Neutral Citation Number: [2024] EWCA Civ 901

Case No: CA-2024-000191

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
Costs Judge Leonard
SC-2022-APP-001077
[2023] EWHC 2189 (SCCO)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2024

Before:

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE NUGEE

- -

Between:

Signature Litigation LLP	**Appellant**
- and -	
Bidzina Ivanishvili	**Respondent**

- -
- -

Benjamin Williams KC and George McDonald (instructed by **Signature Litigation LLP**) for the **Appellant**
Roger Mallalieu KC and Simon Teasdale (instructed by **Blake Morgan LLP**) for the **Respondent**

Hearing date: 18 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE COULSON:

1. Introduction

1. At the hearing of the appeal on 18 July 2024, the parties were agreed that, if the court dismissed Ground 1 of the appeal, which turned on whether the invoices in question could be interim statutory bills for the purposes of s.70 of the Solicitors Act 1974 ("the 1974 Act"), that would be dispositive of the whole appeal. Having heard argument on Ground 1, the court informed the parties that the appeal on Ground 1 would be dismissed. These are my reasons for joining in that decision.

2. By an order dated 28 November 2023, Costs Judge Leonard ("the judge") granted the respondent a declaration that the 79 invoices rendered by the appellant to the respondent between 31 March 2016 and 26 October 2022 were not interim statutory bills for the purposes of s.70. That meant that, in respect of those invoices, which totalled almost £13 million, and had all been paid by the respondent, the time limits as to challenge and court assessment set out in s.70 did not apply. The reasons for the judge's decision are set out in his judgment at [2023] EWHC 2189 (SCCO). In short, the judge concluded that, because the invoices were for 65% of the Standard Fee, with the remaining 35% of the Standard Fee (together with an Uplift Fee and a Success Fee) only due if particular contingencies were subsequently achieved, the invoices were neither final nor complete, and so could not be interim statutory bills under the 1974 Act.

3. The judge himself gave permission to appeal. This was doubtless because he recognised that there was a potential tension between the 1974 Act and the authorities (which stress that finality and completeness are required for invoices to be interim statutory bills), and the subsequent widespread usage of CFAs, which are based on a potential additional fee entitlement accruing later, possibly long after any interim invoices based on discounted rates have been rendered and paid. There is no Court of Appeal authority directly on point.

4. I set out in outline in Section 2 below the contracts of retainer. In Section 3, I summarise the work done by the appellant and the invoices rendered. In Section 4, I summarise the judgment below. In Section 5, I set out the issues on appeal, explaining why Ground 1 was pivotal. In Section 6, I summarise the relevant law applicable to Ground 1. Thereafter in Sections 7 and 8, I explain why I have rejected Ground 1 of the appeal. There are some brief concluding observations at Section 9. I am very grateful to leading counsel on both sides for the clarity of their written and oral submissions.

2. The Contracts of Retainer

2.1 The June 2016 Engagement Letter and the Appellant's Standard Terms of Business

5. The respondent is a wealthy Georgian businessman, resident in Georgia. In about 2005, he engaged Credit Suisse to manage assets of around $1bn. The assets were settled in trusts for the benefit of the respondent and his family, and those trusts were administered by Credit Suisse.

6. From about 2016, the respondent, members of his family and associated companies have been engaged in litigation against Credit Suisse arising out of the alleged mismanagement of the respondent's assets. The Credit Suisse litigation spans a number of jurisdictions including the Courts of England and Wales, Canada, Switzerland, Singapore, New Zealand, and a number of Caribbean jurisdictions. The appellant was instructed on behalf of the respondent and other family beneficiaries (including a BVI company) to act as global co-ordinating counsel in the Credit Suisse litigation.

7. The contract of retainer was originally made up of two documents: the engagement letter of 7 June 2016, and the enclosed Terms of Business of the appellant. The letter of engagement from the appellant was signed by the respondent as requested. It made plain that the appellant's relationship with the respondent and the beneficiaries collectively was "governed by the accompanying Terms of Business and also by the terms of this letter, which is specific to this particular matter and will prevail if there is any conflict between the two documents." The letter set out details as to who the appellant regarded as "our client" and "the scope of our instructions". It identified by name the members of the appellant's team who would be working on this matter.

8. The sections of the letter dealing with fees and payments were sections 4-8 inclusive:

> "**4 Our fees – basis of charging**
>
> Time spent is the principal factor in deciding our fees. However, other factors are, if appropriate, also taken into account. These include the complexity of the matter, the value of the matter, the level of skill and specialist knowledge involved, and the extent of unsociable working hours required.
>
> We have agreed that we will calculate our fees by reference to time spent. We apply hourly rates according to the seniority of the personnel involved and record our time in units of one-tenth of an hour. Our current hourly rate charge-out rates are:

	Our Standard Rates
Partner	£625-650
Senior Associate	£500-550
Associate	£300-475
Trainee	£175
Paralegal	£150

> However, as explained below, we have agreed to discount these rates.
>
> **5 Conditional Fee Arrangement**
>
> The rates above are the "**Standard Fee**" agreed in respect of this work.

> We have agreed in principle a conditional Fee Agreement pursuant to which you, on behalf of Signature's Clients will be liable to pay **65%** of the Standard Fee mentioned above in any event in accordance with our usual invoicing and payment terms (the "**Discounted Rate**"), and the **35%** (the "**Additional Portion of the Standard Fee**") will only be chargeable in the event that a successful recovery above an agreed amount is achieved. We have also discussed and agreed in principle the basis on which you, on behalf of Signature's Clients, will be liable to pay to us an **Uplift Fee** and a **Success Fee**, again on the basis that a successful recovery is achieved between a certain range and/or up to an agreed amount. For the purposes of charging the Additional Portion of the Standard Fee, the Uplift Fee and the Success Fee, a successful recovery will be defined as occurring if and when the Claim is resolved in favour of Signature's Clients, either by agreement or following a trial or other final hearing, which in this case shall mean that Signature's Clients receive money or monies worth (e.g. assets with an intrinsic value) up to the specified ranges and/or amounts to be finally agreed between us. The precise terms of our agreement, evidencing the agreement in principle already reached, will be set out in a subsequent letter.
>
> In the interim, and until the aforementioned later is issued, we will continue to invoice you at the Discounted Rate on the basis that you, on behalf of Signature's Clients, will be liable to pay us the Additional Portion of the Standard Fee on all invoices issued by us to you (whether before or after the date of this letter) as and when there is a successful recovery within the agreed specified range applicable to the Additional Portion of the Standard Fee. The Uplift Fee and Success Fee will likewise be chargeable as and when there is a successful recovery within the agreed specified range and/or amount applicable to the Uplift Fee and the Success Fee…
>
> **7 Our Invoice and Payment terms**
>
> Unless we agree otherwise, we will normally issue invoices to you on a monthly basis, and will then send a final invoice when the work has been, or is about to be, completed. This should help to keep you informed of the costs which are being incurred.
>
> In addition, each bill delivered by us will:
>
> (a) identify the value of the bill based on the hourly rates as stated above;
>
> (b) contain a breakdown of hours worked for each fee earner and a narrative of tasks carried out during the period with further information to be supplied as agreed with you; and
>
> Our invoices must be paid within 30 calendar days. We reserve the right to charge interest on any overdue amounts on a daily basis at the official rate payable on judgment debts."

9. Clause 5.1(a) of the Terms of Business reiterated that the basis on which the fees would be charged were set out in the Engagement Letter. It is unnecessary for present purposes to set out any more of those Terms.

10. Between June 2016 and September 2021, the appellant carried out work for the respondent and sent monthly invoices, which were paid. During this period of over 5 years, the "agreed amount" and the "certain range" which would have triggered the payment of the Additional Portion (35%) of the Standard Fee, the Uplift Fee and the Success Fee, had not apparently been agreed.

2.2 The September 2021 Variation

11. On 19 September 2021, the appellant wrote to the respondent, evidencing the "detailed agreement referred to at paragraph 5 of the letter of 7 June 2016 which we previously agreed would be set out later in writing". The letter identified the relevant contingencies as follows:

> "1. You have agreed to pay the Standard Fee on a time-spent basis calculated at the agreed hourly rates we charge for the various team members from time to time. To date, and as agreed, you have paid 65% of the Standard Fee ie the Discounted Rate. This generates a low margin for the firm. If, at the conclusion of the case, your successful recovery does not exceed USD350 million, then you will not pay anything more to us than 65% of the Standard Fee. To date we are agreed that there has been a recovery of USD79.08 million.
>
> 2. If there is a successful recovery of at least USD350 million, and the case continues, then our Standard Fee for all future time spent following the date of receipt by you of that amount will be chargeable in full (ie 100%).
>
> 3. We have also agreed that if your final successful recovery exceeds USD450 million, then you will pay to us at the conclusion of the case and following receipt of that recovery:
>
> (a) the Additional Portion of the Standard Fee for all work billed at the Discounted Rate;
>
> (b) an Uplift Fee, in addition to the Standard Fee, of 35% of the Standard Fee for work done during the whole of the period of billing, if the final successful recovery exceeds USD450 million but does not exceed USD550 million; and
>
> (c) if the final successful recovery exceeds USD550 million, a Success Fee of 4.5% of the total amount of the final recovery, less Agreed Costs (as defined below) payable by the Claimants pursuant to invoices known by Signature to have been delivered to any of those Claimants in respect of existing and anticipated claims by those Claimants worldwide (save for the avoidance of doubt that nothing in this paragraph 3(c) shall disentitle Signature to the entitlements which may be due pursuant to paragraphs 2 and 3(a) to (b) above)."

The letter went on to say that, in all other respects, the appellant's instruction continued as set out in our letters of 7 June and 7 November 2016. The letter was signed by the respondent on 17 December 2021.

12. On 28 September 2021, the appellant sent an email to Mr Victor Kipiani of the Georgian law firm MKD, who was the agreed conduit for any further instructions or

communications to the respondent. The email attached the appellant's "current terms of business (May 2021) which accompany the supplemental engagement letter." Some of the "current terms of business" had been varied from those originally incorporated into the June 2016 retainer. However, since the letter of engagement continued to take precedence over the Terms, it is unnecessary to set out the revised Terms of Business for the purposes of determining Ground 1 of the Appeal. The appellant terminated the retainer on 23 September 2022.

3. The Work Done and the Invoices Rendered

13. As I have indicated, between 31 March 2016 and 26 October 2022, the appellant rendered 79 invoices to the respondent in connection with their work as global co-ordinators of the Credit Suisse litigation. The total amount of those invoices was £12,781,354.66. The sums were paid by the respondent without challenge.

14. As to the invoices themselves, I can conveniently summarise their form and content by reference to the following paragraphs of the judge's judgment which were not in issue on this appeal:

> "50. The Defendant's invoices were rendered to the Claimant regularly, normally (in accordance with the June 2016 Retainer) on a monthly basis. They are not described on their face as "final". The Defendant's termination letter of 23 September 2022 does describe as "final" the invoices delivered following termination of the retainer, but in context that appears to be no more than a reference to them as the last of a series, representing payment at the Discounted Rate for outstanding work.
>
> 51. Each bill however identifies the period to which it applies. Each appears, consistently with the June 2016 Retainer, to represent the discounted charge for all of the work undertaken by the Defendant during the stated period. Each was accompanied by a detailed narrative and a statement of the full and discounted value of the work done at the Defendant's hourly rates. Each, again consistently with the terms of the June 2016 Retainer, was presented as a demand for payment…
>
> 56. That said, there is nothing about the form or content of the Defendant's invoices generally that is obviously inconsistent with their being interim statutory bills."

4. The Judgment Below

15. Having set out the law and the relevant documents, the judge addressed the issue of finality between [57]-[73]. In those paragraphs, he did not accept the basic proposition put forward by Mr Williams KC that, where an agreement provides for payment A to be made on a specified date, but also for payment B to be made at a later date, depending upon outcome, then an invoice for payment A is nonetheless the final invoice for payment A. The judge found at [59] that a 'bill of costs' under the 1974 Act could not be for part payment only; that such an idea "goes directly against the concept of finality". As he explained at [60], "the test is not whether a given invoice is final for the charges it represents, but whether it incorporates a final charge for the

work it represents…they are final and complete for any work performed during that period".

16. At [74]-[79], the judge addressed the issue of informed consent. He said at [74] that the appellant would have to make clear that its regular invoices were interim statutory bills, and would have to make the consequences of such an arrangement clear too. At [80]-[84], the judge dealt with the tension between CFAs and interim statutory bills. At [84] he observed that, if it was possible to agree that interim statutory bills could be rendered for any unconditional element of a solicitor's charges under a CFA, "one would expect the relevant retainer to contain clear terms overcoming the difficulties of reconciling the conditional element of the CFA with the concept of a complete and final bill."

17. At [85]-[90], the judge found that there was nothing in the June 2016 retainer or the June 2016 terms that authorised the delivery of interim statutory bills. In particular he noted that the June engagement letter talked about the invoices being sent "to keep you informed of the costs which are being incurred", and that the appellant would send "a final invoice when the work has been, or is about to be, completed". He said at [88] that this suggested that "the bills rendered in the meantime were not final".

18. At [91]-[94], the judge concluded, that up to the variation on 19 September 2021, there was no proper basis for inferring from the parties' conduct, any agreement for the delivery of interim statutory bills. From [95]-[120], the judge reached the same conclusion in relation to the September variation and the May 2021 terms.

19. The remainder of the judgment was concerned with matters which did not arise on appeal in any event (questions about a 'natural break' and the effect of the termination). The judge's final conclusions were as follows:

> "131. The monthly invoices rendered by the Defendant under the terms of the June 2016 Retainer before it was varied from 19 September 2021 were not statutory bills.
>
> 132. The May 2021 Terms adopted by the parties from 19 September 2021 did not have retrospective effect, because the parties agreed that they would not have such effect. Even if they did have retrospective effect it would not have extended to monthly invoicing, given that the May 2021 Terms expressly applied to future invoicing. Nor could any such agreement have converted retrospectively what were, as a matter of fact, non-statutory invoices into interim statutory bills.
>
> 133. The monthly invoices rendered by the Defendant under the terms of the June 2016 Retainer after it was varied in September 2021 were not statutory bills.
>
> 134. There is no basis for inferring, from the conduct of the parties at any time, an agreement to the effect that the Defendant's monthly invoices were statutory bills, because any such agreement would have been inconsistent with the terms of the retainer under which they were rendered and paid."

5. The Issues on Appeal

20. Ground 1 of the appeal addressed the question of finality. Mr Williams KC submitted that interim statutory bills can be delivered for part of the fees, even if there was a subsequent liability to pay further fees, depending on later events. As Mr Mallalieu pointed out, that argument principally depended on the proper characterisation of the entitlement to be paid those later fees. As noted above, the parties were agreed that, if this court was against the appellant on Ground 1, the appeal was bound to fail.

21. In those circumstances, I note the remaining Grounds briefly. Ground 2 of the appeal took issue with the judge's conclusion that the solicitors must set out in clear terms the proposition that the invoices are interim statutory bills. This was related to Ground 3, which was that, on the appellant's case, the two retainers of June 2016 and May 2021 do contain an agreement to deliver interim statutory bills. Ground 4 of the appeal suggested that the judge was wrong not to find that the parties' conduct amounted to an implied right on the part of the appellant to deliver interim statutory bills.

22. Before plunging into the detailed analysis, it may seem counter-intuitive that invoices which were rendered and paid years ago could, theoretically at least, now be the subject of challenge. But, on a proper analysis, I consider that the law points clearly in that direction. One of the reasons for this dichotomy is that s.70 of the 1974 Act, which contains significant restrictions on a client's right to challenge a solicitor's bill, has not been amended to reflect either the wholesale move away from the solicitor's retainer being an entire contract (with an entitlement to be paid only at the end of their work), or the popularity and widespread usage of CFAs following the more recent changes to costs funding models. The 1974 Act has been the subject of considerable criticism because it has not been amended to reflect modern practice. In my view, this appeal is another example of that ongoing problem.

6. The Law Applicable to Ground 1

6.1 The Solicitors Act 1974

23. Section 65 provides that:

> "**Security for costs and termination of retainer.**
>
> (1) A solicitor may take security from his client for his costs, to be ascertained by [assessment] or otherwise, in respect of any contentious business to be done by him.
>
> (2) If a solicitor who has been retained by a client to conduct contentious business requests the client to make a payment of a sum of money, being a reasonable sum on account of the costs incurred or to be incurred in the conduct of that business and the client refuses or fails within a reasonable time to make that payment, the refusal or failure shall be deemed to be a good cause whereby the solicitor may, upon giving reasonable notice to the client, withdraw from the retainer."

24. Section 67 provides that:

> "**Inclusion of disbursements in bill of costs.**
>
> A solicitor's bill of costs may include costs payable in discharge of a liability properly incurred by him on behalf of the party to be charged with the bill (including counsel's fees) notwithstanding that those costs have not been paid before the delivery of the bill to that party; but those costs—
>
> (a) shall be described in the bill as not then paid; and
>
> (b) if the bill is [assessed], shall not be allowed by the [costs officer] unless they are paid before the [assessment] is completed."

25. Section 69(1) provides that, subject to the provisions of the 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 the bill of those costs is delivered in accordance with the requirements mentioned in sub-section (2)…" Section 69(2) requires the bill to be signed in accordance with sub-section (2A) and delivered in accordance with sub-section (2C). There is no dispute in this case that both these requirements were fulfilled.

26. Section 70 provides that:

> "(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, 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.
>
> (5) An order for the [assessment] of a bill made on an application under this section by the party chargeable with the bill shall, if he so requests, be an order for the [assessment] of the profit costs covered by the bill.
>
> (6) Subject to subsection (5), the court may under this section order the [assessment] of all the costs, or of the profit costs, or of the costs other than profit costs and, where part of the costs is not to be [assessed], may allow an action to be commenced or to be continued for that part of the costs…
>
> (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."

27. The time periods in which the client can challenge a statutory bill under s.70 are very tight, a situation exacerbated when the client has an ongoing relationship with the solicitor. In *Harrod's Limited v Harrod's (Buenos Aires Limited) & Another* [2014] 6 Costs LR 975, Jacob J said at [20][1] that the timetable laid out in ss.(3) and (4) put the client "…in an impossible position. Either he challenges his solicitors' bill - the very solicitor who is now acting for him - and continues using that solicitor at the same time; or he has to change solicitor, all in the middle of litigation when he is facing another enemy". In *Vlamaki v Sookias & Sookias* [2015] EWHC 3334 (QB); [2015] 6 Costs LO 827, Walker J referred at [16] to the observations of the costs judge in *Bari v Rosen* [2012] 5 Costs LR 851, and "the impracticality and unfairness to a client if a retainer has the effect that interim bills are final in relation to the period that they cover, with resultant drastic limitation on the ability of the client to make use of statutory provisions for assessment."

28. It should also be noted that s.70 has been regularly criticised in recent years by this court. In *Menzies v Oakwood Solicitors Limited* [2023] EWCA Civ 844; [2023] Costs LR 1083, the Master of the Rolls referred to two other recent Court of Appeal authorities and said at [5] that all three highlighted the inadequacy of the 1974 Act for the purposes of regulating the relationship between solicitors and clients in modern civil litigation. The court went on:

> "The 1974 Act restricts the time during which clients can seek court assessments of their solicitors' bills. There are, of course, regulatory requirements outside the 1974 Act, but this case highlights (as did *Belsner v*

[1] Jacob J said that s.70 "calls for legislative re-examination under the modern costs rules practice".

> *Cam Legal Services Ltd* [2022] EWCA Civ 1387 and *Karatyzs v SGI Legal LLP* [2022] EWCA Civ 1388) that it is for consideration whether there should be further and more up-to-date statutory safeguards to protect clients in relation to the charging and payment of solicitors' fees."

6.2 Entire Agreement and Interim Statute Bills

29. A solicitor's retainer is generally regarded as an 'entire agreement', such that a solicitor can in normal circumstances only deliver a statutory bill to the client upon conclusion of the work: see *Bari v Rosen*, and the judgment of Newey LJ in *Slade v Boodia* [2018] EWCA Civ 2667, [2019] 1 WLR 1126 ("*Boodia 1*"), at [19]. S.70 incorporates statutory language going back 200 years, based on the assumption that the solicitor could not put in a bill until the end of the work. That explains why s.65 (paragraph 23 above) offers the alleviation of payments on account. These days, most solicitors endeavour to charge fees on an interim basis, and the question then arises whether such interim invoices are interim statutory bills – with all the restrictions of s.70 – or simply demands for payment on account. Interim invoices have gone from being rare (as noted in *Abedi v Penningtons* [2000] 2 Costs LR 205) to being commonplace, but with no changes to the 1974 Act.

30. This issue was concisely identified by Newey LJ in the first paragraph of his judgment in *Boodia 1*. He said:

> "1. Not every bill that a solicitor renders to his client is a "statute bill". A "statute bill" is one complying with the Solicitors Act 1974. Where a solicitor has delivered such a bill to his client, he can potentially sue on it, but he cannot subsequently charge any more for the work in question and, subject to certain time limits, the client can ask for the bill to be assessed by the Court under section 70 of the Act. Depending on the terms of the retainer, a solicitor may be able to raise statute bills during the course of a retainer as well as when he has completed the task on which he has been instructed, but interim bills may, alternatively, represent requests for payments on account. If that is the case, the time limits on applications for assessment do not bite and the solicitor cannot bring proceedings to recover his fees. On the other hand, it may be open to the solicitor subsequently to increase the amounts claimed and also to terminate the retainer if a bill is not paid."

31. Newey LJ identified the two ways in which the right to issue an interim bill might occur: at a natural break in the proceedings (see *Davidsons v Jones-Fenleigh* [1997] Costs LR (Core Vol.) 70; and by agreement. As to the latter, in *Abedi*, Simon Brown LJ said that it was "open to solicitors to agree the terms of payment under their retainer and the wiser amongst them nowadays do so". But it is for the solicitor to demonstrate that an interim invoice is in law an interim statutory bill: see *In Re Romer & Haslam* [1893] 2 QB 286 at 298-299.

6.3 'Final' and 'Complete'

32. It has been repeatedly held that, in order to be a bill of costs under s.70 of the 1974 Act, the bill in question must be final and complete. In *Davidsons*, at page 75, Roskill

LJ referred to such a bill as "a complete self-contained bill". In *Abedi,* Simon Brown LJ, citing the then-current edition of *Cordery on Solicitors,* said:

> "Although they are interim bills they are also final bills in respect of the work covered by them. There can be no subsequent adjustment in the light of the outcome of the business. They are complete self-contained bills of costs to date. Interim statute bills are rare and during the currency of the retainer can arise in only two ways: by natural break or agreement."

It appears that these same words appear, unchanged, in the current edition of *Cordery on Legal Services* Issue 140, April 2024, at [1154].

33. This definition was restated by Spencer J in *Bari v Rosen*. He said:

> "15. However, a solicitor may contract with his client for the right to issue statute bills from time to time during the currency of the retainer. Such bills are known as "interim statute bills". They are nevertheless final bills in respect of the work they cover, in that there can be no subsequent adjustment in the light of the outcome of the business. They are complete self-contained bills of costs to date."

34. In *Boodia 1* at [31], Newey LJ identified an exception to this principle:

> "31. Slade J considered [2018] 1 WLR 2037, para 53 that "application of the principle explained in *Bari v Rosen* [2012] 5 Costs LR 851 leads to a requirement that to constitute a statute bill it must contain all costs relating to a defined period". To my mind, however, that is to attribute to the words "complete self-contained bill of costs" a significance that they do not have. *Bari v Rosen* was not concerned with whether a statute bill had to extend to both profit costs and disbursements, and no such issue arose either in *Davidsons v Jones-Fenleigh* [1997] Costs LR (Core Vol) 70 or *Adams v Al Malik Carpets PVT Ltd* [2014] 6 Costs LR 985. The point being made in *Davidsons v Jones-Fenleigh*, echoes of which can be found in the later authorities, was essentially that, for a bill to be treated as a statute bill, it must be apparent that it is not merely seeking a payment on account but is intended to be complete and final as regards its subject matter. The cases do not appear to me to assist with whether a statute bill has to include everything (profit costs and disbursements) attributable to the period covered by the bill."

35. In his oral submissions, Mr Williams expressed a certain amount of dissatisfaction with the authorities on this point, and said that the references to "final", "complete" and "self-contained" were of dubious origin, because no authority was cited in the original passage from *Cordery on Solicitors* that was set out in *Abedi,* from which so much else stemmed. He also said that the issues in most of the cases which I have cited above were not concerned with whether or not the bill in question was an interim statutory bill. I come back to this point in paragraph 52 below.

6.4 CFAs

36. The requirement that an interim statutory bill must be final and complete in respect of the work it covers can create a tension with arrangements, such as CFAs, where the

solicitors' full remuneration may well not be capable of being identified until a later date. A CFA is defined at s.58(2) of the Courts and Legal Services Act 1990 in the following terms:

> "(a) a conditional fee agreement is an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances; and
>
> (b) a conditional fee agreement provides for a success fee if it provides for the amount of any fees to which it applies to be increased, in specified circumstances, above the amount which would be payable if it were not payable only in specified circumstances; and
>
> (c) references to a success fee, in relation to a conditional fee agreement, are to the amount of the increase."

37. In *Sprey v Rawlinson Butler LLP* [2018] EWHC 354 (QB); [2018] 2 Costs LO 197, the CFA provided that the client would pay the solicitors at discounted rates (40% of the normal rate) if he lost the claim, but if he won he would pay the solicitors their normal rates in full, plus a success fee of 50%. Following the successful outcome of the claim, the solicitors billed the client for 100% of their normal rates, and the success fee. When the client sought to challenge the bill, the solicitors said that it was too late because there had been no challenge under s.70 in respect of the earlier, discounted invoices, which they said were interim statutory bills. The decision largely turned on the proper construction of the CFA in question, addressed at [22]-[25] of Nicklin J's judgment. But at [28] he said:

> "28. Finally, this construction of the CFA is consistent with the principle that a statute bill cannot subsequently be amended (see paragraph 5 above). The effect of the clauses I have identified was that the 40% invoices were liable to be later changed. What was ultimately to be paid for the work that was the subject of any 40% invoice would not be known until the Appellant won or lost the claim or terminated the CFA. Mr Marven submits that this construction would mean that the Respondent was not entitled to be paid. If by that he means that the Respondent lacked an enforceable right to payment of its fees (under s.69 Solicitors Act 1974), then that is right. But the consequences of that principle are not as harsh as they might appear. It does not mean that the Respondent was not entitled to some form of payment. The Respondent could always insist that the Appellant make payments on account under the express terms of the Client Care Letter."

38. A not dissimilar issue arose in the *Winros Partnership v Global Energy Horizons Corporation* [2021] EWHC 4310 (Ch), [2022] Costs LR 543, albeit that the case was particularly concerned with whether the CFAs allowed interim statutory bills to be delivered at a 'natural break'. At [163] of his judgment, Trower J said:

> "…The CFAs themselves deal with the time at which the solicitors' entitlement to charge their basic and success fees arises in a manner that is inconsistent with their ability to render a statute bill, which carries with it a requirement that it be complete and self-contained, any earlier than the time at

> which a 'win' has occurred. It is only then that it is possible for the solicitors to say that they have any right to recover the basic charges and the success fee..."

39. In the last of the CFA cases, *Richard Slade v Erlam* [2022] EWHC 325 (QB), the original retainer between the parties was not a CFA and, although the district judge found that that first retainer did not permit the rendering of interim statutory bills, that decision was overturned by Judge Gosnell on appeal[2]. As to the CFA, his analysis starts at [30]. He found that the CFA was the result of a significant change in the contractual provisions regarding billing, and that the clause giving the solicitors the right to deliver interim statute bills in the original retainer was not carried forward into the CFA. He therefore agreed with the district judge that the bills rendered under the CFA were not interim statutory bills.

40. At [37], Judge Gosnell dealt with *Sprey*:

> "37. Whilst the argument that *Sprey v Rawlinson Butler* did not apply in this case was not pursued on the appeal I should deal with it briefly. I accept in that case there was an added complication that the solicitors hourly rate increased if the condition which triggered the success fee applied. Not surprisingly Mr Justice Nicklin found that an interim bill at the lower hourly rate could not be an interim statute bill because it was not a self-contained and final bill for that period. I would also question whether a bill rendered during the currency of a CFA can be an interim statute bill when there is no liability to actually pay it (and there may never be a liability if the condition is not met). It would be wholly wrong if interest were allowed to run and the clock for assessment allowed to start running before there was actually any liability to make any payment."

41. In this way, although each turned on different points, all three cases involving the interplay between s.70 and CFAs – *Sprey*, *Winros* and *Erlam* - resulted in the conclusion that the interim invoices issued under the CFAs could *not* be interim statutory bills, so that the restrictions on any challenge under s.70 did not apply.

7. The Finality and Completeness of the Invoices

7.1 The Proper Characterisation of the Further Contingent Fees

42. It is, I think, a critical first step to characterise precisely what the further contingent fees in this case were for. Mr Williams' skeleton argument suggested that the unconditional fees - the 65% - were final and stand-alone entitlements to payment in respect of the work done for the respondent. He submitted that the further contingent fees, namely the remaining 35% of the Standard Fee, and the Success and Uplift Fees, were not further charges for the same work. He said at paragraph 50 that they were "a risk-based return for achieving the defined level of recoveries, and not ordinary fees for the underlying work itself". Putting the same point in a slightly different way, he said in the same paragraph that they were "a free-standing return for the attaining of a

[2] I note that the words used in the retainer were that the interim bills "are detailed bills and are final in respect of the period to which they relate". It might be thought that that could not have been any clearer.

specified outcome, albeit they may be calculated as an uplift on charges previously paid."

43. In response, Mr Mallalieu said that the argument on Ground 1 turned on the appellant's particular characterisation of the conditional payments, which he submitted was artificial (because it was solely designed to get round the principle of finality) and inconsistent with the June 2016 retainer letter. He submitted that the sum invoiced to the respondent in the interim invoices was not the full sum payable in respect of the fees for the work done during the respective period. It was a temporary discount for the work done, and the client would not know the full amount he was to be charged for the work until the conditions were or were not satisfied.

44. In this way, as Mr Mallalieu pointed out at paragraph 31 of his skeleton argument, the difference between, for example, the full Standard Fee, and the discounted or Unconditional Fee was not a "risk-based return": it was the risk itself, by which the risk-based return was calculated. The appellant put part of the ordinary Standard Fees for the work done at risk, in order to generate a potential entitlement to a reward for so doing.

45. In my view, for the reasons set out below, Mr Mallalieu's submissions were correct. For the purposes of this analysis, I shall focus on the appellant's Standard Fee, as explained in Section 5 of the letter of 7 June 2016 (paragraph 8 above).

46. The Standard Fee was calculated by reference to the Standard Rates set out in Section 4 of the letter of June 2016. For example, the partner's hourly rate was stated as being between £625 and £650. The terms of the CFA meant that the respondent was liable to pay 65% of that Standard Fee. That was the Discounted Rate which featured in the invoices which are the subject of the appeal. The remaining 35%, which was described as the Additional Portion of the Standard Fee, would only be chargeable on the happening of the first of the contingencies.

47. But the work that was the subject of both the Discounted Fee (the 65%) and the Standard Fee (100%) remained exactly the same. It did not vary or change. The appellant was being paid for that work: some of the payment was claimed in the 79 invoices, but the remainder of the Standard Fee will – if due – be included in later invoices. The work done will neither change nor increase in order to justify that full Standard Fee. Although the work remained the same, the appellant was agreeing to give the respondent a temporary discount of 35% on the fees payable. That discount might be permanent but, if the necessary contingency was achieved, it would only be temporary. At the time that the invoice was rendered, nobody knew whether or not the additional 35% would ever be payable.

7.2 Preliminary Conclusion as to the Interim Invoices

48. To be an interim statutory bill, it must be final and complete in respect of the work or period that it covers. There can be no subsequent adjustment for any reason, whether that be "the outcome of the business" or something else: an interim statutory bill must be a complete self-contained bill of costs. Prima facie, therefore, the interim invoices in this case, based on the Discounted Fee, were neither final nor complete. On a proper characterisation of the contingent charges, the same work and/or the same period covered by any particular invoice could be revisited in the future when the

appellant made a further claim for the Additional Portion of the Standard Fee (and potentially the Uplift and Success Fees too). The lack of finality or completeness strongly suggests that the invoices were not interim statutory bills.

49. That preliminary conclusion is supported by the statutory definition of a CFA (paragraph 36 above). That definition explains that the conditional element of the fees are a part of the fees for the work that the solicitor has carried out. They are only payable in specified circumstances. But that does not mean that the conditional element of the fees ceases to be part of the fees for the work done: as s.58(a) says, they are emphatically part of the fees for that work.

50. In addition, I consider that Mr Williams' attempt at characterising the contingent sums as somehow separate from the work done is inconsistent with the approach taken by the first instance judges in *Sprey, Winros* and *Erlam* referred to in Section 5.4 above. If necessary, Mr Williams said that *Sprey* was wrongly decided, although he did not elaborate on that submission. In any event, I disagree: I consider that those three authorities (although they largely turn on the terms of the CFAs in question) correctly apply the existing law to define an interim statutory bill, and point out the fundamental problems of attempting to render such bills under a CFA.

51. Accordingly, I consider that, prima facie, these invoices could not be final and complete and could not therefore be interim statutory bills in law. I consider that this conclusion is consistent with the statutory definition of CFAs, and supported by the authorities. I now turn to the specific arguments that Mr Williams advanced orally in order to persuade the court that that preliminary conclusion was incorrect.

8. Analysis of the Appellant's Specific Arguments

8.1 The Juridical Basis of 'Final' and 'Complete'

52. I have already noted at paragraph 35 Mr Williams' complaint that the references in the authorities to a bill of costs having to be final, complete and self-contained in order to be an interim statutory bill are unsatisfactory. He urged this court to be wary about following them. I accept his point that those statements often arose in cases where the finality or completeness of the bill in question was not in fact an issue. I also accept the proposition that this principle has rather backed into the spotlight, emanating in part from the lengthy quotation from *Cordery* in *Abedi*, which is – at least on is face - untethered to authority. But I am bound to note that the principle has the authority of Roskill LJ in *Davidsons* and, much more recently, Newey LJ in *Boodia 1*. Accordingly, it seems to me that the principle of law that, to be a bill of costs within the terms of s.70, the bill must be complete, final and self-contained, is too embedded in the authorities to be doubted.

8.2 'Subject Matter'

53. Perhaps conscious of that reality, Mr Williams' second argument was to rely on what Newey LJ said at [31] of his judgment in *Boodia 1*, namely that, to be an interim statutory bill, it must be "intended to be complete and final *as regards its subject matter*." Mr Williams argued that, on that basis, the invoices in the present case were final as regard the subject matter of the Discounted Fee, but not in respect of the

subject matter of the Additional Portion of the Standard Fee which could be the subject of later invoices, depending on the contingencies.

54. In my view, Mr Williams was seeking to do precisely what he criticised others for doing, namely taking a phrase in a judgment (on another issue) and giving it the effect of a statute. It is plain that, when he referred to "subject matter", Newey LJ meant that to be synonymous with "the work in question" (his phrase at [1] of his judgment): in other words, the work that was the subject matter of the invoice. *Boodia 1* was all about the difference between a bill for profit costs, which was based on the work that had been done, and a separate bill for disbursements. As in this case, there was no dispute in *Boodia 1* that the work that was the subject of the bill for profit costs was the work that had been done by the solicitors. The separate bill for disbursements did not change that: it was an entirely different thing altogether.

55. Mr Williams' attempted reliance on "subject matter" was one of a number of different ways in which he sought to argue that, even if he was stuck with the principle of finality noted above, he could still find a way round the difficulties by endeavouring to limit that which was final and complete. Accordingly, at one point, he argued that the invoices were final "in respect of the things which have been billed". That submission only has to be considered for a moment before its fundamental flaw becomes apparent. His proposition would allow a solicitor to render what he said was an interim statute bill, because it was final in respect of the things included within it (including, say, 50 hours work by the partner in March 2024), but would allow that solicitor to render a later interim statute bill for another 20 hours worked by that partner during March 2024, which had previously been overlooked. The first invoice would be final in respect of the 50 hours that it billed; the second invoice would be final for the additional 20 hours it billed during the same period. Whilst this would mean that the first bill was neither final nor complete, on this hypothesis, that would not matter.

56. In my view, that is the complete antithesis of an interim statutory bill. The advantages of an interim statutory bill, in terms of certainty and clarity, arise out of the fact that it cannot be revisited. It is therefore impossible to qualify the finality and completeness of an interim statutory bill; as soon as you do, it ceases to be an interim statutory bill.

8.3 Boodia 1

57. Thirdly, Mr Williams relied on *Boodia 1* for another purpose. In that case, this court held that a bill for the solicitor's profit costs was an interim statutory bill and that a separate bill for disbursements was an interim statutory bill in respect of those disbursements. Mr Williams sought to argue that this was a similar situation. He relied on [34] and [35] of Newey LJ's judgment, and argued that, just as Newey LJ said that there was no part of the 1974 Act which stated that a statutory bill must encompass both profit costs and disbursements, there was nothing in the 1974 Act that said a statutory bill must encompass the Discounted Fee and the Additional Portion of the Standard Fee.

58. I reject the analogy between this case and *Boodia 1*. First, the 1974 Act clearly distinguishes between profit costs and disbursements: see s.67 and s.70(5) and (6) (dealing with assessments), set out at paragraphs 24 and 26 respectively. Secondly, the retainer in *Boodia 1* provided that profit costs and disbursements would be the

subject of separate bills (see [3] of Newey LJ's judgment). Thirdly, there seems to me to be all the difference in the world between the situation in *Boodia 1*, where there was one bill for the profit costs, and another bill for disbursements, and this case, where there is one bill for a part of the profit costs and a potential further bill for another part of the same profit costs on the happening of a subsequent contingency. Fourthly, it is unsurprising that there was nothing in the 1974 Act which addressed such a situation, since CFAs were illegal when the 1974 Act came into force.

8.4 In Re Romer & Haslam

59. Fourthly, Mr Williams sought to rely on *In Re Romer and Haslam*: indeed, he spent longer on this authority than any of the others, reading from all three judgments in the Court of Appeal. That was a case from 1893, where the first bill was not sent at the time of a natural break; where the position on the others was unclear; and where all the bills were obviously requests for payment on account. In the words of Lord Esher MR at 295, "there is the strongest evidence in the present case that the intermediate bills were intended to be merely statements of how things were going on and were not intended as final bills". Bowen LJ said at page 299: "there is an absence of all demand for payment of the bills as bills: the solicitors did no more than on two occasions ask for money on account in respect of the work done by them extending over a very considerable time."

60. Mr Williams sought to argue, I think, that because the bills in that case were obviously based on a running account, and the invoices here were not so obviously based, the invoices in this case must have been interim statutory bills. But the comparison is inapt: just because these invoices were not obviously based on a running account does not somehow make them interim statutory bills. More widely, I derived no real assistance from this Victorian authority[3]. It dates from a time when, save for the natural break point, solicitors rendered bills at the end of their retainer. Unlike the more recent general authorities, and the three CFA cases to which I have referred above, I consider that *In Re Romer & Haslam* has nothing to say about the particular issue that arises under Ground 1 of the appeal.

8.5 Davidsons

61. At one point, Mr Williams sought to rely on *Davidsons* and the statement that, if invoices were paid without demur, it indicated that they were interim statutory bills. Of course, the difficulty with that argument is that, because the invoices themselves were not final and complete, the fact that they were paid could not change their status, a point which Mr Williams expressly accepted during oral argument. He also accepted that, if the court was against him on the principle of finality, then not only could he not rely on *Davidsons* but also that, if a further claim for the same period could be made, the invoice in question could not be an interim statutory bill.

[3] I was similarly unassisted by the reference to *In Re Thompson* (1885) 30 Ch. D. 441, a case about solicitors varying or amending their bills. That is, of course, the last thing that the appellant seeks to do in the present case: here, they do not want to vary the bills, but instead submit further invoices.

8.6 The Practical Effect of the Judge's Decision

62. It is common in costs cases for the appellant to argue that, if the decision at first instance is not overturned, it will have a devasting effect on costs practice and funding. This case was no exception. Mr Williams pointed to the fact that, if these were not interim statutory bills, his clients faced the possibility of bills going back to 2016 being the subject of detailed challenge. He also said that it could have a chilling effect on the use of CFAs more widely.

63. As to the point about the risk of a potentially stale challenge to the bills, that is a risk that any solicitor runs if his bills are not interim statute bills. In any event, it does not seem to me that, even if the respondent's challenge went back to 2016, that should present any sort of insurmountable difficulty for the appellant. These days, with full computer records, a well-run firm of solicitors should have no difficulty in being able to justify the charges that it made in its detailed invoices, even if those invoices are some years old.

64. As to the wider implications of the judge's judgment, there has been no evidence on that point before this court. No representations have been received from the Law Society or any of the other organisations who often seek to intervene in costs cases. Moreover, given that, as I have demonstrated, the three CFA cases have each rejected the solicitor's claim that the bill in question was an interim statutory bill (see paragraphs 36-41 above), a further decision to the same effect should not come as a surprise to those solicitors undertaking work on this basis.

65. In response, Mr Mallalieu also identified two practical effects, one to support the proposition that the appeal should be dismissed, and one to demonstrate the difficulties if the appeal was allowed.

66. As to the former, he said that one test of whether the invoice was an interim statutory bill was to ask whether it could have been the subject of proper assessment. He submitted that what would have been assessed would have been the claim at the Discounted Rate. The costs judge undertaking the assessment would have looked at the overall figure to see if it was reasonable, and might have concluded that, even if the hours were overstated, the overall figure was reasonable, because the hourly rates were only charged at 65% of the Standard Fee. So the result of any assessment might have been skewed because only the Discounted Rate was being charged. Although Mr Williams sought to argue that that was unlikely and that what would matter would be the hours only, I was not persuaded that it would be as simple as that.

67. I note that this potential difficulty was identified expressly at [25] of *Sprey*, where Nicklin J said:

> "25…At the heart of an assessment is whether the sum charged by the solicitors to the client is reasonable. The charge for work done at 40% of the normal rates might well be reasonable, but at 100% not reasonable. A client would not know until the end of the claim (or earlier termination) at which rate he was being charged. On Mr Marven's construction of the CFA, the Appellant progressively lost the right to challenge the bills as the claim went on."

68. Moreover, this issue was linked to what might happen if the appeal was allowed. Mr Mallalieu submitted that, in that event, the respondent would never have the opportunity of challenging the remaining 35%. That would be because, on this assumption, the invoices thus far were interim statutory bills, and the further invoices would simply be for the mathematical percentage uplifts that had been agreed on the happening of further contingencies. That would then mean that, not only could the respondent not challenge the interim bills rendered so far, but he would effectively be prevented from challenging the interim bills that were rendered in the future, because they would be based on a simple mathematical uplift in respect of work that it was now too late to challenge. That was the very outcome that the solicitors were unsuccessfully arguing for in *Sprey*.

69. It is unnecessary for present purposes to delve further into these two elements of Mr Mallalieu's submissions. But, in my view, they provide at least some further support for the conclusion that Ground 1 of the appeal must be dismissed.

9. Concluding Observations

70. Mr Williams' opening oral submission was to the effect that this area of law had become "blinded by its own specialism", and that highly technical arguments were blurring the straightforward resolution of these issues. He said that this explained the surge in the number of disputes arising under s.70.

71. In my view, that submission neatly avoided the reality of what was happening here. In an ordinary case, a consumer of services may have up to six years to pursue claims against the services provider. But in the case of solicitors, s.70 drastically truncates that right: it offers a highly technical form of protection to solicitors by limiting the period of challenge to one year after the bill has been paid. That was not a problem in the past, because solicitors' bills were usually rendered at the end of their work. Now solicitors sensibly seek interim payments, but they still want the protection of s.70, even under CFAs. As the authorities demonstrate, they make uneasy bedfellows.

72. For these reasons, I concluded that this appeal should be dismissed.

LORD JUSTICE NUGEE:

73. I concurred in the dismissal of the appeal for the reasons so well expressed by Coulson LJ.

LORD JUSTICE LEWISON:

74. I also joined in the decision to dismiss the appeal for the reasons given by Coulson LJ.