Case No: JR 1700516

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 21/07/2017

Before :

MASTER ROWLEY

- -

Between :

James Conibear	**Claimant**
- and -	
Humphries Kirk Solicitors	**Defendant**

- -
- -

Robin Dunne (instructed by **Deep Blue Costs**) for the **Claimant**
Tom Asquith (instructed by **Humphries Kirk**) for the **Defendant**

Hearing date: **20 June 2017**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MASTER ROWLEY

Master Rowley:

1. This decision concerns the ability of the defendant solicitors to render two invoices to the claimant in respect of their work on his behalf in the administration of the estate of the claimant's late father.

2. On 13 July 2015 the defendant rendered a bill numbered 59708 to the claimant in the sum of £23,132.52 inclusive of VAT. This figure was made up of £11,832 of time costs; £7,500 represented a value charge and the balance of £3,800.52 constituted the VAT.

3. Whilst the time charge was a little higher than the estimated costs of £9,200, those fees have essentially been agreed. The value element however has always been contentious from the moment Mr Cross, the solicitor with overall conduct at the defendant, wrote to set out his firm's charging arrangements. The value element was described as being 1.5% of the value of the gross estate. The need to charge a value element in addition to the time costs was challenged by the claimant upon receipt of the letter.

4. I was taken to a considerable number of pieces of correspondence between the claimant and Mr Cross regarding the value element but, in summary, no figure has been agreed. Given the value of the estate is roughly £923,000, the 1.5% charge amounts to £13,845.44 plus VAT. The figure appearing on the invoice in July 2015 of £7,500 was a compromise figure put forward by the solicitors in early negotiations. That figure was set out in the Estate Accounts as being part of the fees of the defendant in connection with the administration of the estate. As I have set out, it was included in the July invoice rendered to the client.

5. The claimant did not accept that he was liable for any value element and so correspondence continued after the July 2015 invoice was rendered. For a period, those communications were in addition to correspondence concerning the final tidying up of the Estate Accounts, but subsequently they continued on their own. Mr Cross eventually decided that no agreement was going to be reached and consequently rendered a second invoice on 20 May 2016. The time costs claimed in that invoice were £756.76. They either related to further work in concluding the administration of the estate or simply related to the correspondence between the claimant and Mr Cross, depending upon the parties' submissions. The value element of £6,345.44 claimed in the second invoice is the balance of the 1.5% of the total of the father's estate.

6. Having received the second invoice, the claimant decided to take separate legal advice. His costs lawyers appreciated that more than a year had passed since the first invoice and, since it had been paid, it would be difficult to bring proceedings under the Solicitors Act 1974 as a result of section 70(4) of that Act. The costs lawyers asked the defendant to agree to the two invoices being considered by the court, notwithstanding the defence afforded to the defendant by s 70(4). But the defendant's response was to indicate that it was too late to challenge the 2015 invoice and the point would be taken if proceedings were brought.

7. Consequently, the claimant's Part 8 proceedings brought under the Solicitors Act simply seeking an assessment of the 2016 invoice. On 14 March 2017 I gave directions for evidence so that the application could be heard and there have been witness statements from the claimant himself Mr Cross and the fee earner most directly concerned with the work involved, Ms Dyer.

8. It would appear that, during the collation of this evidence, or perhaps only when instructing counsel for the hearing, the parties have reconsidered their positions. Consequently, the defendant no longer seeks to use the limitation defence under section 70(4) and is content for the two invoices to be assessed. That, on the face of it, would appear to be an agreement for a Solicitors Act assessment and there would have been no need for the hearing to have taken place before me. However, the claimant has also changed his view of the original invoices. He no longer challenges the first invoice albeit seemingly he does not accept that he ever agreed to a value element being imposed. He now says that the first invoice was a final statute bill and as such the defendant was not entitled to render a further bill.

9. I queried this change of heart by the claimant at the hearing. For if I did not agree with the claimant's position regarding the status of the first invoice, then the claimant would no longer be able to argue that the value element in its entirety ought to be removed from the invoices. Mr Dunne, counsel for the claimant, confirmed to me that his client appreciated the position and that his case was as put forward by Mr Dunne at the hearing.

10. I have set out his background because I need to make clear that the question before the court was reformulated when directions were given so that it states "whether the defendant delivered a final statute bill numbered 59708 on 30 July 2015 and if it did, could it deliver a further invoice." That is not the question raised by the original claim form.

11. The wording of the invoice is simply *"in connection with the above named Deceased as per the Narrative attached."* That narrative is as follows:

> "To include all correspondence (letters, emails and faxes), all attendances, all telephone conversations, preparation of documents, perusal of documents, consideration, research, reviewing the file from time to time as necessary, advising the Executors and dealing with all work in connection with the administration of the estate from 30 June 2015 to the winding up of the administration of the estate."

12. The letter enclosing the invoice contains the following wording:

> "For your information, I also enclose this firm's final account, together with a copy of this firm's time ledger for the period from 30 June 2015 to date. I confirm I will arrange settlement of the bill from the funds available. You will see the Estate Accounts includes this firm's full and final costs for dealing with the administration of the estate."

13. Mr Dunne says that the wording of this covering letter and the invoice could not be clearer in establishing that the invoice rendered is a final statute bill and which would be conclusive as to the costs that could be charged for the period involved.

14. The invoice could not be an interim request for a payment on account because it would contradict the terms of the covering letter. It would also contradict the original reaction of the solicitors to hold onto the limitation argument under section 70(4). The invoice

set out the previous payments on account in setting off amounts already received so as to establish the balance owing. It was entirely inconsistent with any formal further request for payment on account.

15. Similarly in Mr Dunne's submissions, this invoice could not be an interim statute bill. First, there is no provision in the retainer letter for interim statute bills to be rendered during the course of the administration. Secondly, the wording of the covering letter contradicts the invoice being interim. Thirdly, the sums involved were contained in the Estate Accounts and were clearly assumed to be final figures.

16. Mr Dunne also submitted that the conduct of Mr Cross in referring in correspondence to methods by which the bill could be assessed by the court, however erroneous in detail, clearly demonstrated that the defendant considered it to be the final bill. In negotiations prior to the rendering of the second invoice, the defendant continued to offer to accept payment of the bill in full and final settlement (rather than seeking the entire 1.5%).

17. In conclusion, given that the July invoice could only be categorised as a final statute bill then, in accordance with Rezvi v Brown Cooper (a firm) [1997] 1 Costs LR 109, there is a strong presumption that the defendant was not entitled to render the second invoice and the claimant should be found to have paid all of the sums owed by him to the defendant.

18. Mr Asquith, counsel for the defendant, sought to argue that the invoice was indeed interim in nature. The central point relied upon by Mr Asquith was the continued dealing between the claimant and Ms Dyer in relation to the Estate Accounts and between the claimant and Mr Cross regarding the disputed value element. In Mr Asquith's submission, the parties were entirely aware that the work being done by the defendant had not ceased. Consequently, when considering the July 2015 invoice and its covering letter, the factual context needed to be considered in a wider fashion than the claimant's literal interpretation of the letter and invoice.

19. Mr Asquith disputed that the defendant's offer to accept payment of the first invoice in full and final settlement in March 2016 demonstrated that it was a final invoice. The offer was made as part of the negotiation regarding the assessment of the costs by a cost draftsman and which in Mr Cross's view would support the amount of time claimed. The offer to accept payment of the first invoice in full was therefore offering a discount on the costs to which the defendant was in fact entitled.

20. The decision of the defendant to stand on its potential limitation point was also no guide to the finality of the July 2015 invoice in Mr Asquith's submission. The defendant is not a costs specialist and could therefore be forgiven for not following all of the nuances of the arcane area of the Solicitors Act.

21. Similarly, the wording of the letter used by Ms Dyer when enclosing the July 2015 invoice was produced in ignorance of the finer points of the status of the invoice. It was clear to the parties that further work needed to be done and that no final position had been reached. It was, according to Mr Asquith, impossible for anyone to read the July 2015 invoice as representing the entirety of the defendant's claim given its context.

22. Mr Asquith contrasted the claimant's case, which is based entirely on the documents, with the defendant's case which includes reference to the witness statements of Ms Dyer and Mr Cross in particular. If the claimant had been seeking, for example, to establish special circumstances for having the bills assessed, he would no doubt have relied upon witness evidence in addition to the formal wording of the documents. That was the approach Mr Asquith urged upon me in a situation where it is the defendant seeking the assessment rather than the claimant.

23. In particular, Mr Asquith relied on the following passages from the witness evidence of Simon Cross:

> "14. The Claimant, in my respectful submission, did not believe that to be the end of the matter because there follows a long line of correspondence extending until the summer of 2016 between him, Julie and myself. Even very shortly after the letter of 14 July 2015 the Claimant wrote to Julie and requests "a copy of your time ledger covering the entire same period". He then goes on about a month later in an email to Julie Dyer dated 18 August 2015 and timed at 13:54 to state that he "still does not accept that the "value" element of the £7,500 which you have billed was part of terms of this engagement. Although this is a matter for Mr Cross was to justify now we are at the end of the administration" (sic).
>
> 15. This is clear evidence in my view that the Claimant believed the matter of the value element to be unresolved and that he took the Defendant's letter 14 July 2015 simply to indicate the "end of the administration" but not the amount of the value element to be charged."

24. Mr Asquith also relied upon the following paragraph from the witness statement of Julie Dyer:

> "10. I do not believe that he should be surprised at the receipt of a further invoice given the length of time that we continued to correspond as evidenced by the extensive emails and letters in the Bundle."

25. Mr Asquith contrasted the comments regarding the claimant's belief that the work was continuing with the absence of any evidence directly from the claimant about a belief that the July 2015 invoice was final.

26. In reply, Mr Dunne characterised Ms Dyer's evidence as being that the various pieces of infelicitous language were all a mistake and that Mr Cross's evidence was simply not very helpful to the parties. None of the evidence went to the central problem with the defendant's case which was that the defendant could not say whether it thought the invoice was an interim request for a payment on account or an interim statute bill. In the circumstances the choice before me was either some form of interim invoice or the final statute bill for which he contended.

Decision

27. It is generally said that if a solicitor wishes to protect himself from uncertainty as to his retainer, he needs to make sure that it is written down. If he does not do so, the oral evidence of the client is likely to be preferred to that of the solicitor. As Lord Denning in the Court of Appeal decision of Griffiths v Evans [1953] 1 W.L.R. 1424 said:

> "On this question of retainer, I would observe that where there is a difference between a solicitor and his client upon it, the courts have said, for the last 100 years or more, that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it (see Crossley v. Crowther , 25 per Turner V.-C., and Re Paine , 26 per Warrington J.). The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer, he has only himself to thank for being at variance with his client over it and must take the consequences."

28. In this case, however, the solicitor has committed everything to paper but his counsel is asking me essentially not to rely on those formal words because the solicitor is not learned in the law of costs and it is the former client, via his costs lawyers, who has the expertise.

29. It seems to me to be incontrovertible that the intention of Ms Dyer in writing the letter of 14 July 2015 was to render a final invoice to the claimant on the basis that the estate was about to be wound up, subject to any final alterations necessary to the Estate Accounts, and the money would then be distributed. Even though the claimant had a particularly keen eye on making sure that all of the figures were exact, the distribution occurred within a couple of months of Ms Dyer's letter. Whilst the claimant is criticised for not specifically stating that he thought the work ended with the July 2015 invoice, it is notable in my view that Ms Dyer does not give any direct evidence that she ever expected to render a further invoice for the work carried out after July 2015. It would appear that her work must have concluded by the end of 2015 and there was no suggestion at that time, based on the correspondence before the court, that a further invoice was going to be rendered.

30. It is also clear to me that the solicitors were quite content to accept £7,500 as the value element which they had put forward on numerous occasions. The inclusion of that sum in the Estate Accounts is but one demonstration of this. The only purpose of rendering the second invoice, in my view, was as an attempt to negotiate with the claimant so as to gain his acceptance of the invoice originally rendered.

31. The claim for a value element in my view is built on very shaky foundations given the complete lack of any suggestion that the parties ever reached a meeting of minds on this point. Rendering a second invoice and essentially doubling the sum said to be payable does not detract from that fact. I have not set out the correspondence between the claimant and Mr Cross but it is clear from the outset that the claimant did not see any need for a value element to be rendered in respect of his father's estate when it had apparently not been sought in respect of his mother's estate following her passing away relatively recently. At no point in that correspondence does Mr Cross give a convincing reason as to why the estate was sufficiently valuable or complicated to justify an additional charge.

32. If the question was posed, "what more needed to be included in the July 2015 invoice or its covering letter to make it a final statute bill rather than an interim bill?" it is difficult to conceive that the answer is anything other than "nothing." The letter has the appearance of being a relatively standard text used at the point when the administration of the estate is coming to a close and ensuring that the client has the details of the costs being rendered as part of the administration of the estate. The use of the phrase "full and final costs" accords with the tenor of the rest of the letter entirely. The invoice records the interim payments made so as to account for them on the face of the invoice in the classic manner of a final bill. There is nothing to suggest that the invoice was ever intended to be an interim invoice of any description.

33. The only avenue for the defendant to render a further bill would be if it related to further work carried out upon instruction of the client for the period after the end of the first invoice. But it seems to me that the narrative to the July 2015 invoice prevents that situation occurring here. It explicitly states that the bill that has been rendered is from 30 June 2015 until the winding up of the administration of the estate. Whether any further time costs relate to correspondence regarding the value element or to additional work regarding the estate, it must be covered by the wording of the July 2015 invoice.

34. Similarly, the value element must come within the time period up to the winding up of the estate. Consequently, if it was to be claimed, it needed to have been claimed in the July 2015 invoice.

35. I have come to the conclusion therefore that the claimant is right in respect of the question posed by his reformulated claim. The July 2015 invoice is a final statute bill. As such it is conclusive of the charges that can be rendered in respect of the work carried out by the defendant including any value element that may be claimed for the administration of the claimant's father's estate.

Next steps

36. I will hand this decision down on the day set out on the front page of the draft judgment. There is no need for the parties to attend the handing down itself. The sums at stake are modest and I urge the parties to seek to resolve any consequential matters without the need for further court time. If however there are matters the need to be resolved then the parties are to request a hearing date from my clerk with an agreed time estimate. The time for seeking permission to appeal this decision would be extended to that hearing.