Neutral Citation Number: [2022] EWHC 1968 (QB)

Case No: H80SE105

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
MASTER ROWLEY, COSTS JUDGE
SCCO Ref: SC-2021-APP-00714

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2022

Before :

MR JUSTICE JOHNSON

- -

Between :

LISA JONES	**Claimant/Respondent**
- and -	
RICHARD SLADE AND COMPANY LTD	**Defendant/Appellant**

- -
- -

Robin Dunne (instructed by Clear Legal Ltd) for the Claimant/Respondent
Benjamin Williams QC (instructed by Richard Slade and Company Ltd) for the Defendant/Appellant

Hearing date: 20 July 2022

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Approved Judgment

Mr Justice Johnson :

1. This appeal raises an issue about the scope of an assessment of costs under section 70 of the Solicitors Act 1974. The respondent ("Ms Jones"), within the assessment proceedings, sought to set aside an agreement between her and the appellant ("RSC") as to her liability in respect of their bills. RSC applied to strike out her contention that the agreement should be set aside, on the grounds that fell outside the jurisdiction created by section 70, and that a claim for rescission would have to be made in separate proceedings.

2. Costs Judge Rowley, in a clear and detailed judgment which drew on his considerable experience in a highly specialist jurisdiction, concluded that the nature of Ms Jones' claim, and the remedies sought, fell within the court's jurisdiction. He therefore refused the strike out application. RSC appeals against that decision. Permission to appeal was granted by Sir Stephen Stewart.

Background

3. RSC is a solicitors' firm. In February 2017 Ms Jones consulted RSC with a view to it representing her and her siblings in a dispute with their late father's executors concerning his will ("the dispute"). On 22 February 2017 RSC sent Ms Jones and her siblings written retainer agreements. These were signed. The dispute was subject to mediation. An agreement was reached in October 2019. The executors agreed to pay Ms Jones and one of her siblings £87,500 each, and to contribute £13,750 towards their costs. RSC's invoiced fees substantially exceeded the amount that the executors had agreed to pay in respect of costs. Ms Jones was not willing to pay those fees. By an email dated 3 April 2020 RSC offered to reduce its fees to £15,000 excluding VAT and disbursements. The total amount, including VAT and disbursements, was £22,090.01. Ms Jones accepted this offer by an email dated 10 June 2020 ("the agreement").

4. With Ms Jones' consent, RSC deducted the sums due under the agreement from the funds which it held in its client account following the mediation settlement, and remitted the balance to Ms Jones and her sibling. Ms Jones then consulted her current solicitors, who trade as "checkmylegalfees.com" ("CMLF").

5. On 8 December 2020 CMLF notified RSC that Ms Jones would seek an assessment of their bill under the 1974 Act. On the same day, RSC responded and indicated that it would agree to an assessment, but on the basis that the agreement was set aside. It objected to the suggestion that Ms Jones could both take the benefit of the agreement, but then seek a further reduction at the same time. That, it said, would be "the costs equivalent of having their cake and eating it." In subsequent correspondence, RSC contended that the agreement was a "concluded contract of compromise."

6. On 16 February 2021, Ms Jones issued a claim under Part 8 of the Civil Procedure Rules ("CPR"), seeking an order under section 70 of the 1974 Act for assessment of the bills that had been delivered to her, in accordance with the agreement, in the total sum of £22,090.01. She also sought alternative relief in the event that the court found that the bill was not capable of assessment under section 70 of the 1974 Act. RSC maintained that there was a concluded compromise agreement and this precluded assessment of the bill. It said there were two preliminary issues that fell to be considered. The first was whether there was a legally valid retainer at all (this was

because Ms Jones was contending that the retainer was an unenforceable conditional fee agreement). The second was whether there was a binding settlement agreement that precluded assessment. It is not necessary to say anything further about the first proposed preliminary issue.

7. A directions hearing took place before District Judge Bellamy on 26 April 2021. Mark Carlisle, of CMLF, represented Ms Jones. In advance of the hearing he submitted a note. In his note, he said that if RSC was correct that there was a binding compromise, then Ms Jones would still strictly have an entitlement to an assessment, but that the bills would be assessed in the amount of the compromise and that she would therefore "lose". He further said that Ms Jones' position was that there was no binding compromise. He suggested that directions should be made for the trial of preliminary issues. He adopted RSC's suggested wording for the second preliminary issue, namely that it should determine "whether there has been a binding compromise as between the Claimant and Defendant in relation to the bills to be assessed."

8. In a witness statement, he says that at the hearing on 26 April 2021 he "put to the District Judge" that if the agreement was not an agreement to deliver a bill for a certain sum (which would then be subject to the right to assessment in the usual way), then it might alternatively be a Contentious Business Agreement which would be amendable to being set aside if it was found to be unfair or unreasonable in any way, and that the circumstances surrounding the agreement pointed to Ms Jones having agreed under duress and under protest.

9. District Judge Bellamy transferred the case to the Senior Courts Costs Office ("SCCO") and made what was in effect an agreed direction that there should be a trial of two preliminary issues: the legal status of RSC's retainer, and "the legal status and effect of [the agreement]". He made directions for Ms Jones to file Points of Claim, and RSC to file Points of Defence.

10. In her Points of Claim, Ms Jones said:

> "…There is clear evidence of unconscionable conduct by [RSC] such that [Ms Jones] did not enter into the agreement of her own free will.
>
> [RSC] is unable to rebut this by reference to any independent advice given to [Ms Jones] prior to entering into the agreement.
>
> In the alternative, [Ms Jones] contends that the agreement was reached following illegitimate pressure and economic duress and but for such tactics [Ms Jones] would not have entered into the agreement. [Ms Jones] did not consider any alternative course of action was available to her but to agree to [RSC's] demands.
>
> Consequently, the Court is invited to set aside the transaction."

11. On 9 July 2021 RSC applied to strike out this part of the Points of Claim pursuant to CPR 3.4(2) or 3.1(2)(f) on the basis that it disclosed no reasonable grounds for bringing that part of the claim. It said the court did not have jurisdiction to grant the remedy sought, and that part of the claim should therefore be struck out or stayed.

Judge Rowley's judgment

12. Judge Rowley observed that it was commonplace for litigants in costs proceedings to assert that matters in issue would be more appropriately addressed in proceedings brought under CPR Part 7. He observed that the authorities did not attempt "to delineate an exact line" in respect of what disputes fell within the court's jurisdiction under section 70 of the 1974 Act. There was an exception in respect of professional negligence: where such an allegation was made then it was conventional for the proceedings under the 1974 Act to be stayed pending the outcome of a claim for professional negligence under CPR Part 7. In respect of other types of issue, Judge Rowley suggested "some of the dicta in the cited cases potentially muddies the water rather than clarifies them." Thus, he agreed that *Drukker* (see paragraph 27 below) was correctly decided, and that "wholesale" allegations of professional negligence fall outside the jurisdiction conferred by section 70, but disagreed with the suggestion that this was because they "went to the heart of the retainer." He pointed out that issues concerning the retainer and which have the potential to "knock out" the entire claim are regularly dealt with in costs proceedings. So, the fact that an issue goes to the heart of the retainer does not, in itself, mean that it falls outside the scope of section 70. Further, some of the issues that had been raised in *Stephenson Harwood* (see paragraph 28 below) (such as breach of fiduciary duty) are regularly dealt with by costs judges.

13. For these reasons, the Judge considered that it was not "obvious that an argument that a contract should be set aside should of itself ring alarm bells." That was "the more so" given that costs officers have jurisdiction under the 1974 Act to examine non-contentious and contentious business agreements to determine whether they are fair and reasonable (with the result that they might be either upheld or set aside). Here, the Judge considered that if Ms Jones had been seeking equitable remedies as a result of setting aside the contract then RSC would have been "on firmer ground". However, the only purpose of seeking to set aside the agreement was so that the claimant could have the bill of costs assessed under section 70. The agreement was simply "an obstacle on the way to that assessment." In those circumstances, Judge Rowley did not consider that "a specialist Chancery Court" was required to determine the issue. The Judge made reference to Foskett on Compromise at 12-02 in which it is said that the procedure to rescind a compromise agreement "is identical to that required in relation to any other contract" and that to rescind a compromise agreement "[a] fresh action is needed seeking an order setting aside the agreement with consequential directions." Judge Rowley said that because the procedure for rescinding a compromise agreement is the same as that required "in relation to any other contract" it follows that "it is not a jurisdiction closely held by one part of the judicial structure."

14. Further, RSC had agreed to the preliminary issue that DJ Bellamy directed. Given that the wording of the preliminary issues had not altered, it had "an uphill battle" to suggest the court could not address the issues that had been agreed between the parties. RSC had not pointed to anything which showed that there was "a formal lack of jurisdiction", and Judge Rowley considered that the claim advanced by Ms Jones on the preliminary issue, and the remedy sought by her, fell within the ambit of the court's jurisdiction.

Submissions

RSC's case

15. Benjamin Williams QC, on behalf of RSC, submits that section 70 provides a jurisdiction that is *sui generis* and is wholly contained within the 1974 Act and rules of court. Ms Jones' arguments in respect of the agreement raise issues, and seek a remedy, which are, he says, outside the scope of proceedings under section 70 of the 1974 Act. His case is that if Ms Jones wants to rescind or set aside the agreement, then she should bring a freestanding claim in the County Court; there is no jurisdiction to do so within section 70 proceedings. He submits that Judge Rowley took too broad a view of the jurisdiction under section 70 which is, he says, a "highly abbreviated procedure to determine the reasonableness of charges contained within a solicitors' bill" and is not a forum for determining "other disputes between solicitors and their clients." He says that if, as the judgment of Judge Rowley indicates, it is now routine for issues such as allegations of breach of fiduciary duty to be determined under section 70 of the 1974 Act then that development in practice is contrary to the law and should cease. Far from muddying the waters, he says that Openshaw J in *Drukker* and Teare J in *Stephenson Harwood* were right to identify the limited nature of the section 70 jurisdiction.

16. Mr Williams also argues that the section 70 jurisdiction is not well-suited for the fair determination of issues such as fraud or breach of fiduciary duty. It does not require statements of case (so there is no obligation on the parties to verify their cases by a statement of truth), and there are no developed procedures for disclosure or witness statements.

Ms Jones' case

17. Robin Dunne, on behalf of Ms Jones, submits that Judge Rowley is a highly experienced costs judge who was exercising a specialist jurisdiction. He is steeped in the way that jurisdiction has developed, and was entitled to draw on that experience when determining RSC's application. There is, he says, nothing within section 70 (or elsewhere) which excludes from the court's jurisdiction the issues that Ms Jones seeks to ventilate.

18. He says that it has always been the case that taxing masters and costs judges have been able to consider issues of undue influence and unfair pressure – that is explicitly required (in respect of contentious business agreements) by section 61 of the 1974 Act. It is, he says, "unthinkable" that issues as to the circumstances in which the parties reached the agreement here would be outside the court's jurisdiction.

19. Mr Dunne suggests there is no reason why the application to set aside the agreement cannot be litigated in section 70 proceedings. Those issues can be fairly and justly be determined in costs proceedings. The judge can order witness statements, which must be verified by statements of truth (and a direction for witness statements has been made here). There is unlikely to be any need for disclosure, because both RSC and Ms Jones are in possession of all relevant documents. Conversely, if the proceedings are litigated in the County Court then they will be allocated to the small claims track or, possibly, the fast track (it is easy to lose sight of the fact that the true amount in issue, so far as Ms Jones is concerned, is less than £10,000; that amount is exceeded, by a substantial margin, by the costs of this appeal alone). A trial on the small claims track or the fast

track is no better suited to determine the issues that arise than a trial before a specialist costs judge. The latter is preferable because the case raises specialist costs issues and it would avoid parallel proceedings (with yet further costs).

The statutory scheme

20. The background to the statutory scheme for the taxation (now assessment) of costs was explained in *Harrison and others v Tew* [1989] QB 307. Solicitors are court officers. Historically, the court had an inherent supervisory jurisdiction in respect of the conduct of solicitors. This included an inherent jurisdiction to tax a solicitor's bill (*Re Arrowsmith* 33 ER 241 (1806) 13 Ves 124), that is, to determine the amount that should be paid by the client under the bill, so long as the client first paid the full amount of the bill into court (*Harrison per* Dillon LJ at 316F).

21. In 1605, the statute 3 Jac 1 c 7 was enacted to address solicitors charging excessive fees ("an Act to reform the Multitudes and Misdemeanors of Attornies and Solicitors at Law, and to avoid unnecessary Suits and Charges in Law"). It required that receipts be obtained for certain disbursements, and that a true bill be rendered to the client. The process of taxation was not put on a statutory footing: it continued to be undertaken pursuant to the court's inherent jurisdiction. In 1729, the statute 2 Geo 2 c 23 provided that a solicitor could not commence an action for their fees until one month after delivery of a bill. That provision can be traced right through to section 69(1) of the 1974 Act which is to the same effect. The same 1729 statute provided that the court could order taxation of the solicitor's bill, without the monies being first paid into court. That provision can also be traced right through to the 1974 Act: section 70(1) is to the same effect. The language of "taxation" was changed to "assessment" by the Legal Services Act 2007, but without changing the underlying meaning. Section 70 now states:

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

22. This is a wholly statutory jurisdiction. The inherent jurisdiction of the court to deal with solicitors' costs was ousted when Parliament introduced statutory regulation: *Harrison*. The ambit of the jurisdiction to assess costs is determined by the terms of the statute. The jurisdiction is triggered by the delivery of a solicitor's bill. At that point, the court is required to order that the bill be assessed. There will be cases where there is an issue as to whether a solicitor's bill has been delivered, or whether the applicant is the party who is chargeable with the bill. In such cases, it will be for the court to determine these (and other such) issues before ordering that the bill be assessed. That is inherent in it its duty to ensure that the threshold condition in section 70(1) is met before the costs are assessed.

23. Once the court has made an order in accordance with section 70(1) that the bill be assessed, the duty of the costs judge, in accordance with that order, is to assess the bill of costs and also (in accordance with section 70(7)) the costs of the assessment, and to certify what is due. The process of the assessment of costs is regulated by the CPR. An application under section 70 must be made under CPR Part 8 (see CPR 67.3(2)(a)). By CPR 46.9(1) the costs are assessed on the indemnity basis. That means (see CPR 44.3(3)) that where there is any dispute about whether costs have been reasonably incurred, the court will resolve any doubt in favour of the receiving party. The core task of the Costs Judge is therefore to determine, in respect of each disputed item of costs, whether it was reasonably incurred (the burden, in this instance, being on the client to show that any individual item of costs was not reasonably incurred) and to certify what is due.

24. It is common ground that the exercise of the assessment of costs is far from a simple arithmetical exercise. It may involve the resolution of complex issues of fact or law. It is also common ground that some matters (in particular allegations of "wholesale" negligence) fall outside the jurisdiction of section 70 and must be litigated in separate proceedings issued under CPR Part 7. What is in dispute is where the dividing line falls.

25. There are a number of authorities that consider what can, and cannot, be determined in the context of proceedings under section 70.

26. In *In re Massey and Carey* (1884) 26 ChD 459, the solicitors had failed to issue a rejoinder in time. The question in the subsequent taxation proceedings was whether the client should be charged for the costs consequences of this failure. The court distinguished between cases where "the whole action had been rendered useless to the client by the negligence of his solicitor" (in which case the issue was not capable of being raised in taxation proceedings) and cases where an isolated item of costs were caused by a failure of the solicitor to do his duty (in which case it could be said, on taxation, that those costs were not properly chargeable to the client) – see *per* Cotton LJ at 461, and Bowen LJ at 463 and Fry LJ at 464. The court held that the Taxing Master had jurisdiction to disallow costs on the ground that they were unnecessarily incurred. On the facts of the case, the court concluded that the Master was right to conclude that the costs that were referable to the solicitor's failure were unnecessarily incurred and should therefore be disallowed.

27. *Drukker & Co v Pridie Brewster & Co* [2005] EWHC 2788 (QB) concerned wide ranging allegations of professional negligence made in the context of assessment proceedings. The allegations concerned 70% of the bill of costs. Master Seager-Berry held that the assessment proceedings were not the appropriate forum in which to determine these issues. On appeal, Openshaw J (sitting with assessors) agreed. He held that section 70 does not confer jurisdiction to hear wholesale allegations of professional negligence "which affected not just individual items in the bill of costs but which went to the heart of the retainer."

28. In *Stephenson Harwood LLP v Geneva Trust Company (GTC) SA and others* [2019] EWHC 1440 (Comm) the claimant was a firm of solicitors that was seeking to recover fees charged to its client. The client advanced a number of defences, including whether the bills delivered were statute bills, whether sufficient authority was given to the claimant for it to take certain steps, that the claimant had been negligent and that it had breached its fiduciary duties. The claimant wanted all the issues of liability to be tried in the Part 7 proceedings it had initiated, with the assessment of costs then to be undertaken by the SCCO. Two of the defendants sought an order for the majority of the liability issues also to be transferred to the SCCO. Teare J ruled in the claimant's favour. He recognised that the SCCO can determine "issues other than pure quantum assessment", but the nature of the defences that had been raised was such that they were better determined in Part 7 proceedings.

29. Quite apart from the jurisdiction to assess costs under section 70, Part 3 of the 1974 Act grants the courts a statutory jurisdiction in certain matters concerning both non contentious business agreements (section 57) and contentious business agreements (section 59). In the case of both non contentious and contentious business agreements, the court has jurisdiction to set the agreement aside if it is in any respect unfair or unreasonable (sections 57(2) and 61(2)(b) respectively).

Were the points of claim a "statement of case" which was liable to strike out under CPR 3.4?

30. The underlying application before Judge Rowley was (in part) for an order striking out part of the points of claim pursuant to CPR 3.4(2). Judge Rowley expressed some doubt as to whether points of claim are "formal pleadings". He was right to do so. The power to strike out under CPR 3.4(2) applies only to a statement of case. A "statement of case" means a claim form, particulars of claim, defence, part 20 claim or a reply to a defence, and any further information given in respect of a statement of case – see CPR 2.3(1). The points of claim are not, therefore, strictly a statement of case and are not an available target under CPR 3.4(2).

31. Nevertheless, I respectfully consider that Judge Rowley was right not to dismiss the application on this basis. RSC's application raised an important point as to the court's jurisdiction. It was necessary to resolve the substance of that point. The application was also cast under CPR 3.1(2)(f) which provides a general power to stay the whole or any part of any proceedings. If the application is otherwise well-founded that provides a sufficient route to RSC's intended terminus. So too would CPR 3.1(2)(k) (the power to exclude an issue from consideration).

The scope of the preliminary issue

32. RSC agreed to the direction that there should be a trial of a preliminary issue. I respectfully agree with Judge Rowley's observation that, having done so, it is hardly in a position to complain that the court is embarking on that trial and that Ms Jones is setting out her case.

33. That, however, assumes that Ms Jones' points of claim are directed to the preliminary issue. The courts have regularly drawn attention to the need for clarity when a court orders the trial of a preliminary issue, observing that "preliminary points of law are too often treacherous short cuts": *Tilling v Whiteman* [1980] AC 1 *per* Lord Scarman at 25. This is particularly so where the "preliminary issues are set in motion in a casual and unstructured way": *McLoughlin v Jones* [2001] EWCA Civ 1743 [2002] QB 1312 *per* David Steel J at [63]. This is, in part, because there is a considerable risk of parties approaching a preliminary issue at cross purposes.

34. Here, the terms of the preliminary issue were defined before either party had formally set out their case in a written document. Mr Carlisle had submitted a note which said one thing (see paragraph 7 above) but then, according to his witness statement, he took a slightly more expansive approach as to what might be in issue when he made oral submissions. RSC did not put in a written argument, but had formulated a suggested preliminary issue on the basis of its understanding that the contest concerned whether the agreement amounted to a binding compromise of the costs dispute. That was reflected in Mr Carlisle's formulation of the preliminary issue in his note.

35. The ultimate formulation of the preliminary issue was the "legal status and effect of the agreement." This captures the essence of the issue which had been canvassed in email correspondence. That was whether the agreement amounted to a binding compromise of the costs dispute (so as to preclude assessment proceedings), or whether it mandated the outcome of the assessment proceedings (in that costs would fall to be assessed in the agreed sum), or whether it was subject to Ms Jones' right to seek assessment of the costs (with a view to reducing the sum below the level of the agreement). It is also sufficiently broad to capture the point that Mr Carlisle advanced in his oral submissions, namely that it might amount to a contentious business agreement. This may explain the broadening out of the issue from the question of whether the agreement amounted to a binding compromise, to the "legal status and effect of the agreement."

36. Ms Jones' case in the points of claim seems to me to go further than an argument about the legal status and effect of the agreement. It seeks a ruling not just about the legal effect of the agreement, but that the agreement itself should be set aside. That, at least arguably, goes further than the terms of the preliminary issue. It certainly goes further than what RSC had understood the terms of the preliminary issue to contemplate. For these reasons, I do not consider that the fact that RSC had agreed to the terms of the preliminary issue is of particular weight when deciding whether Ms Jones may use it as a vehicle to set aside the agreement.

37. On the other hand, just as it is not desirable to determine this appeal on the formal status of a "points of claim", it would not be appropriate to allow the appeal on the basis that the argument that Ms Jones seeks to advance falls outside the scope of the preliminary issue. Even if that were so, this was not the basis on which Judge Rowley considered the case, and it is not the basis on which the appeal has been argued. The fundamental

question of jurisdiction remains, and that should be determined: whether there is jurisdiction in section 70 proceedings to set aside an agreement on the grounds of illegitimate pressure or economic duress.

Is there jurisdiction to set aside the agreement under section 70 of the 1974 Act?

38. I accept Mr Dunne's submission that the judge here was exercising a highly specialised jurisdiction and considerable weight should be given to his judgment. That is so, even though the underlying question concerns the ambit of his jurisdiction. The contours of permissible enquiry under section 70 are not sharply defined. The views of an experienced judge in this particular field are formed from countless costs assessments which involve the resolution of many different types of dispute. That is a valuable resource for testing the outer limits of the powers of enquiry that are granted by section 70.

39. There is, though, a limit. The difficulty is locating where, precisely, it lies. If, in principle, section 70 permits an enquiry into whether the agreement was procured by illegitimate pressure or economic duress and allows it to be set aside, then I would not allow this appeal on the basis of Mr Williams' argument that such a dispute is better suited to the County Court. That is effectively a case management decision. I accept Mr Dunne's submission that in the particular circumstances of the present case, the issue could fairly be tried in the course of a part 8 claim, and there is no compelling reason why it would be fairer to do so in the context of a small claims or fast track trial.

40. If, on the other hand, the issues that Ms Jones seeks to canvass lie outside the ambit of section 70, then the appeal must be allowed because otherwise the first instance court would be acting without jurisdiction.

41. The professional negligence cases are valuable in indicating a principled approach to the limits of section 70. They show that "wholesale" allegations of professional negligence may not be determined when assessing costs. Such allegations are simply not relevant to the exercise of assessing costs. On the other hand, a discrete and contained allegation of negligence (what Mr Williams termed "localised" negligence) may be relevant to the question of whether particular items of costs were reasonably incurred. If, for example, a solicitor submits a witness statement late, and costs are incurred in securing an extension of time, then it may be relevant to enquire whether the delay was the fault of the client, or the solicitor. If the former, then the costs of securing an extension of time are likely to be reasonably incurred. If the latter, then the client might succeed in showing that they were unreasonably incurred, in that they were due to the solicitor's negligence. In that type of case, the issue of negligence is closely tied to the exercise that the court is required to undertake – the assessment of the costs' bill. Resolving where the fault lies is a necessary part of assessing the costs. Conversely, if a claim is issued after the expiry of the limitation period, and is, for that reason, ultimately unsuccessful, the assessment of each item of costs that was incurred during the case does not depend on whether the solicitor was negligent in issuing the claim late. Such a case of "wholesale" negligence is irrelevant to the assessment of costs.

42. The same might be said of allegations (such as the claimant here advances) of breach of fiduciary duty, or inappropriate pressure, or economic duress. There is no good reason why they should be treated in a qualitatively different way from allegations of professional negligence. If an individual item of costs was incurred because, for

example, a solicitor acted in breach of fiduciary duty, then that might be relevant to the assessment of costs. More generalised allegations about a solicitor's conduct are less likely to be within the proper scope of a costs assessment.

43. That does not mean that issues which (as the Judge put it) "go to the heart of the retainer" are always excluded. Such issues may be highly relevant to the assessment of costs (for example whether there is a retainer at all or whether there is a conditional fee agreement (and, of so, whether it is enforceable)). The reason why there is jurisdiction to address such matters is because it is necessary to do so as part of the process of assessing costs (including the decision whether to order the assessment of costs). Other types of issue which might be fundamental to the relationship between client and solicitor (such as wholesale professional negligence, or breach of fiduciary duty) are different and, as the authorities show, do not fall within the section 70 jurisdiction.

44. In the present case, the court has jurisdiction to determine whether the agreement precludes a section 70 assessment. It is necessary to resolve that issue in order to embark on the assessment itself (or to decide not to do so). The parties agree that should be determined as a preliminary issue. The court would also have jurisdiction (if this were in issue) to determine if the agreement is a contentious business agreement. In all these respects, the court is required to determine the legal status and effect of the agreement and thereby address the preliminary issue.

45. Further, if the court were to conclude that the agreement is a contentious business agreement, then it would have power (but under section 61(2)(b), not section 70) to decide if it was unfair or unreasonable, and, if so, to set it aside.

46. I do not consider that there is anything within section 70 that permits the court to embark on what is in effect a freestanding enquiry into the question of whether the agreement should be set aside on grounds of undue influence. That involves the exercise of a distinct equitable jurisdiction which forms no part of an assessment of costs.

47. The judge put the matter the other way round, and said that there was nothing in section 70 that excluded a power to do what Ms Jones asked. Mr Dunne urges the same point. It is right that section 70 does not explicitly say that a court assessing costs may not set aside a prior agreement between solicitor and client. But that is not particularly informative. Where, as here, a judge is exercising a wholly statutory jurisdiction, it is necessary to show what the statute positively permits. The fact that something is not positively excluded does not mean that it is, by omission, permitted.

48. Further, the fact that Parliament included a power to set aside a non-contentious business agreements under section 57(2), and a power to do the same in respect of contentious business agreement under section 61(2)(b), but did not include a more general power to set aside agreements under section 70, is a strong indicator that section 70 was not intended to permit this type of exercise.

49. Judge Rowley was, I think, right to indicate that RSC would have a strong case if Ms Jones was asking the court to grant an equitable remedy. But this is exactly what Ms Jones is asking the court to do. She explicitly asks that the agreement be set aside. The Judge was right that the reason for doing this was to remove "an obstacle on the way to [an] assessment." That does not, however, avoid the fact that Ms Jones is asking the court to exercise a jurisdiction that it does not have. The Judge was also right that the

case would not have to be dealt with by a specialist Chancery Court and that it is not an issue that is "closely held by one part of the judicial structure". It could, for example, be dealt with in the County Court. None of that means, however, that it may be dealt with in the course of an assessment of costs under section 70.

50. For all these reasons, I have concluded that the court does not have power to set aside the agreement when assessing costs under section 70.

Outcome

51. The court, in the underlying assessment of costs under section 70, does not have jurisdiction to set aside the agreement.

52. The appeal is therefore allowed.