NCN No. [2023] EWHC 1857 (SCCO) (Costs)

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

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

Date: 20/07/2023

**Before**:

**COSTS JUDGE ROWLEY**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

SC-2023-APP-000068

**MR KENROY WATSON** **Claimant**
**- and -**
**SLATER AND GORDON UK LIMITED** **Defendant**

SC-2023-APP-000087

**MR SURINDER VERMA** **Claimant**
**- and -**
**SLATER AND GORDON UK LIMITED** **Defendant**

- - - - - - - - - - - - - - - - - - - - -

**Mark Carlisle** (instructed by **JG Solicitors**) for the **Claimants**
**Robert Marven KC** (instructed by **Slater & Gordon UK Ltd**) for the **Defendant**

Hearing date: 15 May 2023

- - - - - - - - - - - - - - - - - - - - -

# 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.

.....

COSTS JUDGE ROWLEY

## Costs Judge Rowley:

1. The claimants in each of these proceedings issued Part 8 applications under section 68 Solicitors Act 1974 in January 2023. The claim forms were supported by witness statements of the solicitor with conduct, Mr James Green, in a relatively standard form.

2. Since the representatives of both sides were the same in each case, I listed them together for a short video hearing in February 2023. However, it became clear at that hearing that the argument deployed by the defendant in respect of each case, and supported by a witness statement of the defendant's solicitor, Katie Wheeler, was a novel one. Consequently, I adjourned to a longer hearing on 15 May 2023. There appeared to be some benefit in keeping the cases together in order to provide two factual examples of the issue raised and so the cases were heard together albeit they are not conjoined in any way.

3. On 15 May 2023, I heard detailed submissions from Mark Carlisle, a costs draftsman, on behalf of the claimants and Robert Marven KC on behalf of the defendant. I reserved judgment at the end of the hearing and this is my reserved judgment.

The claim

4. In respect of each case, the claimant seeks an order pursuant to section 68 for:

    1. Delivery of such parts of the Defendant's file over which the Claimant has proprietary rights; and

    2. Delivery of a statute bill of costs arising from a personal injury claim conducted by the Defendant on behalf of the Claimant within 14 days;

    3. The costs arising from this application to be paid by the Defendant.

5. As far as paragraph 1 of the applications concerned, the defendant has provided documents to the claimants and I do not need to deal with that application.

6. It is common ground that the defendant has not delivered a statute bill in respect of the charges it made when acting for the claimants. In the general run of things, an application of this nature would be compromised without a hearing. Receipt of a bill which complies with the Solicitors Act is the key to considering whether to bring proceedings for assessment of the solicitor's charges under the Act. Without a bill, no such application can be made.

7. It is therefore novel, at least in my experience, for the defendant to defend such proceedings on the basis that the client should not receive any such bill. Usually, a defence to these applications occurs only where the defendant solicitor says that a bill had in fact already been provided to the client prior to the commencement of the proceedings.

Case law

8. The defendant's argument is that the court has jurisdiction to order the defendant to deliver a bill both under the CPR (67.2(1)(a)) and under the court's general jurisdiction. Deciding whether to order such a bill to be delivered requires the court to exercise its discretion. Wherever such discretion is required, there is always the possibility that it will not be exercised in a particular case. The defendant says that these cases demonstrate a situation where that discretion should not be exercised.

9. The authority for this argument comes from the dicta of Sir Raymond Evershed, the then Master of the Rolls, in the Court of Appeal decision of Re A Solicitor [1953] Ch 480, [1953] 2 All ER 23. In what he described as a further point, having essentially disposed of the appeal already in his judgment on a different ground, he said the following:

> "The court has a discretion whether, in a given set of circumstances, it will order the delivery of the bill. Counsel for the solicitors relied on *re A Solicitor. Re Taxation of Costs*, as indicating that where there has been a lapse of time such as passed here, it would not be right for the court to order delivery of the bill on the application of a client who, during the period which has elapsed, did not take the trouble to avail himself of his statutory right, and until he received inspiration from another case, made no complaint whatever about the bill, which he had, in fact, paid. The matter, being one of discretion, must obviously be decided by the court according to the facts of the particular case before it. I say no more about *Re A Solicitor* than that the length of time which had passed, the circumstances relating to the actual charge said to have been delivered, and the communications which passed during the interval of six years, were all of a nature which make that case wholly different in its general aspect from the present case. All that can be said against the clients here is that they did not challenge the bill in 1949, although the male executor raised a query about it, and that for three years they continued to treat the solicitors with confidence, and, indeed, instructed them in certain other matters, but beyond that, I do not think it could possibly be said that, by their conduct, they have deprived themselves of the right, which otherwise they would possess, to have a proper bill. At any rate, exercising my discretion to the best of my ability in this case, I think it would be right to make the order for the delivery of an itemised bill of costs for which the executors have asked."

10. This decision is cited in the commentaries for the proposition that the court has a discretion as to whether to order a solicitor to deliver a bill. Given the express wording of the first sentence of the above quotation, it might be thought that little more needed to be said.

11. However, Mr Carlisle did not accept that the jurisdiction was discretionary. Indeed, his skeleton argument says it is "absolutely clear" that the entitlement to a statutory bill is absolute save for limited circumstances that do not apply here.

12. That skeleton argument was written prior to the original hearing and so by the time of the longer hearing, Mr Carlisle was able to refer me to numerous cases which, he submitted, supported the claimant's argument that delivery of a statute bill to a client is obligatory. His submissions culminated in the suggestion that in Re A Solicitor [1947] Ch. 274, [1947] 1 All ER 369 (which is the case referred to, but not named, in the quotation above) is the only case where a bill was not ordered to be delivered and that its writ should be confined to its own specific circumstances.

13. Mr Marven responded to the various cases cited by Mr Carlisle. He did not disagree with the choice of cases but said that the defendant drew the opposite conclusions from them. The circumstances of the various cases were such that it was obvious that the court should decide to order delivery of the bill. The issue however was that the court, in doing so, was exercising a power that it had rather than any form of obligation.

14. In my view, Mr Marven was entirely correct in this characterisation of the various cases. I do not propose to set them all out since the point applied to all of them in my judgment. As ever with Solicitors Act cases, most of them are very old. I will take examples from two of the cases for illustration.

15. The first is In re Foljambe (1846) 50 ER 398. There, the claimant paid to Messrs Foljambe the amount claimed by them for their costs. At the time the solicitors stated that their bill was only in rough draft and had not been fair copied "but that if the Plaintiff would pay the amount thereof, they, Messrs Foljambe, would send the bills of costs within a few days."

16. The claimant made repeated requests for the bill before presenting a petition to the court. The Master of the Rolls' admirably brief judgment said:

> "This is not an application for the taxation of the bill, but for an order that the Respondents may be ordered to deliver the bills of costs according to their undertaking. They are officers of the Court, and are bound to do what is right. The Petitioner, who has paid the bills, ought to have had them delivered to him long ago, to enable him to know what he has paid, and for what.
>
> The Respondents, it appears, procured payment on their undertaking to deliver the bills within a few days; they were bound to fulfil their part of the agreement without delay, but they have omitted to do so.
>
> I have jurisdiction to order the delivery, which I will certainly exercise, and, taking the whole matter into consideration, the Respondents must pay the costs of the petition."

17. The second is from In Re Blackmore (and others) (1851) 13 Beav 154. In the middle of his judgment, the Master of the Rolls records the following:

> "Mr Blackmore admits that he never delivered to the Petitioner any bill of costs. His excuse is, that he accepted an agreed sum, and he suggests that he has charged less than he was entitled to, and that she has not offered to pay a full bill regularly made out.

> I am of [the] opinion that this is no valid excuse for a solicitor declining to deliver a proper bill of costs. I think the petitioner has a right to determine for herself, or according to the advice which you may receive, whether she will have the bill taxed, that the solicitor has no right to preclude taxation by refusing to state the particulars of his charge."

18. In both of these cases the Master of the Rolls makes a positive decision to order a bill to be delivered. In Blackmore he considers the excuse of the solicitor to be without merit. If there was no need to consider the excuse of the solicitor – because delivery of the bill was obligatory – then there would be no reason for him to find that the excuse was not a valid one. In Re Foljambe he expressly refers to his jurisdiction to order delivery and I have no doubt that Mr Marven's position that there is a jurisdiction to be exercised is the correct one.

19. As can be seen from the end of the Blackmore quotation, the application for delivery of the bill and any subsequent application to have that bill assessed are, as the authorities describe it "two distinct jurisdictions." Indeed, some of the authorities suggest that even if there is no possibility of having the bill assessed, the client is still entitled to seek delivery of the bill. There are limits to that requirement, as Mr Carlisle accepted. For example, if the solicitor decides not to render any charge, he cannot be obliged to produce a statute bill for zero pounds. But the very existence of some limitations to this requirement rather demonstrates that it is a matter for the jurisdiction of the court as to whether or not to compel a solicitor to deliver a bill in any particular circumstances.

20. Some of Mr Marven's arguments did suggest that the ability of the client to have the bill subsequently assessed ought to play a part in considering whether to order a bill to be delivered in the first place. For the reasons I have just set out however, I do not accept such arguments, notwithstanding the intuitive nature of them in the circumstances before the court.

21. Mr Marven submitted that the only reason for bills being requested is to reset the clock so that applications to have the bills assessed can be made in accordance with section 70 Solicitors Act 1974. Mr Carlisle, with due regard for the current Master of the Rolls' pronouncements in CAM Legal Services v Belsner [2022] EWCA Civ 1387 suggested that the routes which the claimant might wish to pursue would include the Legal Ombudsman or indeed the solicitor's own complaints procedure and not necessarily a section 70 application. Whatever is the case, the authorities are clear in my view in indicating that a client is entitled to apply for a bill to be delivered to them without necessarily having to commit in some form to having that bill assessed.

Exercising the discretion

22. Having come to the conclusion that I have an exercise of discretion to undertake, I need to set out the facts and matters in each case on which to consider exercise of that discretion. The importance of the specific facts is demonstrated by the outcome of the two Re A Solicitor cases referred to above.

23. In the 1947 case, the facts were summarised as follows:

> "On 31 July 1940, the respondent solicitors wrote to the applicant, who was in Switzerland, enclosing their receipted bill of costs and a cash account. An item in the cash account was a disbursement, "bill of costs herewith", amounting to a substantial sum. The accompanying statement of charges showed only a gross or lump sum for a large proportion of the work specified. One of the items for which the lump sum was charged was a mortgage completed, but it was not contended that it included any freehold or leasehold property within the jurisdiction. The applicant received the letter and documents in August 1940. The respondents continued to act for her and she sent them many letters and cables and introduced two new clients. In a letter dated 20 March 1944, she informed the respondent that she had changed her solicitors, but it was not until 4 January 1946, that she raised the question of the statement of charges which had been paid by retention on 31 July 1940."

24. In respect of the 1953 case, the following is taken from the Master of the Rolls' judgment:

> "The solicitors were engaged to conduct the legal business necessary in the winding up of the testator's estate. That they did, there is no question that they did it properly, and in July 1949, the executors received from them a document, headed: "Edgar Lewis East, deceased. Statement of receipts and payments."
>
> …The last item on the left-hand side was expressed thus: "To Messrs Percy Walker & Co legal charges and disbursements on extracting probate, administration of estate, assents and negotiating surrender of the Bentham Road leases £735."
>
> … The receipts, however, did not amount to as much as the outgoings, so that the last item on the right-hand side is a balance figure expressed of thus, "Balance of account due to Messrs Percy Walker & Co £260 9s 7d." The executors were satisfied with the account as delivered and they paid the £260 9s 7d in a cheque to the solicitors. Indeed, it appears that thereafter they continue to instruct the solicitors in other matters.
>
> … In 1951 the son, the male executor, found himself in the position of being the executor of the will of somebody else who had died. That estate was not so large as his father's, but in the second case the legal charges of the solicitors acting were very much less than the figure of £735 which appeared in the document to which I have referred. This executor thereupon expressed to the solicitors his doubts whether the figure which had been charged, and paid, was a proper figure, and he asked to be supplied with details to justify it. On 13 August 1952, the solicitors made out a document which was in form a bill, though it was not delivered as such…"

25. I have set out at paragraph 9 the views of the Master of the Rolls in the 1953 case as to the difference in the facts of the two cases. In the 1947 case, the former client said that she always intended to have the bill assessed but then took six years in which she used the solicitors and indeed referred other clients to them before taking up the challenge. In the 1953 case, it appears that the solicitors were also still instructed on certain other matters for a period of three years before a challenge was made. That is "all that can be said against the clients" and the Master of the Rolls did not think "it could possibly be said that, by their conduct, they have deprived themselves of the right, which otherwise they would possess, to have a proper bill."

26. Mr Carlisle pointed out that these two cases both involved the client receiving a bill for a lump sum and they sought a detailed bill in its place. The entitlement to this revolved around the Solicitors Remuneration (Gross) Order 1934 and its relationship to the Solicitors Act 1932 and indeed a General Order of 1882. The present cases do not involve the client receiving a gross sum bill and then requesting a detailed bill as is provided for in respect of contentious business by section 64 Solicitors Act 1974. In these cases, the clients have not received any bills whatsoever.

27. Mr Carlisle is obviously right in terms of the factual matrix of the Re A Solicitor cases on which the defendant relies. However, I take the view that the court's exercise of discretion is not limited to the question of whether a detailed bill is to be provided in place of a gross sum bill. There is no such qualification evident from the plain words I have quoted above. Given the 70 intervening years, if there was such a qualification, I doubt the editors of the White book and other commentaries would still be stating the proposition that the court has a discretion whether to order the delivery of a bill in the absolute terms that are set out but would have limited comments to cases under section 64.

<u>The facts in these cases</u>

28. From the witness statements of Mr Green and Ms Wheeler, I understand that Mr Watson was involved in a road traffic accident on 24 October 2013. He instructed the defendant via a conditional fee agreement and at the conclusion of the claim 25% of the claimant's damages were retained by the defendant in part payment of the defendant's costs. The letter sending the balance of the damages is dated 19 November 2014. There is no date given as to when the claimant instructed Mr Green to obtain a copy of the defendant's file of papers but the letter to the defendant requesting delivery of the file is dated 1 September 2022.

29. In respect of Mr Verma, he was also involved in a road traffic accident. That occurred on 8 January 2016 and he was similarly represented by the defendant using a CFA and at the end of the case a 25% deduction from his damages was made as part payment of the defendant's costs. The cheque for the balance of the damages was sent on 7 September 2017. The letter of claim from JG solicitors is dated 28 September 2022.

30. It is obvious from the preceding two paragraphs that there is not a lot of case specific information before the court, notwithstanding two witness statements in each case and a number of pages of exhibits. Those witness statements were from the parties' current solicitors rather than either of the claimants or indeed the file handlers at the time the claims were being pursued. Consequently, the sort of information available to the courts in the 1947 and 1953 cases is essentially absent. That might be understandable if the

original hearing had gone ahead and the claimants' solicitors (in particular) were not expecting the novel argument that has been run here. However, having adjourned the hearing to a longer time estimate, I take the view that the claimants had the opportunity to put in evidence themselves if they had wished to do so.

The defendant's submissions

31. Mr Marven's skeleton argument refers to the brief facts of the claims. He then points to the absence of any complaint to the defendant's complaints procedure or to the Legal Ombudsman. Indeed, the essence of Mr Marven's submissions are that the claimants have made no complaint whatsoever until they instructed JG solicitors for advice in 2022.

32. Mr Marven submitted that neither claimant has advanced any cogent criticism of the deduction from damages and these proceedings are simply a mechanism to enable section 70 proceedings to be brought. His skeleton argument refers to the deprecatory comments of the Master of the Rolls in both Belsner and Karatysz v SGI Legal LLP 2022 EW CAC 1388. The Belsner quotation (paragraph 14) refers to it being unsatisfactory that "solicitors like checkmylegalfees.com" can adopt a business model allowing for High Court litigation to be brought to assess solicitors' bills in cases of this kind. He suggested that the Legal Ombudsman scheme would be a cheaper and more effective method of querying solicitors' bills.

33. The quotation from Karatysz (paragraph 45) concerns the deprivation of costs in such proceedings if claimants continue to bring "trivial claims" for assessment in the High Court even if those claimants are successful in reducing the bill by more than a fifth (the key point according to s70(9)). The quotation from Karatysz goes on to say that the critical issue is and always will be whether it is proportionate to bring this kind of case to the High Court. Mr Marven's skeleton argument follows these quotations by concluding:

> "Those comments were of course directed at the situation where there had already been an assessment, but the principles underpinning them compel the conclusion that, where the court has the opportunity to avoid such an objectionable assessment in the first place, that opportunity should be taken."

Discussion

34. It seems to me that Mr Marven's submissions recognise that the effective shutting out of the claimant from any potential remedy is going to require heavy arguments to weigh in the opposite scale. Consequently, he relied on the Master of the Rolls' comments on the nature of the claims being brought in addition to the length of time which has elapsed since the personal injury claims were concluded and the absence of any complaint, formal or otherwise, until new solicitors were instructed.

35. I do not think that the Master of the Rolls' comments can be taken in quite the manner proposed by the defendant. The claimants in Belsner and Karatysz had looked at the statute bills they had received and decided to embark upon an assessment of the costs under s70. If the current claimants sought to do this, having received a statute bill, they would no doubt be mindful of the Court of Appeal's concern about the costs generated

in claims whose value would usually cause them to be allocated to the small claims track if they involved different legal circumstances.

36. It might be that a claim to the Legal Ombudsman would be brought instead. That might be less remunerative, but arrangements might still be made between claimants and their lawyers to make this viable. But I do not need to speculate on this point because the client's decision on what to do with the bill needs to be divorced from the entitlement to see it, just as much as the previous cases divorced an entitlement to have the costs assessed from the entitlement to receive a bill in the first place.

37. I do not think that there can be any doubt that a client is entitled to an invoice for work done as a general concept. I note that there were contractual obligations to do so in this case in addition to professional obligations. Therefore, whilst the authorities require me to exercise my discretion to require the defendant to provide its former client with a bill, it seems to me that it is a relatively low hurdle to surmount.

38. The remainder of the defendant's challenge to providing a bill is the length of time since the claim settled and, to some extent, the lack of any challenge to the settlement terms in the intervening period.

39. Taking these in reverse order, I do not think that the absence of any complaint aids the defendant. Rather obviously, there is no bill on which a complaint could be raised. There are figures put forward in settlement correspondence but even if arithmetically correct (not always the case in my experience) the calculation may depend upon applying statutory caps etc and that would not necessarily be apparent from correspondence or telephone calls. The guidance in Ralph Hume Garry (a firm) v Gwillim [2002] EWCA Civ 1500 regarding the adequacy of bills for the purposes of assessment is echoed here in that the client needs to have sufficient information on which to take advice. Absent a bill, it is very difficult for such advice to be given.

40. It seems to me that the defendant's best point is the "lapse of time", as Sir Raymond Evershed described it, in even bringing a claim for a bill in the first place. There is no evidence as to why the claimants did not seek a bill for roughly 5 years in Mr Verma's case or 8 years in Mr Watson's.

41. Mr Carlisle's submissions on this point were robust. The claimant had no limitation on the amount of time that could elapse before he requested the bill. The only reason he would have to make a request at all is because of the failure on the defendant's part to provide what was required contractually and / or professionally.

42. I raised the point that the solicitor would only have 6 years in which to pursue the client for fees. Mr Carlisle's response was that it was a manifestation of the higher duty owed by the solicitor to the client. Solicitors could prevent applications such as this by complying with their terms of business / professional responsibilities. There were no time limits on the client seeking a bill and nor should there be.

43. I do not think this can be correct. For a start, it would call into question the Court of Appeal's decision in the 1947 case. Moreover, civil proceedings are invariably regulated by limitation periods of varying lengths and I do not see that the client's entitlement here can be open ended. Perhaps this is just another way of saying that the

length of time before a request is made is a factor to be taken into account when exercising the court's discretion.

44. As I have indicated, there is little information before me regarding the specific facts of these cases and the prominent feature is the period of 5 or 8 years before any request is made. Are those periods sufficient to deny the clients a bill?

45. The 1947 and 1953 cases involved roughly 6 years and 3 years respectively. In the 1947 case, the court also took into account that the client said she had always intended to challenge the bill: something which is absent in these cases. In the 1953 case, the court clearly did not think that three years was sufficient to deprive a client of their right, absent any conduct issues (see the quotation at paragraph 9 above.)

46. These authorities suggest to me that Mr Verma's lapse, if that is the right word, of 5 years is not sufficient, without more, to prevent him seeking a bill on which to take advice. The 8 year period of Mr Watson goes beyond the earlier cases and seems to me to encapsulate the problem if there is no limitation of time to bring these applications.

47. As I have said, I do not think that can be right. All claims either become statute barred or require the court to exercise a jurisdiction to admit a late claim. Solicitors are only required to keep their files for a finite period and although that does not appear to be an issue in these cases, it goes to the reasonableness of allowing unlimited claims in general.

48. If there was a reason why Mr Watson decided he wanted to challenge his fees in a manner similar to the executor in the 1953 case, who became aware of the charging of other solicitors, that would be one thing. But I have no evidence at all from Mr Watson as to his actions, and in the absence of any material, it is difficult to see why discretion should be applied in his favour. He could not sue the defendant for breach of contract or negligence at this point. In my judgment the same position ought to apply regarding this application.

Conclusion

49. Consequently, I will grant Mr Verma's application and refuse Mr Watson's application for a statute bill to be delivered by the defendant. As I have set out at the beginning of this judgment, the delivery up of papers has already been undertaken and I do not understand there to be any issue regarding the adequacy of this.

50. As far as the costs of the applications are concerned, there has been a score draw arithmetically. If the parties are able to resolve that issue prior to the handing down, I will incorporate the result in the order. But if there are to be arguments on the incidence of costs (and / or the extent of them) then a further hearing may be required.