Neutral Citation Number: [2019] EWCA Civ 547

Case No: A2/2018/2840

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT NEWCASTLE UPON TYNE
District Judge Temple
C04NE276

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE COULSON

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Between:

BRITISH AIRWAYS PLC	**Appellant**
- and -	
JOHN PROSSER	**Respondent**

- -
- -

Mr Laurent Sykes QC (instructed by **Weightmans LLP**) for the **Appellant**
Mr Steven Turner (instructed by **Sintons Law**) for the **Respondent**

Hearing date: 12 March 2019

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Approved Judgment

Lord Justice Newey:

1. Nowadays, solicitors instructed on personal injury claims will sometimes use a medical reporting organisation (or "MRO") to obtain relevant medical reports and records. That was what happened here. The respondent, Mr John Prosser, had been injured at work on 26 May 2014. He instructed Sintons Law, solicitors, to act for him in a claim against the respondent, British Airways plc ("BA"), by whom he was employed. Sintons in turn commissioned Absolute Medicals Limited ("AML"), an MRO that they owned, to secure medical reports and records. Between December 2014 and June 2016, AML invoiced Sintons for a total of £1,278, £213 of which was attributable to value added tax ("VAT"). Two of the invoices expressly recorded that £30 (plus VAT) was being charged by way of "Admin Fee", but it is common ground that an administration fee (in one case of £165, in the others of £30, plus VAT) accounted for part of each of the seven invoices. The balance of the invoices was attributable to the sums charged by the doctor, medical centre and hospitals that had provided the reports and records, together with VAT.

2. BA admitted liability to Mr Prosser and in September 2016 damages were agreed at £15,424.98. BA also made a payment in respect of the fixed costs to which Mr Prosser was entitled. BA took issue, however, with the sums that Mr Prosser claimed for disbursements. While, therefore, it made an interim payment on account of disbursements, it denied liability for much of the VAT included in the invoices from AML. As a result, Mr Prosser issued costs-only proceedings, pursuant to CPR 46.14, on 23 December 2016. On 8 February 2017, District Judge Temple, sitting in the County Court at Newcastle Upon Tyne, made an order for BA to pay Mr Prosser's reasonable disbursements, to be assessed if not agreed. Assessment proceedings ensued, culminating in an oral hearing before District Judge Temple on 16 July 2018.

3. BA's position was that AML should in fact have charged VAT only on the element of each invoice that represented its administration fee. As to the remainder, the doctors, medical centre and hospitals would not have levied VAT (because the providers were not VAT-registered or their supplies were exempt), and AML (so it was argued) should not have done so either. In the circumstances, BA should not be required to meet the excess (viz. £189).

4. District Judge Temple did not accept BA's contentions. She said that, if she had to make a decision on the point, it was her view that VAT was properly chargeable on the totality of AML's invoices and not merely AML's administration fees. She considered that AML "is not simply a direct agent or post-box … for the solicitor/client" but "provides services whereby it obtains records and reports and passes those back on to the solicitor" (paragraph 18 of the judgment). However, she saw the question that she had to ask as being, "was it unreasonable and disproportionate for the claimant's solicitors to incur these fees and was it unreasonable and disproportionate for the claimant's solicitors not to investigate and ask questions of their supplier in relation to the VAT status" (paragraph 22). The District Judge went on:

> "My view is that it would have been entirely unreasonable and disproportionate to expect the claimant's solicitors to start questioning the VAT status of the invoice that was provided to them by the medical agency. That, in my view, is going way

> too far on the expectations that are to be placed on a claimant's solicitor.
>
> It is not, under a standard basis of assessment of costs, the job of a claimant solicitor to take every step necessary or possible to investigate whether or not a cost has been properly incurred. The issue is whether or not the claimant's solicitors have acted reasonably and proportionately, and whether or not those costs have been reasonably and properly incurred. My view is that it was perfectly reasonable and proportionate for the claimant's solicitors to accept the bill as it was presented to it on the face of it, including the VAT that was charged. It is not for the claimant's solicitors to start investigating with their supplier and with the tax authorities, whether or not the supplier should or should not be charging VAT on particular aspects of their bill. That is a matter between the supplier and the taxman."

5. On 29 October 2018, His Honour Judge Freedman, sitting in the County Court at Newcastle Upon Tyne, granted BA permission to appeal against District Judge Temple's decision and ordered that the appeal be transferred to the Court of Appeal on the ground that it raised an important point of principle or practice. While the amount in dispute in this particular case is of course very small, the issue to which it gives rise is of far wider significance to insurers: Mr Simon Gallimore, Vice President with American International Group, Inc., has explained in a witness statement that a decision on the point "may be applied to many thousands of cases". In the circumstances, Judge Freedman directed BA to bear both sides' costs of this appeal.

6. In January of this year, BA's solicitors informed HM Revenue & Customs ("HMRC") of the forthcoming appeal, but in February HMRC confirmed that they would not be applying to join the proceedings.

7. The parties' contentions give rise to two issues:

   i) Was AML right to charge VAT on the full amounts it was billing rather than just its administration fees?

   ii) Was the District Judge entitled to allow the costs claimed on the basis that, whatever the correct VAT position, the costs had been reasonably and proportionately incurred and were reasonable and proportionate in amount?

8. It is convenient to address the second of these points next.

Reasonableness and proportionality

9. In general, the only costs that a successful claimant can recover in a claim under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims (such as Mr Prosser's was) are the fixed costs laid down by Part 45 of the CPR and "disbursements in accordance with rule 45.29I". Under CPR 45.29I, such costs can include "the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol" (see CPR 45.29I(2)(a)). However, CPR 44.3 applies. Where, therefore, costs are being assessed on the standard basis (as

was the case with Mr Prosser), the Court will "not … allow costs which have been unreasonably incurred or are unreasonable in amount", will "only allow costs which are proportionate to the matters in issue" and will "resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party" (see CPR 44.3(1) and (2)).

10. Mr Laurent Sykes QC, who appeared for BA, pointed out that costs "are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them", but are rather "given by the law as an indemnity to the person entitled to them" (*Harold v Smith* (1860) 5 H & N 381, at 385, per Bramwell B). If, he argued, VAT was not in fact due on AML's invoices except as regards its administration fees, Mr Prosser could recover the over-payment from AML, which, in turn, could remedy the position as between itself and HMRC by means of an adjustment in a VAT return, in accordance with HMRC's VAT Notice 700/45, dealing with "How to correct VAT errors and make adjustments or claims". It would, Mr Sykes suggested, be contrary to principle to require BA to pay Mr Prosser an amount that he could anyway recover from AML. Mr Sykes acknowledged that, more than four years having elapsed since its first invoice was rendered, AML might now have lost any right to recover any over-payment in respect of that particular invoice, but he said that there had been ample opportunity to sort things out earlier.

11. As, however, was pointed out by Mr Steven Turner, who appeared for Mr Prosser, District Judge Temple's decision served to indemnify Mr Prosser in respect of actual outlay. AML's invoices had been paid in full, and AML will doubtless have accounted to HMRC for the VAT charged in the invoices. That being so, there can be no question of Mr Prosser, Sintons or AML receiving a "bonus". The total amount of each invoice, including the VAT component, represented a cost to Mr Prosser.

12. The question then arises whether the sums claimed in the invoices were "reasonably and proportionately incurred" and "reasonable and proportionate in amount", so as to satisfy the requirements of CPR 44.3. District Judge Temple considered that they were, and it seems to me that she was amply entitled to take that view. This was a low value claim in which Sintons could recover no more than the relatively modest fixed costs prescribed by CPR 45.29E by way of remuneration. The amount at stake with which Mr Prosser should, on BA's case, have taken issue was, moreover, tiny: just £189. On top of that, whether or not Sintons were aware of them at the time, there were seemingly authoritative materials appearing to confirm that VAT was chargeable. In a letter to Deloitte & Touche LLP dated 29 April 2008, HMRC stated that a claim handling service provider (or "CHSP") "must account for VAT on the *full amount* charged to their client" so that, "where the total charge made comprises the £50 fee charged by the doctor or hospital, plus a further charge made by the CHSP of, say, £30, the total value of the CHSP's supply for VAT purposes will be £80, and it is this amount on which VAT must be calculated". Again, a (now withdrawn) practice note published by the Law Society in 2011 suggested that VAT was probably payable on the totality of what an MRO charged. In all the circumstances, it is readily comprehensible that the District Judge did not think that it was incumbent on Sintons to investigate the VAT position.

13. That is not to say that the fact that VAT was charged on a bill that a receiving party has paid will always mean that the cost was reasonable and proportionate. If, say, the

VAT element were substantial, VAT should not in fact have been imposed and the receiving party or his lawyers ought to have been aware that there was real doubt as to the VAT position, a costs judge might well conclude that the receiving party should not recover the VAT.

14. On the facts of the present case, however, I would answer the question posed in paragraph 7(ii) above in the affirmative. In other words, it appears to me that District Judge Temple was entitled to allow the costs claimed, including the VAT, regardless of whether AML was actually obliged to charge VAT as it did.

15. That conclusion suffices to dispose of the present appeal. It could not, however, be right for me to stop here. Given the importance of the issue to insurers, we ought, I think, to try to give such guidance as we can on when VAT should be charged.

The incidence of VAT

16. VAT is charged by reference to the "taxable amount" of a supply. Under article 73 of Council Directive 2006/112/EC on the common system of value added tax ("the Principal VAT Directive"), the taxable amount in respect of a supply is, subject to specified exceptions, to include "everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply". This principle, however, is qualified by article 79, which states:

> "The taxable amount shall not include the following factors:
>
> …
>
> (c) amounts received by a taxable person from the customer, as repayment of expenditure incurred in the name and on behalf of the customer, and entered in his books in a suspense account.
>
> The taxable person must furnish proof of the actual amount of the expenditure referred to in point (c) of the first paragraph and may not deduct any VAT which may have been charged."

17. After referring to the equivalent provision then to be found in the predecessor of the Principal VAT Directive (viz. article 11A(3)(c) of the Sixth Council Directive of 17 May 1977 (77/388/EEC)), Sir Christopher Slade explained as follows in *Nell Gwynn House Maintenance Fund Trustees v Customs and Excise Commissioners* [1996] STC 310 (at 326):

> "VAT law draws a clear distinction in principle between (i) the case when the relevant expenses paid to a third party C have been incurred by A in the course of making his own supply of services to B and as part of the whole of the services rendered by him to B; and (ii) the case where specific services have been supplied by the third party C to B (not A) and A has merely acted as B's known and authorised representative in paying C. Only in case (ii) can the amounts of the payments to C qualify for treatment as disbursements for VAT purposes, and on this

> account as constituting no part of the consideration for A's own services to B."

When the case reached the House of Lords, Lord Slynn expressed agreement with Sir Christopher Slade on this point: see [1999] 1 WLR 174, at 183-184.

18. Just as the concept of a "supply" is "an autonomous concept of the EU-wide VAT system" (see *Revenue and Customs Commissioners v Airtours Holidays Transport Ltd* [2016] UKSC 21, [2016] STC 1509, per Lord Neuberger, at paragraph 20), so must article 79(c) of the Principal VAT Directive fall to be interpreted in its own terms rather than on the basis of the domestic law of Member States. This is borne out by a passage from the opinion of Advocate General Kokott in Case C-98/05 *De Danske Bilimportører v Skatteministeriet* EU:C:2006:186. At paragraph 40, the Advocate General observed that the question which she was addressing:

> "must be answered by reference to Article 11(A)(3)(c) of the Sixth Directive, that is to say, the Community law notion of acting in the name and for the account of another and not by reference to civil law provisions concerning agency and mandate which vary from one legal system to another".

19. "[C]onsideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT" (Case C-653/11 *Revenue and Customs Commissioners v Newey* [2013] STC 2432, at paragraph 42 of the judgment). The contractual position may nonetheless be important. That can be seen from the decision of the Supreme Court in *Secret Hotels Ltd (formerly Med Hotels Ltd) v Revenue and Customs Commissioners* [2014] UKSC 26, [2014] STC 937. The case concerned article 306(1) of the Principal VAT Directive, which provides:

> "Member States shall apply a special VAT scheme, in accordance with this Chapter, to transactions carried out by travel agents who deal with customers in their own name and use supplies of goods or services provided by other taxable persons, in the provision of travel facilities.
>
> This special scheme shall not apply to travel agents where they act solely as intermediaries and to whom point (c) of the first paragraph of Article 79 applies for the purposes of calculating the taxable amount."

The issue was whether the business of "Med", which marketed hotel rooms, fell within the second of these paragraphs. In that connection, Lord Neuberger said this:

> "[34] In the present proceedings, it has never been suggested that the written agreements between Med and hoteliers, namely the Accommodation Agreements, were a sham or liable to rectification. Nor has it been suggested that the terms contained on the website ('the website terms'), which governed the relationship between Med and the customers …, were a sham or liable to rectification. In these circumstances, it appears to me that (i) the right starting point is to characterise the nature of

> the relationship between Med, the customer, and the hotel, in the light of the Accommodation Agreement and the website terms ('the contractual documentation'), (ii) one must next consider whether that characterisation can be said to represent the economic reality of the relationship in the light of any relevant facts, and (iii) if so, the final issue is the result of this characterisation so far as art 306 is concerned.
>
> [35] … In order to decide whether the FTT was entitled to reach the conclusion that it did, one must identify the nature of the relationship between Med, the hotelier, and the customer, and, in order to do that, one must first consider the effect of the contractual documentation, and then see whether any conclusion is vitiated by the facts relied on by either party."

20. Various United Kingdom cases have raised issues as to whether VAT was chargeable on expenses incurred in relation to work undertaken by solicitors. The earliest to which we were referred was *Rowe & Maw v Customs and Excise Commissioners* [1975] 1 WLR 1291, which related to travel costs of a solicitors' representative which had been charged to the client as a disbursement in accordance with the Solicitors' Accounts Rules. Bridge J, in his judgment, emphasised (at 1296-1297):

> "the importance of the distinction between two different classes of disbursement which a solicitor may expend on his client's behalf which lead to different consequences in respect of the incidence of value added tax. 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."

21. Rather more recently, in *Makuwatsine v Trathens Travel Services Ltd*, 9 July 2010, unreported, His Honour Judge Grenfell considered that a solicitor had been right to charge VAT on "the fee for obtaining medical notes in a claim for personal injuries" (paragraph 1 of the judgment). In Judge Grenfell's view, the District Judge whose decision was under appeal "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". Judge Grenfell went on:

> "19. … 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-Saker'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."

As regards the reference to "Master Gordon-Saker's view", Judge Grenfell had explained in paragraph 12:

> "A letter to … costs draughtsmen by Master Gordon-Saker, 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 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."

22. That case can be contrasted with *Barratt, Goff and Tomlinson v Revenue and Customs Commissioners (Law Society intervening)* [2011] UKFTT 71 (TC), [2011] SFTD 334 ("the *Barratts* case"), a decision of the First-tier Tribunal (Tax Chamber) ("FTT"). There, Barratts, a firm of solicitors specialising in personal injury and clinical negligence claims on behalf of claimants, successfully challenged a decision by HMRC that "fees charged by medical professionals for providing medical records and medico-legal reports for litigation purposes were part of a VAT-inclusive supply of

legal services, and were not disbursements for VAT purposes". FTT Judge Demack considered that:

i) "the fact that the invoice raised by whoever makes supplies to Barratts records on it the name of Barratts' client … is sufficient to satisfy the 'in his own name' requirement" (paragraph 56);

ii) "the additional 'on his own account' requirement" was also "satisfied if the service is provided by Barratts as agents for and on behalf of the client", as Judge Demack found it to be (paragraph 56); and

iii) "Barratts' office account, ie the account containing the firm's own money as opposed to that of its clients, … qualifies as 'a suspense account'" (paragraph 57).

23. Judge Demack further said that he had concluded that "the case presented by Mr. Milne [i.e. Mr David Milne QC, who had put in written submissions on behalf of the Law Society], as supported by [Barratts' counsel], is to be preferred to that offered by [counsel for HMRC]" (paragraph 57 of the judgment). Earlier in his judgment, Judge Demack had explained that Mr Milne had advanced, among others, these submissions:

i) "a personal injury solicitor *uses* medical reports and records as part of the service to his client, a use reflected in the time spent by the solicitor in analysing the reports, which is charged to the client. The act of obtaining the medical records and reports is quite separate, and does not form part of the service provided by the solicitor to his client; it is carried out by Barratts as agent for and on behalf of the client" (paragraph 41); and

ii) "the fact that the client owns the medical records and reports is a critical factor pointing to the conclusion that the solicitor obtains them for and on behalf of the client: the use by the solicitor of the records and reports subsequent to his obtaining them is irrelevant to the question of whether the act of obtaining and paying for them is an inherent part of the solicitor's service to the client, or one provided as agent, for convenience" (paragraph 43).

24. In *Kellett v Wigan & District Community Transport*, 16 September 2015, unreported, neither side appears to have taken issue with the *Barratts* case, which was cited. The claimant's solicitors had invoked the services of a medical agency to obtain a medical report in connection with a personal injury claim, and the amount for which the agency had invoiced the solicitors represented the doctor's fee, an amount in respect of the agency's own services, and VAT on both elements. His Honour Judge Platts, sitting in the County Court at Manchester, decided that VAT was not properly chargeable on so much of the invoice as was attributable to the doctor's fee. Judge Platts said in paragraph 21 of his judgment:

> "It seems to me that, on any proper construction of the relationship here, the payment by the agency to the expert was expenditure incurred in the name of the solicitor and/or the Claimant and on behalf of the solicitor and/or the Claimant. Although the solicitor's name is not mentioned in [the expert's]

> invoice to the agency, the Claimant's name is and, on any view, it seems to me, it is a report obtained in her name and on her behalf. There is no evidence before me that the payment was entered into the agency's book in a suspense or other equivalent account, but it seems to me that that fact of itself cannot and should not alter the character of the provision of the report. Had there been a suspense account it seems to me there could have been little argument. The fact that there was not one does not of itself render a charge which would otherwise have been a disbursement, into a supply."

25. The last case I should mention is the decision of the FTT in *Brabners LLP v Revenue and Customs Commissioners* [2017] UKFTT 0666 (TC). The question there was whether search fees charged to a law firm undertaking conveyancing work by Searchflow, a specialist online search agency, bore VAT. FTT Judge McNall held that they did. He explained:

> "47. In my view, the relevant expenses paid to Searchflow have been incurred by the Appellant '*in the course of making its own supply of services to*' (its client) '*and as part of the whole of the services rendered by it to* (its client)' - the first category identified in *Nell Gwynn House Maintenance Fund Trustees.*
>
> 48. The Appellant is supplying conveyancing services. As part of this, it owes its clients a duty to take reasonable care and skill. It routinely makes property searches. This is because the client is asking the Appellants, as solicitors, to ensure that the transaction can safely go ahead; and is expecting the Appellants, as solicitors, to identify any risks or other factors adversely affecting the subject property.
>
> 49.The client expects the Appellant to do all that is necessary for the transaction - unless the Appellant is told expressly otherwise - which includes making all relevant searches and inquiries, and to draw anything relevant in them to the client's attention ….
>
> 50.The Appellants are not simply a conduit or post-box for search results. Simple common sense dictates that clients engage the Appellant in transactional work since the Appellant knows what it is doing, knows what a search is, knows what searches to obtain, knows how to get them quickly and conveniently, and knows what to do with them when it gets them."

Judge McNall rejected the "argument that the act of obtaining the search results is separate from the provision of the advice", which, he said, was a "species of artificial disaggregation" which "disregard[ed] the overall nature of the supply" (paragraph 61).

26. With regard to the *Barratts* case, Judge McNall said that he "part[ed] company with [Judge Demack] on his ultimate analysis" (paragraph 69). He continued:

> "70. In *Barratt*, the Tribunal was dealing with a materially different scenario, namely the obtaining of medical records and the reporting on them in the context of personal injury litigation. The scenario in *Barratt* lends itself more readily to the analysis that the solicitor was, for those purposes (and in the words of Advocate General Kokott in *De Danske)* 'merely an intermediary … used to facilitate payment'. The context supports such an analysis. The solicitor could only obtain access to patient records with the client's consent. The records were otherwise confidential. They were not matters of public record, available to all and sundry. The client (him- or herself) was the subject matter of the records, and (at least for certain purposes) could be regarded as the 'owner' of the records and reports.
>
> 71. There are no such restrictive features in this case. Anyone can commission a search, over any property. One does not have to own the property to commission the search. The records are public records."

27. It is also relevant to consider what the contractual position is where medical reports and records are obtained. As a general rule, "where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and, prima facie, at common law the only person who may sue is the principal, and the only person who can be sued is the principal" (*Montgomerie v United Kingdom Mutual Steamship Association Ltd* [1891] 1 QB 370, at 371, per Wright J). The principle was applied in *Wakefield v Duckworth & Co* [1915] 1 KB 218, where solicitors had ordered certain photographs from a photographer for the purposes of litigation in which the solicitors were acting for a client. It was held that the solicitors were not liable to the photographer for the price of the photographs. Lord Coleridge J said (at 220):

> "There is no question that the plaintiff knew that the defendants were solicitors acting on behalf of a client, and that being so, apart from any other considerations, they were agents acting on behalf of a principal. Prima facie in such a contract the plaintiff would have to have recourse to the principal and not the agent."

Lord Coleridge J noted that "the solicitor might be personally responsible … where a custom can be proved that he should be so", but said that no such custom had been proved (see 220).

28. On the other hand, in *Hichens Harrison Woolston & Co v Jackson & Sons* [1943] AC 266 solicitors were held to be personally liable in connection with a sale of shares for which they had given instructions, Lord Atkin observing (at 274) that it is "the commonest occurrence in business for known agents, known to be acting on behalf of a principal, to contract in their own names". Moreover, there came to be a principle of solicitors' professional conduct that a solicitor was "personally responsible for paying

the proper costs of any professional agent or other person whom he or she instructs on behalf of a client, whether or not the solicitor receives payment from the client, unless the solicitor and the person instructed make an express agreement to the contrary" (see "Guide to the Professional Conduct of Solicitors" (1999), at Principle 20.01). Further, a note in the "Guide to the Professional Conduct of Solicitors" explained that the principle "covers the proper costs of experts as well as professional and ordinary witnesses and enquiry agents". The principle was not, at least in terms, carried forward into the Solicitors' Code of Conduct which replaced the "Guide to the Professional Conduct of Solicitors" in 2007. Even so, Hodgkinson and James, "Expert Evidence: Law and Practice", 4th ed., comments (at paragraph 13-001):

> "it is thought that the principle that a solicitor (rather than his client) is personally liable for the fees of an expert instructed in the course of litigation is so well established as a matter of practice and custom that it still governs a contract between an expert and a solicitor unless the parties make an express agreement to the contrary. This is important for the expert because it means that the expert's remedy for non-payment of his professional fees is generally against the solicitor and not against the solicitor's client (unless the expert has expressly agreed otherwise)."

The authors also suggest that authorities such as *Wakefield v Duckworth & Co* "may need to be reconsidered in the light of modern practice" (see footnote 3 to paragraph 13-001).

29. To my mind, there is force in these comments. Support for the view that a client does not himself contract with an expert (and, correspondingly, that the solicitor acts as principal rather than agent in this respect) is also to be found in what was said about the recoverability of disbursements in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 1 WLR 2487. The Court of Appeal there proceeded on the footing that a client would not be liable for unpaid disbursements such as experts' fees if his agreement with his solicitor was unenforceable (see paragraphs 43(ii), 93 and 113-116). That implies that the client did not have a direct contractual relationship with the experts. In the present case, of course, the interposition of AML meant that the doctor, medical centre and hospitals were at one further remove from the lay client.

30. Communications between the relevant parties may, of course, be important in determining their contractual relationships. In the present case, Sintons have explained that no written contracts existed between themselves and AML or with the doctor, medical centre or hospitals. They have also, however, pointed out that they work with a number of other MROs and that contractual agreements will differ from organisation to organisation and from solicitor to solicitor. Equally, the terms of a solicitor's retainer by his client may be of significance when considering whether the solicitor was acting as principal or agent in his dealings with an MRO, an expert or a source of medical records. While any formal contractual documentation is likely to matter most, what the parties have said to each other otherwise, either in writing or orally, may also be material.

31. I suspect that it will be a rare case in which an MRO acts as agent for the ultimate client, so that a direct contractual relationship arises between the client and the

doctor/medical centre/hospital producing the report or records. The client will obviously have to consent to disclosure of medical records relating to him, and the doctor or other provider of the report/records can be expected to be aware that what he is being asked to do is for the benefit of the client. It by no means follows, however, that the doctor or other provider should be taken to be contracting with the client rather than either the MRO with which he is in contact or the solicitor from whom the MRO is taking instructions.

32. An MRO is more likely to have acted as agent for the solicitor. Subject to any light that might be cast on the point by communications between the parties, it seems to me that that might well be the correct analysis in a case where an MRO had in effect acted as a mere postbox, obtaining and forwarding documents as asked for an identifiable fee. In any event, the "economic and commercial realit[y]" in such a situation will usually, I think, be that the cost of a report or records represents "expenditure incurred in the name of and on behalf of" a customer (viz. the solicitor) within the meaning of article 79(c) of the Principal VAT Directive. On that basis, the MRO should charge VAT only on its own fee, not on the totality of the amounts invoiced.

33. An MRO may, however, play a more active role. It might, for example, be expected to vet possible experts, to have some input into how a particular report is prepared and to check the quality of a draft. Once again, communications between the parties may be crucial to the nature of the contractual relationships, but the MRO is less likely to have acted as a mere agent from a contractual point of view. More importantly for present purposes, where an MRO has done substantially more than act as a postbox, the "economic and commercial realit[y]" will probably be that the cost of the report/records is not "expenditure incurred in the name of and on behalf of" a customer. The expense will instead have been incurred by the MRO "in the course of making [its] own supply of services … and as part of the whole of the services rendered by [it]" (to adapt words of Sir Christopher Slade in the *Nell Gwynn House Maintenance Fund Trustees* case). VAT will therefore be payable on everything that the MRO invoices, not just its own "fee".

34. Even supposing, however, that the circumstances are such that an MRO does not need to charge VAT on anything but its own fee, the client will not necessarily escape VAT on the cost of medical reports/records. That will depend on whether the solicitor is himself obliged to impose VAT when passing on the cost to the client.

35. As I have already indicated (paragraph 31 above), I doubt whether a client will often have entered into a direct contractual relationship with the doctor or other provider of a medical report or records obtained via a solicitor and MRO. If that is right, the solicitor will generally have contracted as a principal with either the doctor/provider or the MRO. As a matter of domestic law, he will not have acted merely as an agent of his client.

36. The "economic and commercial realit[y]" may nonetheless be that the solicitor has incurred the cost of the report/records "in the name of and on behalf of" the client if his role has essentially been that of a postbox. That, however, must surely be unusual. It can be seen from the *Makuwatsine* case that a client is unlikely even to be provided with medical notes and that, whilst a client might be given a copy of a medical report, "in the ordinary way the report would not be used by the client outside the service of

the solicitor". The solicitor will have obtained the report/records in order to advise the client on the merits of the claim and/or to facilitate his pursuit of the client's claim. Consideration of the report/records will have been part of the solicitor's broader supply of legal services to his client. The solicitor's role will not merely have been to forward the report/records to the client.

37. In the circumstances, it seems to me that in a typical case in which a solicitor commissions an MRO to obtain a medical report/records the solicitor will neither be acting as the client's agent in contractual terms nor incurring the expenditure "in the name of and on behalf of" the client for the purpose of article 79(c) of the Principal VAT Directive. The report/records will be "supplied to the solicitor … to enable him effectively to perform the service supplied to his client" (in the words of Bridge J in the *Rowe & Maw* case).

38. While I would not endorse all of the reasoning in *Kellett v Wigan & District Community Transport*, the outcome would appear to have been correct if the MRO in question was fairly to be seen as a postbox. As regards the *Barratts* case, that did not involve an MRO: Barratts obtained medical reports and records themselves, without using an MRO. That distinction could potentially affect the contractual analysis: it is easier to conceive of a solicitor who obtains reports and records direct acting merely as his client's agent, although there is plainly scope for argument to the contrary (see paragraphs 27-29 above). I can see a strong case for saying that, whatever the true contractual position, as a matter of "economic and commercial realit[y]" a solicitor who is more than a postbox does not incur the cost of the reports/records "in the name of and on behalf of" his client. The point was not, however, squarely before us and I prefer not to express a final view on it.

Conclusion

39. I would dismiss the appeal.

Lord Justice Coulson:

40. I agree.

Lord Justice Lewison:

41. I also agree.