Case No: 9PF00857

IN THE LEEDS COUNTY COURT

Leeds Combined Court
The Courthouse
1 Oxford Row
Leeds LS1 3BG

Date: 9th July 2010

Before :

HIS HONOUR JUDGE S P GRENFELL

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Between :

LEROY MAKUWATSINE	**Claimant** **Respondent**
- and -	
TRATHENS TRAVEL SERVICES LIMITED	**Defendant** **Appellant**

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- -

Ms Ayling (instructed by **Taylor Rose Law**) for the defendant appellant
Mr Ralph (instructed by **Corries**) for the claimant respondent

Hearing date: 14th May 2010

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge S P Grenfell

His Honour Judge Grenfell:

1. This appeal raises the question whether a solicitor is correct to claim the VAT on the fee for obtaining medical notes in a claim for personal injuries. Plainly, in terms of an individual case such as that of the claimant's, the sums involved are small. However, replicated in the context of the large number of claims that are processed, the cumulative sum is substantial. There is also some uncertainty in the guidance that has thitherto been available to solicitors. It was, therefore, proportionate for District Judge Ellington to consider this issue and for this appeal to be determined. That is why at the hearing I granted the defendant permission to appeal.

2. District Judge Ellington held that the claimant's solicitor had properly included the VAT element on the item in the Bill relating to the obtaining of the claimant's medical notes. Ms Ayling counsel for the defendant contends that he was wrong to do so.

3. This appeal turns on the interpretation of disbursements for the purposes of VAT which are to be distinguished from mere disbursements in a Bill of Costs.

4. This was a standard personal injury claim in which the claimant was successful, in that his claim was settled with an order for costs in his favour on the standard basis. There was nothing peculiar to this case in respect of obtaining the medical notes, which in the usual way were required for the medical expert to consider.

5. The reasoning under challenge is contained in paragraphs 34 and 35 of the District Judge's judgment. He held in summary that it was the solicitor's duty to obtain the medical notes as part of his services in the conduct of the claim. He rejected the argument that the solicitor was obtaining the notes merely as agent for the claimant.

6. The District Judge applied the 8 point test contained in HM Customs and Revenue Notice 700 The VAT Guide which reads as follows:

> "You may treat a payment to a third party as a disbursement for VAT purposes if all the following conditions are met:
>
> - you acted as the agent of your client when you paid the third party;
>
> - your client actually received and used the goods or services provided by the third party (this condition usually prevents the agent's own travelling and subsistence expenses, telephone bills, postage, and other costs being treated as disbursements for VAT purposes);
>
> - your client was responsible for paying the third party (examples include estate duty and stamp duty payable by your client on a contract to be made by the client);
>
> - your client authorised you to make the payment on their behalf;

- your client knew that the goods or services you paid for would be provided by a third party;

- your outlay will be separately itemised when you invoice your client;

- you recover only the exact amount which you paid to the third party; and the goods or services, which you paid for, are clearly additional to the supplies which you make to your client on your own account.

"All these conditions must be satisfied before you can treat a payment as a disbursement for VAT purposes."

7. It follows that, if any one of these conditions is not satisfied, then VAT has to be charged.

8. The District Judge made the following findings of mixed fact and law as relevant to the circumstances of a case such as this claimant's:

> "31. The payments we are concerned with were made to a medical agency for that agency to obtain copies of the Claimant's GP notes and hospital notes. The purpose of obtaining these notes was to assist in the preparation of the claim. The notes needed to be inspected by the solicitors who sought the copies and by the medical experts who were to be asked to produce reports detailing the Claimant's condition.
>
> "32. It seems to me inescapable that the obtaining of the notes was a necessary and integral part of the solicitor's work on behalf of his client. The work would have been incomplete if the notes were not obtained. In some cases, it would be negligent of the solicitors not to obtain the notes and include references to them in their instruction of others.
>
> "33. On that basis, the cost of obtaining the notes must to be included in the value of the totality of the work undertaken by the solicitors, and VAT applied."

9. He then dealt with each relevant condition from the 8 point test as follows (my italics):

> "(i) The payment made by the solicitor was *not as agent for the client* except in the most general sense that all payments made by a solicitor acting under instruction from a client are made in the course of those instructions. In this case, *the solicitor sought the notes for his own use, and incurred personal responsibility for paying the fee*.[1]
>
> "(ii) The notes were not sought for the client. Although he may have seen copies, the probability is that that would only

[1] 'you acted as the agent of your client when you paid the third party;'

> occur if there was some question arising during an examination of them that needed to be explained by the client. They would not have been sent to the client as a matter of course.[2]
>
> "(iii) The client was not responsible for paying these fees except by way of reimbursement to the solicitor through contractual obligations he entered into with him.[3]
>
> "(iv) The obtaining of the notes cannot be seen as "additional" to the solicitor's general service for his client. It is a necessary and integral part of that service.[4]"

10. Ms Ayling's submission can be summarised in her own words: if the solicitor incurs expenditure on behalf of the client as the client's agent, then that does not constitute part of his services but is part of the client's expenditure and does not attract VAT. In this case, as she points out, the solicitor merely passed on the VAT that was payable to the supplier of the notes, UK Independent Medical Services Ltd.

11. Specifically she submits that it is trite law that the solicitor is agent of the client whose right it was to have the medical notes; that the solicitor would have charged separately for reading the notes; that the client *was* responsible for paying the invoice for the notes – the agent disburses them for the principal –; that paying for the notes is a right the solicitor is exercising on the client's behalf, so it is additional to the general service to the client.

12. I have been referred to a number of documents of varying degrees of authority. The Law Society's VAT on disbursements practice note 19 February 2009 includes under 'Costs that can be treated as disbursements for VAT purposes' 'medical .. records'. Section 1.1.2.4.2 of the Law Society VAT Guide suggests that 'fees for medical or police reports' 'can be treated as disbursements [for VAT] provided the guidelines set out above are adhered to.' That is a reference to the 8 point test set out Notice 700. In a letter to costs draughtsmen dated 7th August 2007 on the subject 'medical reports' HM Revenue and Customs wrote: '.. if you merely pay amounts to third parties as the agent of your client and debit your client with the amounts paid, then you *may* be able to treat them as disbursements for VAT purposes ..' (my italics). A letter to the same costs draughtsmen by Master Gordon-Slaker, costs judge, dated 20th March 2009 and headed 'Application of VAT to medical disbursements', was based on the assumption that in most cases the solicitor would arrange the examination and report and be responsible for paying the agency. He took the view that the medico-legal report would be used by the solicitor to give advice to the client and would be part of the overall value of the solicitor's supply and added that in the ordinary way the report would not be used by the client outside the service of the solicitor. In my view, the same applies to the provision of notes. Unless the client suffers from hypochondria, I

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[2] 'your client actually received and used the goods or services provided by the third party (this condition usually prevents the agent's own travelling and subsistence expenses, telephone bills, postage, and other costs being treated as disbursements for VAT purposes)'

[3] 'your client was responsible for paying the third party (examples include estate duty and stamp duty payable by your client on a contract to be made by the client)'

[4] 'you recover only the exact amount which you paid to the third party; and the goods or services, which you paid for, are clearly additional to the supplies which you make to your client on your own account.'

can see no use to the client. The reality is that he or she is unlikely even to be provided with a copy of the notes.

13. I do not derive much assistance from the discussion in paragraphs 15 and 16 of District Judge Smedley's judgment in *Sutton v Selwyns Travel* dated 8th August 2008. *United States of America v Phillip Morris Inc* [2006] EWHC 90067 (Costs) is authority for the proposition that a costs judge as a general rule will give great weight to any guidance given by HM Revenue and Customs.

14. The Divisional Court in *Rowe & Maw v Customs and Excise Commissioners* [1975] 1 WLR 1291 considered disbursements which a solicitor pays out as agent of the client and those which form part of the whole services rendered by the solicitor, for the purposes of determining whether the solicitor was liable for VAT on those disbursements. Wien J, with who Eveleigh and Bridge JJ (as they then were) agreed, at 1297 distinguished the two kinds in the following passage:

> "By way of an example, I would say that in many cases a solicitor has to pay out on behalf of his client disbursements which he certainly pays out as an agent. One had, in the course of argument, the question of stamp duty on a conveyance or an assignment. That is clearly a disbursement made on behalf of the client and would not attract value added tax, because it was a pure disbursement as agent for a principal. But where one gets the case of a solicitor charging as a disbursement, because he is so obliged to do by virtue of the Solicitors' Accounts Rules 1967 …, something which is not strictly a payment that the client has asked for, either expressly or impliedly, but is part of the whole of the legal services rendered by the solicitor for which there is a consideration, then it seems to me that one must come to the conclusion that there is a taxable supply of legal services which cannot be split up except for accounting purposes."

15. Bridge J added this at 1297:

> "On the one hand, a solicitor, like any other agent, may purchase goods or services for his client, as for instance when paying stamp duty, court fees, or buying, say, a travel ticket to enable the client to travel. The goods or services purchased are supplied to the client not to the solicitor, who merely acts as an agent to make the payment. Naturally no value added tax is payable, if the goods or services in question are themselves exempt or zero-rated, because such payments form no part of the consideration for the solicitor's own services to his client. But, on the other hand, quite different considerations apply where the goods or services purchased are supplied to the solicitor, as here, in the form of travel tickets, to enable him effectively to perform the service supplied to his client, in this case to travel to the place where the solicitor's service is required to be performed. In such case, in whatever form the solicitor recovers such expenditure from his client, whether as a separately itemised expense or as part of an inclusive overall

> fee, value added tax is payable because the payment is part of the consideration which the client pays for the service supplied by the solicitor."

16. Both counsel rely on this case to support their arguments, Ms Ayling, that the payment for the notes was simply as agent for the client, Mr Ralph, that it formed part of the solicitor's services to the client.

17. Mr Ralph, counsel for the respondent claimant submits that in context the claimant's solicitor is the taxpayer. He relies on the correspondence with Senior Costs Office and HM Revenue and Customs as what is required to gather in by way of VAT. He submits that the solicitor's contractual relationship is the governing contract that allows these fees to be levied; that it is, as the District Judge found, reasonable to obtain the notes; the solicitor must provide a service and, if he does, then he is entitled to be recompensed; it is an integral part of the services.

18. Mr Ralph addressed the following specific propositions advanced by Ms Ayling. To the suggestion that a claimant might be a litigant in person obtaining the notes, that claimant would not be the taxpayer. To the suggestion that the claimant could have chosen to obtain these notes personally, the fact is that in this case he did not. I should only add that I cannot envisage any circumstances in which the client would do so, simply because he relies on his solicitor to prepare his case in the best way possible. Indeed even a litigant in person might well rely on his medical expert obtaining the notes for himself on his authority.

19. In my judgment, as to whether the claimant actually received or used the services or goods obtained, in my judgment, the District Judge correctly found that it was the solicitor who received and used the notes, albeit on behalf of the claimant in the conduct of his claim; that there was no reason for the claimant himself to receive or use the notes other than in the context of receiving advice as to his claim as a whole. The District Judge's observation, no doubt borne of practical experience, that in most cases the client would not be supplied with a copy of the notes, seems to be entirely correct. In most cases, the solicitor requires the medical notes for the purpose of completing the necessary medical evidence relevant to the litigation. That plainly goes much further than merely obtaining the notes as a mere agent for the client. I agree with Master Gordon-Slaker's view expressed with regard to the obtaining of a medical report. That applies even though in many cases the client will in fact be supplied with a copy of the report, whereas, as I have indicated, it would be rare for the client to be given a copy of the notes.

20. In my judgment, the District Judge's reasoning accords with the views expressed by Wien and Bridge JJ in *Rowe & Maw*.

21. I take that to be a correct understanding of the solicitor's conduct of a personal injury claim, of which this claimant's case was typical.

22. In my judgment, the District Judge's reasoning cannot be faulted and the appeal must be dismissed.

23. Consequential matters may be dealt with by written submissions or a telephone hearing.