Judgments

Re Ablyazov

[2012] Lexis Citation 135

Mr Registrar Baister

1 November 2012

Judgment

APPROVED JUDGMENT

I DIRECT PURSUANT TO CPR PD 39A PARA 6.1 THAT NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR REGISTRAR BAISTER:

The application

1. This is an application by Mukhtar Kabulovich **Ablyazov** to set aside a statutory demand dated 5 December 2011 by which Clyde & Co LLP seek the sum of £695,290.20 said to be due in respect of an undertaking in writing given on 20 September 2011 to pay £686,497.36 within 21 days. Interest is also claimed under the Late Payment of Commercial Debts (Interest) Act 1998. The application is supported by two witness statements of Richard James Leedham and one of Kitaj Perrottet Woodward. Clyde & Co rely on two witness statements of Julian Paul Connerty.

The background

2. The background is set out in paragraphs 4 – 10 of the first witness statement of Mr Leedham and paragraphs 6 – 25 of the first witness statement of Mr Connerty. There are some disagreements about the detail, but it seems to me that the salient facts can be stated fairly shortly and neutrally.

3. Mr **Ablyazov** is a Kazakh citizen. He owned and was chairman of JSC BTA Bank. The bank was nationalised in 2009. The bank brought proceedings against him in the Commercial Court for $4 billion. There is due to be a trial later this year. There are also proceedings in the Chancery division.

4. On 3 February 2011 in the Chancery proceedings Henderson J granted the bank a search order which resulted in the seizure of a number of documents contained in some boxes held in storage. Clyde & Co had acted for Mr **Ablyazov** and a number of associated individuals and companies, but Mr **Ablyazov** changed solicitors in or about March 2010, initially so that he was represented by Stephenson Harwood and later by Addleshaw Goddard. A question arose as to the extent to which the documents contained in the boxes were subject to privilege.

5. On 25 July 2011 Henderson J made an order in what have come to be known as the "boxes applications". Among the orders he made was the following:

> "2. The Fourteenth and Eighteenth Defendants shall, by 4pm on 31 August 2011:
>
> a. identify those documents contained in the Boxes over which the Fourteenth Defendant, the Eighteenth Defendant, Mr Roman Solodchenko and/or Mr Zhaksylyk Zharimbetov assert legal professional privilege,
>
> b. in respect of any documents over which legal professional privilege is asserted, provide sufficient particularity of the claim to privilege so as to enable the Bank to decide whether to challenge such claim…".

Two extensions of time were granted in which to comply with the order. The last extension had the effect of extending the 31 August 2011 deadline to 20 September 2011 but on "unless" terms.

6. Mr **Ablyazov** reinstructed Clyde & Co in or about April 2011 because it was accepted by all involved that it would be more effective for them to deal with the boxes applications than for Mr **Ablyazov**'s new solicitors to do so. However, Clyde & Co had outstanding costs and, as Mr Connerty remarks in paragraph 14 of his witness statement, the boxes applications were "extremely active and as a result costs accumulated quickly".

7. By September 2011 Clyde & Co had become impatient. By 14 September 2011, according to Mr Connerty, a balance of fees amounting to £886,509.16 was outstanding (see paragraph 21 of his witness statement which contains a breakdown). Thereafter further payments were made in one form or another (see paragraph 22 of Mr Connerty's witness statement), and as a result the sum said to be due to Clyde & Co was reduced to £686,497.36. By that time, however, Clyde & Co were refusing to continue working for Mr **Ablyazov** unless their outstanding fees were paid (paragraph 23 of Mr Connerty's witness statement).

8. On 19 September 2011 Mr Leedham of Addleshaw Goddard rang Mr Connerty to say that Mr **Ablyazov** was unable to come up with the money to pay the outstanding fees in sufficient time to enable Clyde & Co to comply with the 20 September 2011 deadline. He suggested that an undertaking to pay might resolve the situation. The wording of an undertaking was agreed, and Clyde & Co set about completing the work.

9. The undertaking given by Mr **Ablyazov** was as follows:

> "I, Mukhtar Kabulovich **Ablyazov**, undertake to pay to Clyde & Co LLP within 21 days the sum of £686,497.36, in satisfaction of outstanding invoices rendered to me and to Syrym Shalabayev. In its turn Clyde & Co LLP will complete the work required in connection with the order of Mr Justice Henderson dated 25 July 2011".

10. Although the document is referred to in the evidence as an undertaking, both Mr Carpenter and Mr Bayfield proceeded on the basis that it constituted (or perhaps evidenced) a contract between Mr **Ablyazov** and Clyde & Co. Thus, Mr Carpenter refers at one point in his skeleton argument to "breach of the agreement by Clydes", while Mr Bayfield referred me to extracts from *Chitty on Contracts* (30th edition). Both addressed me on the issue of consideration. In my view the undertaking did constitute (or evidence) a contract, and alt-

hough some of the wording leaves something to be desired (the words “in connection with” are arguably vague) the meaning and intention are plain. Mr **Ablyazov** undertook to pay the sum referred to within 21 days in exchange for which Clyde & Co agreed to complete the work required to comply with the order of Henderson J of 25 July 2011.

11. Clyde & Co came off the record as acting for Mr **Ablyazov** in November 2011.

12. On 18 January 2012 Mr **Ablyazov** applied for detailed assessment of eight of eleven invoices rendered to him by Clyde & Co since April 2010. Clyde & Co applied for detailed assessment of three additional bills covering the period September to November 2011 and later sought assessment of a further invoice of 8 March 2012. There was a hearing before Master Gordon-Saker on 3 May 2012 at which the master ordered Mr **Ablyazov** to pay £500,000 as a condition of assessment. Clyde & Co then made their own application for assessment of all twelve bills. Mr **Ablyazov** failed to pay, as a result of which, in the words of Ms Woodward, “his own application for detailed assessment has lapsed”; but as she goes on to note, the assessments under Clyde & Co's application(s) remain live. According to Mr Carpenter, Mr **Ablyazov** intends to take part in those detailed assessment applications, and the master has made clear that Clyde & Co's bills will be scrutinised and not simply “rubber stamped”. The invoices to be assessed, as I understand it, total over £2.5 million of which £976,017 odd remains outstanding.

The grounds of the application

13. The evidence in support of the application puts forward a number of grounds for setting aside the statutory demand:

a) the undertaking was extracted under duress;

b) the debt claimed in the statutory demand is unliquidated;

c) there is a substantial dispute as to the level of the debt claimed;

d) the applicant has a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt claimed;

e) the debt has in any event been discharged.

The allegation of duress has been abandoned. There was an indication in the evidence that Mr **Ablyazov** may have wished to assert a negligence claim against Clyde & Co, but Mr Carpenter conceded in the course of the hearing that this was not being pursued as part of this application. Accordingly I am only concerned with (b), (c), (d) in part and (e).

Debt claimed not a liquidated sum

14. It is common ground that as a general rule a claim for solicitors' fees is not a claim for a liquidated sum (*Turner & Co v O Palomo SA* [2000] 1 WLR 37). A client may therefore challenge the reasonableness of fees claimed by seeking assessment. Accordingly, solicitors' costs cannot usually found a bankruptcy petition unless they have first been made the subject of judgment, assessment or agreement.

15. The leading authority on the nature of solicitors' costs and bankruptcy is *Truex v Toll* [2009] 1 WLR 2121. The case was a successful appeal against a bankruptcy order I made in commonplace circumstances. The solicitor had been engaged to conduct matrimonial proceedings on behalf of the client. He served a statutory demand for fees due under his bills. The debtor applied to set the demand aside, but I dismissed her applica-

tion on the basis that she had agreed the costs and thus converted what was an unliquidated sum into a liquidated sum. Neither the solicitor nor his client had applied for assessment. The learned judge found that there was no unequivocal admission of the debt, but, more importantly for present purposes, dealt at some length and after hearing argument, with the circumstances in which a sum claimed in a solicitor's bill could be converted from an unliquidated sum to a liquidated sum:-

> 26. Mr Macpherson, Counsel for the appellant, submitted that it was insufficient to find a bare admission, agreement or acknowledgement that Mr Truex's invoices were correct. Where a debt is of an unliquidated sum because it has not been judicially assessed or determined that sum can only become liquidated if the client is bound by the admission, agreement or acknowledgment relied upon. Thus Mr Macpherson said that one must look for a waiver of the right to assessment or determination. In order to constitute such a waiver, the client's conduct must be supported by consideration or give rise to an estoppel.
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> 27. Doubtless a bare admission coupled with failure over a long period to challenge the bill would be strong evidence that the bill was reasonable. However, submitted Mr Macpherson, such conduct would not be enough to convert the amount of the bill from an unliquidated to a liquidated sum. In *In re Park; Cole v Park* 41 Ch D 326, Stirling J said of similar conduct that it did not preclude investigation of the bill, despite the fact that without further explanation the circumstances "would probably be held to be conclusive against" the client. *In re Park* was a strong case in which the late client had taken delivery of the bill more than 12 months before he died, had made no objection to it and had paid a large proportion of it on account. Even so, his executors were held to be entitled to dispute it.
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> 28. I tested Mr Macpherson's proposition by asking Mr Preston in what circumstances a client could change his mind about paying a bill, in other words, what in the absence of consideration or estoppel would constitute waiver of the right to assessment or determination? He responded that the client could change his mind, but only on reasoned grounds and where the dispute as to the bill was a genuine one.
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> 29. If that were right, the sum claimed would start life as unliquidated and then, because the client admitted it, it would become liquidated and then the next day, month or year (if the client changed his mind on reflection or advice) it would revert to being unliquidated. To my mind Mr Preston's answer conflates the pre-requisite that the debt founding the petition must be for a liquidated sum with the separate issue whether, on the hearing of that petition, there is a genuine dispute about the debt.
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> 30. It seems to me that there is logic in Mr Macpherson's submission that an agreement converting an unliquidated debt into a liquidated one must be a binding agreement. That would mean an agreement for consideration, that is to say an agreement as to a fixed amount, or an agreement as to hourly rates and time spent in consideration of future services, or a compromise agreement, or conduct giving rise to an estoppel according to established principles.
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> 31. I turn to the authorities to see whether this conclusion is reflected in them. In the *Turner & Co* case [2000] 1 WLR 37, 51, Evans LJ said:
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> "Nothing [in the Solicitors Act 1843…], or its successors, takes away the need for the solicitor to prove that his fees are reasonable, if they are challenged, absent any express agreement as to what they should be."
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> 32. Despite Mr Preston's submission to the contrary, it seems to me that the kind of agreement that the Court of Appeal had in mind was a prospective agreement. I derive this from the example considered on the following page (367) of the report, namely where the hourly rate has been agreed and where the client expressly agreed to pay for as many hours as the solicitor in fact worked. Where an agreement of that kind, or an agreement to pay a fixed sum, is made at

the outset, or where further work is only undertaken on condition that the client agrees to pay outstanding invoices, there is consideration for the agreement and the client cannot resile from it. My conclusion in this regard is supported by the type of agreement referred to by Sir Richard Scott V.-C in the first line of the quotation from the *Thomas Watts & Co* case […].

33. In *In re a Debtor (No 32 of 1991) (no 2)* [1994] BCC 524, Vinelott J said of the situation where a demand is made for payment of reasonable remuneration for services rendered at p 527:

"I do not say that a statutory demand can never properly be presented in such a case- that the creditor must always quantify his claim by obtaining a judgment before serving a statutory demand. There may be cases where the minimum sum due can be ascertained by reference to some objective standard. There may be cases where the rate of charging is agreed and the minimum time that had to be spent on the task for which remuneration is sought can be similarly established; or advance or periodic payments may have been agreed. But these cases must be regarded as exceptional."

34. This passage seems to me to be contemplating a situation where the proper amount of the bill can be established by a purely arithmetical process. The alternative interpretation allows the bankruptcy judge to take a view whether or not the bill is good. He could therefore make a value judgment that the client's case on assessment had so little merit that it could not possibly succeed, at any rate as far as £750 of it was concerned.

35. Again as a matter of logic I would agree with Mr Macpherson that this latter interpretation appears to confuse the question of what is a liquidated sum with whether there is any genuine defence in relation to the bill.

36. In my judgment whether a sum is liquidated and whether there is a defence to the claim are separate issues and the first must be determined before the second is addressed. Accordingly any admission, acknowledgment or agreement converting the amount claimed from an unliquidated to a liquidated sum must be one from which the client has bound himself not to resile. A mere acknowledgment would be insufficient to bind him to forego judicial assessment or determination.

37. On this basis it was not possible to say that any part of the work done by Mr Truex had been quantified, or was quantifiable by the bankruptcy court as a mere matter of arithmetic. It seems to me that the Chief Registrar conflated the issue of whether there was a genuine dispute about a liquidated debt with that of whether the sum claimed was liquidated in the first place. The bill as a whole was capable of challenge as to quantum, was thus for an unliquidated sum and did not fulfil the requirement of s. 267. The same point applies to the Chief Registrar's alternative finding that there could not be a genuine dispute as to at least £750 of the costs.

38. I would however add that I reach the above conclusion of law with some hesitation for the following reasons. The *Thomas Watts & Co* case… the *Turner & Co* case…and *Joseph's* case…were not bankruptcy cases and judges of the calibre of Sir Donald Nicholls V-C and Vinelott J evidently thought it was permissible to found bankruptcy proceedings on a solicitor's unassessed bill of costs. My conclusion runs counter to the established practice of experienced registrars in bankruptcy. The case before me had a very short time estimate as the principal legal issue was taken late in the day. While I do not blame the parties or their legal advisers, some matters may have been insufficiently explored. I had to ask the parties to find and address me on some of the cases, including the two decisions of Vinelott J to which I have referred. Some of the submissions were sought and received after conclusion of the oral hearing.

> 39. I have a further concern. In answer to a question put to him by the Court, Mr Macpherson maintained that it is not possible to contract out of the assessment provisions of the Solicitors Act 1974. That issue is not before me and although Mr Macpherson put in a written submission I have not heard argument on it. If he is correct, no agreement even for consideration could prevent a solicitor's client from applying for assessment under the Act. The effect would be that the Court might well find a contractual agreement conclusive only in the context of the assessment exercise itself. The words “absent any express agreement” in the *Turner Watts & Co* case must have some meaning. One meaning that could be ascribed to the phrase is that the client had expressed himself in such a manner that the process of assessment could not reduce the bill below the £750 threshold. In other words, the bankruptcy judge could take his own view of the matter.
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> 40. However it seems to me that the fact (if such is the case) that public policy requires the client to be able to seek assessment of a solicitor's bill even after having reached an otherwise binding agreement is merely a reason why the court ought not to make a bankruptcy order on a petition likely to be the subject of assessment under the Act. The availability of assessment does not prevent an otherwise binding agreement converting what was previously the solicitor's mere estimate of proper costs into a liquidated sum capable of founding a petition under s. 267 of the 1986 Act (*per* Proudman J).

16. It seems plain to me that the learned judge accepted the principle that there could be a binding agreement sufficient to convert solicitors' fees, an unliquidated sum, into a liquidated sum. That this kind of agreement is possible is clear from the final sentence of paragraph 40 of the judgment. Contrary to Mr Carpenter's submission, it seems to me that there is nothing in the context in which the judge spoke that sentence that detracts from its clear meaning.

17. Central to the judge's decision on the point she was considering is the relationship between any agreement to pay costs and the client's right to seek assessment. That was relevant to the facts of that case; it is not relevant here, for, as we have seen, assessment applications have been made. Mr **Ablyazov**'s applications are no longer proceeding, but Clyde & Co's are. It follows that I am dealing with a case of a wholly different kind, because in the present circumstances there can be no question of Mr **Ablyazov**'s having given up his statutory rights. They are fully preserved. Nor does that mean that an unliquidated sum which has become a liquidated sum by agreement would be converted again into an unliquidated sum in the way contemplated by Proudman J in *Truex v Toll*. If, in respect of any of the invoices to which the 20 September 2011 undertaking relates, a smaller sum is found to be due than that which Mr **Ablyazov** undertook to pay, Clyde & Co's obligation will be to repay or give credit for any amount found to have been overcharged. The position is analogous to one that arises quite frequently in the context of costs. Mr Bayfield makes his point as follows:

> “The situation is analogous to the court ordering an unsuccessful party to make a payment of a certain sum on account of the successful party's costs. Where a costs order is made in someone's favour, but it is to be assessed if not agreed, there is plainly no liquidated sum owing. If, however, the court orders the unsuccessful party to pay, say, £100,000 on account of the successful party's costs: (a) that sum must be paid within 14 days (or any other specified period) and is a liquidated sum on which a petition can be based; and (b) the fact that, on an assessment, the paying party might persuade the costs judge that the costs he should be obliged to pay are less than £100,000 makes no difference to the paying party's obligation to make that payment on account of the costs”.

18. As Mr Bayfield submits, the undertaking constituted a freestanding agreement giving rise to an obligation separate to any obligation to pay the underlying bills of costs. I should note, however, that Mr Bayfield expressly conceded that whilst the undertaking did create a freestanding liability it did not create a liability in addition to any liability arising out of the bills. There is therefore no question of Clyde & Co making a double recovery.

19. I agree with Mr Bayfield and conclude that the agreement gave rise to an obligation to pay and that the obligation was to pay an agreed sum which was therefore a liquidated sum. Mr **Ablyazov**'s statutory rights to assessment were not compromised by the agreement as is plain from the fact that the Clyde & Co assessments continue.

20. Mr Carpenter relies on two authorities in support of the proposition that a solicitor may not circumvent the requirement to render a bill (and the client's concomitant right to assessment) by relying on a collateral agreement to pay and seeking to enforce that agreement independently. As he points out, where solicitors have attempted to do that the courts have prevented it. The authorities in question are *Ray v Newton* [1913] 1 KB 249 and *Martin Boston & Co v Levy* [1982] 1 WLR 1434. (The relevant modern statutory provision is section 69 Solicitors Act 1974 to which Mr Carpenter referred me.) He submitted that those authorities applied in this case because the undertaking in this case was parasitic on Clyde & Co's claim for fees.

21. In *Ray v Newton* it was held that a solicitor could not sue on a bill of exchange on the basis that the bill constituted agreement to fees in the sum of the bill; the solicitor had first to deliver a bill of costs which could be made the subject of taxation. But it is plain in that case that the solicitor had not delivered a proper bill of costs. It was the failure to do that that was the mischief that was under attack. This is plain from the observation of Farwell LJ:

> "Under the statutory jurisdiction the solicitor is bound to render a bill of costs to his client, and his client is entitled to have the bill delivered under the common order to tax; no special circumstances are required. The solicitor may avoid the stringency of that liability in various ways; and one is by taking payment from his client. A bill of exchange is not payment; it is only a conditional payment. The solicitor cannot in my opinion escape from the Act by taking a bill of exchange from his client. The bill of exchange is simply a means of giving him a summary remedy under the Bills of Exchange Act. But the substance underlying the bill of exchange is left untouched, and that in this case is the solicitor's bill".

22. *Martin Boston & Co v Levy* was directed at the same mischief, namely the apparent exclusion of the entitlement to have the bills in question taxed (*per* Warner J at p. 1436 D). I do not think that I can regard that case as determinative of the issue since the application before the court was to set aside a judgment obtained in default. The judgment was indeed set aside, but the judge left the final decision on the central issue to the trial judge.

23. It seems to me therefore that neither authority takes the matter further, for Mr **Ablyazov**'s rights in relation to the bills that Clyde & Co have rendered are fully preserved. The authorities concern a wholly different situation to the one in this case and are directed at a mischief that does not arise here.

24. I gain further support for my view from the decision in *Ring Sites Holding Co Limited v Lawrence Graham* (Companies Court, 8 October 2001, unreported) in which the judge expressed the view that neither *Ray v Newton nor Martin Boston & Co v Levy* could "be taken as establishing an invariable rule that a solicitor who has received a cheque from his client on account of costs can… never, in any circumstances, sue on that cheque in the absence of a valid bill of costs having first been delivered. […] It seems to me that everything depends on the circumstances in which the cheque is provided". The judge also explicitly rejected an argument relied on by Mr Carpenter, namely that the only remedy for a solicitor in a situation of the kind contemplated was to withdraw from the retainer. Section 65 Solicitors Act 1974 certainly provides for that, but it does not follow from the availability of that the remedy that it is the only remedy available to an unpaid solicitor and that he is thereby deprived of rights available to everyone else such as the right to sue.

25. I should add that, as Mr Bayfield points out, section 69 Solicitors Act 1974 prevents the bringing of an action. A statutory demand does not, however, constitute an action (see *In re a Debtor (No 88 of 1991)* [1993] Ch 286).

Substantial dispute as to the level of the fees

26. I can deal with this point quite quickly. The assessment proceedings will deal with the level of the fees. I am simply concerned with a sum due under an agreement. The fact that there is a dispute about the level of fees does not relieve Mr **Ablyazov** of his obligation under the contract any more than it deprives him of his rights on assessment.

Counterclaim, set-off or cross demand

27. Mr Carpenter conceded that at this stage at least no claim in negligence was relied on in support of the contention that Mr **Ablyazov** had a counterclaim set-off or cross demand. He suggested, however, that Clyde & Co's failure to comply with the order of 25 July 2011 amounted to a total failure of consideration or repudiatory breach of the agreement.

28. As Mr Bayfield submitted, the proposition that there had been a total failure of consideration was unsustainable. Plainly Clyde & Co continued to do work. Equally plainly, however, Clyde & Co did not do the work properly: it took them three attempts to satisfy the court, and even then there had to be an application for relief from sanction. It may be that Clyde & Co's failure to complete the work they undertook to do properly and/or on time amounted to a breach of the agreement, but Mr **Ablyazov** has not put forward any evidence as to any loss or damage he has suffered as a result, so there is nothing to enable me to conclude that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of Clyde & Co's debt.

29. A repudiatory breach would have given Mr **Ablyazov** the usual choice, namely to affirm the contract or accept the repudiation. There is no evidence that he elected to accept the repudiation; the fact that Clyde & Co appear to have made the application for relief from sanction would, to the contrary, seem to indicate that he affirmed the agreement.

Debt discharged

30. This part of my judgment is a second draft which I have produced in the following circumstances.

31. On 16 October 2012 I sent out a draft judgment. On 17 October I received comments and suggested corrections from Mr Carpenter. On 18 October I received comments and suggested corrections from Mr Bayfield including some (in relation to paragraphs 30-32 of the first draft) which he said went to the heart of the single issue on which his client had lost the application. Briefly, his position was that a concession on which I relied had not been made and that I had misunderstood aspects of his client's case. Later on 18 October I received a further message from Mr Carpenter taking issue with what Mr Bayfield was contending.

32. In the light of the foregoing exchange I said that I would listen to the recording of the hearing (as opposed to relying on my handwritten notes of it) and re-draft my judgment.

33. Paragraphs 30-32 of my first draft judgment read as follows:

> “30. Mr **Ablyazov**'s obligation under his agreement with Clyde & Co was to pay £686,497.36 within 21 days of 20 September 2011. He did not do that, but in paragraph 18 of her witness

statement Ms Woodward asserts, '[I]t appears that payments totalling £880,195.72 have been made on Mr **Ablyazov**'s behalf towards the outstanding liability (or at least amounts have been applied by Clyde & Co against the outstanding liability)'. She makes her point good by reference to a cash account constructed by her firm from Clyde & Co's ledger, contending that between 20 September 2011 and 5 December 2011 amounts totalling £781,315.72 were paid and or applied to Mr **Ablyazov**'s account. Mr Connerty deals with that in a rather round about way in his witness statement in answer:

'At paragraph 18 of Ms Woodward's statement she says that £880,195.72 has been applied by Clyde & Co against the outstanding liability, and that therefore the undertaking has been satisfied. This is incorrect. The undertaking was to pay the sum of £686,497.36 that was due as at 20 September 2011. As I set out above, there was at that time a substantial amount of unbilled work in progress that was not taken into account when calculating the undertaking figure, and which was subsequently billed; and further work was done, in reliance on the undertaking, that was also subsequently billed.'

Mr Connerty's statement, 'This is incorrect' may not refer to the payment of the sums relied on by Ms Woodward; but this is not entirely clear. In paragraph 28 and paragraphs 30 ff. Mr Connerty gives a great deal of detail about sums that have from time to time been applied against Mr **Ablyazov**'s indebtedness, but the effect of his case, as I understand it, is to say that some or all of the amounts in question have been appropriated to invoices or liabilities other than those representing the sum claimed in the undertaking. However, in paragraph 32 of his first witness statement he confirms that sums referred to in the preceding paragraphs “total approximately £900,000”, and in the course of his submissions Mr Bayfield conceded that since 20 September 2011 Clyde & Co had received more than the sum in the undertaking. I can readily see the justification for leaving out of account sums received from or on behalf of Mr **Ablyazov** that have been used to meet adverse costs claims (see paragraph 30 (v)) and sums for which credit has already been given, but not others. A further round of evidence ends with Mr Connerty's second witness statement to which he exhibits an extremely detailed cash account.

31. I do not think for the purposes of this application that I need go into the detail of the principles governing the appropriation of payments. Suffice it to say that it is trite law that when making a payment a debtor may appropriate it to a particular debt or debts, but if the debtor makes no appropriation when making payment the creditor may do so.

32. It seems to me that if, as appears to be the case, Mr **Ablyazov** has paid the sum Ms Woodward says he has paid since he gave the undertaking, then those payments will have extinguished his obligation, since, as Mr Carpenter points out, Mr **Ablyazov**'s obligation was simply to pay the sum; and if he has done so, he has done so and that is the end of the matter. It seems to me that that is determinative of the issue; but, if I am wrong about that, at the very least it gives rise to a substantial ground for disputing the debt. If Clyde & Co has put Mr **Ablyazov** in breach of his agreement by appropriating sums to a liability other than that arising under the undertaking it seems to me that it is unlikely that the court would exercise its discretion to make a bankruptcy order. That, arguably, constitutes an independent ground under rule 6.5(4)(d) Insolvency Rules 1986 for setting aside the demand. I was not taken through the figures in anything like the detail that would be required to reach a proper view as to what precisely might be owed by Mr **Ablyazov** to Clyde & Co. Plainly there are areas of disagreement on the figures and as to the way in which funds have been applied. This is not the proper forum for taking a detailed account. A detailed account is more properly dealt with in proceedings for an account or in the course of the proceeding pending before the master. That, in my view, is a further area of dispute warranting investigation and determination, but not in petition proceedings”.

34. Mr Bayfield's objections to the way in which I dealt with the issue are set out in a note accompanying his message of 18 October:

> "No concession was made that '*since 20 September 2011 Clyde & Co had received more than the sum in the undertaking*'. It was common ground that that was not the case (see the words in parentheses in Woodward, para 18, first sentence; the final sentence of that para of her evidence; and the skeleton argument filed on Mr **Ablyazov**'s behalf at para 31). Amounts had been *applied* by Clyde & Co in respect of various invoices but Clyde & Co had *received* a materially smaller sum. The position is explained in Connerty 1, paras 30-31.
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> The first sentence of para 32 of the judgment – which is the key to the Court's decision – proceeds on a false basis because that is neither what Ms Woodward's evidence was (properly understood) nor what Mr **Ablyazov**'s case was (nor is it true).
>
> The only sums *received* after the undertaking had been given were the Gable monies totalling £449,792. As was set out in Connerty 1, paras 28 and 31, the Gable payments were sought, and paid, with reference to sums due under post-undertaking invoices (see the correspondence at [7/15-19] and the table at [13/5-6]). That is why the monies received were appropriated to post-undertaking invoices.
>
> It cannot be said that Clyde & Co '*put Mr **Ablyazov** in breach of his agreement by appropriating sums to a liability other than that arising under the undertaking*' in these circumstances. Further, in relation to £353,792 of the Gable monies, the relevant sums were received only *after* Mr **Ablyazov** had breached his undertaking by not paying the required sum within 21 days of 20 September 2011.
>
> Further, in the penultimate sentence of para 30 it is said that the Court '*...can readily see the justification for leaving out of account sums received from or on behalf of Mr **Ablyazov** that have been used to meet adverse costs claims [£125,240 (Connerty 1, para 30(v))]… and sums for which credit has already been given… [£200,000 (Connerty 1, paras 30(i) and (ii))]*'. If those sums were deducted from the payments applied post-undertaking, there would still be a substantial debt due under the undertaking (or in excess of £750)".

35. Mr Carpenter's recollection was more in line with mine:

> "Insofar as the question is whether or not Mr Bayfield confirmed the figures given by Ms Woodward, my clear recollection is that you specifically asked Mr Bayfield whether he agreed with Ms Woodward's evidence that the sums referred to in the judgment had been applied against the bills since the undertaking was given and Mr Bayfield confirmed on instructions that they had. Clydes' position was that the figure was irrelevant because what mattered was how the money had been appropriated".

36. Having listened to the recording of the hearing (and given counsel for the parties the opportunity to do so), read counsels' notes and re-examined the relevant evidence, I re-formulate my judgment on the last issue as follows.

37. The submission made by Mr Carpenter in the afternoon of the hearing was a simple one, namely that the undertaking was discharged because "payments well in excess of the undertaking have been made" and "any payment in discharge of any liability ought to be credited". He went on to say that this was not an appropriation issue since "on Clyde's own figures they have received a considerable amount more than the undertaking". He noted, however, that the accounts were "a bit of a mess" (a point I shall come to in due course). Mr Carpenter made those points beginning at about 2.51 pm. They are set out in greater detail in paragraphs 31-36 of his skeleton argument.

38. Mr Bayfield began his submissions on this issue at about 3.25 pm saying that he had understood Mr Carpenter's argument to be “an appropriation argument”. The following exchange then took place:

> Registrar: Is it common ground that after 20 September 2011 Mr **Ablyazov** paid more than the amount of £880,000?
>
> Mr Bayfield: Yes. [However, at this point Mr Bayfield turned to take instructions.]
>
> Mr Bayfield: There were already monies held by Clyde's which had not been applied as at the date of the undertaking. Adding those that came in subsequently, one does get to about £680,000 [*or possibly £880,000*].
>
> Registrar: So…putting it neutrally, since 20 September 2011 Clyde & Co had more than £680,000 from wherever?
>
> Mr Bayfield: They've appropriated that sum to various invoices.

There followed submissions about appropriation, consideration and other propositions in the part of Mr Carpenter's skeleton argument to which I have referred.

39. It may well be that I was wrong to describe the effect of the exchange I had with Mr Bayfield as amounting to a concession. It was an answer given after taking instructions to a question I put. The effect, however, seems to me to be broadly similar to the effect of a concession.

40. The question I put to Mr Bayfield arose not only out of Mr Carpenter's submission that the debt had been discharged but also out of a statement in paragraph 18 of Ms Woodward's witness statement. She says, “[I]t appears that payments totalling £880,195.72 have been made on Mr **Ablyazov**'s behalf towards the outstanding liability (or at least amounts have been applied by Clyde & Co against the outstanding liability)”. She makes her point good by reference to a cash account constructed by her firm from Clyde & Co's ledger, contending that between 20 September 2011 and 5 December 2011 amounts totalling £781,315.72 were paid and or applied to Mr **Ablyazov**'s account.

41. Mr Connerty deals with that in a rather round about way in his witness statement in answer:

> “At paragraph 18 of Ms Woodward's statement she says that £880,195.72 has been applied by Clyde & Co against the outstanding liability, and that therefore the undertaking has been satisfied. This is incorrect. The undertaking was to pay the sum of £686,497.36 that was due as at 20 September 2011. As I set out above, there was at that time a substantial amount of unbilled work in progress that was not taken into account when calculating the undertaking figure, and which was subsequently billed; and further work was done, in reliance on the undertaking, that was also subsequently billed.”

Mr Connerty's statement, “This is incorrect”, may not refer to the payment of the sums relied on by Ms Woodward; but this is not entirely clear.

42. In paragraph 28 and paragraphs 30 ff. Mr Connerty gives a great deal of detail about sums that have from time to time been applied against Mr **Ablyazov**'s indebtedness, but the effect of his case, as I understand it, is to say that some or all of the amounts in question have been appropriated to invoices or liabilities other than those representing the sum claimed in the undertaking. However, in paragraph 32 of his first witness statement he confirms that sums referred to in the preceding paragraphs “total approximately £900,000”. A further round of evidence ends with Mr Connerty's second witness statement to which he exhibits an extremely detailed cash account, but it is plain that there are areas of dispute (some, admittedly,

minor, but others more serious), so there appears to be some justification for Mr Carpenter's contention that the accounts and figures are unclear.

43. I do not accept Mr Bayfield's submission that the only sums received after the undertaking was given totalled £449,792. In making that submission Mr Bayfield seeks to narrow the manner in which Mr **Ablyazov** could meet his obligation by his use of the word “received”. Mr **Ablyazov**'s obligation was to pay. The obligation to pay could have been satisfied in a number of ways: by payments made by Mr **Ablyazov** himself, but also by payments made by others on his behalf (as had happened in the past) or by transfers from client to office account or the application or taking into account of credits. It could, for example, have been satisfied in part out of the £449,792 provided by an insurer. Mr Connerty says that it was agreed that that sum would fall outside the scope of the undertaking liability, but that is not accepted by Mr **Ablyazov**. Clyde & Co used £125,240 to attempt to satisfy an adverse costs liability, but the sum was ultimately applied to a post-undertaking invoice. There is a dispute about Clyde & Co's authority to treat that sum in that way. There is disagreement as to the effect on the account as a result of certain invoices being reissued without VAT, and questions have been raised on Mr **Ablyazov**'s behalf about £123,580 transferred from the Clyde & Co client account on 30 November 2011.

44. All the foregoing matters incline me to accept Mr Carpenter's proposition that Mr **Ablyazov** has an argument of substance to the effect that his obligation under the terms of the undertaking has been met.

45. Furthermore, there are areas of disagreement about substantial sums which I cannot resolve. I was not taken through the figures in anything like the detail that would be required to reach a proper view as to what precisely (if anything) might be owed by Mr **Ablyazov** to Clyde & Co under the terms of the undertaking. A question whether, for example, authority was given to use particular sums in a certain way may only be capable of resolution after hearing direct oral evidence. I further differ from Mr Bayfield in that I do not read the last sentence of paragraph 34 of Mr Carpenter's skeleton argument as an admission that £351,304.29 remains due. That is a figure reached in the context of what comes above. In paragraph 35 he raises further concerns.

46. Plainly there are areas of disagreement on the figures and as to the way in which funds have been applied. They raise points which may or may not turn out to be correct, but they are matters of substance that require detailed inquiry. I cannot be sure, as Mr Bayfield submits, that a sum in excess of £750 is due.

47. In any event, this is not the proper forum for taking a detailed account. A detailed account is more properly dealt with in proceedings for an account or in the course of the assessment proceedings pending before the master.

48. Mr Bayfield pointed out that Mr **Ablyazov** had not made the payment he was required to make on time. I accept that that appears to be the case. However, time was not made of the essence in relation to either party's obligations. (Clyde & Co did not comply with its obligation on time either: it took three attempts before the order was complied with, and an application had to be made for relief from sanction).

49. In summary, it seems to me that if, as appears to be the case, Mr **Ablyazov** has paid the sum Ms Woodward says he has paid since he gave the undertaking, then the payments made (by whatever method) will have extinguished his obligation, since, as Mr Carpenter points out, Mr **Ablyazov**'s obligation was simply to pay the sum; and if he has done so, he has done so and that is the end of the matter. It seems to me that that is determinative of the issue; but, if I am wrong about that, at the very least it gives rise to a substantial ground for disputing the debt. If Clyde & Co have put Mr **Ablyazov** in breach of his agreement by appropriating sums to a liability other than that arising under the undertaking it seems to me that it is possible, even likely, that the court would decline to exercise its discretion to make a bankruptcy order. That, arguably, constitutes an independent ground under rule 6.5(4)(d) Insolvency Rules 1986 for setting aside the demand. Furthermore, as we have seen, there are disputes as to what was agreed or not as to how some funds were

to be dealt with, and there is no agreed account or other material which enables may to conclude with any degree of confidence that there is an undisputed sum that could safely found a petition.

50. In my view, this is not a case of a debtor “raising a cloud of objections” (*per* Chadwick J in *Re a Company (No 006685 of 1996)* [1997] BCC 830 at 841, to which Mr Bayfield refers in his skeleton argument). All the matters referred to in this part of my judgment amount to grounds of substance for disputing the debt claimed in the demand, alternatively some other ground of substance on which the debt in the demand can be challenged.

51. Accordingly, I shall set aside the statutory demand.