Online Case 48
Vlamaki

v

Sookias and Sookias

[2015] 6 Costs LO 827

Neutral Citation Number: [2015] EWHC 3334 (QB)
High Court of Justice, Queen's Bench Division
20 November 2015

Before:
Walker J (sitting with assessor, Master Haworth)

Headnote

In proceedings for detailed assessment under s 70 of the Solicitors Act 1974, ambiguities in the solicitor's terms and conditions as to whether bills delivered had been interim bills on account of a final bill or interim statute bills were to be resolved in favour of the client. Accordingly, as none of the bills which the client had received had been statute bills, her time for applying for detailed assessment of them had not begun and it followed that the proceedings for assessment under the Act were premature.

Cases Cited

Bari v *Rosen* [2012] 5 Costs LR 851
Denton and Others v *TH White Ltd and Another*; *Decadent Vapours Ltd* v *Bevan and Others*; *Utilise TDS Ltd* v *Davies and Others* [2014] 4 Costs LR 752; [2014] EWCA Civ 906

R (Halborg) v *The Law Society* [2010] 5 Costs LR 685; [2010] EWHC 38 (Admin)

Judgment

WALKER J:

A. Introduction and Overview

1. This appeal from Master Campbell's order dated 2 February 2015 concerns two aspects of a preliminary determination made by him in a reasoned judgment handed down on 15 December 2014. Permission to appeal was granted by Holroyde J on 30 March 2015. As explained below, both aspects turn on the true meaning of written documents, being a solicitors' retainer as regards the first aspect, and a letter written by the solicitors on the second aspect.

2. The claimant ("Dr Vlamaki") had previously been the client of the defendant firm of solicitors ("Sookias & Sookias") in relation to three matters. The preliminary determination was that Dr Vlamaki could proceed with her application for invoices rendered to her by Sookias & Sookias, concerning those three matters, to be the subject of assessment under s 70 of the Solicitors Act 1974.

3. The first aspect on which Sookias & Sookias appeal affects most, but not all, of the invoices. Sookias & Sookias say that, as regards what I shall call "the alleged time bar invoices", s 70(4) prohibited an assessment. That subsection states that the power to order an assessment shall not be exercisable on an application for assessment made by the party chargeable with "the bill" after the expiration of twelve months from the payment of "the bill". It is common ground that in order to be a "bill" for this purpose an invoice must be final in relation to the work that it covers; for convenience the parties have referred to such an invoice as a "statute bill". The master upheld Dr Vlamaki's contention that the alleged time bar invoices had not, at the time of payment, constituted statute bills, with the result that the time bar under s 70(4) did not bite. On this aspect the crucial ground of appeal now advanced is that the master ought to have held that Sookias & Sookias were contractually entitled to render statute bills while work was in progress. The master's conclusion was that the

retainer did not permit this, and if that conclusion is upheld then Sookias & Sookias no longer contend that later conduct of the parties gave rise to a contractual agreement for statute bills while work was in progress.

4. The second aspect on which Sookias & Sookias appeal affects all the invoices. Sookias & Sookias say that if the master was right to hold that the alleged time bar invoices were not statute bills at the time of payment, then none of the invoices were statute bills. The result, say Sookias & Sookias, is that success by Dr Vlamaki on the first aspect has the necessary consequence that the present proceedings are premature, and that no further proceedings can be brought until after delivery of a statute bill for the relevant matter. In answer, Dr Vlamaki placed reliance on the fact that on 4 October 2013 a letter ("the October 2013 letter") was written by Sookias & Sookias stating that even if there was unbilled time "we are not proposing to invoice this and therefore there are no further sums due".

5. The master did not accept Sookias & Sookias's arguments on this aspect. He held that the last bill submitted as part of a series could be treated as "a final bill rendered on the termination of the retainer". As to what was the last bill in relation to each matter, the master in para 51 of his judgment quoted what had been said in the October 2013 letter, which he considered to indicate that:

> "Mr Sookias was afforded an opportunity to render fresh bills in substitution for the bills delivered on account, but did not avail himself of his chance to do so."

6. The appeal before me was argued by counsel who had appeared below, Mr Robin Dunne for Dr Vlamaki and Mr Roger Mallalieu for Sookias & Sookias. After hearing Mr Mallalieu's submissions that contractual provisions in the retainer in relation to each matter provided for interim statute bills, I concluded that I was not persuaded by those submissions, and gave a short judgment explaining why it seemed to me that Master Campbell had been right to hold that the contract of retainer did not permit such bills. In section B below I give my considered reasons for that conclusion.

7. In the light of my conclusion on the contractual provisions, these being identical in each of the three retainers, Mr Mallalieu did not contend that there was any other basis on which he could support the appeal on the first aspect. When Mr Mallalieu turned to the second

aspect of the appeal, I sought clarification as to Dr Vlamaki's stance. Permission to appeal had been sought by Sookias & Sookias, and had been granted by Holroyde J, on the footing that the master concluded that the bills collectively, together with the letter of 4 October 2013, could be regarded as a single bill with an effective date of 4 October 2013. This had indeed been Dr Vlamaki's primary answer on the second aspect. However Mr Dunne's skeleton argument for the hearing before me, while saying that "[as] before, [Dr Vlamaki] submits that [Sookias & Sookias's] objection is not sustainable", went on to say that the master had not in fact held that the October letter had converted the earlier invoices into statute bills. The skeleton argument then identified, and relied upon, other grounds on which the master had justified his conclusion.

8. I asked Mr Dunne whether in these circumstances Dr Vlamaki sought to argue that her primary answer below, even though not adopted by the master, was right. After taking instructions Mr Dunne stated that she did, and would seek any necessary extension of time to enable this argument to be run. Mr Mallalieu strongly opposed the grant of any such extension. I concluded that I would allow argument on the point, reserving the question of an extension of time until I had considered the argument on the second aspect as a whole.

9. In section C below I set out the conclusion that I have reached on the second aspect. For the reasons given in section C, I conclude that while I would grant an extension of time, if needed, for a respondent's notice in this regard, I conclude that on this second aspect the appeal succeeds.

B. The First Aspect: Interim Statute Bills?

10. A solicitor's retainer is an example of what, although known as an "entire contract", is perhaps better described as involving an "entire obligation": a solicitor can generally only claim remuneration when all work has been completed, or when there is a natural break. That, however, is subject to any agreement to the contrary. As is pointed out in *Cook on Costs 2015* at para 2.4, solicitors have always been free to agree terms with their clients in respect of both non-contentious and contentious business, and in recent years solicitors have appreciated the desirability of including provision for stage payments among such terms. In that regard, para 2.5 points out advantages and disadvantages of non-statute interim bills "on account". Among other

things, such a bill need not be the final quantification of all work included in it. Moreover such an interim bill, even though it is not a statute bill, may have a significant consequence as regards money received from the client and held in the solicitor's client account. This is that, provided that the interim bill does not go beyond the amount of costs and expenses incurred to date, it entitles a solicitor to transfer money from the client account into the office account in payment of the bill.

11. However, a stage may come where a solicitor wishes to pursue the client for payment, in which event a contractual entitlement to render interim statute bills will be desirable. Those bills cannot be the subject of subsequent adjustment by the solicitor: they must be complete self-contained bills of costs for the period that they cover.

12. For present purposes, relevant legal principles concerning statute bills are helpfully summarised by Spencer J in *Bari* v *Rosen* [2012] EWHC 1782 (QB); [2012] 5 Costs LR 851:

> "13. … Where a solicitor issues to his client a bill of costs which complies with the requirements of the Solicitors Act 1974 it is known colloquially as a 'statute bill'. Section 70(1) of the Act gives the client the right, within one month of delivery of the bill, to apply to the High Court for the bill to be assessed, without requiring any sum to be paid into court. If no such application is made, the absolute right to assessment is lost. However, if a statute bill has not been paid and the client applies to the High Court for assessment of the bill within twelve months from delivery of the bill, the combined effect of s 70(2) and (3) is that the High Court may allow assessment (and I am advised by my assessors usually does allow assessment), on such terms as the court thinks fit. If the bill remains unpaid and twelve months have expired from delivery of the bill, the court may only order an assessment if special circumstances are shown.
>
> 14. The position after a statute bill has been paid is somewhat different. The client still has the absolute right to an assessment before the expiry of one month from delivery of the bill. After that, but only up to twelve months from the date of payment, if the client applies for assessment, special circumstances need to be shown. No assessment at all can be ordered after the expiration of twelve months from payment. Section 70(4) creates an absolute bar. For completeness I should mention that

there are additional provisions where the solicitor has obtained judgment on the bill, but this does not arise in the present case."

13. In that case a contention was advanced for the solicitors that interim statute bills were "highly advantageous" to the client. That contention was met by this observation on the part of Master Leonard when refusing permission to appeal:

"The potential difficulties and expense faced by a client who can only challenge regular bills by instituting multiple assessment proceedings – against the same solicitor who is actively handling a number of current matters … – are obvious. Further, the choice is between a right which begins to diminish after one month from the first regular bill and a right which does not begin to diminish until a later and, for the client, obviously more practicable time."

14. In the present case relevant provisions of the contractual retainers include:

"5 **MONIES ON ACCOUNT**

5.1 It is normal practice to ask clients to pay sums of money from time to time on account of the charges and expenses, which are expected in the following weeks or months. This helps to avoid delay in the progress of their case. …

5.3 When we put payments on account towards your bills, we will send you a receipted bill. It is important that you understand that your total charges and expenses may be greater than any payments on account.

5.4 Payments on account are paid on account of the work in progress. Thus, we shall not be accounting to you for any interest accrued thereon.

5.5 All payments held in our client account, be it on account of costs or in respect of payments to be made (particularly in conveyancing or commercial transactions) are held at your own risk. Therefore we may not be liable to repay the same in the event the money is lost due to banking failure.

6 **BILLING ARRANGEMENTS**

6.1 To help you budget, we will send you a bill for our charges and expenses at the end of each month while the work is in progress. We will send you a final bill after completion of the work.

6.2 If not paid from monies on account, payment is due to us on delivery of a bill. We reserve the right to charge you interest on the bill at 4% over the base rate prevailing from time to time from the date of the bill if you do not pay our bill within this time …

6.3 If you have any query about your bill, you should contact us straight away. …

10 **TERMINATION** …

10.2 We may decide to stop acting for you only with good reason, for example, if you do not pay an interim bill or comply with our request for a payment on account. We must give you reasonable notice that we will stop acting for you. If you or we decide that we should stop acting for you, you will pay our charges up until that point. These are calculated on an hourly basis plus expenses as set out in these terms and conditions.

11 **COMMUNICATION … AND COMPLAINTS** …

11.4 Once a formal complaint is made we shall handle it in accordance with our written complaints procedure which is set out below namely:

– We will ask you to set out your complaint in writing within 14 days.

– This will then be considered by this firm's client care partner or if they cannot deal with it for any reason, by another partner.

– We will endeavour to give an initial response within 14 days and give you an estimate as to how long it will take for a substantive response (if applicable) which should not be more than a further 28 days.

– We would endeavour to put forward our plan for resolution of the matter in our substantive response and confirm whether it is a final written response."

15. In accordance with established principles, I interpret the terms of the contractual retainer by reference to the agreement as a whole and by reference to the factual matrix at the time of the agreement. In addition I have regard to two concessions which were properly made by Mr Mallalieu:

(1) if there were an ambiguity on a fundamental aspect of the terms and conditions that cannot otherwise be resolved then the ambiguity is to be determined against the solicitors; and

(2) the factual matrix was that Mr Mallalieu's client was a firm of solicitors while Dr Vlamaki was not a lawyer.

16. These concessions reflect the approach taken by Spencer J in *Bari* v *Rosen*. In that case ambiguities in the retainer were resolved against the solicitors, with the result that an entitlement to render bills which the solicitor required to be paid "by return" was not an entitlement to render interim statute bills. In reaching that conclusion Spencer J noted the observations of Master Leonard cited above. Those observations underscore the impracticality and unfairness to a client if a retainer has the effect that interim bills are final in relation to the period that they cover, with resultant drastic limitations on the ability of the client to make use of statutory provisions for assessment. Thus, for example, a client who followed the complaints procedure in clause 11.4 of the present retainers would, without knowing it, be giving up the statutory right to taxation within one month of delivery of the bill. These drastic limitations, and the inevitable recognition of the factual matrix found in concession (2) above, in my view constitute sound reasons for strictly applying concession (1) above. Application of such a concession carries with it a corollary: unless the retainer makes it unambiguous, the client will not be able to say that under the retainer bills are final in relation to the period that they cover. However that corollary, to my mind, is unlikely to cause injustice to either side.

17. The approach taken by Master Campbell in the present case was founded upon the existence of ambiguity. Among other things, he noted that the first sentence of clause 6.1 referred to interim bills which were not stated to be final. By contrast the second sentence of clause 6.1 expressly described the bill which would come after completion of the work as "final".

18. In paras 35 and 36 of the master's judgment he said this:

> "35. … Mr Dunne submits that the reference [in clause 6.1] to sending 'a final bill after completion of the work' is incompatible with the contention that the bills rendered were self-contained. I accept that the clause is unhappily expressed but I do not think the conclusion he invites me to draw can be reached as easily as that. Mr Mallalieu's riposte is that all that is meant by this clause is that the firm will submit a final bill at the end of the case for the work done since the last bill, and equally, nothing in having provided for that, is incompatible with the proposition that all bills were 'final'.

> 36. It is certainly arguable that that is what Mr Sookias intended was to happen, but in my judgment, it is not clear. In the same way that a clause in Rosen and Co's terms of business which told the client that 'regular statutory final bills' would be sent but that there was a 'right to have an assessment *at any time* [original emphasis] in the High Court', was held by Spencer J to be ambiguous in *Bari* [33], I also find clause 6.1 to be ambiguous. It can be asked rhetorically, why, if all bills were statute bills, is it necessary to say that a final bill will be sent unless all the previous bills were not final but something else, namely interim on account of a final bill? There is also the reference to 'interim bill' in [clause] 10.2. Again I ask rhetorically, if the bills were final bills, what place at all does the word 'interim' have in the termination clause? In my judgment, these are examples of 'unsatisfactory ambiguities' (to adopt with respect the description used by Spencer J in *Bari* at [33] and [34]), a conflict which I am bound to resolve (as the learned judge did) in Dr Vlamaki's favour as Mr Mallalieu accepts that I must. For that reason, Mr Mallalieu has not made out Sookias & Sookias' case for statute bills relying on [clause] 6.1."

19. In his able submissions on appeal Mr Mallalieu stressed that what was said by Master Campbell about clause 6.1 involved a rejection of the primary submission made on behalf of Dr Vlamaki. This was that the wording in clause 6.1, distinguishing between "a bill for our charges and expenses at the end of each month while the work is in progress" and "a final bill after completion of the work", on its face appeared to be something very much in favour of Dr Vlamaki. Instead the approach taken by Master Campbell was that matters were not as straightforward as that. He found that those words gave rise to an ambiguity which, applying the principles that I mentioned earlier, was to be resolved against the solicitors.

20. Mr Mallelieu submitted that when read in context there was no ambiguity in clause 6. He stressed the words in clause 5, which he described as redolent of the idea that the bill, when it came, would be a bill for payment for work done. The fact that it was to be receipted supported that. The second sentence of clause 5.3 drew a distinction between payments on account and billing. Similarly in clause 5.4 payments on account were on account of work in progress. Clause 6 followed directly on from clause 5. What was drawn as a particular contrast was that there would be bills, the arrangements for which

were set out in clause 6, which would be separate from the payments on account which were described in clause 5. In clause 10.2 a failure to comply with a request for payment on account, and a failure to pay a bill, each appeared as a separate ground for termination.

21. Moreover, submitted Mr Mallalieu, the true meaning was apparent from provisions for payment to be due on delivery of the bill, and for interest to be payable if there had been a failure to pay the amount of the bill. He submitted that those provisions were inconsistent with the bill being anything other than a statutory bill.

22. Thus, as to the ambiguity in clause 6.1 identified by the master, the submission for Sookias & Sookias was that these factors had the result that the ambiguity fell away, or at least that it was so outweighed by them as no longer to warrant a conclusion against Sookias & Sookias. I am not persuaded by this submission. To an objective reader, what is contemplated in clauses 5 and 6 of the present retainers is that money would be paid on account of charges and expenses *expected in the following weeks or months* (clause 5.1, emphasis added), that these payments on account would be used by Sookias & Sookias to pay interim bills at the same time as delivery of the bill (clauses 5.3 and 6.2), and that bills might go beyond the amounts that had been paid on account in which event payment was due "on delivery of a bill" (clauses 5.3 and 6.2).

23. Absent from those clauses in particular and the retainer in general is any express statement that each interim bill would be a final bill for the period that it covered. I do not underestimate the force of the argument that they must be statute bills because of what is said in the retainer as to payment being due and as to interest. That argument, however, assumes knowledge of the 1974 Act and procedures under it: but this does not sit happily with concession (2). In the ordinary course a lay client cannot be assumed to have such knowledge.

24. To an objective reader without special knowledge of the 1974 Act the only indication that any bill is to be final is what is said in the second sentence of clause 6.1. I agree with the master that there is a substantial ambiguity here. The ambiguity is not removed by the provisions cited by Mr Mallalieu. Those provisions do not tell the client that the bill "at the end of each month" will be final as to work and expenses during the period covered by the bill. From the solicitor's point of view, they are all consistent with Sookias & Sookias wanting to minimise risks in relation to their cash position, by:

(1) getting payments in advance for work which is yet to be done and expenses which are yet to be incurred, and putting such payments into their client account;
(2) rendering monthly bills which do not go beyond costs and expense thus far incurred, and which once delivered will enable them immediately to move money from their client account into their office account in payment of the amount billed; and
(3) enabling them, to the extent that funds in the client account are insufficient to meet a monthly bill, to ask the client to make immediate payment of the unpaid balance with interest to the date of payment.

25. I add that, to my mind, consideration of these provisions reinforces, rather than removes, the ambiguity. In those circumstances, even if the word "final" had been absent from the second sentence of clause 6.1, I would not have regarded these provisions as making it clear that any bill was to be final as to the period that it covered.

26. Much reliance was placed by Mr Mallalieu on the decision of Keith J in *R (Halborg)* v *The Law Society* [2010] EWHC 38 (Admin). That case was a judicial review in a rather different context from the present case. Mr Mallalieu is right to say that Keith J in that case construed clauses very similar to clauses 5 and 6 in the present retainers, and concluded that they provided for interim statute bills. However the marked difference between that case and this is that concessions (1) and (2), rightly made in the present case, did not feature in that case. In those circumstances the analysis in that case simply does not address, because it was not called upon to address, the points that arise in the present case.

27. It was essentially for the reasons given above, which are largely those given by the master, that at the hearing I found against Sookias & Sookias on this aspect of the appeal. In those circumstances I did not hear argument from Mr Dunne on matters which would have been urged as additional or alternative reasons for rejecting this aspect of the appeal.

C. The Second Aspect: Prematurity

28. The October letter was addressed to Dr Vlamaki's new legal representative. With paragraph numbers added for ease of reference, it stated:

> "[2] You have asked if any further sums are due to this Firm from Dr Vlamaki other than those in the attached Statements of Accounts.
>
> [3] Whilst there may be further unbilled time on these matters, we are not proposing to invoice this and therefore there are no further sums due from Dr Vlamaki.
>
> [4] I note that you state that Dr Vlamaki will probably make an application for assessment under s 70 Solicitors Act and you are awaiting instructions.
>
> [5] Of course she may be entitled to do this but this does not alter the current position that our invoices have been outstanding for many months now.
>
> [6] Therefore, if we are not served with such an application within 14 days from the date of this letter I shall have no alternative but to issue proceedings for recovery of the outstanding sums plus interest and costs."

29. As noted in section A above, permission to appeal was obtained on the footing that the master, accepting Dr Vlamaki's case below, held that the bills collectively, together with the October letter, could be regarded as a single bill with an effective date of 4 October 2013. Mr Dunne's skeleton argument said that this was not so. The skeleton argument then identified, and relied upon, other grounds on which the master had justified his conclusion.

30. Mr Mallalieu accepts that Mr Dunne's skeleton argument is right to this extent: in para 51 of his judgment the master stated clearly that:

> "there is no question of the … October letter having converted the on-account bills into statute bills."

31. In broad terms, what I shall call "the master's October letter reasoning" as set out in para 51 was that, (a) because the October letter declined the opportunity to render any further bill, as regards each matter the last bill to have been delivered was to be considered the final bill in relation to that matter, and (b) that final bill incorporated the earlier bills because they were part of a series.

32. It was the master's October letter reasoning that Mr Dunne's skeleton argument sought to uphold. In his powerful oral submissions before me, however, Mr Dunne rightly accepted that proposition (a) in

that reasoning could not be sustained. It would have the consequence that a solicitor at the end of case could ignore an obligation to render a final bill and turn "on account" bills previously rendered into statute bills, fixing a client with a date many months in the past.

33. Thus it was that Mr Dunne sought permission for an extension of time in which to file a respondent's notice. The purpose of taking this course would be to enable him to seek to uphold the master's decision on this aspect of the appeal, relying upon the argument that he had advanced to the master.

34. Argument at the hearing before me effectively assumed that such permission would be needed. On reflection, I doubt whether this is so. The issue which Mr Dunne wishes to argue is an issue on which permission to appeal was given, albeit on the basis of a mistake in the account given by Sookias & Sookias of the master's reasoning.

35. If permission is needed, however, I have no hesitation in granting it. Mr Mallalieu opposed permission, properly reminding me of the principles set out by the majority of the Court of Appeal in *Denton* v *TH White Ltd* [2014] EWCA Civ 906; [2014] 1 WLR 3926. The majority's first stage is to identify and assess the seriousness and significance of the failure to comply. In the present circumstances I consider that as regards both seriousness and significance the failure is at the low end of the scale. Until relatively recently the legal team for Sookias & Sookias believed that the point in question was a point which they would have to deal with on the appeal. If Mr Dunne's skeleton argument had sought to argue the point it is difficult to see that there could have been any serious opposition to that course being taken. The decision in Mr Dunne's skeleton argument not to take that course did not mean that this ground of appeal was at that stage formally conceded. Dr Vlamaki's subsequent wish to reverse that decision causes no prejudice. In these circumstances it is not necessary to spend much time on the second and third stages. The second stage is to consider why the default occurred: the answer is because Dr Vlamaki's legal team were focussing on the main issues which arose under ground 1 of appeal. The third stage is to evaluate all the circumstances of the case: for the reasons given on stage one, grant of an extension will enable the court to deal justly with this aspect of the appeal.

36. I turn to consider whether the October letter can have the effect contended for by Mr Dunne. Here the crucial question to my mind is

whether the October letter can have caused any change in status of any of the bills. Mr Mallalieu observes that what the October letter says is that no further invoice will be rendered. He submits that what is being done, quite simply and clearly, is that Sookias & Sookias proceed on the basis that they have issued proper invoices and they are not going to issue invoices for further work which has been done.

37. By contrast Mr Dunne observes that it is only upon receipt of the October letter that Dr Vlamaki knows what Sookias & Sookias's total costs claim is. Mr Dunne stressed that he did not say that the October letter constituted a statute bill. It was, he submitted, a letter intending to crystallise the sums due, and thus was a date on which the charges previously made became final as to the period of the retainer. The previous bills thus became statute bills with a deemed date of delivery of 4 October 2013.

38. This was a valiant attempt by Mr Dunne to identify a construction of the October letter which would enable Dr Vlamaki to seek assessment immediately on receipt of that letter. I cannot, however, find in the letter any sound basis for such a construction. The letter must be construed in the context of the retainers. For the reasons given in section B, they provided in clause 6.1 for a final bill after the work had been completed, but they also provided for interim bills which were not statute bills. Nothing in the October letter said that if the interim bills were not statute bills then the letter was intended to change their status. It said that there was no proposal to invoice further amounts. It added that, in the absence of an application for assessment, proceedings for the amounts already invoiced would be brought. In these circumstances the mere fact that the letter informed Dr Vlamaki of these matters does not change the nature of the earlier bills.

39. For this reason the appeal on this aspect succeeds. There have been no statute bills and thus the application for assessment was premature. If I had held that the October letter changed the nature of the earlier bills, further questions would have arisen on this aspect of the appeal. I consider it unnecessary and undesirable to seek to deal with them: their answers would, in my view, depend upon the reason why there had been a change, and the precise nature of that change, and on certain aspects would call for further submissions from the parties.

D. Conclusion

40. For these reasons given in sections B and C above the appeal on ground 1 fails while that on ground 2 succeeds. I will hear argument on appropriate consequential orders.

Robin Dunne (instructed by Berlad Graham LLP) appeared for the claimant/respondent.

Roger Mallalieu (instructed by Sookias & Sookias) appeared for the defendant/appellant.