client).

From Costs Law Reports Online 2023/3, published by Class Legal
www.classlegal.com