Neutral Citation Number: [2024] EWCA Civ 15

Case No: CA-2023-000440

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
SENIOR COURTS COST OFFICE
COSTS JUDGE BROWN
[2023] EWHC 181 (SCCO)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2024

Before:

LORD JUSTICE COULSON
LORD JUSTICE STUART-SMITH
and
LORD JUSTICE NUGEE

- -

Between:

DANIEL KENIG

Claimant/Respondent

-and-

THOMSON SNELL & PASSMORE LLP

Defendant/Appellant

- -
- -

Robert Marven KC and **Alicia Tew** (instructed by **Thomson Snell & Passmore LLP**) for the **Appellant**
Roger Mallalieu KC and **Simon Teasdale** (instructed by **SCS Law**) for the **Respondent**

Hearing date: 18 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 January 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 Stuart-Smith:

Introduction

1. Mr Kenig, the respondent, and his sister are the beneficiaries of a will made on 13 February 2019 by their mother, Mrs Cunnick. The appellant firm of solicitors ["the Solicitors"] were retained and instructed by the sole executor of the will to administer Mrs Cunnick's estate. The Solicitors' original costs estimate for their fees was between £10,000 and £15,000 plus VAT and expenses. In the event, the total of their charges included in a series of invoices dated between 17 October 2019 and 2 August 2021 was £54,410.99 plus VAT and expenses. The Solicitors transferred sums from the estate to meet the claims for costs in the bills either upon delivery or immediately after delivery of the bills in the course of their retainer.

2. Mr Kenig wishes to challenge the fees charged by the solicitors and has applied to the Court for an assessment under section 71(3) of the Solicitors Act 1974 ("the 1974 Act"), he being a "person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay the bill" and not being a person chargeable with the bill. To that end he issued these proceedings on 25 April 2022, some 8 months after the last invoice was delivered to the executor. The Solicitors oppose Mr Kenig's application, arguing that (a) the principles that should be applied on any such assessment are those identified by the Court of Appeal in *Tim Martin Interiors Ltd v Akin Gump LLP* [2011] EWCA Civ 1574; and (b) application of those principles means that any assessment of their bills on the application of the beneficiaries would be fruitless and therefore should not be allowed. The Solicitors' overarching submission is that, in a case such as the present, it is not open to a beneficiary to challenge legal fees that have been paid from the proceeds of the estate.

3. On 1 February 2023, Costs Judge Brown ordered that there should be a section 71(3) assessment of the solicitors' eight bills. He explained his decision in a detailed judgment handed down that same day: [2023] EWHC 181 (SCCO). He rejected the submission that a section 71(3) assessment would be governed by the principles set out in *Tim Martin*. Even if *Tim Martin* was directly applicable, he was of the view that there would still be a realistic prospect that material deductions might be made from the Solicitors' bills; and he exercised his discretion in favour of ordering an assessment.

4. The Costs Judge gave the Solicitors permission to appeal on the grounds of their arguments about *Tim Martin*. Other grounds were refused permission and have not been pursued. The written and oral submissions of both parties were of sustained high quality. However, for the reasons set out below, I would dismiss the appeal.

The statutory framework

The Solicitors Act 1974 ("the 1974 Act")

5. Part III of the 1974 Act deals with the remuneration of solicitors. Section 69 establishes formal requirements for a statutory bill; and section 69(1) lays down the general rule that no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date of compliant delivery to the party to be charged with the bill personally.

6. Section 70 makes provision for assessment of a solicitor's bill on the application of the party chargeable or the solicitor; and section 71 makes provision for assessment of a bill on the application of third parties i.e. any persons other than the party chargeable or the solicitor. Resolution of the issues in this appeal requires us to focus on the similarities and differences between sections 70 and 71 and the consequences of those similarities and differences.

7. For present purposes the most relevant provisions of sections 70 and 71 (with occasional emphasis added) are:

> **70 Assessment on application of party chargeable or solicitor.**
>
> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.
>
> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order-
>
> (a) that the bill be assessed; and
>
> (b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.
>
> (3) Where an application under subsection (2) is made by the party chargeable with the bill-
>
> (a) after the expiration of 12 months from the delivery of the bill, or
>
> (b) after a judgment has been obtained for the recovery of the costs covered by the bill, or
>
> (c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill,
>
> 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) …

(6) …

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

(8) If after due notice of any assessment either party to it fails to attend, the officer may proceed with the assessment ex parte.

(9) Unless-

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

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

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

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

…

71 Assessment on application of third parties.

(1) Where a person other than the party chargeable with the bill for the purposes of section 70 *has paid, or is or was liable to pay*, a bill *either to the solicitor or to the party chargeable with the bill*, that person, or his executors, administrators or assignees may apply to the High Court for an order for the assessment of the bill *as if he were the party chargeable with it*, and the court may *make the same order* (if any) *as it might have made if the application had been made by the party chargeable with the bill*.

(2) Where the court has no power to make an order by virtue of subsection (1) except in special circumstances it may, in considering whether there are special circumstances sufficient to justify the making of an order, take into account circumstances which affect the applicant but do not affect the party chargeable with the bill.

(3) Where a *trustee, executor or administrator has become liable* to pay a bill of a solicitor, then, on the application of *any person interested in any property out of which* the trustee, executor or administrator *has paid, or is entitled to pay the bill*, the court may order-

(a) that the bill be assessed *on such terms, if any, as it thinks fit*; and

(b) that such payments, in respect of the amount found to be due to or by the solicitor and in respect of the costs of the assessment, be *made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee*, as it thinks fit.

(4) In considering any application *under subsection (3)* the court *shall have regard-*

(a) *to the provisions of section 70 as to applications by the party chargeable* for the assessment of a solicitor's bill *so far as they are capable of being applied* to an application made under that subsection;

(b) to the extent and nature of the interest of the applicant.

(5) If an applicant under subsection (3) pays any money to the solicitor, he shall have the same right to be paid that money by the trustee, executor or administrator chargeable with the bill as the solicitor had.

(6) *Except in special circumstances*, no order shall be made on an application under this section for the assessment of a bill which has already been assessed.

(7) If the court on an application under this section orders a bill to be assessed, it may order the solicitor to deliver to the applicant a copy of the bill on payment of the costs of that copy.

8. Section 70 establishes a graduated scheme, depending on when an application is brought by the party chargeable (or the solicitor). If the application is made by the person chargeable before the expiration of one month from the delivery of the bill, the court *shall* order that the bill be assessed without requiring any money to be brought into court: section 70(1). If the application is made by either the solicitor or the party chargeable between one month and the expiration of 12 months from the delivery of the bill the court *may* (subject to sections 70(3) and (4)) order assessment on such terms as it thinks fit: section 70(2). If the application by the party chargeable is made after the expiration of 12 months from the delivery of the bill (or after a judgment has been obtained for the recovery of the costs or after the bill has been paid but before the expiration of 12 months from the *payment* of the bill), the court has a discretion to order assessment but shall not do so except in "special circumstances"; and any such order may be on such terms (including as to costs of the assessment) as the court may think fit: section 70(3). No order for assessment may be made where the application by the party chargeable is made after the expiration of 12 months from the *payment* of the bill: section 70(4).

Special circumstances

9. There is no statutory definition or description of what may amount to "special circumstances" as that phrase appears in sections 70(3) and (10) or in section 71(2). The circumstances need not be exceptional: *Wilsons Solicitors LLP v Serena Bentine* [2015] EWCA Civ 1168 at [69]. The question whether special circumstances exist is "essentially a value judgment" which "depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified despite the restrictions contained in section 71(3)": *Falmouth House Freehold Co Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch) at [13]. Where the court in a case falling under section 70(3) finds that special circumstances exist, it has a discretion whether to make an order for assessment of the bill.

Comparing section 71(1) and 71(3)

10. It is plain on the face of section 71 that the third-party applications under sections 71(1) and 71(3) differ in (a) the person who may apply for assessment, (b) the nature of the application which the applicant may make, and (c) the nature of the order that the court may make on such an application. Certain observations may be made at this stage in relation to each of these differences.

11. Under subsection 71(1), the person who may apply is "a person … [who] has paid or is or was liable to pay the bill either to the solicitor or to the party chargeable with the bill." Typically, such a liability will be imposed by contract. *Tim Martin* was, as we shall see, such a case, being one where the terms of the contract by which the third party borrowed from the bank included a covenant that it would pay to the bank the costs and charges that the bank incurred in relation to the third party or the mortgaged properties, which included the fees charged by the solicitors instructed by the bank. By contrast, the person who may apply under subsection 71(3) is "any person interested in any property out of which the trustee, executor or administrator has paid or is entitled to pay the bill." I shall refer to such persons generically as "beneficiaries". The present case is a typical example of such a case because the executor of the will was the person chargeable and liable to pay the solicitors bill and was entitled to do so out of the assets of the estate, which is property in which the beneficiaries have their interest.

12. Why should separate categories of third parties be established? The answer is, to my mind, self-evident and derives from the different interests and different allocations of risk as between the person chargeable and the third party in each case. In the case contemplated by section 71(1), the primary liability to pay the solicitor rests on the party chargeable who must pay out of their own resources and who then takes the risk that the third party will be insolvent or otherwise not good to indemnify them in accordance with their contractual obligations. By contrast, the person chargeable in the case contemplated by section 71(3) initially has either a diminished risk or no risk at all because they can pay the solicitor's bill out of trust or estate property.

13. The logic of this distinction is apparent in the differing nature of the applications that may be made by an applicant under section 71(1) or section 71(3) respectively. Under section 71(1), the third party "may apply … for an order for the assessment of the bill as if he were the party chargeable." The subsequent reference to the order which the court may make shows that the third party must make his application as if he were the party chargeable. There is no such restriction or requirement imposed on a beneficiary

making an application under section 71(3). This is explicable on the basis that the party chargeable under section 71(1) owes no particular duty to the third party applicant other than anything imposed by their contractual arrangements. The third party's interests do not need particular protection: the assessment can therefore be conducted as one affecting the interests of the solicitor and the person chargeable i.e. a normal solicitor and client assessment. By contrast, the party chargeable in an application under section 71(3), quite apart from being entitled to pay the solicitor's charges out of trusts or estate property, owes fiduciary obligations to the third party beneficiaries, as will usually be known (at least in general terms) by the solicitor. The interest of the third party beneficiary under section 71(3) is therefore wider than the interest of the third party applicant under section 71(1), quite apart from there being a greater need to protect the third party beneficiary because of the ability of the trustee or executor to pay the fees out of trust or estate property.

14. To my mind, it seems clear that the logic of the distinctions identified thus far is played out in the nature of the order that may be made by the court. Under section 71(1) the court is limited to making "the same order (if any) as it might have made if the application had been made by the party chargeable with the bill". In other words, the graduated provisions of section 70 must be read across because the third party must make their application for an assessment as if they were the party chargeable and the court may (only) make the same order (if any) as it might have made if the application had in fact been made by the party chargeable with the bill. By contrast, where the application is made under section 71(3), there is no such restriction. The court may order assessment "on such terms, if any, as it thinks fit" and in considering the application is merely required to "have regard" to the provisions of section 70 "so far as they are capable of being applied to an application under that subsection" and to the nature and extent of the interest of the applicant: see subsection 71(4)(a) and (b).

15. Giving these provisions of section 71 their normal and natural meaning, it is clear that the scheme of the section as a whole is that applications by beneficiaries under subsection 71(1) may give rise to issues that differ from and are more extensive than the issues that arise on an application under subsection 71(1). That is because, as expressly recognised in subsection 71(4)(b), the beneficiary may have independent interests that should be taken into account when deciding whether to order an assessment and, by extension, when an assessment is undertaken. I shall consider how this may work itself out in practice later.

The background to the current framework

16. The current statutory framework can be traced back to the Solicitors Act 1843 ["the 1843 Act"]. It is not necessary to set out the relevant provisions in full in this judgment. It is sufficient to say that comparing sections 37 to 39 of the 1843 Act with sections 69 to 71 of the 1974 Act reveals the same general scheme as described above, enacted in closely similar language subject to limited modernisation of language by the time of the 1974 Act. Section 37 of the 1843 Act is the statutory precursor of sections 69 and 70. Section 38 of the 1843 Act is the precursor of sections 71(1) and (2) of the 1974 Act in all essential respects; and section 39 is the precursor of sections 71(3) and (4) of the 1974 Act.

17. If anything, section 38 of the 1843 Act was even clearer than section 71(1) of the 1974 Act by providing that it was lawful for the third party to "make such application for a

Reference for the Taxation and Settlement of such Bill as the party chargeable therewith might himself make, and the same Reference and Order shall be made thereupon and the same Course pursued in all respects, as if such Application was made by the party so chargeable with such Bill … ." It is, however, common ground (and I agree) that the changes in language between section 38 of the 1843 Act and section 71(1) of the 1974 Act make no substantive difference: see *Tim Martin* at [69].

18. Two authorities to which we were referred provide support for the proposition that the current statutory framework draws a material and long-established distinction between third parties applying under section 71(1) and beneficiaries applying under section 71(3).

19. The first is *in re Brown* (1867) LR 4 Eq 464. The solicitor acted for a trustee under a will. When the estate was got in and distributed, he presented his bill of costs, and received payment from the trustee. A beneficiary subsequently obtained an order for the taxation of the bill. On taxation, the Taxing Master disallowed a considerable number of items, including charges for attendances on the trustee and for letters written to the trustee and others at the trustee's direction. The solicitor applied for a review of the taxation, with the intention of restoring his charges for those items. Despite the fact that the beneficiary had applied for the taxation after the passing of the 1843 Act, the report records that the bill had been taxed under section 38, not 39. That reported fact enabled counsel for the solicitor to submit that "it has been repeatedly held that under that section the [beneficiary] stands in the place of the trustees and that the taxation must be as between solicitor and client"; and that "if it was improper in the trustee to require the solicitor to write so many letters or to attend upon him so often, the remedy of the [beneficiary] is to object to the allowance of the items in the account between the trustee and himself."

20. Counsel for the beneficiary was not called upon. Lord Romilly MR accepted the general proposition that "the person who taxes the solicitor's bill must tax it exactly as if he stood in the place of the trustee, and that, therefore, it is a taxation between solicitor and client": but he imposed a qualification:

> "If a person, being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee."

21. Lord Romilly then contrasted two positions. The first was where a client (not being a trustee) required work to be done that was not wanted or useful. When a bill came to be taxed, the client could not complain: "he would be told, "you ordered it to be done, you were told it was useless, and you must pay for it."" In contrast, where the client was a trustee and made the same request despite being told it was useless or inappropriate, it would then be the duty of the solicitor to tell the client that the work was not required for the purposes of the administration of the trust and that, accordingly he (the solicitor) could not put them in his bill of costs which would have to be paid out of the trust estate.

22. Lord Romilly looked at the bill adopting this approach. He continued:

> "and then comes this question, which is properly a question for the Taxing Master to determine, is it proper, or necessary, or fit, for the administration of the trust that certain things should be done?
>
> Now, on a question of *quantum* the Court always allows the opinion of the Taxing Master to be paramount and follows it, and this rule really applies not merely to a question of *quantum*, but, if I may go on with the same sort of illustration, to a question of *quoties*. For instance, it is a question of *quantum* whether you shall allow 13s. 4d. or 6s. 6d for an interview; it is a question of *quoties* whether you shall allow ten or twelve interviews. On those matters the Taxing Master is best capable to form a judgment, and he always goes through these matters very carefully. I am of opinion that I cannot alter any of the taxation of the Taxing Master. …"

23. On the narrowest interpretation, Lord Romilly was allowing the beneficiary to raise questions about whether it was proper, necessary or fit for the administration of the trust that certain things had been done, which would not be permissible challenges on a solicitor and own client taxation where the client had insisted on (or approved of) what was done. On a broader interpretation, the Judge was allowing quantum deductions that had been made for overcharging (e.g. the 13s 4d rather than 6s 8d for an interview). On either view, what was being contemplated was that (even if the taxation was pursuant to section 38) the beneficiary was entitled to raise challenges that would not have been open to the client/trustee and was entitled to raise them after the fees had been paid. To modern eyes, and despite the fact that it was described in the report as being a taxation under section 38 of the 1843 Act, this looks like a taxation that fell more naturally under section 39 of the 1843 Act or, in modern times, an assessment under section 71(3) of the 1974 Act. However, the main significance of the case lies in the recognition of the independent interest of the beneficiary that goes beyond that of the client/trustee.

24. *In re Brown* was considered in *Tim Martin* and I will refer to it again in that context. *Hazard v Lane* (1817) 3 Mer. 285 is yet more ancient, predates the 1843 Act and was not considered in *Tim Martin*. A solicitor's bill was referred to taxation upon the application of one of two trustees and executors who had been the solicitor's client. The motivation for the reference came from the beneficiary but he could not at that time bring an application in his own name. Without the knowledge of the beneficiary, the bill had long since been paid by the second executor who refused to consent to the application; hence it was brought by the first executor alone. The issue was whether the solicitor should be permitted to avail himself of the payment by the trustees and their subsequent acquiescence over time.

25. In giving judgment Lord Eldon LC held:

> "that a Solicitor cannot be allowed to interpose the payment of his bill of costs, by a person in the situation of a trustee, between himself and the parties ([beneficiaries]) for whom he was at the time aware that the person who paid him was no more than a trustee—as, here, an executor acting for the parties beneficially

> interested under the will.—That the [beneficiaries], whose funds were to bear the whole expenses of the suit, had a right to make use of the name of their trustees and executors (giving them proper indemnity), to obtain a taxation of the bill;—for, although these trustees and executors would be entitled to retain or be paid any money which they had expended, yet the taxation of a Solicitor's bill could operate no injury to them, as the Solicitor could have no right to demand against them more than would be allowed on taxation."

26. The record of argument indicates that reference was made to section 23 of the then current statute, which was An Act for the better Regulation of Attornies and Solicitors 1729 (2 Geo II c. 23) ("the 1729 Act"). Section 23 made provision for taxation of a solicitor's bill, including familiar provisions that are now to be found in the 1974 Act such as that a bill was not to be enforced within a month of its delivery and that, if a reference to taxation within that period were to be made, then it should be ordered without any money being brought into court. What is missing from the 1729 Act is anything equivalent to sections 38 and 39 of the 1843 Act or section 71 of the 1974 Act. Yet even in the absence of any such provision, the court extended protection to the beneficiary in *Hazard*, with at least part of the reasoning being that the beneficiary's funds were to bear the expenses of the suit.

27. These are slim pickings, but they do suggest and support the inference that the position of beneficiaries as a particular subset of third parties has long been recognised because they have interests that go beyond those of a "normal" third party to a solicitor's bill.

The Presumptions under CPR 46.9

28. The numbering of various relevant provisions of the CPR have changed since the decision in *Tim Martin*, but their substance has not. For present purposes it is sufficient to refer to them by adapting [20]-[22] of *Tim Martin* to update the references to those in the current iteration of the CPR:

> "20. It is also necessary to be aware of provisions of the CPR which deal with assessments as between solicitor and client, above all rule [46.9(3)]. The rule applies to every such assessment except a legal aid assessment.
>
> > "Subject to paragraph [(2)], costs are to be assessed on the indemnity basis but are to be presumed— (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client; (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client; (c) to have been unreasonably incurred if— (i) they are of an unusual nature or amount; and (ii) the solicitor did not tell his client that as a result he might not recover all of them from the other party."
>
> 21. Assessment on the indemnity basis is governed by rule [44.3]. By rule [44.3(1)], even on the indemnity basis the court will not allow costs that are unreasonably incurred or

> unreasonable in amount. [Rule 44.3(3)] provides that where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party. The presumptions in rule [49.6(3)] apply for that purpose.
>
> 22. It seems clear that the presumptions in rule [49.6(3)] are rebuttable, and that the presumption in paragraph (c) can prevail over those in paragraphs (a) and (b). Subject to that, however, if the client has expressly or impliedly approved of the incurring of the costs for which the bill is rendered, and their amount, there seems to be no scope for contending that the costs ought to be disallowed as between solicitor and client."

29. In order to rely upon presumptions (a) and (b) it is necessary for solicitors to show informed consent or approval to the incurring of the costs. The initial burden lies upon a solicitor who wishes to rely upon the presumptions to show that the precondition of informed consent is satisfied. Once the solicitor does that, the evidential burden shifts to the client to show that there was in fact no consent or no informed consent. The overall burden of showing that informed consent was given remains on the solicitor: *Herbert v HH Law Ltd* [2019] EWCA Civ 527, [2019] 1 WLR 4253 at [37]-[38].

Tim Martin

30. The basic facts of *Tim Martin* are relatively simple and largely appear from the headnote, which I adopt with minor additions and adaptations.

31. A company borrowed money from a bank on the security of mortgages of several properties, and of guarantees given by two of its directors. The mortgages included a covenant for payment which entitled the bank to recover its actual costs, charges and expenses incurred in relation to the company or the mortgaged properties, except for any which were not reasonably incurred or which were unreasonable in amount.

32. The company defaulted on the loans and the bank instructed solicitors to take steps to enforce the mortgages and to obtain possession of the properties. The solicitors pursued several avenues for recovery of the money owed, including actual or contemplated bankruptcy proceedings against the directors who had provided guarantees. The solicitors submitted their bill of costs to the bank. The bank approved the solicitors' final bill. Pursuant to the mortgage covenant the bank charged those sums to the company, which paid them, and the bank then paid the solicitors' bill. Subsequently the company applied as a third party pursuant to section 71 of the Solicitors Act 1974, as amended, for an order for assessment of the solicitors' bill of costs. The master granted the application.

33. On the assessment the company expressly maintained its challenge to the amount of its liability even if the amount was correct and unchallengeable as between the solicitors and the bank. The master reduced the amount of a number of items contained in the bill, including reducing the hourly rate claimed for some items because of an unreasonable use of partner time when a more junior person could have done the work; and he disallowed other items in their entirety, including costs relating to bankruptcy

proceedings which were not within the scope of the covenant and other miscellaneous costs for a number of different reasons. On a number of points the master disallowed costs against the company on the express basis that the bank might well have been liable to the solicitors for the relevant costs in the full amount charged. The result was that the solicitors' bills were reduced from £114,216 to £31,447.50 (including VAT). The master ordered the solicitors to pay to the company the amount by which the bill had been reduced, namely £82,768.97.

34. Lewison J allowed the solicitors' appeal, holding that the master had erred in his ruling since there was no foundation for an order for repayment by the solicitors, and that the company ought to raise the matter in proceedings as between itself and the bank.

35. On appeal to the Court of Appeal, the leading judgment was given by Lloyd LJ, with whom Ward and Kitchin LJJ agreed. It is rich in detail; and it deserves close attention both for what it says and for what it does not. One of the material features of the judgment, which I shall consider in greater detail below, is that the judgment does not discriminate or suggest that there may be material distinctions to be drawn between applications made pursuant to section 71(1) on the one hand or section 71(3) on the other. It is (rightly) common ground that the application by the third party borrower in *Tim Martin* was an application under section 71(1) and not under section 71(3). Yet from the outset of the judgment, Lloyd LJ tends to elide applications under the two sub-sections both in his formulation of the issues in the case and in addressing them.

36. In addressing the issues at [12]-[16], Lloyd LJ highlighted as "surprising" that the outcome of the application could be an order that the solicitors make payment to the company when the item had been adjusted on the express basis that the charge may have been unchallengeable between the solicitors and their client, the bank. He identified this as being a major criticism of the procedure adopted below, particularly in circumstances where the bank was not a party to the proceedings so that there was no basis on which an order for repayment could be made against the bank.

37. At [17]-[28] Lloyd LJ addressed the relevant legislative framework. He set out the whole of section 71. At [19] he addressed the statutory background to the current regime as follows:

> "19. The provisions of sections 70 and 71 go back to sections 37 and 38 of the Solicitors Act 1843… . These were much longer, but their substance was essentially the same (though the provisions about time limits were less elaborate). In the 1843 Act section 37 provided for a reference to taxation, and for an order to be made on that reference. Section 38 allowed for a third party to apply for the same purpose, and provided that "the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill". The legislation became sections 66 and 67 of the Solicitors Act 1932, and then sections 69 and 70 of the Solicitors Act 1957, before coming into its present form. Subject to one argument as to the wording, to which I will refer later, each version of the sections is identical in substance on the points which matter for present purposes. "

38. It will immediately be noted that this summary contains no reference to section 39 of the 1843 Act or its successor provisions up to and including section 71(3) of the 1974 Act. To my mind, this indicates that Lloyd LJ had in contemplation applications under section 71(1) and not section 71(3) of the 1974 Act.

39. Having identified that the classic remedy if a dispute arises between mortgagor and mortgagee as to what is owed by one to the other is a claim for an account of what is due under the mortgage, Lloyd LJ considered the scope of the legislation at [32] ff, starting with the observation that section 71(1) entitles the third party to obtain an assessment of a bill as if he were the client: it is therefore an assessment as between the solicitor and the client. He then commenced his review of previous authority at [33] by saying:

> "We were shown a succession of cases decided under the 1843 Act. Since, subject to one contention for the claimant, the legislation is in substance the same, the decisions of the Court of Appeal on section 38 of the 1843 Act bind us in relation to section 71."

40. Once again, the reference to section 38 of the 1843 Act (and the absence of any reference to section 39) indicates that Lloyd LJ had in contemplation the binding effect of previous decisions of the Court of Appeal in relation to section 71(1) and not section 71(3) of the 1974 Act. With the notable exception of *In re Brown*, the decisions to which he then referred were clearly decisions in relation to section 38 of the 1843 Act and not in relation to section 39. At [40] Lloyd LJ introduced his consideration of *In re Brown* as follows:

> "However, two years later in *In re Brown* … Lord Romilly MR had to consider a taxation under section 38 of the bill of a solicitor acting for the trustee under a will. (Section 39 of the 1843 Act was the predecessor of the present section 71(3)(4), which appear to govern such a process, but nothing seems to turn on whether it was section 38 or 39 that was relevant.)"

41. Lloyd LJ then set out most of the passages to which I have referred at [20]-[22] above and observed:

> "41. As to issues of detail, whether to allow one amount or another for an interview, and whether to allow for ten or for twelve interviews, he held that he would not interfere with the Taxing Master's judgment.
>
> 42. The report does not disclose what order had been made, but since the trustee was not a party to the taxation, there cannot have been an order against him. Presumably, therefore, the order was that the solicitor should refund money to the trust fund, or to the beneficiaries directly. That is therefore more promising for third parties, and for the appellant in the present case, and it shows a rather different attitude from that adopted in the earlier cases which I have cited."

42. Although he referred again to *In re Brown* later in the judgment, there was no further analysis of the basis for Lord Romilly's approach save that it was treated as being the start of a process by which the tension between the limitations on a third party taxation and the effect of the third party's undertaking (which is no longer required) to pay the sum found to be due was ameliorated: see [73]. Nor was there any further analysis of whether *In re Brown* should be seen as involving an application of section 39 of the 1843 Act or as a precursor to applications being made under section 71(3) of the 1974 Act. A number of observations may therefore conveniently be made at this point. First, at [41] Lloyd LJ recognised, without expressing doubt as to its correctness, that matters of both scope and quantum had been addressed by the taxing master and that Lord Romilly had ruled that he would not interfere with the taxing master's judgment. Second, in the absence of information in the report, it was presumed that the order would have been that the solicitor should refund money to the trust fund or to the beneficiaries directly. Third, in the extensive review of authority conducted by Lloyd LJ, *In re Brown* was the only case that sits comfortably within section 39 of the 1843 Act or section 71(3) of the 1974 Act.

43. Having concluded his extensive review of authority, Lloyd LJ analysed two main issues, quantification and payment. His conclusion as regards quantification was set out at [95]:

> "As regards quantification it only allows the costs judge to follow what might be called a blue pencil approach. He can eliminate (a) items which ought not to be laid at the door of the third party at all because they are outwith the scope of his liability, here as mortgagor, and (b) items which are only allowable as between client and solicitor on a special arrangement basis, within the terms of CPR [46.9(3)(c)]. He cannot either eliminate any other item or reduce the quantum of any item which is properly included in itself, but for which he considers that the charge made is excessive, unless he could have done so as between client and solicitor on an assessment under section 70."

44. As regards payment, Lloyd LJ concluded at [96]-[98] that:

> "96. As regards payment, if the third party has not yet paid anything in respect of the bill (or only sums on account which are less than the amount properly allowable) then the section 71 assessment may be useful to the third party, because he should not be liable to pay more than the amount so certified. Formally the client, not being a party to the assessment, will not be bound by the result but in practice it may be as effective as against the client as it is as between the third party and the solicitor. The same would be true if the third party has paid the costs but has done so directly to the solicitor.
>
> 97. If, however, the client has paid the solicitor, and the third party has paid the client, then it seems to me that the third party's remedy must lie against the client, not against the solicitor, because it cannot be right to require the solicitor to pay to the

> third party money which he received from his client and which his client was bound to pay to him, merely because the third party was not liable to pay the same amount to the client.
>
> 98. In those circumstances, the third party ought to bring proceedings against the client to establish how much was due from him to the client. In a mortgage case such as the present, the proceedings would be conventional proceedings for an account of what was due under the mortgage. Such proceedings would enable the court to determine the correct issue as between the correct parties, and if appropriate to order repayment by the mortgagee to the mortgagor. In such proceedings it would be possible for the court to do what cannot be done under a section 71 assessment, namely to disallow part of an amount claimed on the basis that something was due, but not as much as is claimed – for example by substituting a lower hourly rate."

45. As will immediately be clear, in expressing his conclusions in this way, Lloyd LJ drew no distinction between assessments under section 71(1) and section 71(3). He referred entirely generally to "section 71" in [95], [96] and [98], as set out above.

The judgment of Costs Judge Brown

46. After a concise introduction and summary of the relevant statutory provisions, the Costs Judge first addressed the questions whether the bills in the present case called for an explanation and whether they amounted to special circumstances, answering both questions in the affirmative. In reaching those conclusions he relied primarily upon the scale of the discrepancy between the original estimate and the costs claimed, which he described as "very substantial indeed"; the speed with which the initial estimate was exceeded; the absence of information that either justified the discrepancy or came close to doing so; and specific matters in the bills that gave rise to possible concern. He was scrupulous in avoiding the appearance of conducting a mini-assessment. He did, however, comment that it was "rather obviously the position on the information available" that the sums claimed in the bills called for an explanation and amounted in themselves to special circumstances. There is no appeal against his finding.

47. At [63] ff the Costs Judge addressed the Solicitors' submission that he was bound by *Tim Martin* and that the "blue pencil test" set out in [95] of *Tim Martin* precluded any meaningful challenge to the reasonableness of the fees being claimed; and at [79] ff he addressed the question whether an application under section 71(3) was materially distinct from an application under section 71(1). He held that it was, for essentially the following reasons:

    i) Section 71(1) expressly provides that the third party may apply to the court "as if he were the party chargeable with it" and the court may make the same order (if any) "as it might have made if the application had been made by the party chargeable with the bill." Those restrictions do not appear in section 71(3): see [81];

    ii) When an application under section 71(3) is made by the executor or the beneficiary for an assessment it is the estate's liability for costs with which the

court is ultimately concerned. When retaining solicitors and incurring costs, the executor is assumed to be acting on behalf of the estate and able to pass all costs in the bill to the estate. The ultimate paying party for the purposes of the assessment is the estate, in effect the beneficiaries. By contrast, all the cases reviewed in *Tim Martin* other than *In re Brown* are cases under section 38 (now section 71(1)) in which the legal relations between the person chargeable with the bill and the third parties are ones of contract. In the case of a section 71(3) application the executor owes fiduciary duties to the beneficiaries. The Costs Judge regarded this distinction as material: see [82]-[83];

iii) Where a solicitor is instructed by an executor to administer an estate, the interest of the estate is shown by *In re Brown* to be central to consideration of the reasonableness of the costs in a way that forms no part of the exercise undertaken by an assessment being conducted under section 71(1): see [87];

iv) Where a bank in the position of the bank in *Tim Martin* could not complain that the city solicitors it had chosen to appoint charged city rates, it appears from *In re Brown* that a trustee, who for their own personal convenience instructed city solicitors with commensurately high charging rates, would have difficulty in charging the additional sums associated with such an instruction to the estate whether it is the trustee who applies for an assessment or a beneficiary: see [94];

v) Section 71(3) makes express provision for the court to make an order that "such payments, in respect of the amount found to be due to or by the solicitor … be made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee, as it thinks fit." There is no equivalent provision attached to section 71(1): the orders that the court may make pursuant to a section 71(1) assessment are limited to "the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.": see [98].

48. On the basis that I have briefly summarised above, the Costs Judge held that the restrictions set out in paragraph 95 of *Tim Martin* did not apply to a section 71(3) assessment and that *In re Brown* was binding authority on the approach to be taken to an assessment under section 71(3). For reasons that it is not necessary to set out in detail here, he was not satisfied that, even if the *Tim Martin* restrictions applied to the present case, they would prevent a meaningful assessment of the costs with the potential for significant benefit to the Claimant. He then considered how his discretion under section 71(4) should be exercised, on the assumption that payment of all the bills but the last had been made over 12 months prior to the issuing of Mr Kenig's application so that the executor would not have been able to challenge them even if there had been special circumstances. Taking into account the circumstances leading to delay (which it is not necessary to rehearse here) he concluded that he should exercise his discretion in Mr Kenig's favour.

Ground 1: are the restrictions outlined in [95] of *Tim Martin* applicable and binding in an application under section 71(3)?

49. The Solicitors' case, put shortly, is that Mr Kenig is restricted on an application and assessment under section 71(3) to taking points limited to those set out in [95] of the judgment of Lloyd LJ in *Tim Martin*. In other words, a Costs Judge:

i) Would be entitled to eliminate items which ought not to be laid at the door of the third party at all because they are outwith the scope of his liability; and

ii) Would be entitled to eliminate items which are only allowable as between client and solicitor on a special arrangement basis, within the terms of CPR [46.9(3)(c)]; but

iii) Would not be entitled to eliminate any other item or reduce the quantum of any item which is properly included in itself, but for which he considers that the charge made is excessive, unless he could have done so as between client and solicitor on an assessment under section 70.

50. Two things may be said with confidence about *Tim Martin* at the outset. First, the application in that case was an application pursuant to section 71(1) and not section 71(3). Therefore, unless essential to the court's reasoning on section 71(1), any observations about section 71(3) or its precursor sessions were "obiter". Second, Lloyd LJ assumed there was no material distinction to be drawn between sections 38 and 39 of the 1843 Act and drew no material distinction between sections 71(1) and section 71(3) of the 1974 Act: see [40] of his judgment, which I have set out at [40] above. This second point may seem surprising, but (a) it is what Lloyd LJ said in terms ("… it seems…") in [40], (b) in contrast to the multiple references to sections 37 and 38 of the 1843 Act the only reference to section 39 is the passing reference in [40] of Lloyd LJ's judgment, (c) there is no analysis or even recognition in the judgment of the potential differences between the two sections despite the clear differences in their terms and historical background, and (d) it is also consistent with Lloyd LJ's frequent references to "a section 71 application" without further specificity. Furthermore, there is no indication that the point was raised by the parties. This is not altogether surprising: if I am right in the outline that I have provided earlier in this judgment, consideration of section 71(3) and its precursors was not necessary to an analysis of the terms of section 38 of the 1843 or the cases decided under that section. The only practical difficulty that emerges from the judgment in *Tim Martin* is that *In re Brown*, if treated as a case under section 38 of the 1843 Act, appeared to be something of an outlier, whereas, for the reasons I have explained above, it sits much more comfortably as a case under section 39. This feature, too, was not addressed.

51. Whatever the reason for Lloyd LJ's assumption, in my judgment it was wrong. For the reasons set out at [4] to [26] above, I would hold that there are material differences between applications under section 71(3) and those under section 71(1) because of the different nature of the interests of the third party that the different sub-sections are intended to reflect. The consequence of Lloyd LJ's mistaken assumption is that his judgment cannot be relied upon as saying anything authoritative about the position that obtains where an application and assessment are brought under section 71(3): his judgment simply does not deal with that question. Furthermore, in my judgment there is no rational basis for transposing the principles that apply to a section 71(1) assessment, as identified in [95] of *Tim Martin*, to the different circumstances of an assessment pursuant to section 71(3). I would therefore reject the appeal under Ground 1 on the basis of principle and the absence of any binding authority that requires us to apply the *Tim Martin* principles to an assessment under section 71(3). In my judgment the Costs Judge was correct to find that *Tim Martin* was distinguishable and should be distinguished - essentially for the reasons he gave - and that the relevant principles to be applied are to be derived from *In re Brown*, which is binding on us.

52. If my Lords agree with me, that conclusion is sufficient to dispose of the appeal *unless* by pure coincidence the points that may be taken by or on behalf of a beneficiary on an assessment under section 71(3) happen to be identical to those that apply under section 71(1). I am not persuaded that they are identical. To the contrary, the approach adopted by Lord Romilly MR in *In re Brown* permits a wider enquiry, going to quantum if appropriate as well as scope.

53. Given the narrow scope of the grounds of appeal in this case, I am hesitant about saying more than is necessary for the determination of those grounds. However, two points were raised in argument which require attention.

54. First, it was submitted by the Solicitors that the fact that the executor had paid some of the bills more than 12 months before Mr Kenig made his application provides a complete answer to any assessment in relation to those bills because of the terms of section 70(4) of the 1974 Act. We heard limited argument on this point and my conclusion should therefore be regarded as provisional. That said, while I accept that *on the application of the executor*, the fact he had paid the bills more than 12 months before would preclude an order that the bill be assessed, the situation in relation to a beneficiary is different since the court is only required "to have regard" to the provisions of section 70 as to applications by the party chargeable. It seems to me to be well arguable that different considerations may apply to an application by the person chargeable (who will know whether and when the bills were paid) as contrasted with an application by the beneficiary (who may have no such knowledge, or may learn of the payment later).

55. The Costs Judge said (at [21]) that the Solicitors accepted before him that "the limit in section 70(4) on ordering the assessment of bills that had been paid more than 12 months before an application is made is not determinative in this application and that I have a discretion to allow an assessment in such circumstances". Later in his judgment he considered the factors going to the question of delay in bringing these proceedings and decided to exercise his discretion in favour of ordering an assessment. There is no challenge to that exercise of his asserted discretion and the Grounds of Appeal do not cover such a challenge. Despite the fact that, as now framed, the point could be said to be a point of jurisdiction, I would hold that it is not open to the Solicitors to take the point now and, for that reason also, decline to decide it.

56. Second, there is an issue (which we are not able to resolve) about whether the executor approved the bills (in the sense of providing fully informed consent and approval) so as to bring into play the presumptions under CPR 46.9. The question was raised before us what the effect on a section 71(3) assessment would be if it were to be held that the executor had approved the bills. For the Solicitors it was submitted that the effect of such approval would preclude any challenge by the beneficiary. For Mr Kenig, while accepting that approval by the executor may be a material factor, it was submitted that there should be no hard and fast rule because what mattered most was the legitimate protection of the beneficiary's separate interest.

57. I would accept Mr Kenig's submission, for a number of inter-related reasons. First, although the starting point is that an assessment under section 71(3) is an assessment as between solicitor and client, I accept that the ultimate interest to be protected on an assessment under section 71(3) is that of the estate and/or the beneficiaries. Second, I consider it to be material that section 71(3)(b) makes express provision permitting an

order that payments be made "to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee", which underscores the broader nature of the enquiry under section 71(3) when compared with an assessment under section 70 or section 71(1). Third, it seems appropriate that separate consideration should be given to the position of the beneficiary and the estate in circumstances where the executor/trustee carries no risk because of their ability to pay the solicitor out of the trust property. Fourth, the decisions in *In re Brown* and *Hazard v Lane* both contemplated and allowed the beneficiary to challenge the bill even though an executor had approved it.

58. That said, I would accept that the fact of fully informed consent by the executor (if proved) is likely to be a major consideration, which in many cases may prove to be determinative.

Conclusion

59. For these reasons I would dismiss the appeal on Ground 1. It therefore becomes unnecessary to consider Ground 2. I would uphold the order that there should be an assessment of the bills under section 71(3) while making clear that we are not in a position to determine whether there is material that would justify rebutting the presumptions and that we do not purport to do so.

Lord Justice Nugee

60. I agree.

Lord Justice Coulson

61. I also agree.