COOK *on* COSTS

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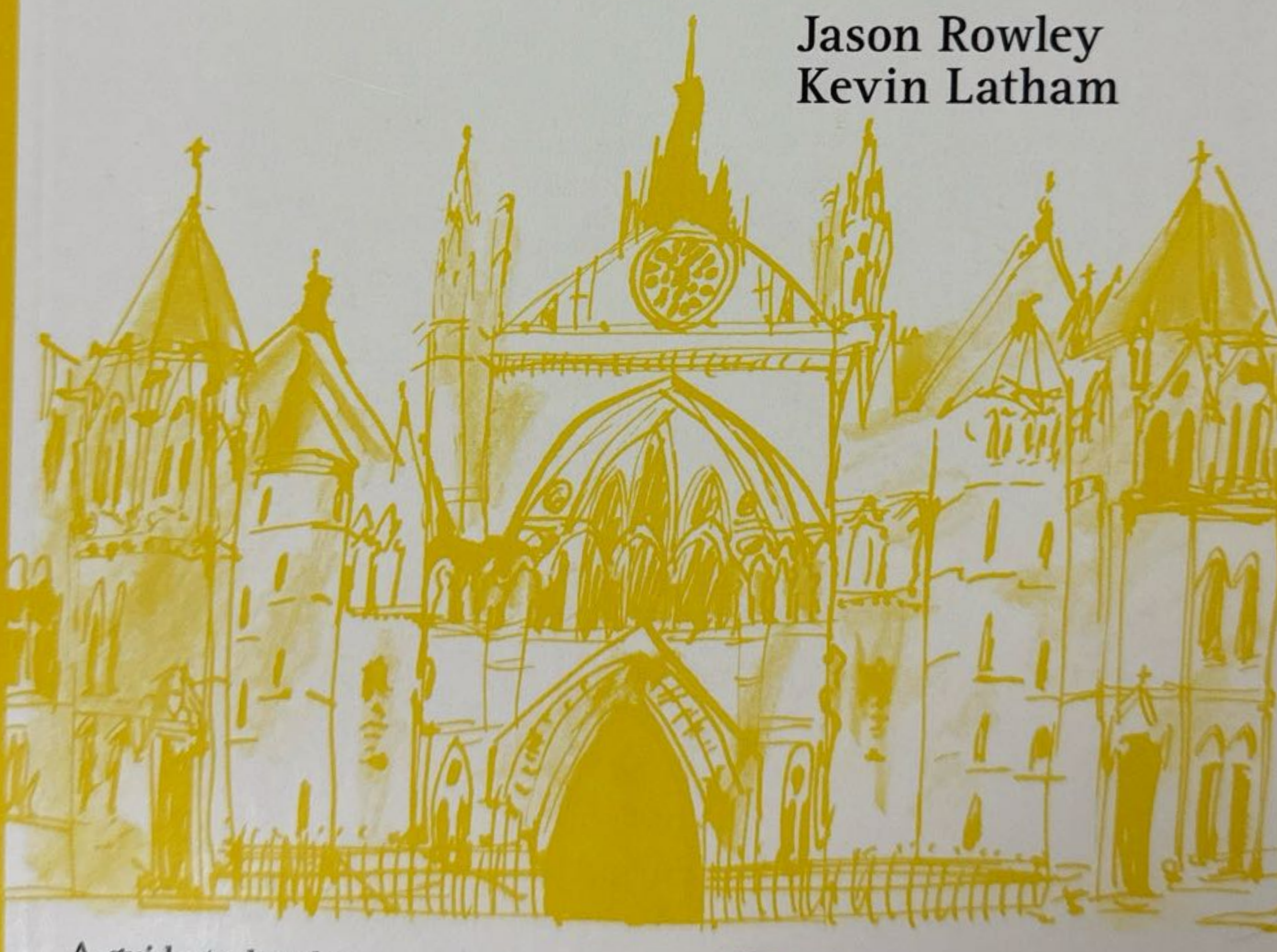
Jason Rowley
Kevin Latham



A guide to legal remuneration in civil contentious and non-contentious business

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costs' and not the client's. This is completely wrong, even where the client has been told that the solicitor will take whatever can be recovered from the other side and render no additional bill to the client.

It may well be that the client has rights against other persons or funds, which will ultimately pay the solicitor's fees. The trustee looks to a trust fund for reimbursement; a successful party in litigation can expect an order for costs against the loser; the landlord may provide in the lease that his legal costs be paid by the tenant, but none of this affects the solicitor and client relationship between the trustee, the successful litigant or the landlord and their respective solicitors. The solicitor on behalf of his client seeks to recover money due to the client from the trust fund, the unsuccessful litigant or the tenant, but he does not have any personal relationship with them. The solicitor looks to his client for payment of the costs whether or not the client is reimbursed by a third party. The solicitor must therefore deliver a bill to his client for the whole of his costs and give credit for any sum that has been received. This is the strict legal position and has been since at least 1908. In *Cobbett v Wood* [1908] 2 KB 420, 77 LJKB 878, CA, the Court of Appeal held that a bill of costs which excluded the between the parties' items and simply referred to the excess chargeable as between solicitor and own client was not a proper bill. The obiter comments of the Court of Appeal in *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 about the constituent elements of the bill suggest that little has changed.

Misunderstandings about this arise frequently when a third party who is paying the client's costs wishes to have an invoice on which he can recover the VAT. For example, leases regularly contain clauses where the landlord has obtained an undertaking from the tenant to pay his costs. Such a clause also regularly provides that the landlord should be 'compensated fully' or 'indemnified' for costs and expenses incurred as a result of the tenant's breach of the lease. Similar clauses appear in most mortgage deeds. The solicitor is providing legal services to his client, not the third party tenant (for example), and so that tenant cannot obtain a VAT invoice even though he has ultimately funded payment of the client's bill. For more on costs in contractual situations, please see Chapter 38.

INTERIM BILLS

[2.4]

Solicitors have always been free to agree the terms of their retainer with their clients in respect of both non-contentious and contentious business. It is only in recent years that solicitors have realised what has long been appreciated in every other walk of life: that without stage payments by the client the entire burden of financing the work falls upon he who is doing it. 'Cash is King' as every managing partner, chief executive and their bank manager can tell you without hesitation. Without cash flow, any business is in difficulties.

Litigation in particular can be protracted, complicated and lingering, as indeed can some non-contentious work. An agreement with a client that the firm will render interim bills at monthly, three-monthly or six-monthly intervals will transform a firm's cash flow. Any basic system of time recording and costing will enable simple interim bills to be produced based on time spent and hourly rates. If done correctly (see below) any anomalies or inequities can be rectified

in the final bill. The clients will be grateful. Solicitors live in fear of offending their clients with requests for payments on account of costs and disbursements, but it is nothing compared with the fear of the clients of the ever-growing size of an unknown bill which they know they will inevitably receive. (This is true now even of most CFA clients who used to have the luxury of being told that they would receive all their compensation and not have to pay any costs to their solicitor or their opponent, whatever the circumstances.) Clients welcome knowing the amount of costs they have incurred to date, even if it may mean them crying 'Halt!' before any more costs are incurred; they will (generally) also welcome the opportunity of making stage payments. Furthermore, clients appreciate that a solicitor who is efficient in the conduct of his own affairs is likely to be no less efficient in looking after theirs.

There are two kinds of interim bill, and the difference between them is crucial. When deciding what sort of interim bills you want to send out, you need to consider in particular whether you think you might need:

- to sue the client on such bills (and not simply on a final bill); and/or
- to seek a different amount from your client at the end of the case for the period the interim bill covers

Keep these questions in mind as we now look at interim bills on account and interim statute bills.

(a) Interim bills on account

[2.5]

A bill on account is really nothing more than a request for payment on account in fancy dress. Not being a statute bill it cannot be sued on by the solicitor, the client cannot apply for a detailed assessment of it and, therefore, the time limits for applying for a detailed assessment do not run.

In *Turner & Co v O Palomo SA* [1999] 4 All ER 353, [2000] 1 WLR 37, CA, five bills rendered during the course of litigation had been headed 'on account of charges and disbursements incurred or to be incurred'. It was held these could not be construed as final or statute bills in respect of the work covered by them, and accordingly the time limits for applying for a detailed assessment under the Solicitors Act had not started to run. In contentious business, if the client does not pay a bill on account the solicitor should give him 'reasonable notice' according to s 65(2), that unless payment is made within a stipulated (reasonable) time, the solicitor will withdraw from the retainer. But you should note that if the client regards the amount requested on account as excessive he can invite the solicitor to render a statute bill which he may then have assessed. If the solicitor then fails to render a statute bill the client can obtain an order from the court that he should do so, pursuant to the Solicitors Act 1974, s 68.

One advantage to the solicitor of rendering a bill on account is that it need not be the final quantification of all the work included in it, but is merely the minimum amount of his charges to date. It also avoids the risk of limiting any between the parties' costs recoverable in respect of this period to the amount of the bill on account under the indemnity principle. Furthermore, unless the sum charged is based on the unsuccessful rate set out in a CFA, there is a risk of appearing to charge by results without the benefit of a statutorily compliant CFA. For this reason it is important to make it clear to the client that the bill on account is simply a request for payment on account of the final (statute) bill which will be delivered later.

A bill on account constitutes a written intimation to the client of the amount of costs incurred to date and therefore entitles a solicitor to transfer from his client account into his office account money received from the client in accordance with the SRA Accounts Rules. Such a transfer is restricted to the amount of costs already incurred and must not cover anticipated future costs. A bill on account must therefore be restricted to costs incurred. Any request for money on account of future costs must, in respect of contentious business, comply with the requirements of the Solicitors Act 1974, s 65(2) and in respect of non-contentious costs must be pursuant to an agreement with the client.

Therefore if you are looking to improve cash flow and leave flexibility as to the final bill, a bill on account is the interim bill for you. It does mean that you cannot pursue your client on such bills but a separate final bill can be delivered and pursued where necessary. You need to be careful that the payment on account does not turn into a statute bill by mistake (see [2.7]) and which inadvertence may cause you problems, such as being limited to the sums you can claim.

(b) Interim statute bills

[2.6]

These are called statute bills because they comply with all the requirements of the Solicitors Act 1974 and result in all the consequences which flow from such compliance – the solicitor can enforce payment by suing the client, the client can obtain an order for a Solicitors Act 1974 assessment and the various time limits relating to the client's rights to an assessment run from the date of their delivery. 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.

How complete and self-contained do such bills have to be? In *Richard Slade & Co v Boodia and Boodia* [2018] EWCA Civ 2667, the Court of Appeal considered this phrase of long standing. It overturned the view of the costs judge and appeal judge that it required such bills to include profit costs and disbursements for the particular period. Newey LJ concluded a review of the provisions of the Solicitors Act and case law by stating:

> 'I do not think it can be inferred that a statute bill must always, or even usually, include both profit costs and disbursements. Separate billing for profit costs and disbursements is common with modern, digital billing, and I do not accept that that need give rise to problems.'

In *Sprey v Rawlison Butler LLP* [2018] EWHC 354 (QB), the court had to consider a retainer which the drafters of the Solicitors Act 1974 could not possibly have contemplated. The claimant's case was run on a CFA where a fee based on a lower hourly rate was to be paid if the case was not successful. That fee was paid via regular invoices during the life of the case in response to invoices being rendered. The claimant was in fact successful in his case and so the solicitors were entitled to their full hourly rate and a success fee. Those two elements were claimed via two invoices. It was common ground that the invoice

relating to the success fee should be assessed given the speed with which the claimant brought Solicitors Act 1974 proceedings. The parties disagreed as to whether the periodic invoices could be interim statute bills (and largely outside the 12-month period for seeking assessment if they were) given the second invoice which claimed the remaining fees based on the balance of the hourly rate multiplied by all of the time claimed in the case. The costs judge at first instance sided with the solicitors but Nicklin J overturned that decision on the basis that the periodic invoices had been adjusted by the 'balancing' invoice and so they could only have been payments on account and all invoices could be assessed.

The extent to which the authorities require a bill to be final, complete and self-contained was one of a number of arguments raised by the appellants in *Signature Litigation LLP v Ivanishvili* [2024] EWCA Civ 901. Coulson LJ accepted that the status of the bill was not, in fact, in question in a number of those authorities. But it was specifically referred to in the more recent authorities including by Newey LJ in *Boodia* and was too embedded in the authorities to be doubted. None of the arguments raised by the solicitors found attraction with the Court of Appeal and it is now entirely clear that interim statute bills cannot be rendered on CFA cases because they will always be vulnerable to amendment depending upon the outcome. In response to the complaint from the appellant's advocate that this result would condemn solicitors to defending work from many years back because they could only have been paid as interim bills on account, Coulson LJ was unsympathetic. The prospect of a 'stale challenge' was present wherever a solicitor billed a client on account. A well-run firm ought to have no difficulty in defending its charges with the benefit of a full computer record. More fundamentally, interim invoices were at odds with the time limits in s 70 of the Solicitors Act 1974. At paragraph 71, he said this:

> '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.'

We think this statement is a little unfair to solicitors. The consumer of services has up to six years to sue for breach of contract or in tort. That remains the case in claims, for example, professional negligence against solicitors. But there is no comparable provision, as far as we are aware, which allows for an accountant's invoice, for example, to be scrutinised by a court simply because the client thought the charges were too much for the work done, notwithstanding that the scope of the work and the hourly rate at which it was to be done had ostensibly been agreed. The contrast in the remedies available to a client can be seen in the case of *Glaser KC v Atay* [2024] EWCA Civ 1111. If the work had been done by a solicitor rather than Michael Glaser KC, a challenge under the Solicitors Act 1974 could easily have been brought by either the client or the solicitor. As it was, the direct instruction of leading counsel required proceedings to be brought for breach of contract by counsel and a defence that the contractual terms were unfair under the Consumer Rights Act 2015 (a defence of professional negligence having previously been struck out).

The High Court Judge (Turner J) had concluded that the core of the bargain was the agreed fees of £90,000 and £45,000 for leading and junior counsel to prepare for and attend the hearing. The client did not challenge those fees and Turner J's conclusion meant that she could not do so because they were protected by the 'safe harbour' provisions in the Act. The contractual term which allowed for counsel to charge these fees even if the hearing did not go ahead was not sufficiently at the heart of the bargain to be within the safe harbour and so fell to be assessed for fairness. The Court of Appeal approved those conclusions. This term, to use the wording of the Act, caused a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Interim statute bills during the currency of the retainer can arise in only two ways: by natural break or agreement. These days, it is rare for a client care letter not to cater for the making of interim payments. But, as we have just seen, some retainers cannot properly cater for interim statute bills in any event.

By Agreement

[2.7]

'Before a solicitor is entitled to require a bill to be treated as a complete self-contained bill of costs to date, he must make it plain to the client expressly or by implication that that is the purpose of his sending in that bill for that amount at that time. Then of course one looks to see what the client's reaction is. If the client's reaction is to pay the bill in its entirety without demur, it is not difficult to infer an agreement that the bill is to be treated as a self-contained bill of costs to date.'

That was how Roskill LJ put it in *Davidsons v Jones-Fenleigh* (1980) 124 Sol Jo 204, (1980) Times, 11 March, CA. In that case the court found that each of four bills delivered was complete and final in its own right and that the time for challenging three of them had expired. In *Abedi v Penningtons (a firm)* [2000] NLJR 465, CA, the solicitors had not agreed with their client that they could deliver interim bills and there were no natural breaks in the litigation, but the solicitors did in fact deliver bills on a monthly basis, each purporting to be a final bill for the period in question. The client at first paid regularly, but then stopped, leaving five bills unpaid and four bills partially paid. The client then alleged that she had been overcharged and sought a detailed assessment under the Solicitors Act. She was so long out of time in making her application that if each of the bills was treated as a final (statute) bill she was not entitled to have any of them assessed under the Act. The Court of Appeal upheld the award of summary judgment to the solicitors on the grounds that the possibility of interim bills being statute bills could arise by virtue of an inferred as well as an express agreement. The client, far from disputing the bills, had paid them regularly and had promised to pay the outstanding bills. The case was distinguished from *Re Romer and Haslam* [1893] 2 QB 286, 62 LJQB 610, CA, because in that case the solicitors had never asked for payment of any of their bills, but merely sought and obtained payment on account.

In *Adams v Mackinnes* SCCO Case No 13 of 2001 the retainer commenced in 1990 with a client care letter, no copy of which survived. In August 1994 the solicitors sent a further client care letter, which was available, stating they would apply an uplift for care and conduct but probably not until the end of the action, when they could decide what mark-up was merited. However, they did not change the format of their bills until May 1996, when they bore a prominent message that the bill was an interim bill. Prior to then the bills were drawn in a way which made them look like final bills. They set out exactly what work had been done, the rate being charged and the period covered by the bill, and each carried a notice informing the client of his rights to detailed assessment under the Solicitors Act. In these circumstances the solicitors were not entitled to any uplift for care and conduct prior to their client care letter of August 1994.

As Roskill LJ said in *Davidsons*, the solicitor must 'make it plain' that the bill is intended to be an interim statute bill. Does that mean that the client has to be told about how to challenge it? Time to do so starts running from delivery if it is a statute bill and pre-printed wording on stationery has traditionally confirmed some information about the entitlement to bring proceedings – but such wording does not usually give any indication of the time periods involved (see Chapter 3). The lack of wording is sometimes considered to be a pointer that the invoice is merely a request for payment rather than a formal statute bill. For example, in *The Winros Partnership (formerly known as Rosenblatt Solicitors) v Global Energy Horizons Corpn* [2021] EWHC 3410 (Ch), Trower J was faced with an interim bill rendered prior to the original claimant 'winning' under the CFA. That was found to be neither in accordance with the agreement nor utilising a natural break (see [2.8]). At the point that the claimant had won under the CFA, Trower J said that the client needed to be informed both of that fact 'but also that the consequences of the entitlement to render the bill as a statute bill was that time for its assessment had started to run'. Trower J relied on the words of Fulford J in *Adams v Al Malik* [2014] 6 Costs LR 985 in this context.

But in *Richard Slade & Co plc v Erlam* [2022] EWHC 325 (QB), HHJ Gosnell, sitting as a High Court judge, declined to take the same approach and pointed out that Fulford J's words came from a decision refusing permission to appeal and as such are not binding on any other court. HHJ Gosnell took the contrary view that if there is a clear contractual entitlement to render interim statute bills, that was not dependent upon any need to spell out the consequences of such delivery. In *Boodia v Slade (t/a Richard Slade & Co)* [2023] EWHC 2963 (KB), Freedman J reviewed the various authorities and found the *Erlam* approach to be the more persuasive, even though he did not consider himself to be bound by any of the previous authorities.

Whilst these judgments deal with a number of points regarding the status of the bills, it is difficult to reconcile this particular issue simply based on the facts of the cases. The extent of the entitlement of a client to be informed of his rights remains a point that will no doubt be raised on applications for Solicitors Act assessments.

Natural break

[2.8]

If there is no agreement in the client care letter or other document regarding the delivery of interim bills, the solicitor has to rely on the concept of a natural break in protracted litigation. There is authority for the rendering of an interim statute bill at such points but unfortunately, there is little authority to help to identify what is a natural break. In *Chamberlain v Boodle and King (a firm)*

[1982] 3 All ER 188, [1982] 1 WLR 1443, CA, Lord Denning said: 'It is a question of fact whether there are natural breaks in the work done by a solicitor so that each portion of it can and should be treated as a separate and distinct part in itself, capable of and rightly being charged separately and taxed separately'. In that case the Court of Appeal held that there had been no natural breaks justifying treating a series of accounts rendered during litigation as final accounts and that they should accordingly be treated as one bill all of which could be assessed.

In *Wilson v William Sturges & Co* [2006] EWHC 792 (QB), a bill delivered at the end of the first stage of proceedings was held to be a statute bill. Even though the court held it to be 20% in excess of the proper amount, the solicitors' insistence on it being paid before proceeding further did not terminate the retainer and disentitle the solicitors to their reasonable costs. The Law Society's advice is not to rely on the 'natural break' principle as a ground for delivering an interim statute bill except in the clearest circumstances.

So if you take the view that your clients may need suing and/or are likely to challenge your bill, you should consider rendering formal interim statute bills rather than a bill on account. The all-important time limits for challenging the bill (see **[3.16]**) start running from when the statute bill is delivered. The limitation period may well have run out on at least some bills if the litigation carries on for a long period of time. Bills that were paid quite happily by the client originally have a nasty habit of appearing far less reasonable to them at a later stage, particularly if the litigation has not gone so well in the meantime.

FINAL BILLS

Form and content

[2.9]

The formalities governing the content of a bill are surprisingly few. The Solicitors Act 1974 is silent as to the form of a bill for non-contentious work and in respect of contentious business s 64 merely prescribes that the bill of costs may, at the option of the solicitor, be either a bill containing detailed items or a gross sum bill. Since the Solicitors Act does not set out what needs to be done, regard is to be had to case law where the requirements are discussed. Ward LJ described this exercise in *Ralph Hume Garry (a firm) v Gwillim* [2002] EWCA Civ 1500 in the following, slightly world weary, fashion:

> 'There is no other hint or help in the Act to determine what is or is not bona fide compliance with the Act. To discover the answer one may have to trawl through statute and case law stretching back over 273 years. It has been an interesting, if not entirely satisfactory exercise.'

The Court of Appeal in *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 has recently tried to assist would be drafters of statute bills. It said, at para 46:

> 'Properly drawn bills ought in future to state the agreed charges and/or the amounts that the solicitors are intending by the bill to charge, together with their disbursements. They should make clear what parts of those charges are claimed by way of base costs, success fee (if any), and disbursements. The bill ought also to state clearly (i) what sums have been paid, by whom, when and in what way (i.e. by direct

> payment or by deduction), (ii) what sum the solicitor claims to be outstanding, and (iii) what sum the solicitor is demanding that the client (or a third party) is required to pay.'

A bill must be such as to be regarded as a demand for payment. Where an invoice was produced for negotiation with a third party and, according to the covering email, it had been 'pitched high', it was not a bill of costs in accordance with s 69 of the Solicitors Act 1974: *Kingstons Solicitors v Reiss Solicitors* [2014] EWCA Civ 172. Nor was an invoice lying on the solicitors file which was disclosed to the client but had never been sent: *Parvez v Mooney Everett Solicitors Ltd* [2018] EWHC 62 (QB).

A bill of costs must contain sufficient particulars to enable the client to judge the fairness of the charges. Furthermore, it needs to be sufficiently particularised for (another) solicitor to advise on it and a court to judge the propriety of the various items of which it is composed. Unsurprisingly, in *Re Kingsley* (1978) 122 Sol Jo 457 a bill merely stating 'for professional services' (and without any informative documents in support) was held to be void as inadequate.

This problem has been superseded in the main by two practical answers arising from s 64 of the Solicitors Act 1974. First, in respect of contentious business, the client can require the solicitor to replace the uninformative gross sum bill with a detailed one (for more on this see Chapter 3 at **[3.14]**). The client has to be within various time limits to do so. Sometimes clients ask for some clarification which may (or may not) amount to a request for a fully detailed bill in substitution for the gross sum bill. It is prudent when receiving such a request to write to the client and ascertain precisely what the client wants. At the same time, you can point out that s 64(2) (which gives the client the right to request the detailed bill), entitles you to submit a replacement detailed bill that exceeds the amount of the gross sum bill, if the work done justifies it. In *Parissis v Matthian Gentle Page Hassan LLP (2017)* [2017] EWHC 761 (QB) the solicitor did not answer the client's request and paid the costs of Solicitors Act proceedings notwithstanding that the client paid the bill in full having received a breakdown following a court direction to do so.

Second, the solicitor is required to 'furnish the costs officer with such details of any of the costs covered by the bill as the costs officer may require.' This is translated by the court rules which require, at rule 46.10(2) the solicitor to provide a breakdown of the costs claimed so that the client and the court can see what is being claimed in more detail.

In non-contentious business, a client used to be able to request a Remuneration Certificate to check that the fee charged was fair and reasonable but that route was removed when the relevant Order was repealed (see **[8.15]**).

The law in this area was reviewed by the Court of Appeal in *Ralph Hume Garry*. A balance must be struck between protection of the client's right to seek a Solicitors Act assessment and the solicitor's right to payment not being defeated by 'opportunistic resort to technicality'. To establish that a bill was not in 'bona fide compliance' with the Act, a client must establish (i) it contained no sufficient narrative to identify what he was being charged for; and (ii) he did not have sufficient knowledge from documents in his possession, or from what he had been told, to take advice about challenging the bill. The more the client knows, the less the need for the bill to spell it out.

In these days of computerised time recording and standard documents generated via case management systems, it is tempting simply to create a bill which merely sets out a mathematical calculation of the time spent because it can be done virtually automatically. But, in the absence of at least a sufficient summary of the work done, such a bill might well be treated by the court as not being a properly delivered bill. Nevertheless, a computer print out can help to provide clients with additional information to a suitable summary as Ward LJ's cri de coeur at the end of *Ralph Hume Garry* makes clear:

> 'I add this postscript for the profession's consideration so that an unseemly dispute of this kind does not happen again. Surely in 2002 every second of time spent, certainly on contentious business, is recorded on the Account Department's computer with a description of the fee-earner, the rate of charging and some description of the work done. A copy of the print-out, adjusted as may be necessary to remove items recorded for administrative purposes but not chargeable to the client, could so easily be rendered and all the problems that have arisen here would be avoided. In these days where there seems to be a need for transparency in all things, is a print-out not the least a client is entitled to expect?'

A full narrative could include details embarrassing to the client who wishes to use the bill as a VAT invoice and there are various methods of preserving this confidentiality, the most usual being to set out the narrative either on a separate sheet or on a tear-off portion at the end of the bill.

Taking account of interim bills

[2.10]

Where interim bills on account have been rendered pursuant to s 65(2) of the Solicitors Act 1974 these should be ignored for the purposes of the final bill and treated as requests for payment of money on account. The final bill should therefore be for the total amount of the solicitor's charges and disbursements with any additional mark-up (or mark-down) on the interim bills and give credit for all payments received as a result of bills on account.

If pursuant to an agreement with your client (or where there have been natural breaks) you have been rendering interim statute bills, each bill is a self-contained account for the work done during the period which it covers. Therefore the final bill will only be for the fees incurred since the period covered by the last interim statute bill.

Unpaid disbursements

[2.11]

The bill may include unpaid disbursements, as well as those that have been paid, but only if they are described in the bill as not yet paid. The defect is fatal to these items if they are challenged on a subsequent assessment (Solicitors Act 1974, s 67). The only remedy would be to ask the costs judge for an adjournment, apply to the court for leave to withdraw the entire bill, re-deliver it and then start again. Even if you were not ordered to pay all the costs thrown away by the client, the economics of starting again will often be questionable.

In *Tearle & Co v Sherring* (29 October 1993, unreported), QBD, Wright J held that where a solicitor has acted in good faith but by inadvertence has omitted to describe disbursements as unpaid, the court not only had power to give him leave to withdraw his bill and deliver another one, to save costs it could in an appropriate case give leave to amend his bill by adding the words 'unpaid'. He tentatively expressed the view that a costs officer might have the same powers.

Section 67 says that, if the bill is assessed, the unpaid disbursement 'shall not be allowed' unless it is paid before the assessment is completed. If the assessment is lengthy, one practical answer would of course be simply for the solicitor to pay the disbursement before the assessment is completed. A similarly pragmatic solution to this situation was approved by Sir Andrew Nicol in *Murray v Richard Slade and Co Ltd* [2021] EWHC 3383 (QB) – payment being made between judgment being reserved and being handed down.

Cash account

[2.12]

The first question most solicitors ask in reference to a cash account is 'what is it?' It is defined at sub-paragraph 6.6 in the Practice Direction to Part 46 as an account 'showing money received by the solicitor to the credit of the client and sums paid out of that money on behalf of the client but not payments out which were made in satisfaction of the bill or of any items which are claimed in the bill.'

The breakdown required by CPR 46.10(2) (see [2.9]) includes a cash account so that the court can see the whole picture between the solicitor and client. In effect the cash account deals with money expended by the solicitor on behalf of the client for anything which is not in the bill (or which ought to be there).

Items which the solicitor is not bound by law or custom to make, such as purchase money, interest, sums paid into court, or damages, costs paid to an opponent, estate duty and Land Registry fees, are properly charged in the cash account.

Items which should have been included in the bill as disbursements are, for example, court fees, counsel's fees, expenses of witnesses, agents and stationers.

It is important to know what disbursements should appear in the bill itself and what should be charged in the cash account because, perhaps obviously, only those items in the bill can be recovered from the client. Many solicitors lose money on assessments of costs by regarding as cash account items, entries which should have been disbursements.

Matters are not helped by the fact that definitions of disbursements are only to be found in Victorian cases such as *Re Remnant* (1849) 11 Beav 603. They are said to be 'such payments as the solicitor in the due discharge of his duty is bound to make whether his client furnishes him with money for the purpose, with money on account, or not'. Rather more recent cases such as *Flatman v Germany* [2013] EWCA Civ 278, have skirted round whether there is any worthwhile distinction to be drawn between disbursements and expenses when many of the examples given above are financed by the solicitor rather than paid from money received from the client.

The exception to prove the rule in the previous paragraph is the case of *Herbert v HH Law Ltd* [2019] EWCA Civ 527. The Court of Appeal reviewed the authorities and described the test for deciding which disbursements need to be in the bill of costs as being:

> 'The test is not what is agreed between an individual solicitor and the client but what every solicitor, as such, is obliged to pay irrespective of funding by the client or what is properly included in a bill of costs on assessment as a matter of general custom of the profession.'

The court had no doubt that the ATE premium purchased by the claimant was not a solicitor's disbursement and so should not have been included in the bill. Instead, it should have been in the cash account. This meant that the client could not challenge it via a Solicitors Act assessment. Whilst this makes it less convenient, it does, in our view follow the point reiterated by the court that the ATE policy is a contract between the client and the insurer, not the solicitor.

VALUE ADDED TAX

Does VAT have to be charged at all?

[2.13]

A solicitor's services to his client are subject to VAT at the standard rate unless the solicitor is not registered for VAT or the services are zero-rated. In previous editions, we have reproduced a VAT chargeability chart originally produced by Michael Cook in the first edition. It had kept up to date with HM Revenue and Customs published guidance but we came to the conclusion that the issue it covered – do you have to charge VAT on your services depending upon where your client is based – became progressively more difficult to precis. There is really nothing for it if you are faced with a VAT question but to persevere with HMRC Form 700 and its subordinate documents armed with a cold towel wrapped around your head.

The difficulty is encapsulated by the fact that PD 44, para 2.6 indicates that in case of a dispute about whether VAT is zero-rated or the costs are exempt from VAT, the advice of HMRC is to be obtained, rather than there simply being a certificate from the receiving party's legal representatives or auditors (PD 44, para 2.5). In our experience, a case-specific answer is never forthcoming from HMRC.

What rate to charge?

[2.14]

The standard rate of VAT has been 20% since 4 January 2011. A VAT invoice is normally raised when the service is completed. However, in circumstances where work is yet to be completed, the rate of VAT to be charged will depend on the date at which the supply of service, the tax point, occurs.

If the client is not VAT registered and is liable to pay all the costs at the end, for example, as in a CFA, the difference in the amount of VAT payable could be significant if the standard rate is varied. When parties seek to recover costs against their opponents in such circumstances, the bill should be split to reflect the work done in different VAT periods. To do otherwise means the paying party is being asked to pay more than would have been the case if the receiving party had been billed as the case progressed. The Practice Direction to Part 44 assumes that the client will have elected to receive bills at the lower rate and puts the receiving party to the burden of justifying his course of action where this has not been done.

The Tax Point

[2.15]

The basic rule is that the tax point for services is the date on which their performance is completed. VAT becomes payable on that date irrespective of when the bill is delivered.

For solicitors there is a minor exception. If a tax invoice is issued within three months of the basic tax point, the date of the invoice becomes the actual tax point. VAT is therefore payable by a solicitor when the work is completed or when his bill is delivered provided that this is within three months of the completion of the work (HMRC Notice 700.)

Disbursements

[2.16]

In respect of which litigation disbursements should a client be charged VAT? The simple answer is 'none'. Unfortunately this gives rise to the much more complicated question 'what is a disbursement?' The detailed answer is to be found in the VAT Guide (HMRC Notice 700) on the HMRC website, which sets out eight criteria. The test is whether the goods or services are supplied to the solicitor to enable him to render his service to the client, in which event they are not a disbursement and VAT is chargeable. For example, postage, telephone calls, travelling and hotel expenses are not disbursements and VAT must be charged on them. A disbursement is a payment which relates to goods or services supplied to the client, even if it is, in the first place, paid for by the solicitor. Examples are oath and court fees. A method of avoiding VAT on a payment which would otherwise attract VAT, such as an air fare, is for the client to pay for it direct. The solicitor need not then include it in his account.

VAT on medical reports?

[2.17]

In *Barratt v HMRC and The Law Society* [2011] Costs LR 409 the First-tier Tribunal judge accepted the proposition that although the use of medical reports and records is part of the legal services provided and upon which VAT was already charged as part of the tax payable on the lawyer's fees, the 'obtaining' of the reports was a separate service carried out, as an agent, on behalf of the injured party, and any expense incurred was merely a disbursement and so not subject to VAT.

The Court of Appeal, in *British Airways plc v Prosser* [2019] EWCA Civ 547, [2019] 1 WLR 4513, [2019] SWTI 956, considered *Barratt* might be correctly decided where the solicitor instructed the medical expert directly. Where a Medical Reporting Organisation was involved, it would usually be the case that it should charge VAT on both its own efforts and those of the expert. The court made it clear that the 'economic and commercial reality' needed to be considered with reference to who did what work in any particular case.

Counsel's fees

[2.18]

The fees of counsel are part of the service rendered by the solicitor and should therefore be included in the solicitor's bill and attract VAT even if the barrister is not registered for VAT. However, there is a long-standing concession under which HMRC permit solicitors to re-address counsel's fee notes to the lay client, who then makes payment direct (or is requested by the solicitor to return the fee note to him with a separate cheque payable to counsel) so that counsel's fees do not pass through the solicitor's books at all. Where this is done the fees of the unregistered barrister do not attract VAT, and the solicitor avoids incurring VAT liability on counsel's fees because he need not include them in his VAT quarterly return.

VAT on fixed costs recovered

[2.19]

Fixed costs recovered under CPR Rule 45 Part II contain no element of VAT. The solicitor may either divide the fixed costs into profit costs and VAT and simply charge the client an amount equal to the fixed costs recovered; or he may charge the client VAT on top of the fixed costs as if the opponent had specifically paid the VAT exclusive sum: in both cases giving credit for the sum recovered. VAT is recoverable from the opponent in the normal way under the remainder of CPR Rule 45 provided the client is not registered for VAT.

Insurance claims

(a) Policy holder can recover VAT

[2.20]

If the insurance relates to the client's business and it is VAT registered the client will be able to take a full input tax credit for the VAT on the solicitor's bill. In these circumstances the insurers will only be responsible to their policy holder for the amount of the solicitor's bill exclusive of VAT.

Where the policy holder does not pay the VAT element, the insurer will generally meet this part of the solicitor's fee as well because the only alternative, the solicitor writing off the VAT output tax, disadvantages the solicitor and so is not really an alternative.

(b) Policy holder cannot recover VAT

[2.21]

Where the client is partly exempt, or the insurance does not relate to his business, or he is not VAT registered, the solicitor's bill must still be addressed to the client and include VAT. In the circumstances there is no objection to the client sending the entire bill to the insurers for payment, as previously. If, for internal accounting purposes, the insurers wish solicitors to issue invoices directly to them, this may be done but the invoice so delivered will not be a VAT invoice.

Solicitors Act claims

[2.22]

It may seem obvious but it still escapes many that a solicitor whose bills are being assessed is representing himself in Solicitors Act proceedings. As such his work in those proceedings is not a taxable supply for the purposes of VAT and so no VAT is chargeable and therefore payable on any costs that are awarded. If he instructs another firm of solicitors, costs lawyers or counsel to represent him, their VAT is also not recoverable from the opponent. It is recoverable by the solicitor as input tax as with any other VAT registered client.