Case 6
Devonshires Solicitors LLP

v

Elbishlawi and Another

[2021] Costs LR 109

Neutral Citation Number: [2021] EWHC 173 (Comm)
High Court of Justice, Queen's Bench Division,
Commercial Court
3 February 2021

Before:
Butcher J

Keywords:
solicitors' fees, summary judgment

Headnote

In proceedings in which the claimant solicitors had applied for summary judgment against their former clients in respect of six invoices amounting to £26,659 against the first defendant and £127,645 against the second defendant, judgment would be given on two of the invoices, with the remaining four to be referred for detailed assessment. The defences had raised issues such as that the second defendant and not the first defendant had been answerable for some of the invoices; that there had been a lack of detail about the work done; that the solicitor had had a conflict of interest when taking on the case so that subsequent costs had been wasted; that there had been errors in accounting and a lack of information. Only in respect of one bill was it accepted that sufficient detail had been given so as to comply with s 69 of the Solicitors Act 1974 and that, accordingly, there

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was a complete defence to the action in relation to the other invoices.

Held: a bill delivered in accordance with s 69 was presumed to be bona fide until the contrary was shown. It had been for the defendants to put squarely in issue that insufficient information had been supplied and that had not been done. As to whether there should be summary judgment on the bills, where a particularised bill had been served, there should be judgment if no grounds for objecting to it had been shown (*Jones* v *Whitehouse* [1918] 2 KB 61), but where that had not been done, so that all that the client could do was to challenge the reasonableness of the whole sum, there should not: *Turner* v *Palomo* [1999] 2 Costs LR 184. Here, detailed breakdowns had been provided in respect of two of the bills, but not the other four in which it was not clear exactly how much detail had been supplied. Those bills would be referred for detailed assessment with summary judgment granted on the other two. Orders accordingly.

Cases Cited

In re Park; *Cole* v *Park* (1889) 41 Ch D 326
Jones & Son v *Whitehouse* [1918] 2 KB 61
Ralph Hume Garry (a Firm) v *Gwillim* [2003] 1 Costs LR 77; [2002] EWCA Civ 1500
Thomas Watts & Co (a Firm) v *Smith* [1998] 2 Costs LR 59
Turner & Co v *O Palomo SA* [1999] 2 Costs LR 184; [2000] 1 WLR 37

Judgment

1. **Butcher J:** This is an application by the claimant ("Devonshires") for summary judgment in respect of its claim for fees against the defendants, who are former clients.

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The Parties

2. Devonshires is a limited liability partnership of solicitors incorporated on 7 January 2015. Its predecessor practice was known as Devonshires Solicitors ("the Firm"). The first defendant ("Mr Elbishlawi") is the ultimate beneficial owner of the second defendant property investment company ("LAM"), which is incorporated in Guernsey. LAM owns 47 Wilton Crescent, London SW1 8RX ("47 Wilton Crescent").

The Engagements and Invoices

3. The Firm began acting for Mr Elbishlawi in or about October 2010. On 29 September 2011 Mr Elbishlawi signed a letter of engagement.

4. Devonshires' case is that in about September 2014 it was instructed by the defendants to obtain planning consent for works at 47 Wilton Crescent ("the Planning Dispute"). It further contends that it was instructed by LAM in relation to the possible sale of 47 Wilton Crescent and/or of LAM itself ("the Property Sale") pursuant to a letter of engagement dated 12 November 2015. That letter of engagement was not countersigned, but states that LAM's continuing instructions would amount to acceptance. The defendants accept that Devonshires were instructed in relation to the Planning Dispute and the Property Sale, but contend that those instructions were by LAM and were on the basis that only LAM would be liable for fees.

5. Devonshires sent three invoices addressed to LAM relating to the Planning Dispute and the Property Sale, as follows:

(1) Invoice No. 249442, dated 26 April 2016, for £74,244.06;
(2) Invoice No. 251328, dated 21 May 2016, for £3,077.50; and
(3) Invoice No. 252592, dated 30 June 2016, for £6,058.50.

6. Devonshires contends that both defendants instructed it to resist an application in Guernsey by LAM's professional advisers, to whom I will refer as "Trident", to place LAM into administration for non-payment of fees. The defendants admit that LAM (only) instructed Devonshires to advise in relation to this matter ("the Administration Application"). As an adjunct to the Administration Application, LAM sued Trident in England for breach of director's duties in relation to 47 Wilton Crescent and Mr Elbishlawi was added as a Part 20 defendant. For a period, Devonshires acted for Mr Elbishlawi in those proceedings.

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7. Devonshires submitted three invoices in relation to the Administration Application and related proceedings, as follows:

(1) Invoice No. 253173, dated 22 July 2016, addressed to Mr Elbishlawi, for £8,711.40;
(2) Invoice No. 263739, dated 16 March 2017, addressed to LAM, for £44,266; and
(3) Invoice No. 267076, dated 24 May 2017, addressed to Mr Elbishlawi, for £17,948.12.

The Statements of Case

8. The Claim Form in this action was issued on 22 March 2019, claiming £144,440.58 plus interest. Particulars of claim were served on the same date, which pleaded a claim against both defendants for payment of the six invoices I have referred to above.

9. The defence and counterclaim was served on 16 May 2019. That statement of case had the following features:

(1) It took the point that Devonshires had not existed before 2015.
(2) It pleaded that, subject to its other defences, it was LAM, not Mr Elbishlawi which was answerable for the invoices, save for invoice 267076 which it was accepted related to the English proceedings in which Devonshires had acted for Mr Elbishlawi.
(3) It pleaded that there was no liability under the invoices "until the claimant has provided it with details of work done, payments received and made and copies of its time records for all the work that it had undertaken on behalf of the [defendants]", and that if the defendants then wished to challenge them, they were entitled to seek an assessment.
(4) It pleaded that because Devonshires had not given sufficient details of its work in relation to the Administration Application, it had not been possible to include those costs in the costs recovered from Trident pursuant to an Act of Court of the Royal Court of Guernsey, Ordinary Division, dated 16 November 2016. This was pleaded as giving rise to a set off of £53,639.07 against invoices 253173, 263739 and 267076.
(5) It pleaded by way of set off that it was an implied term of Mr Elbishlawi's retainer of Devonshires to represent him in the English proceedings, that Devonshires would not act if to do so would give rise to a conflict of interest or otherwise conflict with the SRA's

Code of Conduct. In the event, after Mr Barden of Devonshires had commenced acting for Mr Elbishlawi, CMS Cameron McKenna LLP, solicitors for Trident, contended that he and Devonshires could not act because they had formerly acted for LAM. It is pleaded that, as a result, Devonshires had ceased to act for Mr Elbishlawi, and that this meant that costs were wasted, but that the amount could not be particularised pending receipt from Devonshires of details of work done and time records.

(6) It pleaded that Devonshires' fees for acting for Mr Elbishlawi in the English proceedings had not been adequately particularised, with the result that they could not be included in the bill of costs claimed from Trident under the settlement of those proceedings. This was said to have led to a loss of a recovery of £9,090.72 and £4,412.32, which could be set off against invoices 267076 and 253173.

(7) It raised more general issues about the accounting between Devonshires and the defendants and pleaded that Devonshires had not provided sufficient details. One part of the relief counterclaimed was "all necessary accounts and inquiries".

10. A reply and defence to counterclaim was served on behalf of Devonshires on 27 June 2019.

The Application for Summary Judgment

11. A year later, on 26 June 2020, Devonshires issued the application for summary judgment which is now before me. The defendants did not serve any evidence in reply to the application within the time period required by the rules. An application was made to rely on evidence served late, which I refused for reasons which I gave at the time. The defendants have, however, been able to advance the points pleaded in their defence and counterclaim.

12. The grounds on which the court will give summary judgment under CPR 24.2 are well known. The court will give summary judgment if it considers that the defendant has no real prospect of successfully defending the claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial. A real, or realistic, prospect of defending a claim is to be contrasted with a fanciful prospect of such a defence. To have a realistic prospect of success a defence (or claim) must carry a certain degree of conviction and be more than merely arguable. In some cases

it may be clear that there is no real substance in factual allegations made, particularly if contradicted by contemporary documents.

13. On this application, the point on which Mr Bailey for the defendants principally concentrated was one which Mr Burkitt for Devonshires contended was not pleaded in the defence, namely the issue of whether the invoices sued on were "statute bills", and the consequences of that issue. I will return to that question in due course, after considering the other issues raised in the defence and counterclaim.

The Terms of the Retainers

14. In the first place, there are pleas that it was a term of the retainers that Devonshires should provide "details of work done, payments received and made and copies of its time records for all the work [Devonshires] had undertaken" on behalf of the defendants; and apparently on the basis of the alleged breach of that term, there is a denial that the defendants are liable for any of the invoices. This involves a plea that it was a term of the retainers that, before the defendants were liable for any amounts in respect of any bill or work done, Devonshires had to provide the pleaded details/information in respect of **all** work which it had done for the defendants on any matter. I do not consider that this argument has a realistic prospect of success. There is no such express term in the written Letters of Engagement which exist nor in the terms of business which were included with them. No oral express term is alleged. Nor do I consider that an argument that such a term is to be implied stands any realistic prospect of success: it is not obvious, nor is it necessary to make the engagements work.

Failure to Supply Details to Allow Costs to Be Claimed in Guernsey

15. Secondly, as to the pleaded set off based on the alleged failure of Devonshires to supply details of its costs to allow them to be claimed from Trident pursuant to the Guernsey order, this is entirely without substance. Devonshires had on 4 April 2017 sent to LAM's Guernsey solicitors a very detailed breakdown of the work done in relation to the Administration Application and the related application to set aside two statutory demands. It was accordingly not because the details had not been supplied that the relevant costs were not claimed (if indeed they were not claimed). Realistically, Mr Bailey accepted that this aspect of the defence could not be maintained.

Conflict of Interest

16. Thirdly, as to the set off based on the allegation that Devonshires should not have acted for Mr Elbishlawi in the English proceedings because of a conflict of interest, and that this caused additional or wasted costs, I do not consider that there is here a defence which stands a realistic prospect of success, either. First, the case that Devonshires ceased to act because of a conflict of interest, or because of Mr Barden's prior involvement, carries no conviction. No details are pleaded as to what the conflict was, and all that is relied on is the letter from CMS Cameron McKenna of 14 December 2016. Yet, when Devonshires ceased to act, Mr Elbishlawi proceeded to instruct the solicitors who were acting for LAM, Humphries Kerstetter LLP, to act for him as well. This indicates that there was no conflict of interest between LAM and Mr Elbishlawi. Furthermore, Devonshires ceased to act only on or about 8 June 2017, that is to say some six months after the CMS Cameron McKenna letter, itself suggesting that the two were not linked. Moreover, the evidence from the contemporaneous correspondence is that the reason why Devonshires ceased to act for Mr Elbishlawi was that he had not paid historic fees or money on account, not because of a conflict of interest. In any event, in the absence of any details at all as to whether any costs were actually wasted, it is difficult to attach significance to this alleged set off. I do not accept that it is an answer to this to say that such particulars could not be pleaded because Devonshires had not given sufficient information as to the work done. I would expect Humphries Kerstetter LLP to have been able to provide an indication of areas in which there might have been wasted costs or duplicated effort, if such had occurred.

Failure to Provide Information for English Claim for Costs

17. Fourthly, as to the set off based on the allegation that details of the costs in respect of the English proceedings had not been supplied with the result that they could not be included in the amount claimed against Trident, this again is a defence which does not stand a realistic prospect of success. The only relevant invoice was No. 267076, and that had already been supplied to Mr Elbishlawi, before the time at which Humphries Kerstetter LLP asked Devonshires to send invoices relating to the English proceedings. In any event, the defendants claimed £592,303.25 from Trident as their costs of the English

proceedings, but settled for £300,000. It appears very doubtful that there would have been a settlement at a different figure from that round number had Devonshires re-sent the invoice for £17,948.12 or provided more details in relation to it. There is no evidence on this application which shows a cogent reason for considering that there would have been.

Accounting

18. Fifthly, in relation to the pleaded points as to whether Devonshires have given a full account of all sums received and paid in respect of other matters on which they acted for one of the defendants, in the absence of any specific allegation that sums are owing by Devonshires to the defendants, I do not consider that this is a matter which affords an answer to the current application for summary judgment.

Were the Invoices "Statute Bills", and Can They Be Challenged?

19. As I have said the grounds of defence on which Mr Bailey, who had not drafted the defence and counterclaim, particularly relied on this application were not those which I have considered above. What Mr Bailey particularly contended was as follows: (1) that save for No. 263739, the invoices were not "statute bills", because insufficient detail had been supplied; (2) that, in any event, the defendants were entitled to seek a "common law" assessment of all the invoices; and (3) in relation to invoice No. 249442, this related to a period of over 2½ years, some of which was a period when only the Firm existed and Devonshires did not.

20. I will take these points in turn. Mr Bailey contended that to be a "statute bill", which complies with the requirements of s 69 Solicitors Act 1974 ("the 1974 Act"), there must be sufficient information to enable the client to know what he is being charged for; and that if the bills were not "statute bills", then, pursuant to s 69(1) of the 1974 Act, the solicitor could not sue on them. Mr Bailey contended that none of the bills other than No. 263739 had sufficient detail, and therefore there was a complete defence to the action in relation to those invoices.

21. Mr Burkitt submitted that this was not a point which was pleaded and was not open to the defendants to take. He argued that this point was not taken in the defence, as opposed to the allegation of the wider term requiring the supply of details of all work undertaken by Devonshires and of payments by and to it which I have already

considered. Mr Burkitt argued that had the point about the invoices not being "statute bills" been taken in the defence, it would have been addressed in the Reply and the evidence for this application. This would have included reference to information which was already in the possession of the client because, as stated in *Ralph Hulme Garry* v *Gwillim* [2002] EWCA Civ 1500, at para [64], information already in the possession of the client can be taken into account in assessing whether an invoice is a "statute bill". Mr Burkitt submitted that it had been for the defendants to put forward a case of the matters referred to in para [70] of *Ralph Hulme Garry* v *Gwillim*, namely that (i) there was no sufficient narrative in the bill for them to identify what they were being charged for and (ii) that they did not have sufficient knowledge from other documents in their possession or from what they had been told reasonably to take advice on whether or not to apply for the bill to be taxed.

22. I consider that Mr Burkitt is right about this. A bill delivered in accordance with subsections (2A) and (2C) of s 69 of the 1974 Act is to be presumed, until the contrary is shown, to be a bill bona fide complying with the Act: s 69(2E). It was not suggested that the invoices in this case did not comply with s 69(2A) or (2C). In such circumstances it was for the defendants to put squarely in issue that the bills were not "statute bills" because insufficient information had been supplied or was known to the defendants about the work done to which the invoices related. I do not consider that the defence does that. Had it been intended to plead that case it could have been simply stated. Moreover, if that point was being taken it would have been necessary to distinguish between the invoices because invoice No. 263739 is accepted by Mr Bailey to be a "statute bill". There was no such distinction made. It also seems clear that the defence was not understood to have made a case that the bills were not "statute bills", and that it was for that reason that the Reply had not addressed that point in terms.

23. Thus, as Mr Burkitt said, the defendants have not properly pleaded and have not evidenced the matters referred to in para [70] of *Ralph Hulme Garry* v *Gwillim*, which are matters which it is for the *client* to show. In those circumstances, I reject Mr Bailey's first argument.

24. Turning to the second point, I accept Mr Bailey's submission that, even if the invoices were "statute bills" and even though the

period of twelve months specified in s 70(3) of the 1974 Act had expired without the defendants' having made an application for an assessment under that section, that does not mean that the defendants have no entitlement to challenge the sums claimed in those invoices. That is clear from the decision of the Court of Appeal in *Turner* v *Palomo* [2000] 1 WLR 37, which itself referred to and applied the earlier decisions in *In re Park; Cole* v *Park* (1889) 41 Ch D 326, *Jones & Son* v *Whitehouse* [1918] 2 KB 61 and *Thomas Watts & Co* v *Smith* [1998] 2 Costs LR 59. In *Turner* v *Palomo* it was explained that a claim by a solicitor for unpaid sums is an unliquidated claim, for payment of a reasonable charge. That had to be understood, in the context of a claim by a solicitor, as subject to the terms of the retainer and of the 1974 Act but, as Evans LJ said in giving the judgment of the court, "we do not see any difficulty in holding that the solicitor's claim is for a reasonable sum, whether by statute or at common law" (p. 52A/C). I also accept Mr Bailey's submission that, if the reasonableness of the bill is challenged, it is for the solicitor to show that it is reasonable. This is stated in *Turner* v *Palomo* at 51E and 52C.

25. There remains the question, however, as to whether a sufficient challenge has been made by the defendants for them to resist the present application for summary judgment and require Devonshires to justify the reasonableness of the invoices. In this regard, it is apparent from *Turner* v *Palomo* at 45C–E that the Court of Appeal considered there to be a difference on a summary judgment application between a case in which a gross sum bill has been broken down in a way which allows it to be seen not only what work has been done but also how much time has been spent and the rates charged, and a case where such detail has not been given. In the former, the Court of Appeal envisaged that there would need to be a specific challenge to particular items for there to be grounds on which summary judgment might be refused. That is consistent with the approach in *Jones* v *Whitehouse* [1918] 2 KB 61 at 64–65. As Evans LJ pointed out in *Turner* v *Palomo*, at the time of the decision in *Jones* v *Whitehouse* the solicitor would have been obliged to serve a particularised bill of costs. It was in that context that Pickford LJ said that, if a client could point to particular items as being extravagant, then he was entitled to have those items taxed, but not the whole bill. The result in *Jones* v *Whitehouse*, which was that if no ground for objecting to any particular items was shown there should be summary judgment, must be seen in the same context.

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26. By contrast, the Court of Appeal in *Turner* v *Palomo* envisaged that, in a case in which there is no breakdown of the bill allowing specific items to be challenged, and where all that the client can do is to challenge the reasonableness of the total sum claimed then, if such a general challenge is made, it may well be appropriate for there to be an assessment of the whole bill. The order actually made in that case was that the bill of costs should be referred to a costs judge to be the subject of assessment, albeit not one pursuant to s 70 of the 1974 Act. This way of dealing with such cases is recognised in the note to the White Book, 2020, para 24.6.3, which is in these terms:

> "On a claim by a solicitor against their former client for non-payment of costs, the court may, if there is no real prospect of defending the claim, give summary judgment for a sum to be determined by means of a detailed assessment. … Such an order can be made even if the former client has lost the opportunity to apply for a detailed assessment of the solicitor's bill under Part III of the Solicitors Act 1974."

27. In the present case, it is apparent on the material before the court that detailed breakdowns, including of time spent, have been provided in relation to invoices Nos. 263739 and 253173. No specific points have been taken in relation to particular items on those bills being excessive. In the circumstances, I consider that there should be summary judgment for the amounts claimed in those invoices: that is to say, there should be judgment for £44,266 in respect of invoice 263739, and for £8,711.40 in respect of invoice 253173. In each case judgment should be against LAM, it having been accepted by Mr Burkitt that judgment should be given against the party that the defendants accept, subject to their other points, to have been liable. In the case of both the invoices I have referred to, that is LAM.

28. In relation to the other invoices, it is not clear on this application as to exactly how much detail has been supplied. I have not been shown details of time spent in relation to those invoices. In the circumstances, I consider that the position as to those invoices is effectively the same as that for the bill considered in *Turner* v *Palomo*, and that the order should be substantially the same as was made in that case, namely that there should be summary judgment for a sum to be determined on a detailed assessment to be carried out by a costs judge. Therefore there is such judgment against LAM in respect of

invoices 249442, 251328 and 252592, and against Mr Elbishlawi in respect of invoice 267076.

29. Mr Bailey's third point is that invoice 249442 may cover a period in which only the Firm existed and Devonshires did not. I agree that Devonshires cannot claim for sums due to the Firm, and only Devonshires is a party to the action. It appears to me, however, that in the process of assessment which will take place in relation to invoice 249442 in accordance with the previous paragraph it will be identified exactly when all relevant work was carried out and if and to the extent that there are items which relate to the period before Devonshires existed they should be excluded from the sum which it is assessed that LAM should pay to Devonshires.

30. I would ask the parties to draw up an order to reflect the above, and I will hear counsel if necessary if any matters remain outstanding and cannot be agreed.

Daniel Burkitt (instructed by Devonshires LLP) appeared for the claimant.

Stephen Bailey (instructed by Canfields Law Ltd) appeared for the defendants.

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