Michaelmas Term
[2024] UKSC 34
On appeal from: [2023] EWCA Civ 844

JUDGMENT

Oakwood Solicitors Ltd (Respondent) *v* Menzies (Appellant)

before

Lord Briggs
Lord Sales
Lord Hamblen
Lord Leggatt
Lord Richards

JUDGMENT GIVEN ON
23 October 2024

Heard on 3 July 2024

Appellant
Roger Mallalieu KC
Gemma McGungle
(Instructed by JG Solicitors Ltd)

Respondent
Craig Ralph
Erica Bedford
(Instructed by Oakwood Solicitors Ltd)

LORD HAMBLEN (with whom Lord Briggs, Lord Sales, Lord Leggatt and Lord Richards agree):

Introduction

1. The court has long had powers to ensure that solicitors do not claim excessive remuneration for work done by them. These powers are exercised through the court's taxation or, in modern parlance, assessment of solicitors' bills of costs. An assessment involves the court determining whether the costs are reasonably incurred and are reasonable in amount.

2. The right to apply to the court for assessment of a solicitor's bill of costs is governed by section 70 of the Solicitors Act 1974 (the "1974 Act"). In summary, the statutory scheme is as follows. For one month after its delivery there is an unconditional right to have the bill assessed and, if this right is exercised, no action can be commenced on the bill until that assessment has been completed. After that one month period, there is a right, until 12 months have passed from delivery of the bill, to apply to the court for an assessment, which it may order on such terms as it thinks fit. After 12 months have passed, no order for assessment shall be made unless there are "special circumstances".

3. A different regime applies, however, if there has been "payment" of the bill. In those circumstances, if an assessment is sought after the initial one month period but before the expiry of 12 months from payment of the bill, no order for assessment shall be made unless there are "special circumstances". After 12 months have expired from payment, no assessment can be made (section 70(4) of the 1974 Act).

4. The issue which arises on this appeal is what constitutes "payment" for these purposes.

5. The appellant contends that, as Bourne J held, it requires that the client should have been informed of and have provided agreement to the specific amount in respect of which payment is to be made pursuant to the bill.

6. The respondent contends that, as the Court of Appeal held, all that is required is an agreement with the client that fees may be deducted from monies held to the client's account and delivery to the client of a bill setting out the amount of those fees. No further agreement is required.

Factual background

7. On 29 November 2015, the appellant (the "Client") was involved in a road traffic accident as a result of which he suffered serious injuries. The respondents (the "Solicitors") were instructed to pursue a claim for damages for personal injury in relation to the accident. The agreed terms of their retainer were set out in a conditional fee agreement dated 17 December 2015 ("the CFA").

8. Under the CFA, in the event that the claim succeeded the Client agreed to pay the Solicitors' basic charges, disbursements and a success fee set at 25% of basic charges. It was also agreed that the total amount of those sums would be capped at a maximum of 25% of the compensation received, after deducting any fees and expenses recovered from the other side. It was further agreed that the balance of the Solicitors' basic charges and success fee would be paid "out of your compensation" and that, out of compensation monies received, "you agree to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT. You take the rest."

9. The defendant to the claim made an offer to settle the claim for a payment of £275,000 in damages, subject to CRU (the amount of state benefits recoverable by the Compensation Recovery Unit), plus reasonable costs to be assessed if not agreed. The Client decided to accept this offer.

10. The sum paid by the defendant net of CRU, and taking into account interim payments of damages already paid in the sum of £25,000, was £210,004.85 (the CRU payment being £39,995.15).

11. The Solicitors retained the sum of £58,632.79 from the sums paid by the defendant (£56,465.29 together with insurance premium of £2,167.50) in their Client Account. On 25 March 2019, £25,000 of that sum was transferred to their Office Account.

12. On 18 April 2019, the Solicitors wrote to the Client, enclosing what was described as an "Interim Statute Bill" showing its total costs (including the insurance premium) in the sum of £83,711.20, an "Opponent Bill of Costs" showing the amounts potentially recoverable from the defendant and a "Claimant Bill" showing non-recoverable costs of £2,797.20. The letter stated that the costs recoverable from the defendant would be negotiated.

13. The "Interim Statute Bill" set out the following retention from damages: "Total Fees Retained from Damages £47,054.41 (Costs) £2,167.50 (Disbursements) £9,410.88 (VAT at 20%)".

14. Between the parties costs were agreed in the sum of £38,000. The difference between that and the sum stated in the Interim Statute Bill was £45,711.20 of which £10,000 was an issue fee in respect of which the Client was entitled to fee remission, leaving a balance of £35,711.20 based on the figures the Solicitors had set out.

15. On 11 July 2019, the Solicitors paid to the Client the sum of £22,629.09 which was said to be the difference between the sum it had retained and the sum now stated to represent the shortfall.

16. On the same date, the Solicitors sent the Client a “Final Statute Bill”, dated 11 July 2019. That document stated that the Solicitors’ “total fees” were £73,711.20 (to include basic charges, disbursements, insurance premium, VAT and success fee). The bill further stated that: “unless otherwise stated in the covering letter, the total charge has been deducted from your damages, as agreed”.

The proceedings

17. On 1 April 2021, the Client made an application pursuant to section 70 of the 1974 Act to the Sheffield District Registry for an order for assessment of the Final Statute Bill.

18. On 30 July 2021, District Judge Batchelor transferred the claim to the Senior Courts Costs Office for a preliminary issue hearing to determine whether the Client had a right to assessment. The Solicitors contended that the court was barred from ordering an assessment of the bill by section 70(4).

19. The preliminary issue was heard before Costs Judge Rowley who handed down judgment on 11 April 2022. He held that payment for the purposes of section 70(4) occurred more than 12 months before the date of the application for an assessment and that the claim was therefore statute barred. He did not specify the date payment had taken place, though it appears that he took that date to be the date when the Final Statute Bill was delivered (11 July 2019).

20. The Costs Judge held that if it had been open to him to consider whether an assessment should be allowed on the basis of “special circumstances” he would have held that there were such circumstances and would have ordered an assessment. He described the Final Statute Bill and its accompanying letter as “amongst the most impenetrable documentation that I have seen”. He further noted that there was no explanation of why only approximately 17% of the Solicitors’ profit costs had been recovered from the defendant.

21. The Client appealed and the appeal was heard by Bourne J and Costs Judge Brown (sitting as assessor). Judgment was handed down on 14 December 2022: [2022] EWHC 3199 (KB); [2022] Costs LR 1793. The appeal was allowed on the basis that there had been no payment because there had been "no sufficient settlement of account" between the Client and the Solicitors such as to warrant treating the deduction as payment under section 70(4).

22. The Solicitors appealed to the Court of Appeal and the appeal was heard by Sir Geoffrey Vos MR, Lewison and Simler LJJ. Judgment was handed down on 14 July 2023: [2023] EWCA Civ 844; [2023] 1 WLR 4495. The appeal was allowed on the grounds that the Client had agreed under the CFA that the Solicitors could deduct monies and had been sent a Final Statute Bill. Retention of the monies in light of the Client's earlier agreement in principle to such retention sufficed to amount to payment for the purposes of section 70(4). No settlement of account and no agreement to the amount of the retention or agreement to the retention in light of the amount stated in the Final Statute Bill was required.

23. It was held that payment for the purposes of section 70 is "a transfer of money (or its equivalent) in satisfaction of a bill with the knowledge and consent of the payer" (para 41). In their words (para 42):

> "The delivery of a compliant bill will give the client the necessary knowledge. The requirement of consent does not, in our view, require that consent be given after the delivery of the bill, if the client has already validly authorised the solicitor to recoup his fees by deduction from funds in his hands. What the client needs to consent to, in order for payment to take place, is 'the transfer of money', not necessarily the precise amount to be transferred."

24. By order dated 21 November 2023, the Supreme Court (Lord Reed, Lord Leggatt and Lord Richards) granted the Client permission to appeal.

The statutory framework

25. Under section 68 of the 1974 Act the court has the power to make orders for the delivery by a solicitor of a bill of costs.

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

> "(1) Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2) …"

Provisions are then set out as to the signing and delivery of bills of costs. It is well established that the bill must be a complete bill containing sufficient information to enable the client to obtain advice as to its detailed assessment and for the court to assess it.

27. Section 70 of the 1974 Act provides:

> "**70 Assessment on application of party chargeable or solicitor**
>
> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.
>
> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—
>
> > (a) that the bill be assessed; and
> >
> > (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.
>
> (3) Where an application under subsection (2) is made by the party chargeable with the bill—

> (a) after the expiration of 12 months from the delivery of the bill, or
>
> (b) after a judgment has been obtained for the recovery of the costs covered by the bill, or
>
> (c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill,
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> no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.
>
> (4) The power to order assessment conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill. …"

28. Section 71 provides that a third party who has paid or is liable to pay a bill of costs may apply for an assessment "as if he were the party chargeable".

The parties' cases

29. The Client's case is that payment for the purposes of section 70 requires an agreement as to the amount to be paid in respect of the bill of costs. It is a reactive process to a demand made in the bill. The client needs to have been informed of and have provided agreement to the amount in respect of which the solicitor intends to take payment pursuant to their bill.

30. A prior agreement between solicitor and client that the client will pay monies generally on account of costs, or that the client agrees in principle to the solicitor deducting monies to pay costs from monies held on behalf of the client, and then the use by the solicitor of such monies to pay a particular bill without seeking the client's agreement to the amount to be paid in respect of that bill, is not payment of the bill for the purposes of section 70. Nor is it consistent with the rationale and purpose of setting more time limits running in respect of the client's rights to seek assessment of the bill where payment has been made.

31. The Solicitors' case is that the requirement for payment in section 70 is satisfied where there co-exists (i) a retainer agreed with the client that permits payment of the solicitor's fees to be taken by way of a deduction from sums held on the client's account and (ii) the communication of the amount of that deduction to the client by way of the delivery of a statutory compliant bill of costs.

32. It is to be noted that on the Solicitors' case payment for the purposes of section 70 may be made on and simultaneously with delivery of the bill of costs. If a retainer arrangement is in place whereby costs can be deducted from sums retained by solicitors, as in this case, then, if a deduction is made, payment will be complete on delivery of the bill of costs. It is sufficient that the client is notified of the amounts deducted or to be deducted. No further consideration, discussion or agreement in relation to the bill of costs is required before payment is effected. Payment can thus occur before the client has an opportunity to see, consider or take advice in relation to the bill of costs.

33. That is, indeed, illustrated by the facts of this case. Part of the costs were paid by means of the 25 March 2019 transfer of £25,000 from the Solicitors' Client Account to their Office Account. On the Solicitors' case, that transfer became a payment under section 70(4) on delivery of the Final Statute Bill on 11 July 2019.

The meaning of "payment" in section 70(4)

34. The meaning of statutory words needs to be considered in light of their context and the purpose of the statutory provisions – see generally *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 28-29.

35. As to the ordinary meaning of "payment", it is common ground that it is not a legal term of art and that its meaning depends on its context. An important consideration is the subject matter of the payment. In the present case, it is not payment of an agreed price or a fixed fee. Nor is there an agreed formula for determining the amount payable. The only agreed formula was as to a cap on payment, not its amount. The payment was to be of a sum explained in a delivered bill the reasonableness of which the Client had a statutory right to challenge.

36. The most obvious example of payment of a solicitor's bill, or indeed of any bill for services, is the situation where a bill is rendered and then paid by the client transferring money to the solicitor (or other service provider). By making the transfer the client is accepting and agreeing to the amount charged in the bill which has been rendered. Sometimes, items in the bill may be questioned or challenged, a discussion ensues, agreement is reached as to the appropriate sum to be paid and then a transfer is made. These are clear examples of the payment of a bill and they involve agreement to the amount to be paid in respect of the bill.

37. Payment does not, however, have to be made by the transfer of money from the client to the solicitor. There may be many circumstances, as in this case, where monies are held by the solicitor on behalf of the client and payment is made by means of an authorised deduction from the monies so held. Such a payment would only correspond with the most obvious example of payment if there was similarly agreement as to the amount to be paid in respect of the bill. That would provide a consistent meaning to what is required for payment.

38. As explained above, on the Solicitors' case payment may be carried out on and by the delivery of the bill of costs. No transfer or deduction of monies needs to take place at the moment of payment. Payment carried out by delivery of a bill of costs rather than a transfer of money does not accord with the natural meaning of payment.

39. As to the statutory context, there are a number of considerations which are of relevance.

40. First, section 70 is concerned with the right to assess solicitors' bills of costs. It is focused on the proper amount to be charged by way of costs, having regard to whether they have been reasonably incurred and are reasonable in amount. The right to seek assessment, and any assessment carried out by the court, involves a dispute as to the amount of costs claimed and is directed at the specifics of the bill of costs. That being so, it would be surprising if payment was to occur without there being any opportunity for the client to consider the detail of the bill of costs and to decide whether and to what extent it should be paid.

41. Secondly, and relatedly, delivery to the client of a bill complying with the statutory requirements is integral to the statutory scheme. No action to recover costs can be brought unless a bill has been delivered. Once the bill has been delivered, for one month thereafter there is an unconditional right to assessment and to an order that no action may be brought until the assessment has been completed. The 12 month period set by section 70(3)(a) also runs from the time of delivery. This emphasis on delivery highlights that the detail of the bill delivered, and the opportunity for the client to consider that detail, is of central importance.

42. Thirdly, section 70 envisages payment after delivery of the bill of costs and therefore not by virtue of the delivery of the bill. This is reinforced by the fact that under section 70(1) an application for an assessment of the bill of costs carries with it the right not to pay costs until that assessment has been completed. Under section 70(2) that consequence may also follow from an application for an assessment, subject to any terms imposed by the court.

43. As to the purpose of the regime, it is apparent that the requirements that bills of costs be delivered, that the bills comply with statutory conditions, and the right to have those bills assessed are concerned with the protection of the interests of the client - the consumer of solicitors' services. The court's power to assess costs exists to ensure that excessive costs are not claimed from the client. Client protection is diminished if payment occurs before there is any opportunity to consider the bill of costs and whether and, if so, to what extent, it should be paid.

44. In the ordinary case where there has been no payment section 70 affords the client a reasonably generous period in which to seek an assessment: an unconditional right to do so for one month; a right to apply to the court for up to 12 months and thereafter a right to do so if there are special circumstances. Given the growing prevalence of retainer agreements, if delivery of the bill could itself constitute payment there would, however, be increasingly few cases where these rights would be available. In very many cases the stricter regime which applies where there has been payment would govern.

45. As to the specific purpose of section 70(4), the obvious reason for the stricter regime that applies where the bill has been paid is that payment by a client of a particular bill is taken to represent acceptance and agreement by the client to the sums claimed in that particular bill. Where there is such acceptance and agreement it is understandable that the client's right to an assessment should be restricted. On the Solicitors' case, however, payment may occur without there being any opportunity to consider the bill of costs, let alone to accept and agree to it.

46. For the reasons outlined above, considerations of ordinary meaning, context, and purpose favour the Client's case rather than that of the Solicitors. The authorities provide strong further support for that case.

The authorities

47. Before turning to the authorities, the Solicitors took a preliminary point, not taken below, that it was not appropriate to refer to authorities on earlier statutory versions of the 1974 Act since that was a consolidating Act. Reliance was placed on *Farrell v Alexander* [1977] AC 59 and, in particular, Lord Wilberforce's judgment in which he stated (at p 73B-C):

> "… self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve."

48. As this court recently observed, however, in *United Utilities Water Ltd v Manchester Ship Canal Co Ltd* [2024] UKSC 22; [2024] 3 WLR 356 at para 110:

> "there are circumstances, in the absence of overt ambiguity, in which the court must have regard to earlier enactments and case law in order to understand and give effect to the intention of Parliament in the consolidating statute: *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349, 388 per Lord Bingham of Cornhill."

It is not, however, necessary to consider whether this is such a case since I am satisfied that the issue of interpretation raised on this appeal is one of real difficulty or ambiguity.

49. The statutory scheme summarised in paras 2 and 3 above was first introduced by the Solicitors Act 1843 which was described as an "Act for Consolidating and Amending Several of the Laws relating to Attornies and Solicitors Practising in England and Wales" (the "1843 Act").

50. Section 37 of the 1843 Act provided that solicitors were not to commence an action for their fees until one month after the delivery of their bill, that the party chargeable had the right to refer the bill to the court for taxation during that one month period, that thereafter application could be made to the court to refer the bill for taxation which could be ordered on terms, but that after 12 months special circumstances had to be shown before such an order could be made (the equivalent of sections 70(1) and (2) of the 1974 Act).

51. Section 38 provided that bills could be taxed on the application of third parties who are liable to pay or who have paid the bill "as the Party chargeable therewith might himself make" (the equivalent of section 71).

52. Section 41, headed "Taxation of Bill after Payment", provided that the "Payment of any such Bill" did not preclude the court from referring a bill to taxation but that such an application had to be made within 12 months "after Payment" (the equivalent of section 70(4)).

53. These sections were replaced by differently worded provisions implementing the same statutory scheme in the Solicitors Act 1932 which was described as an "Act to consolidate the Solicitors Acts, 1839 to 1928, and other enactments relating to solicitors of the Supreme Court" (the "1932 Act").

54. Under the 1932 Act section 66(1) and (2) were the equivalent provisions to sections 70(1) and (2) of the 1974 Act. Section 41 of the 1843 Act was now contained in a proviso to section 66(2) as follows:

> "Provided that—
>
> (i) if twelve months have expired from the delivery of the bill, or if the bill has been paid, or if a verdict has been obtained or a writ of inquiry executed in an action for the recovery of the costs covered thereby, no order shall be made on the application of the party chargeable with the bill except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the taxation as the Court may think fit:
>
> (ii) in no event shall any such order be made after the expiration of twelve months from the payment of the bill."

55. The trigger for the different statutory scheme applicable to bills which had been paid was "if the bill has been paid" and the 12-month guillotine ran from "the payment of the bill".

56. Section 38 of the 1843 Act was replaced by section 67 of the 1932 Act.

57. There was a Solicitors Act 1957 which made no material changes and then the 1974 Act.

58. The essential point which Mr Roger Mallalieu KC on behalf of the Client says is to be drawn from the authorities on these earlier versions of the statutory scheme is that they establish that, for there to be payment by retention or deduction, there needed to be a "settlement of account" – ie an agreement to the sum to be taken by way of payment for the delivered bill. The authorities will be considered in chronological order.

59. The first case is *In re Bignold* (1845) 9 Beav 269. The judgment was given by Lord Langdale MR who had been the promoter of the 1843 Act. The case concerned an application for taxation by a third party under section 38 of the 1843 Act. A mortgagee's solicitor had retained the amount of his bill of costs out of the proceeds of the sale of the mortgaged estate and rendered an account to the mortgagor. The mortgagor applied for an order for taxation of the bill. Whether or not he had the right to apply for such an order

was treated as being dependent upon whether there had been a settlement of the bill as between the solicitor and his client, the mortgagee, through its payment. In the course of argument Lord Langdale stated as follows:

> "You say that the solicitor, as between himself and client, has retained the amount of his bill. I have never, hitherto, considered, that the mere retainer by a solicitor, out of monies in hand, of the amount of his bill, amounted to a payment, unless there has been a settlement of account."

This would appear to be a statement of Lord Langdale's understanding of the general law applicable to payment of solicitors' bills rather than of any provision of the 1843 Act. The decision was that, as there had been an account stated but not settled, no payment had been made and there was a right to taxation. It is correct to note that the case did not involve any retainer agreement.

60. The next case is *In re Ingle* (1855) 21 Beav 275. This involved an agreement between a solicitor and his client that payment of his bills would be taken out of the sale of shares. It was argued that this agreement precluded taxation. The court held that it did not do so as the client was illiterate. There was a further argument that in any event there had been no payment and *In re Bignold* was cited. In giving the judgment of the court Sir John Romilly MR stated as follows, at pp 278-279:

> "As to payment, there was none; the solicitor was to retain, out of money to be received by him, the amount of his bill. Payment must either be actual payment in money, or an agreement by the client, on the settlement of accounts between him and his solicitor, that the amount shall be retained."

No authority was cited to support this statement in the judgment. As with Lord Langdale's observations in *In re Bignold*, it appears to be based on a general understanding as to what payment requires in this context. The premise upon which the payment issue arose was that there was a retainer agreement.

61. *Ex parte Hemming, re Bischoff and Coxe* (1856) 28 LTR 144 (*"Ex parte Hemming")* is a case relied upon by Mr Craig Ralph for the Solicitors. The solicitors, Bischoff and Coxe, had acted for Mr Hemming in respect of mortgages and sales of estates. An account current was delivered to Mr Hemming, paying him some monies, deducting the amount of the account and giving him a receipt. Some time later Mr Hemming applied for taxation of the solicitors' bills. This was opposed on the basis that there had been payment of the bills and there were no special circumstances and the Court of Common Pleas so found. Cockburn CJ stated:

> "It seems to me that what took place amounted to payment … It appears that they had money in their hands raised by mortgage, when in 1855 they came to a final settlement, in which these bills were included. Mr Hemming submitted to those charges so made, acknowledged the account, and kept the balance in liquidation of the account. It has been ingeniously put that this does not amount to a payment; but it is the ordinary case of a man accepting a balance in liquidation of an account, and, I think, therefore, that these bills are paid and finally settled."

Crowder J agreed on the basis that it came within "the ordinary rule of a bill rendered and balance accepted". Williams J and Willes J agreed but on the additional basis that there had been payment within the meaning of section 41 of the 1843 Act.

62. This would appear to be a case in which the court held that there had been a settlement of account through the client's acceptance of the bill delivered and the balance of monies paid in respect of it. This was a "final settlement", an "acknowledgment" of the account, and an acceptance of a balance in "liquidation" or settlement of the account. It does not suggest that there is no need for a settlement of account; it simply recognises that such a settlement may be implied by conduct and does not require express agreement. It also recognises that such an agreement may be inferred from the acceptance of the balance of a bill rendered.

63. In *Re Street* (1870) LR 10 Eq 165 a solicitor retained the amount of the bill of costs out of money held on retainer. The client on receiving the balance of the money, but before the bill was delivered, signed an account in which the total costs was an item. It was held that there was no payment of the bill and the client was entitled to have the bill taxed a year after the signature on the account. Lord Romilly MR stated at p 167:

> "I have held over and over again that there can be no payment, within the meaning of [section 41 of the 1843 Act] before the bill has been delivered, *and before the client has had the opportunity of seeing the items*. If a solicitor sells an estate, receives the purchase-money, deducts the amount of his costs, and pays the balance to the client, that is not payment within the 41st section, if he has not delivered his bill of costs." (emphasis added)

64. *Re Sutton & Elliott* (1883) 11 QBD 377 is to similar effect to *Ex parte Hemming*. In that case taxation was refused in respect of certain bills which had been paid over 12 months earlier. Payment was found to have been made through acceptance of the balance

due and paid in respect of bills provided to the client's solicitor. Sir Baliol Brett MR stated, at p 378:

> "… a debtor and creditor account was handed to the client, or rather to Mr Hill, his solicitor, which is more important, and in such account, after taking into the account these four bills, a balance was shewn in favour of the client, and the amount of that balance was paid to such solicitor, *who accepted the balance as correct,* and took the money for it, so there was that which was equivalent to payment of these bills…" (emphasis added)

65. *In re Thompson* [1894] 1 QBD 462 is another similar case in which *Ex parte Hemming* was applied.

66. In *Re Foss, Bilbrough, Plaskitt & Foss* [1912] 2 Ch 161 (*"Re Foss")* a company had paid monies on account of costs to its solicitors. The solicitors had rendered accounts from which they had debited their bills of costs and alleged that the company had consented to their retaining these sums in discharge of their costs. The judge found on the evidence that the solicitors had not proved any consent to the amount of costs. In these circumstances it was held that there had been no payment within the meaning of section 41 of the 1843 Act. Neville J stated (at p 164):

> "In my opinion where clients have advanced moneys on account of costs prior to the delivery of a bill and the solicitors subsequently deliver a bill and appropriate the money of the clients in their hands in payment, this does not amount to payment of the bill within section 41 of the Act of 1843, at all events where there has been no settlement of account. In my opinion there was no such settlement in the present case. I think, therefore, there was no payment here."

67. In *Re Jackson* [1915] 1 KB 371 a solicitor had agreed to act for a client in a civil matter for an inclusive fee of 100 guineas. In response to an application for taxation the solicitor contended that it was out of time as the amount had been paid more than 12 months earlier through the collection, allegedly with the authority of the client, of £100 from a debtor of the client. It was held that the case should be remitted for further factual inquiry but Rowlatt J stated the applicable legal principle to be as follows, at para 383:

> "Payment is an operation in which two parties take part. If a man collects a debt due to his debtor and purports to pay his own debt in that way, it is not really a payment unless the other

> party knows what is being done and agrees that the sum received in that way by his creditor shall be used in the payment of his debt."

68. This passage was cited and applied by Stamp J in *Forsinard Estates Ltd v Dykes* [1971] 1 WLR 232. Stamp J, relying on that passage, stated as follows (at p 237):

> "It is clear that if a solicitor without the knowledge or approbation of his client pays his own bills out of monies of his client and hands over the proceeds, that is not payment within the meaning of section 69 of the Solicitors Act 1957."

On the facts of that case it was held that it had been agreed that money received by the solicitor should be used to pay his bill of costs and that payment had thereby been made.

69. This decision, and its citation of *Re Jackson*, was applied by the Court of Appeal in *Gough v Chivers & Jordan* [1996] Lexis Citation 1048. In giving the lead judgment, Aldous LJ stated:

> "…the word 'payment' in my view should be construed as covering the transfer of money in satisfaction of a bill with the knowledge and consent of the payer. That was the view of Stamp J in *Forsinard Estates Ltd v Dykes* …"

The material part of Stamp J's judgment was then set out. On the facts it was held that there had been agreement to the payment of the solicitor's bill in the amount claimed and so there could be no order for taxation as payment had occurred more than 12 months before the application.

70. Finally, in *Harrison v Tew* [1989] QB 307 the principal issue which arose was whether the court had inherent jurisdiction to order taxation notwithstanding that the bill of costs had been paid more than 12 months before the application. It was held by the majority (Dillon LJ and Sir Frederick Lawton; Nicholls LJ dissenting) that such jurisdiction had been replaced and curtailed by the statutory scheme for taxation for costs set out in the Solicitors Acts. In relation to the issue of payment Dillon LJ set out the relevant facts at p 315 and concluded that on those facts "I have no doubt that there was a settled account" between the solicitor and the client. No authority was cited for stating the issue in these terms but it would appear to reflect that very experienced judge's general understanding of the law.

71. In summary, the authorities show a long established understanding as to what payment by deduction or retention requires in this context both generally and with specific reference to section 70 and its statutory predecessors. The need for a settlement of account has been consistently stated in cases from *In re Bignold* in 1845 to *Harrison v Tew* in 1987. This requires an agreement to the sum taken or to be taken by way of payment of the bill of costs. Such an agreement may in an appropriate case be inferred from the parties' conduct and in particular from the client's acceptance of the balance claimed in the delivered bill. The authorities therefore provide strong support for the Client's case of the need for an agreement as to the amount to be paid in respect of the bill of costs and that mere delivery of the bill does not suffice.

72. The Court of Appeal distinguished a number of the older authorities on the grounds that they appeared to involve no written retainer whereby the solicitors were entitled to recoup fees from a fund received on their client's behalf. There was, however, an assumption that there was such an agreement in *Re Ingle* and in *Re Foss* there had been a payment on account of costs to the solicitors. In any event, the settlement of an account connotes agreement to the amount of the retention or deduction, not merely as to the fact of retention or deduction.

73. The Court of Appeal also stressed that the phrase settlement of account is not used in section 70(4) and said that it should no longer be used in this context. It nevertheless informs what is meant by "payment" in this context. It may equally be said that section 70(4) does not refer to knowledge of the bill of costs and consent to the transfer of money, which is what the Court of Appeal held "payment" to mean.

Practical implications

74. Ms Erica Bedford on behalf of the Solicitors submitted that any requirement that there be agreement as to the amount of the retention or deduction to be made in respect of a delivered bill would have serious practical repercussions for solicitors' practice management in modern conditions.

75. She stressed that solicitors are required to be upfront about the likely costs to be incurred and that it is good and usual practice to agree in advance the structure of fees to be charged and the mechanism by which those fees will be billed and paid. Such a prospective agreement accords with the professional obligations placed upon a solicitor and should be sufficient to justify payment by way of deduction from retained funds.

76. If further agreement is required, then a recalcitrant client could frustrate and delay the payment of bills. It is no answer to say that solicitors are entitled to seek assessment of their own bills since assessment is a protracted and expensive business and disproportionate for smaller bills.

77. Although the statutory scheme for assessment of costs is concerned with client protection it is also recognises the solicitors' right to finality, as reflected in the time limits imposed and the need to establish special circumstances.

78. These submissions were persuasively presented but I consider that the concerns expressed are overstated and in any event cannot dictate the proper interpretation of "payment" in this context.

79. First, there is no reason why there cannot be prospective agreement as to some or all of the costs to be charged. That can be done by agreeing a fixed fee or by fixing costs through a mathematical formula. In the present case, there was a mathematical formula but only as a cap on costs as opposed to their quantification.

80. Secondly, the authorities show that the need for an agreement by way of a settlement of account is long established but there is no evidence that it has caused real practical difficulty or led to calls for the legislation to be changed. On the contrary the statutory wording has remained materially unchanged for some 180 years.

81. In this connection, it is to be noted that, prior to the Court of Appeal's decision in this case, the commentary in the *White Book* in relation to what is meant by "payment" in this context had remained essentially the same for many years (going back to at least 1939). That commentary included reference to *Re Ingle* in the following terms: "If a bill has been delivered, the retention of moneys by the solicitors is no payment unless there has been a settlement of account; mere acquiescence is not enough" See eg *Civil Procedure 2023*, vol 2, para 7C-120

82. Thirdly, in the modern world communication with clients is far quicker and more straightforward than it would have been in the 19th century. It should be easier to secure such agreement or acceptance as may be required.

83. Fourthly, it is open to solicitors to agree terms with their client that will assist in establishing acceptance of and agreement to the bill.

84. Fifthly, although assessment may be protracted and expensive, the client has a right to insist on assessment in all cases during the first month after delivery of the bill and in many cases thereafter. A solicitor may therefore be faced with the need for an assessment in any event.

85. Sixthly, if there is an assessment the solicitor will be able to claim the costs of the assessment process if successful (see section 70(9)(a)).

86. Finally, if the client does not engage, the assessment is likely to be an abbreviated process which will confirm the quantum of the bill and prevent any subsequent challenge by the client. Either in the order for assessment or in the order at the conclusion of assessment the court would, moreover, be able to certify special circumstances, such as the client's unreasonable refusal to engage or respond, which would allow it to make such costs award as it sees fit in relation to the costs of assessment (see sections 70(9)(b) and 70(10)).

Conclusion

87. For all these reasons I would allow the appeal and restore Bourne J's order for an assessment.