Online Case 18
Parissis

v

Matthias Gentle
Page Hassan LLP

[2017] 3 Costs LO 269

Neutral Citation Number: [2017] EWHC 761 (QB)
High Court of Justice, Queen's Bench Division
18 January 2017

Before:
Morris J, the Senior Costs Judge
(sitting as an assessor)

Headnote

In proceedings for detailed assessment under s 70 of the Solicitors Act 1974 ("the Act"), upon receipt of a breakdown of a gross sum bill, the claimant had offered to pay the bill and interest in full. In consequence, having failed to reduce the bill by one fifth and with the court being satisfied that there were no special circumstances to depart from the "one fifth" rule under s 70(9) the claimant had been ordered to pay the costs of the reference.

Held on appeal by the claimant. Special circumstances ought to have been certified. The defendant solicitors had failed to provide an explanation for the costs of the gross sum bill when asked to do so, albeit that the claimant's request had not been made under s 64(2) as it could have been rather than by issuing proceedings for detailed assessment under s 70. The fact that the claimant as a litigant in person had not known of s 64, having not been told of it either by the defendant or by the court, was a

relevant factor to be considered when ruling upon special circumstances. The original bill had contained no information of detail of the work that had been done. By the time it had been provided in the breakdown, it was too late. The failure to give an explanation for the bill in response to an express request and the lack of awareness of s 64 were reasons to justify a departure from the default rule in s 70(9). Appeal allowed.

Cases Cited

Re Cheesman [1891] 2 Ch 289
EI Du Pont De Nemours & Company v *ST Dupont* [2003] EWCA Civ 1368
Falmouth House Freehold Company Ltd and Another v *Morgan Walker LLP* [2011] 2 Costs LR 292; [2010] EWHC 3092 (Ch)
Ralph Hume Garry (a Firm) v *Gwillim* [2003] 1 Costs LR 77; [2002] EWCA Civ 1500
Wilsons Solicitors LLP v *Bentine and Another*; *Stone Rowe Brewer LLP* v *Just Costs Ltd* [2015] 6 Costs LO 779; [2015] EWCA Civ 1168

Costs Judgment

1. **Morris J:** This is an appeal brought with the permission of Dingemans J against para 2 of the order of Master Rowley made on 11 July 2016. By that order Mr Andrew Parissis ("the appellant") was ordered to pay the costs incurred by a firm of solicitors, Matthias Gentle Page Hassan ("the respondent") in proceedings for the detailed assessment of a bill of costs rendered by the respondent to the appellant in relation to proceedings in the Chancery list in the Central London County Court in which the respondent acted for the appellant.

2. The appeal concerns s 70 of the Solicitors Act 1974, which provides so far as possible:

"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.

(7) Every order for the assessment of a bill shall require the costs officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the [assessment].

(9) Unless –

(a) the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) the order for assessment or an order under subsection (10) otherwise provides,

the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.

(10) The costs officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit."

3. On this appeal issues are also raised as to s 64 of the 1974 Act, which provides as far as material:

"64 Form of bill of costs for contentious business.

(1) Where the remuneration of a solicitor in respect of contentious business done by him is not the subject of a contentious business agreement, then, subject to subsections (2) to (4), the solicitor's bill of costs may at the option of the solicitor be either a bill containing detailed items or a gross sum bill.

(2) The party chargeable with a gross sum bill may at any time –

(a) before he is served with a writ or other originating process for the recovery of costs included in the bill, and

(b) before the expiration of three months from the date on which the bill was delivered to him, require the solicitor to deliver, in lieu of that bill, a bill containing detailed items; and on such a requirement being made the gross sum bill shall be of no effect."

Section 68 provides a power in the court to order delivery of a bill of costs.

4. In his judgment of 11 July 2016 Master Rowley found that the appellant had not shown "special circumstances" within the meaning of s 70(10) of the 1974 Act so as to displace the normal rule provided for in s 70(9) of that Act. The normal rule is that unless a bill of costs is reduced by more than 20%, the client must pay the costs of the detailed assessment. In the present case, the respondent's bill was assessed in the full amount claimed and Master, having found that there were no special circumstances relating to the bill or to the assessment of the bill, made an order for the costs of the assessment in favour of the respondent and summarily assessed those costs in the sum of £8,961.88.

5. The appellant seeks to set aside that order and asks instead for an order in his favour in respect of the costs of the detailed assessment. He contends on this appeal that, prior to the commencement of the proceedings for detailed assessment, he requested a more detailed explanation of the bill, and that the failure of the respondent to provide such an explanation, either when asked or indeed prior to being ordered by the court to provide the same, did constitute "special circumstances" for the purposes of s 70(10), thereby justifying the appellant recovering the costs of the detailed assessment.

The Factual Background

6. The factual background is as follows. The appellant instructed the respondent to act for him in relation to proceedings in the Chancery Division which were subsequently transferred to the Central London County Court. On 4 June 2014 the respondent delivered to the appellant a bill for a gross sum of £12,600 including VAT. This was one of a number of bills that had been rendered by the respondent to the appellant in relation to the proceedings. The bill was in the most general of terms and contained no details of the times spent on work done nor even of the time period over which the work had been done. On the reverse of the bill, to which attention was drawn on the front of the bill, was the following notification:

> "You may be entitled to have our charges reviewed by the court (this is called 'detailed assessment'). The provisions are set out in ss 71 and 72 of the Solicitors Act 1974."

7. On 9 June 2014 the appellant sent an email to the respondent asking for a breakdown of the costs in this gross bill. No reply to that email was ever sent. On 16 June 2014, within the one-month time limit in s 70(1), and aware of that time limit, the appellant acting in person commenced proceedings in the Supreme Court Costs Office for a detailed assessment of the bill under s 70 of the Solicitors Act. The application came before Master Rowley on 13 November 2014 and the appellant appeared at that hearing in person.

8. Paragraph 26.5(a) of the Costs Office Guide provides as follows:

> "(a) Where an application is made by a litigant in person, an order for detailed assessment will not normally be made in the absence of the parties. The litigant in person must attend in order that the costs judge may explain the effect of s 70(9) of the Act ('the one-fifth rule', as to which, see para 26.6 below)."

9. It is not clear whether at that hearing Master Rowley did in fact explain to the appellant the effect of s 70. However, in my judgment this provision is relevant to the extent that it indicates that in some respects a litigant in person is to be regarded as in a different position in proceedings for detailed assessment as compared with a represented party. I should add that the one-fifth rule is mentioned in the Senior Court Costs Office Guidance published on the Court Service website,

and that the appellant has today very fairly confirmed that he had seen that guidance at the time of making his application.

10. At the hearing on 13 November 2014 Master Rowley made an order that the bill should be the subject of detailed assessment and gave standard directions for such an assessment, including a direction that the respondent had to serve by 12 December 2014 a breakdown of costs. On December 12, the last day for service, the respondent provided that breakdown. The appellant contends that it was only as a result of that order that the respondent provided any further information at all. He also says, in evidence which is not contested, that once he was given this information he readily conceded that the amount of the bill was due.

11. On 8 January 2015 the appellant offered to pay the bill in full and on January 12 offered to pay the interest in full. On 27 March 2015 Master Rowley extended the appellant's time for serving his points of dispute. Shortly thereafter an issue arose as to whether the proceedings had in fact been settled. On 20 April 2015 the appellant emailed the Master's clerk stating that the claim had been settled and that he had paid the bill in full. On the next day the respondent emailed stating that the appellant had paid the bill and that the only outstanding issue was the costs of the assessment itself.

12. That issue was heard and determined by Master Rowley at a telephone hearing on 29 April 2015, when he concluded that there had in fact been no final settlement, but because the appellant had paid the bill, the appellant should pay the costs of the assessment proceedings, summarily assessed at that time at £4,565.

13. The appellant appealed against that order and on 15 December 2015 Garnham J set aside the order on the basis that, having found that there had been no agreement to settle the dispute, Master Rowley ought to have proceeded to give directions for detailed assessment of the bill. Accordingly the learned judge extended time for service of points of dispute and remitted the detailed assessment to Master Rowley. In his points of dispute served on 7 January 2016, pursuant to those directions, the appellant indicated that he did not dispute the amount of the bill. This was not surprising given that he had already agreed to pay the bill in full. Rather, he disputed only the respondent's entitlement to the costs of the assessment proceedings. Thus, the only remaining disputed issue in those proceedings was as to who should pay the costs of those costs proceedings.

14. The appellant provided a witness statement which was before the master on July 11, and I refer in particular to paras 12 and 15 without setting them out. His evidence was to the effect that if he had been given some more detailed explanation the matter would have settled quickly.

15. The dispute was heard by Master Rowley on July 11. He decided (uncontroversially and not surprisingly given the appellant's earlier agreement) that the bill was to be allowed in its entirety. He then went on decide that the appellant should pay the respondent's costs of the detailed assessment proceedings under s 70(9) and that there were no special circumstances within s 70(10) justifying departure from the normal rule.

16. At para 4 of his judgment he concluded that the bill "contained a succinct narrative" and that there was nothing additionally provided by way of computer printout or summary or narrative of any length. At para 6, after considering the case of *Ralph Hume Gary* v *Gwillim* (CA) [2002] EWCA Civ 1500 and the observations of Ward LJ on the provision of printouts, he held, "I do not accept therefore that there was a lack of specific information". At para 7 he held that the claimant clearly decided that there was sufficient information in the bill to make a decision as to whether to have the bill assessed. Then at paras 13 to 16 of his judgment he gave his reason for his conclusion that there did not exist "special circumstances".

17. In summary, the learned master's reasons for his conclusion were:

(1) The appellant acted too quickly in commencing proceedings for a detailed assessment, and that if he had wanted more information, the more appropriate course would have been to have made a request under s 64 of the 1974 Act for a more detailed bill. Section 70 proceedings were the wrong proceedings.
(2) The fact that the appellant was a litigant in person was not a reason not to expect the appellant to have taken this course. Litigants in person should not be treated differently from those who are represented, and the appellant could have taken legal advice as to his best course.
(3) He pointed to the fact that s 70(9) prescribes how the costs are to be paid in s 70 proceedings.
(4) In any event, the respondent had complied with the need for a

breakdown in the course of the proceedings which were in fact brought by the appellant.

The Parties' Arguments

18. Mr Benson for the appellant submits that the respondent's failure to provide an explanation of the bill amounted to "a special circumstance", and that Master Rowley was wrong to conclude otherwise. Had the respondent done so, the appellant would have conceded the matter promptly. The costs of ensuing litigation necessary to extract that application ought to be the claimant's. First, the respondent ought to have given the appellant an appropriate explanation of the bill. Secondly, as regards s 64, he submits that as a litigant in person the appellant was entirely unaware of s 64 or of the distinction between gross sum bills and detailed bills. The respondents did not draw to his attention his rights under s 64 but rather in fact directed the appellant's attention on the reverse side of the bill to ss 70 to 72. The Supreme Court Costs Office's own guidance, which I have referred to earlier and on which the appellant was aware, also makes no reference to s 64. Thirdly, he submits s 64 is not necessarily an advantageous way to proceed since it gives the solicitor the right to reissue the bill in a higher amount. Fourthly, he submits that para 16 of the learned master's judgment is at the very least the nub of his decision and it was fundamentally wrong. Finally, he submits it is wrong, as a matter of policy, for the appellant, who wanted further information, to be penalised in costs when the respondents, who failed to tell him about s 64 and who did not provide any information until required by the court to do so, should be rewarded.

19. Mr Edwards for the respondent submits as follows. First, the decision as to whether there are "special circumstances" is a value judgment or an exercise of discretion, and on appeal this court can only interfere if the lower court has erred in principle, taken into account matters which should have been left out of account, left out of account matters which should have been taken into account or reached a conclusion which is so plainly wrong that it can be described as perverse. In the specific context of special circumstances under the 1974 Act there is strong authority that the appeal court will not lightly interfere with an exercise of discretion by the specialist costs judge. Secondly, in this case there is no basis for interfering with the learned master's exercise of discretion. The master considered the argument

concerning the failure to provide proper detail in the bill and decided, as he was entitled to do, that the appellant had not demonstrated special circumstances. Thirdly, the master was in fact correct: the obvious and reasonable course in this case was for the appellant to have exercised his rights under s 64 of the 1974 Act. Fourthly, the argument that the respondent bill made no mention of s 64 was not raised before the master below and cannot be relied upon in this appeal. Finally, ultimately the master applied the right test. He took account of everything urged upon him and he did not take account of anything he should not have done. He reached a conclusion that was plainly open to him and indeed right.

Discussion and Analysis

20. I have been referred to a number of authorities in relation to "special circumstances" under s 70(10), in particular *Re Cheesman* [1891] 2 Ch 289, *Falmouth House Freehold Company Ltd* v *Morgan Walker LLP* [2010] EWHC 2092 (Ch) and *Wilsons Solicitors LLP* v *Bentine* [2015] EWCA Civ 1168. I have also considered the provisions of CPR 52.11 and the notes in the White Book Service 2016 at pages 1700 to 1701. The principles which emerge from these authorities are as follows:

(1) The test for "special circumstances" under s 70(10) is the same as that for the same phrase as used in s 70(3), and the authorities in s 70(3) are thus relevant.
(2) Whether special circumstances exist is essentially a "value judgment". It depends on comparing the particular case with the run-of-the-mill case. The question is whether something so outside the run-of-the-mill has occurred so as to justify departing from the prima facie result given by the default rule in s 70(9).
(3) However, "special circumstances" do not have to be "exceptional"; rather, just something out of the ordinary course justifying a departure.
(4) An experienced costs judge is in general well placed to make the required value judgment.
(5) The court on appeal considers the case by way of review and not rehearing. The court may interfere where the court below erred in principle or in law or failed to take account of relevant considerations or took account of irrelevant considerations or

> reached a conclusion that was so perverse that no costs judge could have reached that conclusion. However, I point out that this is not the same approach as judicial review, and in this regard I refer to subparagraph (iii) of para 52.11.1 of the White Book Service at 1701, which is quoting from or at least summarising the effect of what May LJ said in the *Du Pont* case ([2003] EWCA Civ 1368) where he drew the distinction between an appeal by way of review and judicial review and pointed out that there is a varying degree of intensity of review on appeals under what is now 52.11.

21. I agree that in the circumstances of this case detailed assessment proceedings were the wrong route for resolving issues surrounding the June 2014 bill, as indeed found by the Master at para 15 of his judgment. Having started off on the wrong foot, the problems multiplied, this being the second appeal in these proceedings. The question is whether the appellant should bear the costs consequences of this wrong path having been taken.

22. I have reached the conclusion that the learned Master's analysis, in particular at paras 13 to 16 of his judgment, was erroneous in a number of respects, as follows. First, as regards the last sentence of para 6 of his judgment, whilst the conclusion that a computer printout was not required may have been justified, the original bill had no information of any detail at all about the work that had been done, the time that had been taken and when it had been done. Accordingly, in my judgment the Master's finding that there was not a lack of specific information in the bill was not well founded and indeed inconsistent with what he said about this in para 9 of his judgment.

23. Secondly, in my judgment the Master failed to take into account sufficiently the fact that a breakdown was expressly sought in the email of June 9 and that no answer was given to that email then or indeed for some considerable time, indeed for over six months. Had it been given at any stage in that period, then the proceedings would have been at an end.

24. Thirdly, in my judgment the Master erred (at para 7 of his judgment) in ascribing to the appellant a belief that he considered that there was sufficient information to make a decision whether to bring detailed assessment proceedings. It was plain on the facts and given the email of a few days earlier that the appellant did not believe that he had sufficient information. In general, the Master may have been

justified in taking the position (at paras 12 and 13 of his judgment) that a litigant in person should in principle be in no different position than a person with legal representation and to suggest that legal advice was available to the appellant. However I take account of the fact that requiring the taking of legal advice is not necessarily realistic in cases where small amounts of costs are in issue, such as in this case. In any event, it does not follow that, where no such legal advice has in fact been obtained, a belief in the sufficiency of the bill should have been ascribed to the appellant merely by dint of the fact of the commencement of the assessment proceedings.

25. Fourthly, at para 15 the Master concluded that s 70 proceedings were the wrong proceedings and that a separate discrete application ought to have been brought. I take the latter to be a reference to a request for a detailed bill under s 64(2). However, I accept that at the time of commencing the assessment proceedings the appellant was not aware of the provisions of s 64. The court itself did not draw it to the appellant's attention. Moreover, there is nothing in the SCCO guide about s 64. Further, the respondent did not draw it to the appellant's attention. Indeed, to the contrary, the reverse of the bill referred only to ss 70 to 72 and to that extent rather directed the appellant towards s 70 proceedings rather than a s 64 request. In reaching this conclusion at para 15 that s 70 proceedings were the wrong proceedings and rather that a s 64(2) request should have been made and thus effectively that responsibility for this course lay with the appellant, the Master did not take account of these facts at all. In this connection I do not accept that the fact that the back of the bill did not refer to s 64 had not been raised before the Master means that it cannot be considered now by this court in reviewing the Master's decision. If, as I consider to be the case, these factors are and were relevant considerations in reaching a conclusion on the value judgment to be made, the fact that through no fault of the Master's they were not considered by him does not mean that the decision below took account of all relevant factors. The decision was nevertheless made without consideration of a relevant factor, even though the Master could not be criticised for that omission.

26. Finally, para 16 of the judgment, which contains the Master's overriding conclusion, is in my judgment flawed in its logic. To say on the one hand that the s 70 proceedings were the wrong proceedings and the wrong remedy for the absence of information, on the other

hand that in any event the appellant's complaint about insufficiency of information was met because the information was provided in the course of those wrong proceedings, is circular. By the time the information was in fact produced in December 2014 it was too late. Those "wrong" proceedings had already been commenced. Thereafter, the proceedings effectively continued only because of the dispute about who should pay the costs of the proceedings. The information to which the appellant was entitled and the provision of which would have obviated the need for s 70 proceedings was only obtained and provided as a result of the commencement of those proceedings. In my judgment, at para 16 the Master took account of a consideration that was not relevant.

27. I have reached the conclusion that in these foregoing respects the master erred in principle and failed to take into account relevant considerations, took into account irrelevant considerations, and accordingly it is appropriate for me to interfere with his value judgment as to the existence of special circumstances.

28. In my judgment, in the particular circumstances of this case the failure to provide an explanation for the bill in response to an express request and the failure to do so at any time until provided on the last day of the time set by the order of the court, the fact that the appellant was not aware of s 64 and had not been informed of s 64, either by the court or by the respondents, are such as to take this case outside the "run of the mill" case so as to justify departing from the normal default rule in s 70(9).

29. In these circumstances I therefore can consider the appropriate order for costs of the detailed assessment below, and in my judgment the appropriate order in respect of the costs of those detailed proceedings is that the respondent should pay the appellant's costs. The respondent, first, could and should have responded much sooner to the request for a breakdown of the original bill, and, secondly, could have suggested that s 64 was the better route. I will make an order to this effect subject to summary assessment which the learned Assessor will conduct following this hearing.

Mr Benson appeared on behalf of the appellant.

Mr Edwards appeared on behalf of the respondent.