IN THE LUTON COUNTY COURT

Claim No: 1LU90032

Cresta House
Alma Street
Luton
Bedfordshire
LU1 2PU

13th September 2011

BEFORE:

HIS HONOUR JUDGE KAY QC

LLOYD FRASER (PLY CHAIN)

CLAIMANT

-v-

JONATHAN PETER HUTTON

DEFENDANT

MISS TRUSCOTT appeared on behalf of the Claimant

MR ASTOR appeared on behalf of the Defendant

Transcript by Cater Walsh & Company
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(Official Court Reporters to the Court)

JUDGMENT

(As Approved)

13th September 2011

JUDGE KAY QC:

1. This is an appeal in relation to one particular point arising in a detailed assessment of costs. The underlying dispute between the claimant and the defendant was a personal injuries action in which the defendant agreed by way of compromise to pay a sum, I think, just over £4,000 to the claimant and to pay the claimant's costs which were to be subject to a detailed assessment. That detailed assessment came before District Judge Wilding on 7th April 2011.

2. In the points of dispute served by the defendant for the purposes of that hearing one of the general points taken was stated to be as follows: "The receiving party may apportion VAT so that 15 per cent applies to work between December 2008 and December 2009. It is unreasonable not to exercise the right to apportion and the additional VAT claimed for that period should be disallowed".

3. In fact, the work carried out by the claimant's solicitors on this case spanned three different VAT rates. There was work in 2008 to 2009, which would have been rated at 15 per cent; work in 2010, if I have this right, which would have been rated at 17½ per cent, and, of course, there was no tax point in relation to these costs until after the detailed assessment which occurred in April 2011. At that date the VAT rate was 20 per cent.

4. I should say that there is no dispute between the parties on the appeal that according to the tax rules, if I can put it broadly in that way, there was an option available to the receiving party, the claimant's solicitors, either to apportion the VAT with regard to the date when the work was done or to claim VAT at the date of the tax point. A number of guidance documents have been put before me and there has also been put before me correspondence between the claimant's solicitors and HMRC. It is plain, as the parties accept, from all those documents that that option to elect as to what rate pf VAT to apply was available.

5. When the matter came before District Judge Wilding on 7th April there was a relatively short discussion between Miss Jarratt, on behalf of the claimant, and the District Judge about the question of apportionment. It covers, roughly speaking, about a page of the transcript of that hearing before the District Judge. The District Judge, in that discussion, indicated that his view was that the tax point was the date of the submission of the bill. That, of course, was a correct statement. Miss Jarratt referred to a Law Society guidance document, which indicated that where the VAT rate changes the receiving party can apportion the rate according to when the work was done. The District Judge accepted that there was such an option.

6. Miss Jarratt then referred to the overriding objective and the duty of the parties to save expense. She then went on to say that if apportionment was not done, there had to be a reason why not, given that the Law Society guidance provides that there is an option and the overriding objective is to save expense. Her point, really, was that if there was an option to reduce the VAT payable then it was the duty of the receiving party to take it.

7. The District Judge was against Miss Jarratt. He stated his reason for so concluding was that the Law Society guidance was not binding upon him, although it clearly was acknowledged at the hearing that there is an option to apportion. He went on to say that his view is that the proper tax point by which VAT is calculated is the date of submission or render of the bill. In that statement he was correct as regards the tax point, or at least if one exercises the option which was available to the receiving party to apply the VAT rate as at the tax point date.

8. The claimant appeals that ruling. In terms of the monetary effect on the assessment it is, if I may say so, trivial. The assessment was in the sum of £8,255.59. The effect of altering the VAT rates is, therefore, going to be minimal. Nevertheless, it is presented to me as an important point of principle which would affect not just this bill but many others.

9. The grounds of appeal are short. It is said that the appeal is based on points of law and the exercise of discretion. In paragraph 3 of the grounds of appeal it is stated that the District Judge was wrong in law, and on the exercise of his discretion, which (a few inaudible words) in failing to allow VAT between the parties apportioned to the rates prevailing at the time at which the work upon which it was claimed was done.

10. In the appellant's skeleton argument, which was submitted and served some time before this hearing, perhaps for the first time, there is clear reference to and reliance upon certain paragraphs in the Costs Practice Direction. In what has been a very short hearing before me, it is recognised that that is the real issue on the appeal. References to the overriding objective, which seem to feature heavily in the argument before the District Judge and in other parts of the skeleton argument on the appeal, have not been pursued.

11. Section 5 of the Costs Practice Direction deals with special provisions relating to VAT, where a claim for VAT is made on costs which had been dealt with by way of summary or detailed assessment. At paragraph 5.7 the Practice Direction deals with a situation where VAT rates change during the course of work being carried out on a case. Paragraph 5.7 recognises that under the relevant sections of the VAT Act 1994 the supplier of goods and services is entitled to elect whether the new or the old rate of VAT should apply to a supply of services where the basic and actual tax points span a period during which there has been a change in VAT rates. That is the point that is recognised by the parties on this appeal, and it is plain from both the Act and the guidance documents issued by, for instance, the Law Society and the Legal Services Commission, which are referred to on this appeal.

12. Paragraph 5.8 goes on to say this: "It will be assumed, unless a contrary indication is given in writing, that an election to take advantage of the provisions mentioned in paragraph 5.7 above, and to charge VAT at the lower rate, has been made. In any case in which an election to charge at the lower rate is not made, such a decision must be justified to the court assessing the costs."

13. Paragraph 5.9 deals with a form of apportionments. It states: "All bills of costs on which VAT is included must be divided into separate parts so as to show work done before, on and after the date or dates upon which any change of the rates of VAT takes effect."

14. Paragraph 5.10 deals with a situation where there is a change in the VAT rate between the conclusion of a detailed assessment and the issue of the final costs certificate, and even in those fairly narrow circumstances an interested party may apply for the detailed assessment to be varied so as to take account of any increase or reduction in the amount of tax payable. So, the Practice Direction is plainly concerned with situations in which the VAT rate changes.

15. On this appeal Miss Truscott, who appears for the appellant, argues that the District Judge was wrong not to apply these relevant paragraphs of the Practice Direction. Mr Astor, on behalf of the respondent, argues that these provisions of the Practice Direction were not raised on the points of dispute, were not raised before the District Judge, were not mentioned in the grounds of appeal, and whilst they were referred to only in the skeleton argument it is not plain that they are relied upon.

16. There is some force in his submission. As regards the point of dispute taken originally, there is no reference to the Costs Practice Direction. However, it seems to me that the wording plainly has in mind the points about apportionment covered by the Practice Direction. If a receiving party is not to apportion so as to charge VAT at the lower rate, when there has been a change in the rates, that decision must be justified.

17. In the points of dispute what the defendant says is that the receiving party may apportion VAT, and it is said to be unreasonable not to exercise that apportionment. It seems to me the defendant that that is in effect saying there cannot be any reasonable justification for not exercising the option to apportion. So, although the Practice Direction is not in terms referred to, it seems to me that what is said has the argument in mind.

18. At the hearing before the District Judge, it seems to me one might struggle to find an argument based on the Costs Practice Direction. The only reference to it is when Miss Jarratt argues that if you do not apportion as the receiving party so as to charge VAT at a lower rate, there has to be a reason why not. However, she does not refer to the Costs Practice Direction, but to the Law Society guidance, which merely gives you the option to apportion, and she then goes on to refer to the overriding objective. It seems to me that the District Judge was not referred to, and did not have his mind directed to, the Costs Practice Direction to which I have referred.

19. As regards the grounds of appeal, they are in general terms but they do seem to me to include an argument that the District Judge was wrong in law in failing to allow VAT between the parties to be apportioned to the rate prevailing at the time at which the work was done. The grounds of appeal are general in nature, but do encompass the argument that is to be advanced today, albeit without specific reference to the Costs Practice Direction.

20. In the skeleton argument, it seems to me the point is taken fully in paragraphs 13 and 14. There is reference to the section of Costs Practice Direction that I have read out, and to the fact that the claimant was not required to justify its decision not to apportion VAT rates in the bill of costs. It is right to say that the skeleton argument deals with quite a lot of other points which have not really been advanced to me today as the grounds of appeal.

21. In my judgment the District Judge was obliged to have regard to the Costs Practice Direction. The argument was advanced that it was unreasonable for the receiving party here, the claimant's solicitors, not to apportion. That decision, in the wording of the Practice Direction, must be justified. There was no attempt to examine what the justification was in this case for not apportioning to the lower rate. It was simply accepted as a right to do so because there was a power to elect.

22. He was not directed to the provisions of the Costs Practice Direction, and therefore did not direct his mind to that very argument. It is a point that seems to me properly taken on the appeal, and as I have heard Mr Astor, he is not suggesting that the argument itself is incorrect. There is no justification put before the court at the hearing before the District Judge, or now before me today, as to why the receiving party would be justified in not apportioning so that VAT is charged at the lower rate.

23. I am, therefore, satisfied that the District Judge was wrong in the conclusion he reached, and I allow the appeal.
