Case No: BRO190814

IN THE ROYAL COURTS OF JUSTICE
SENIOR COURT COSTS OFFICE

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 19 November 2020
Start Time: 2.11 p.m. Finish Time: 3.30 p.m.

Before:

MASTER BROWN

- -

Between:

MR ANDREW ERLAM **Applicant**

- and –

EDMONDS MARSHALL McMAHON LIMITED **Respondent**

- -
- -

MS ERICA BEDFORD for the **Applicant**
DR MARK FRISTON for the **Respondent**

- -

APPROVED JUDGMENT

- -

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

[Transcriber's note: transcript prepared without access to case documents.]

Master Brown:

1. This is an application for assessment of various bills delivered by the Defendants. The Claimant is the former client of the defendant solicitors. The Defendants resist an order for the assessment of their bills.

2. Proceedings were issued as long ago as 6 August 2018 in the Sheffield District Registry. I first gave directions for a preliminary hearing in this matter following transfer to the SCCO in April 2019. Various hearings were adjourned, initially as a result of agreement between the parties. The application was due to be heard in-person at the outset of the lockdown. For reasons which were entirely understandable, that hearing could not proceed and the matter was then re-listed, and we have had three hearings since. I had it in mind to give this extempore judgment on the last occasion, but argument took us, on my estimate, close to quarter to five and I thought it appropriate to adjourn before giving my decision. Ordinarily, one would expect a matter such as this to be determined some time ago, but I hope that this recital of some of the difficulties explains why the delay has occurred.

3. The hearings have proceeded by way of video link. I pay tribute to the advocates in this case, not only for their helpful arguments and genuine assistance on this matter, but also because it is not always easy doing a hearing by video link. It has not always been that easy to hear everybody and questions have to be asked by way of clarification. Also, unfortunately, the participants have, I think, been pushed off the link, so that there have been interruptions. I am grateful to both advocates for their patience. These hearings by video link are, in my experience, tiring and demanding, and I understand why the argument was not finished earlier than it was.

4. I have what has been called a condensed electronic bundle which was provided after the paper bundle. It includes some additional material, in the form of some worklogs. I have read through and considered all the witness statements and documents within the bundle. There are multiple witness statements from both sides and the witness statements from others, not just those who are effectively parties, but also former clients of the Defendants. There is, in short, a large amount of evidence in this case.

5. I have two things to say the outset as to the evidence. First, it is clear that there are factual disputes. Initially in my directions, I gave an order that notices to require witnesses to cross-examine should be served. I understand, or at least I was told, that notice was served in respect of the evidence of Mr Marshall, solicitor of the Defendants, but no notices were served on the Claimant's witnesses. In any event, as I understand it, following the difficulties caused by the pandemic it was agreed that there should be no cross-examination and I am asked to determine the disputes of fact on the evidence that I have. That I have sought to do. Second, I should say something about a complication about the worklogs. These were presented in an apparently amalgamated form in the bundle. Worklogs were, as I understand it, initially appended to the invoices. I had understood that I had a full set of those worklogs. It emerged, really at the very last moment in the course of the second hearing, that there may have been a problem with this. I raised my concerns that the amalgamated worklog did not seem to tally with one of the invoices. I was subsequently provided with further worklogs, and I acceded to application, by Dr Friston, for the admission of this additional evidence. It seemed to me that there had been error when agreement was reached concerning this evidence.

Background

6. I take this principally from the skeleton argument of Ms Bedford and the statement of Mr Erlam, the Claimant. I understand it not to be controversial.

7. In May 2014 a Mr Lutfur Rahman was elected Mayor of Tower Hamlets. There were, as I understand it, concerns and suspicions amongst constituents that Mr Rahman was elected as a result of what might be called 'vote-rigging'. In 2014, the Claimant and three other constituents issued a petition. This culminated in a five-week trial in, or about, April 2015, at which Mr Rahman was found guilty of seven election offences and banned from public office. Mr Rahman was ordered to pay the petitioners' costs, subject to assessment and to make a payment on account of £250,000.

8. The Claimant says that he brought the election petition out of a sense of public duty for the benefit of the residents of Tower Hamlets and the public at large. He says he did not do so for personal gain, but that he has been left very considerably out of pocket, having paid, he says, a sum of about £83,000 to date in costs.

9. The Claimant, along with the other three constituents that I have referred to, originally instructed a direct access barrister, Mr Hoare, to conduct the election petition. There are, I am told, substantial amounts of outstanding fees, which are sought, in any event, by Mr. Hoare. In relation to subsequent matters, another firm of solicitors, Richard Slade & Co, were instructed. They have claimed costs against the Claimant and others. The sums involved in relation to those fees and costs are substantial. In relation to the direct access barrister, I have been provided with figures that suggest an initial fee of some £95,000 was due, and then some over £300,000 on realisation of some assets: in any event a substantial sum has been or was due to this barrister. In relation to Richard Slade's costs, they were claimed in the order of £230,000-£240,000.

10. As I understand it, in November 2015, Mr Rahman declared himself bankrupt and that gave rise to further issues in respect of the recovery of costs and the realisation of assets. There was, further, a substantial breakdown in the relationship with Richard Slade & Co, and an issue arose as to the costs payable to this firm.

11. Turning then to these proceedings, the application concerns some 21 bills, which are listed in a schedule attached to the claim form. I am told that in the Claimant's case that the totality of the bills comes to in the order of £97,000, broken down in accordance with the solicitor's reference as follows:

    - CIV/5 (some £73,000) referred to as "the appeal and costs proceedings", dealing with an appeal to a High Court judge against the determination of Master and contested property charging proceedings;

    - CIV/16 (some £22,500) relating to the sale of the property, this being 3 Grace Street, which is a property which formed part of the assets to be realised.

    - CIV/26, (some £1,660) which are related to judicial review proceedings- a challenge to the election result.

12. Some of the invoices, particularly in relation to the judicial review, are claimed at a 50-50 basis, a matter which I will come onto in due course, and I understand one of the earlier invoices in the appeal and costs proceedings is claimed at 25%. 100% is claimed against the Claimant in relation to proceedings concerning the house sale

13. Some substantial sums have been recovered, as I understand it, from the sale of 3 Grace Street. At least some of these bills, as I understand it, are treated by the Defendants as now having been paid on the basis of entitlement to transfer the sums realised from the sale to the client account. Anyway, be that as it may, the issues before me arise before payment of the bills and under the provisions of section 70,(2) and (3) of the Solicitors Act 1974.

Core relevant provisions of the 1974 Act

14. Subsections 70 (1) – (3) of the 1974 Act provide as follows:

> *"(1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.*
>
> *(2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—*
>
> *(a) that the bill be assessed; and*
>
> *(b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.*
>
> *(3) Where an application under subsection (2) is made by the party chargeable with the bill—*
>
> *(a) after the expiration of 12 months from the delivery of the bill, or*
>
> *(b) after a judgment has been obtained for the recovery of the costs covered by the bill, or*
>
> *(c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill.*
>
> *no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit."*

The issues

15. The parties have helpfully formulated the issues that arise in this application. They are as follows:

> *"(1) Whether or not some of the bills are not statute bills (and capable assessment), because, as Ms Bedford argues, they are not reasonably complete.*
>
> *(2) Whether the bills form what is referred to as a 'Chamberlain' bill, in other words a running account leading to a final bill, or whether they are independent interim statute bills. Interim statute bills are generally understood as being final bills for the period in which they cover, subject to assessment independently under the 1974 Act and, therefore, individually subject to the time limits under the provision of the Act. Interim statute bills delivered over 12 months before issue of process would be subject to section 70 (3) and the need to show special circumstances in order to justify an assessment.*
>
> *(3) Assuming Dr Friston is right and all the bills are interim statute bills, whether or not special circumstances exist.*
>
> *(4) Whether, in any event, even in respect of those bills that were delivered, within the 12-month period prior issue, whether or not I should exercise my discretion to allow assessment of these bills, and if I am to do so, whether I should do so on terms or conditions."*

16. Dr Friston makes the point that quite a number of the bills, a significant proportion of the sums involved, are in respect of bills caught by section 70(3), that is to say, delivered over 12 months prior to issue of proceedings. They are detailed in Ms Bedford's skeleton argument as follows:

    - In relation to the sale of property proceedings: bill 2650 was delivered on 28 April 2017 for £10,400; bill 2765 for £163 was delivered on 20 June 2017; then bill 2769 delivered on 20 June 2017 for £1,530.

    - In relation to the appeal and costs proceedings: there is bill 2182, delivered on 31 August 2016, for some £31,343; bill no. 2247, delivered on 30 September 2016, for some £2,000; bill 2351, billed for £31,260, delivered on 30 November 2016; with a further bill, of £20,000, 883, delivered on 31 January 2017; and bill no. 2017 delivered on 28 April 2017.

    - In relation to the judicial review, there is just, as I understand it, one bill: no. 2773, delivered on 20 June 2017, for some £630.

17. I have all those dates and amounts in mind.

18. Before I set out my conclusions and reasons, and I do not say this as a criticism of the advocates, I cannot help but note that there are a very large number of points were taken in the parties' evidence. I had in mind what was said by Turner J in a completely unrelated case, *Municipal de Mariana v BHP Group and other* [2020] EWHC 2930 (TCC), that in some cases in the interest of proportionality, it is simply not reasonable or necessary – and I take that to be this case –to cover every single point that has been raised in all the evidence. If I were to do that here this would be a very much lengthier judgment than it should be, and will be. But that does not mean that I have failed to consider the points, rather , as it was put in *Municipal* case, that the inclusion of their analysis would not have a material impact on the determination of the central issues. Indeed, the advocates' submissions have proceeded, as I understand it, very much on that basis.

(1) Are all the bills reasonably complete?

19. Ms. Bedford's submission was that some of the bills were not reasonably complete because they did not include information about interim on account payments that had been made and did not further include an account of the sums received from other parties ('*inter partes*') in proceedings. It was said by Ms Bedford that it is a requirement of the 1974 Act, or at least implicit in provisions of the Act, that such details should have been provided in a bill and in the absence of such details the bills are not compliant with the Act. She relied not upon the wording of the statute but on the decision in *Cobbett v Wood*, [1908] 2 KB 410. In that case solicitors had recovered monies *inter partes* but had only claimed in a bill for the shortfall on that recovery, as against the client's liability to the solicitors. The Court of Appeal decided that the relevant bills were not adequate for the purposes of the relevant provisions of the statute which then applied, a predecessor of the 1974 Act.

20. Ms Bedford relied in particular on the following passage from judgment of Fletcher Moulton LJ:

> *"Taking the two signed bills together, they do not purport as regards to that item to be a bill giving all necessary information as to the claim made by the plaintiffs against the Defendant."*

21. I think it is clear from the decision that the necessary information in that case included details of the fees and disbursements of the solicitors. That was the information which had to be included, and it was the failure to include that information which led to the decision that the bill not being considered a statute bill for the purposes of the statute. So I do not think Ms. Bedford can draw from this case the proposition she seeks.

22. It seems to me that Dr Friston is right to say that the information which it is said should have been included in the bill is not a prerequisite to the bill being a statute bill. It seems to me that it would be odd if the result Ms. Bedford contends for were correct because there are other provisions within the 1974 Act that deal with cash accounts: a client can ask for a cash account. I am bound to say from my own experience there can be quite a lot of confusion or dispute about what has been paid and what has not been paid under a bill and it would be odd if a mistake in this regard, or an inadequacy in this regard, would change the character of the bill.

23. In any event, even if I were wrong about this, it seems to me that it would be open to me to allow an amendment to ensure the bill was correct as to the matters complained of.

24. So I decide the first issue again the Claimant.

(2) Interim statute bills or one '*Chamberlain'* bill?

25. This is a substantially more involved issue which affected the bills delivered over 12 months before issue. Ms. Bedford's case was that such bills should be considered as part of a running account, under the principles in *Chamberlain v Boodle & King [1982] 1 WLR 144*, in the context of a retainer between her client and the Defendant solicitors which she says was an 'entire agreement'. An 'entire agreement', as others have commented and which may be more technically accurate, is one which involves an 'entire obligation'. She asserts that on well-established principles, only on completion of the 'entire obligation'

is a solicitor, in general, entitled to payment. She says that the terms of the retainer, being the letter of engagement and the Terms of Business (which were separately agreed) do not sufficiently and unambiguously make clear that the solicitor has an entitlement, notwithstanding the 'entire obligation', to serve interim statute bills.

26. Ms. Bedford draws particular attention to clause 5 of the Terms of Business, dealing with payments on account:

> *"We may also ask for money on account, fees and disbursements either incurred or anticipated. This money will be applied against the next bill issued in the relevant matter. If our request is not met, we may cease to act in any matter and may apply, where necessary, to be taken off the record as solicitor acting in the matter. We also reserve the right to cease to act for you where any bill or request for payment has not been met."*

27. And to clause 7 under the heading 'Bills':

> *"a. Our bills are usually delivered monthly (unless otherwise agreed) and are payable in full upon receipt. We reserve the right to transfer monies held on behalf in our client account against any outstanding bills. We accept all major credit cards subject to payment of a 2% surcharge at the time of payment.*
>
> *b. If a bill is not paid within 30 days of issue, we may charge you interest on the outstanding amount. Interest will be calculated at the rate applicable under Late Payment of Commercial Debts Interest Act 1998, currently 8% above the Bank of England base rate."*

28. Ms. Bedford also refers me to the provisions found in clause 7 at g:

> *"g. In non-contentious matters, we deduct costs, other than disbursements in settlement of the bill from monies paid on to us on account, and you or an entitled person objects in writing to the amount of the bill, you <u>may</u> have the right to have the bill assessed by the court under section 70, 70(1), 70(2) of the Solicitors Act 1974. This is known as "taxation". To take advantage of the process, you should apply to the court before the expiration of one month from the delivery of our bill, although this period may be extended if the court sees fit. We suggest you seek independent legal advice, should you wish to invoke the taxation process."* [my emphasis]

29. And to clause 7 at i:

> *"i. In contentious matters, if you are unhappy with our bill, you <u>may</u> also be entitled to have the charges reviewed by the court and the procedure for this is set out in sections 70, 70(2) of the Solicitors Act 1974."* [my emphasis]

30. Ms. Bedford says that the contract, by its express terms, is not sufficiently clear that the bills to be served, or which may be served, are final for the period that they cover and therefore the bills served are not interim statute bills. She says an ambiguity in 7 a. and b., is compounded by the use of the word, in particular, "may", in 7 g. and i.; it is not made clear that the bills are, if they are interim statutory bills, subject to the provisions in section 70 and 70(1). This ambiguity, she says, leads to potential unfairness, because the client does not really know where he stands in relation to this matter. She says that I am bound by the decision in *Vlamaki v Soukias & Soukias* [2015] EWHC 3334, to find that the inadequacies in the contract are such that there is no entitlement on the part of the solicitors to serve interim statute bills.

31. In her submissions, although I do not think that she expressly conceded this, she appeared to recognise that any inadequacy in the written contract has to be looked at within the full factual matrix, such that a sophisticated client, who has a full understanding of the workings of the Solicitors Act or the contract, might, in some circumstances, be taken as having an understanding which was sufficient to give rise to the right to the solicitors to serve interim statute bills.

32. Ms. Bedford says, to the extent that it is argued otherwise by Dr Friston, that there was no express agreement, nor any agreement that could be inferred generally, that the solicitor could serve interim statute bills.

33. Indeed, independently of her reliance on *Vlamaki*, she says that there was in the nature of what is referred to as a 'gentleman's agreement' between the Claimant and the Defendant to the effect that the bills would be "sorted out" at the conclusion of the matter, this being the realisation of the assets, in particular 3 Grace Street. The realisation of the assets would enable the fees to be paid and until that occurred any bills served would be treated as part of running account. She relies upon what is said in the witness statement of Mr Erlam, of 1 May 2019, paragraph 21:

> *"As regards fees, Mr Marshall recognized the financial position in which we found ourselves and said that although his firm could not work on a no-win no-fee basis, he was prepared to wait for his fees to be sorted out when assets were secured from Mr Rahman. He said this would be a "gentleman's agreement". I had no reason at that time to question his good faith and integrity. He was friendly and said he was sympathetic to the fact that the petitioners had taken the much-needed election petitioning case purely in the public interest. At that time, Mr Marshall has presented himself as a principled solicitor willing to help out the Petitioners. The Petitioners decided they would appoint Mr Marshall as a result of this discussion. It was only very much later that I discovered by chance that Mr Marshall is not a solicitor…"*

34. Mr. Erlam says he was shocked by what he describes as a "revelation" and he would not have recommended instructing Mr Marshall, had he known otherwise. Mr. Marshall, who is a practising barrister denies that he ever claimed to be a practising solicitor. In any event Mr. Erlam goes on to say that "s*ubsequent events have shown that he was neither interested nor professionally skilled or suited to looking after his clients' interests as regards the recovery costs particularly to the simple sale of 3 Grace Street.. Our instructions to Mr*

Marshall were very specific: to try to secure our costs as efficiently as possible, bearing in mind: a) that most of the work securing possession of 3 Grace Street had been completed; and b) our very limited resources.

35. Mr. Erlam says contracts were signed with him and that he is aware that Ms Moffat, a fellow client, signed an identical contract. In respect of Mis Simone and Mr Hussein, the other constituents and clients, he says that had understood they would also do so, although he says subsequently had doubts as to whether that actually happened.

36. So that is relied upon as part of the factual matrix by Ms Bedford, which she says I should take into account.

37. Further, she says, even if there were no 'gentleman's agreement' and there was simply an agreement to forbear in pursuing the sums due under the bills, that would mean that the bills could not, in any event, be statute bills.

38. Dr. Friston says the retainer was not an 'an entire contract' or a contract with an 'entire obligation' and that the parties actually entered into a general contract for services. He says this had very specific consequences because a lack of any express reference to an entitlement to serve statute bills was not fatal to the solicitors' ability to do so. In the case of a contract for services generally it was necessary to infer, for the proper working of such a contract, that the solicitors could deliver interim statute bills. A general contract of services could not, if I understand his position correctly, work properly if that were not the case.

39. Secondly, he says that the contractual terms were conventional terms and that *Vlamaki* is a decision which was confined to its facts. He seeks to distinguish it upon a number of grounds, one of which being that the client in this case, he says, was a sophisticated client who had himself amended the contract of retainer. He refers to a note in manuscript by the Claimant which he says extended the retainer to cover costs matters generally (removing the limitation to proceedings concerning bankruptcy matters).

40. Thirdly, it is said, in any event, that being a sophisticated client, Mr Erlam would have fully understood that the bills served were interim statute bills and should be treated as such, and time ran against the clients. He could reasonably be taken have had that understanding on the basis of the information available. He certainly had the understanding that they were final bills, and as such were interim statute bills.

41. Dr. Friston denies that there was any gentleman's agreement. This is put by Mr Marshall in his witness statement as being "an invention", no less. Mr Marshall, in his statement, says that for a number of very detailed reasons there could not have been a gentleman's agreement of the sort that is being contended, and that it must have been understood that the express written terms of the contract applied; and that they precluded such an agreement. He says that this was a matter raised for the first time after the event and that the inherent probabilities were against any such agreement having been entered into. This was, at least in part, because the Defendants were instructed in relation to the recovery of costs and in respect of a dispute of costs with previous solicitors, there were other fees outstanding to the previous solicitors. It would be highly unlikely that the defendant solicitors would agree to any arrangement which deferred consideration or challenge of their fees, or indeed deferred payment potentially - in any event any agreement that differed from the terms of the express terms.

42. Dr Friston also contended that Mr Erlam was a witness upon whom I could place no reliance because he has proved himself in these proceedings to have a wholly unreliable recollection of events. He referred in detail to Mr Erlam's witness statements. It is not necessary for me to set out all the references in the papers which he relied upon, but I have mind in particular paragraph 5 in Mr Erlam's later witness statement, in which he makes quite a number of concessions concerning what he had earlier said in his earlier witness statement. He had previously claimed that the retainer was not extended, or at least that there was no written extension of the retainers; he makes a concession that there was an extension by virtue of an email on 27 June 2016, and indeed by reference to a note prepared by Mr Marshall. He made earlier contentions that he was not notified of a hearing, but then it emerged that he had actually attended a hearing. He made allegations that he had not been provided with an undertaking given to Richard Slade, but later accepted that he was copied in. There are quite a number of allegations of that sort which were then retracted. Dr Friston argued that I could not, therefore, rely upon anything that Mr Erlam has said in relation to these matters. I have in mind all those points.

43. I was also taken to the note of a meeting on 20 July 2016, which was attended by Mr Jason Pavlou, who was understood to have accompanied Mr Erlam to the meeting, Mr Marshall and Ms Fani Gamon (a fee earner of the Defendants). The note reads:

> *"AE [the Claimant] asked re the fees for EMM. AM [Mr Marshall] was not sure what the WIP [work in progress] was currently on the case but advised that a bill would be sent out and that there would be further discussions, although some payment would need to be paid initially (whether there was later an agreement re monthly instalments would be discussed further at a later date.)"*

44. Dr Friston says that no gentleman's agreement was recorded at that point. He refers to communications with a Crowdfunding institution and to an anticipation of payment in respect of the bills.

-general retainer for services?

45. In my judgment, it is clear that the retainer was not a general contract of services. The initial client care letter of 15 June 2016 specified the work to be covered:

> *"Re Mohammad Lutfur Rahman bankruptcy proceedings, I would like to thank you for instructing my firm in relation to the above matter."*

46. It is correct that subsequently this was amended in manuscript so as to provide an extension of the retainer to cover cost matters. Dr Friston refers particularly to a subsequent updating note, at page 337 in the bundle, which was sent by Mr Marshall to Mr Erlam, which provides (under the heading 8* Matters):

> *"a. The client care letter identifies the matter "in connection with the current bankruptcy proceedings against Lutfur Rahman.*
>
> *b. It is clear that there are multiplicity of matters to resolve, (including costs with RS [Richard Slade] and [the direct access*

> *barrister]), the appeal just heard, the realisation of the properties and costs orders, as well as other matters arising in the bankruptcy.*
>
> *c. For the avoidance of doubt, we understand (and we ask to be notified if not correct) that you wish all matters to be within our instructions."*

47. I do not accept however simply because the retainer was extended to what may be referred to as "*multiple matters*" that it therefore became a general contract of services. It seems to me clear that in this note Mr Marshall, whilst using the word "including", nevertheless did set out the matters to be covered by the retainer. I accept that using the word "*including*" might be argued as intending a broad scope. Nevertheless, he was, as I read it in context, intending to be specific about the matters to be covered. I think this situation is a long way from the situation that arose in *Warmington v McMurray* [1937] 1 AER 562, a case relied upon by Dr. Friston, in which the court proceeded on the basis that there was a general retainer to extricate the client from "*her difficulties*".

48. Ms Bedford, in her submissions, illustrated the distinction by reference to the metaphor of a taxi: were the instructions to the solicitor to go, as it were, on various taxi journeys? or just in for a general use of a taxi and for the taxi driver to take the client wherever the client wanted to go? To my mind, it was the former, notwithstanding the multiple matters which were covered.

49. Indeed, it seems to me whilst it postdates the retainer, the fact is that invoices were sent out in relation to three specific matters under three specific client references: CIV/5; CIV/26; and CIV/16. It seems to me clear that the work was billed in this way because the specific matters for which the solicitors had been instructed were sufficiently clear. It is not unusual, in my experience, for solicitors to be instructed on one particular dispute, but that this gives rise to other associated or 'offshoot' proceedings: it may not be necessary to extend the contract, or the retainer, to cover those matters. In any event I do not think the mere fact that there were multiple matters, all essentially interrelated and associated with the appeal, realising assets in this case and resolving the costs matters gave rise to a general retainer for services.

50. There is another point: had there been a general retainer of the sort contended for, one might have anticipated that there would have been one bill in relation to a specific period, rather than multiple bills on the specific matters. I raised with Dr Friston my concern that if he were right in relation to this point, it might mean that the Defendants fell foul of the rule that a solicitor cannot serve more than one statute bill in relation to the same period. In other words it might be said that if he had a general contract of retainer, some of those bills would be ineffective because they overlapped with other. He did not accept that that was the rule, but it seems to me that it was not clear to me how the actual billing in this case followed the interpretation of the arrangements that Dr Friston urged upon me.

51. In any event, I am against Dr Friston in relation to this issue.

- ***Vlamaki***

52. In *Vlamaki* Walker J was concerned very similar issues to the one that arises here. He said this:

> *"The First Aspect: Interim Statute Bills?*
>
> *10. A solicitor's retainer is an example of what, although known as an "entire contract", is perhaps better described as involving an "entire obligation": a solicitor can generally only claim remuneration when all work has been completed, or when there is a natural break. That, however, is subject to any agreement to the contrary. As is pointed out in Cook on Costs 2015 at para 2.4, solicitors have always been free to agree terms with their clients in respect of both non-contentious and contentious business, and in recent years solicitors have appreciated the desirability of including provision for stage payments among such terms. In that regard, paragraph 2.5 points out advantages and disadvantages of non-statute interim bills "on account". Among other things, such a bill need not be the final quantification of all work included in it. Moreover such an interim bill, even though it is not a statute bill, may have a significant consequence as regards money received from the client and held in the solicitor's client account. This is that, provided that the interim bill does not go beyond the amount of costs and expenses incurred to date, it entitles a solicitor to transfer money from the client account into the office account in payment of the bill."*

53. At paragraph 14 Walker J set out the terms of the retainer which he was considering. And at paragraph 15 he said:

> *"In accordance with established principles, I interpret the terms of the contractual retainer by reference to the agreement as a whole and by reference to the factual matrix at the time of the agreement."*
>
> I pause here to say that I take the same approach.
>
> *"In addition I have regard to two concessions which were properly made by Mr Mallalieu* [counsel for the solicitors]:
>
> *(1) if there were an ambiguity on a fundamental aspect of the terms and conditions that cannot otherwise be resolved then the ambiguity is to be determined against the solicitors [I interpolate to say this is what is referred to as the contra proferentem point]; and*
>
> *(2) the factual matrix was that Mr Mallalieu's client was a firm of solicitors while Dr Vlamaki was not a lawyer."*

54. Then, at paragraph 16:

> *"These concessions reflect the approach taken by Spencer J in Bari v Rosen*[1]*. In that case ambiguities in the retainer were resolved against the solicitors, with the result that an entitlement to render bills which the solicitor required to be paid "by return" was not an entitlement to render interim statute bills. In reaching that conclusion Spencer J noted the observation of Master Leonard cited above. Those observations underscore the impracticality of and unfairness to a client if a retainer has the effect that interim bills are final in relation to the period that they cover, with resultant drastic limitations on the ability of the client to make use of statutory provisions for assessment. Thus, for example, a client who followed the e complaints procedure in clause 11.4 of the present retainers would, without knowing it, be giving up the statutory right to taxation within one month of delivery of the bill. These drastic limitations, , and the inevitable recognition of the factual matrix found in concession (2) above, in my view constitute sound reasons for strictly applying concession (1) above. Application of such a concession carries with it a corollary: unless the retainer makes it unambiguous, the client will not be able to say that under the retainer bills are final in relation to the period that they cover. However that corollary, to my mind, is unlikely to cause injustice to either side."*

55. In his conclusions Walker J said this:

> *"22. Thus, as to the ambiguity in clause 6.1 identified by the master, the submission for Sookias & Sookias was that these factors had the result that the ambiguity fell away, or at least that it was so outweighed by them as no longer to warrant a conclusion against Sookias & Sookias. I am not persuaded by this submission. To an objective reader, what is contemplated…"*

56. I do not think I need deal with the reasons that he gave on that particular point. However the learned Judge went on to say:

> *"23. Absent from those clauses in particular and the retainer in general is any express statement that each interim bill would be a final bill for the period that it covered. I do not underestimate the force of the argument that they must be statute bills because of what is said in the retainer as to payment being due and as to interest. That argument, however, assumes knowledge of the 1974 Act and procedures under it: but this does not sit happily with concession (2). In the ordinary course a lay client cannot be assumed to have such knowledge.*
>
> *24. To an objective reader without special knowledge of the 1974 Act the only indication that any bill is to be final is what is said*

[1] [2012] EWHC 1782 (QB)

> *in the second sentence of clause 6.1. I agree with the master that there is a substantial ambiguity here. The ambiguity is not removed by the provisions cited by Mr Mallalieu. Those provisions do not tell the client that the bill "at the end of each month" will be final as to work and expenses during the period covered by the bill. From the solicitor's point of view, they are all consistent with Sookias & Sookias wanting to minimise risks in relation to their cash position ....”*

59. The learned Judge sets out a number of the provisions in the retainer and continues,

> *“25. I add that, to my mind, consideration of these provisions reinforces, rather than removes, the ambiguity. In those circumstances, even if the word "final" had been absent from the second sentence of clause 6.1, I would not have regarded these provisions as making it clear that any bill was to be final as to the period that it covered.”*

57. In *Iwuanyawu v Ratcliffes Solicitors* [2020] EWHC B25 (Costs) Chief Master Gordon-Saker said as follows:

> *“21. It seems to me, following Vlamaki v Sookias & Sookias, that if a solicitor wishes to reserve a right to deliver interim statute bills which are intended to be final for the periods that they cover, as opposed to requests for payment on account, that right must be spelled out clearly in the contract with the client. In this case it was not.”*

58. It seems to me, following the reasoning of Chief Master Gordon-Saker, that such ambiguity as existed in the retainer in *Vlamaki* was not fundamental to the decision: the decision rested on the importance of solicitors making it clear in the retainer that bills were to be final for the period covered.

59. I do not underestimate the point that is made by Dr Friston. He says that if there were such a principle it has, as he put it, lain undetected for a very considerable amount of time. He referred me to *Slade v Boodia* [2018] EWCA Civ 266 in which the Court of Appeal considered whether it was a necessary feature of statute bills that they were complete self contained bills of costs to date. He said that the Court of Appeal might have been expected to have considered the point which has now been raised if such a principle existed. I have those points in mind. But I do not think the matter that arises here clearly arose for consideration by the Court in *Boodia.* Further, it would seem - if it were necessary for me to go this far- that the points arising out of the concessions of Mr Mallalieu which were considered by Walker J at [15] of his decision were fundamental and important ones that explain his decision and that they were points of distinction with other cases.

60. I do not accept Dr Friston’s argument that this is a case where the terms are not substantially on the solicitors’ terms. To my mind, they were. Any amendment made as to the extent of the retainer did not in my view alter the substantial point that these terms should be construed against the profferor of the terms – in this case that was the solicitor. Nor, to my mind, is there any substantial distinction in this case to be made with the other

matter which was clearly fundamental, or at last important, to the approach taken by Walker J, namely that one of the parties to the agreement was a client and the other is a solicitor. As I raised with Dr. Friston in the course of argument, in considering the terms of a retainer, consideration may be required as to the possibility or the presumption, of undue influence - albeit I do not think I need to go that far in considering these matters.

61. In short, I do not consider there is any basis for distinguishing the decision in *Vlamaki*, nor do I think that the passages I have referred to above, as they were interpreted by the Senior Master, should be regarded as obiter to the decision concerning ambiguity.

62. There are, as was pointed out by the Senior Master in *Ratcliffes*, good reasons for the conclusions reached by Walker J. Having set out passages in the judgment of Lord Denning MR in *Chamberlain v Boodle & King* the Senior Master said at paragraph 26:

> *"This reflects reality. A client receiving monthly invoices may well have no idea whether she will wish to challenge them until either she has received sufficient to be caused concern or has reached the end of the matter and can consider the total, perhaps against any estimate that may have been given. In most cases it will be unrealistic to expect a client to be able to challenge her own solicitors' bills in the middle of matrimonial proceedings."*

63. I do not understand the reference to matrimonial proceedings to be limiting the broad point that the Senior Master was making as to the difficulties that are caused by a clause which entitles a solicitor to serve interim statute bills, subject to time limits for challenge. In such circumstances it is beholden on the solicitor to make sure that the contract makes it clear that any bills served on an interim basis, are final for the period.

64. Dr Friston says that this obligation on the solicitor is unrealistic, unworkable, or unfair. He does so by reference to the case of *Boodia* and the possibility that some matters (disbursements) may be charged by the solicitors in different final bills from those for solicitors' fees. Whilst I understand his point, I do not accept that the matters he raised make the obligation unworkable or unfair. It seems to me that on these issues, the matters are substantially in the client's favour for the reasons set out in the judgment of Senior Master Saker that I have referred to earlier.

65. Dr Friston also argued when you look at the bills that were actually delivered, they are or look like statute bills. They make it clear that they are subject to challenge and the like. I would agree that they look like statute bills. The difficulty with this argument is that their delivery postdates the entry into the retainer. So they do not change the nature of the contract. By that stage, the contract has been formed, and I do not think the mere fact that the bills may appear to be statute bills and are otherwise compliant with the Solicitors Act can change the nature of the entitlement under the contract.

66. Further, Dr Friston argued that even accepting that *Vlamaki* is rightly decided – and he did not say that *Vlamaki* was wrongly decided– it could not be taken as extending the requirement on a solicitor to ensure that the contract itself expressly sets out any bills to be served on an interim basis were final. It should be inferred, as I understand the argument, from the circumstances that the parties had agreed that interim statute bills could be served, reliance being placed on the 'natural break' principles in *Adebi v Penningtons* [2000] 2 Costs LR 205. I do not accept that these principles are on point.

There was a written contract of retainer in this case. In cases where there are natural breaks it may be may be possible for solicitors to serve interim statute bills. But the entitlement to do so is based on an inference to be made from all the circumstances. I do not consider that there is any inference to be made that there was an agreement that interim statute bills could be served in this case. As is clear from *Adebi*, if such any such inference is to be made it would be expected that following service of the bills there would be payment of the bill without demur. That did not happen in this case. I am, accordingly, against Dr Friston in relation to this point.

67. I would add that Eveleigh LJ in *Davidsons v Jones-Fenleigh* [1980] 124 Solicitors Journal 20, said, in agreement with what had earlier been said by the court:

> *"In this case the solicitors were not retained for a single action or specific litigation where it may be that, prima facie, the contract is entire and one bill would be contemplated by the parties. In this case they were retained generally in relation to the defendant's matrimonial affairs, and it seems to me that it could not possibly be understood by the parties, nor indeed a workable rule, that the solicitors should not be paid until the relationship between the parties had ceased. ... The client in this case accepted the bills and he accepted them as final, and I think that the transaction here was the same as that envisaged by the Master of the Rolls, Sir George Jessel, in In re Hall & Barker ..."*

68. This passage suggests that one of the factors that may be relevant in considering whether it may be inferred that there was an agreed entitlement to serve interim statute bills is whether or not the contract of retainer is a general contract of services rather than one specific to a particular matter. I do not think that I need address that matter in any further detail. I am not satisfied that any agreement can be inferred which could be relied upon in this case as establishing a right to serve interim statute bills.

69. Turning to the further point made by Dr Friston, that Mr Erlam was, as he put it, a sophisticated client and that he had a sufficient understanding as to how the Solicitors Act worked or, in any event, understood that these bills were final. He draws my attention to an email, which is sent to Debbie Simone, Ms Moffat, and Mr. Hussein, also clients of the Defendants, on 21 July 2016, in which Mr. Erlam refers to a number of options. He said:

> *"Option 1*
>
> *We refer the bill to the taxation court tomorrow to dispute the whole bill. This places everything on hold. The fees are significant, several thousand I believe.*
>
> *The downside is that we fail to achieve the 20% deduction we have to pay Slade's bill for the taxation costs, likely to be around 25k. Our costs are likely to be about the same."*

70. Dr. Friston says that this shows an understanding of the 'one-fifth' rule (see section 70 (9) of the 1974 Act). Mr. Erlam goes not say:

> *"Option 2*
>
> *As Andrew et al believed that the bill is not payable until funds actually come in that we will let the bill ride.*
>
> *The downside is that Richard may try to sue in the interim, so hold on to your hat and that subsequent referral to the taxation could for taxation is not an automatic right[sic]."*

71. It may well be that this indicates some understanding at that stage of how the process of assessment worked. I am not satisfied that these show a full understanding, or the level of understanding anticipated as necessary by Walker J, in particular that the bills to be served were final for the period they covered. It does not to my mind demonstrate a sufficient level of understanding.

72. On this point I was referred by Ms Bedford to an email on 27 June 2016, following the service of the client care letter, but before the signature in relation to the terms of the conditions (the initial client care letter was signed on 15 June, but the Terms of Business were signed on 30 June). It is from Andrew Marshall to Mr Erlam and in the following terms:

> *"I think the client care letter should be extended to deal with the costs matter. I know that we are/have been, but I thought I ought formally to raise it. You do not need to do anything, unless of course you disagree!*
>
> *Discussing this, the time runs from the final bill. That does not mean the "last" because each invoice can be a final bill. Looking at them they have some elements of a final bill but appear to be missing others. Also, as a CFA, you would not expect to find bills until the conditions for payment have been met. It may well be that all bills until the latest (23 June) are, in truth, interim bills."*

73. Ms Bedford was anticipating the argument from Dr Friston that even if she were right that Mr. Erlam lacked the necessary knowledge initially, as at 15 June, by the time the Terms of Business were signed Mr Erlam had the necessary knowledge. I am not however satisfied that I could draw such a conclusion from this information. Mr Marshall plainly took it upon himself to explain to Mr Erlam matters relating to the finality of bills because, it may be inferred, he anticipated that Mr Erlam would not know about them himself. But, be that as it may, it seems to me that this email does not indicate in clear terms whether either in the case of the Defendants' bills or in respect of the bills of Richard Slade (whose bills were then being considered) the bills were final or what criteria rendered such bills final: the email says "*each bill can be a final bill*" and then refers to certain criteria, without setting out the criteria, which may, or may not, render a bill a final bill. I do not think the email conveys the information that would have sufficiently informed the Claimant that the bills to be served by the Defendants were final bills. This was a discussion after the client care letter was signed. I accept it was before the Terms of Business were served, but I am not satisfied that it is appropriate for me to draw the conclusions Dr Friston urges upon me as to factual matrix going to knowledge or understanding necessary on the part of Mr. Erlam.

74. So, I accept Ms. Bedford's argument, for the reasons which she gave, that the retainer was inadequate and not sufficiently clear in its terms to support a right to serve interim on account statute bills and that this case is on all fours with *Vlamaki*.

-gentleman's agreement?

75. It may not, in the light of the findings I have already made, be necessary for me to make any findings on this matter, because my earlier conclusions determine the second issue in the Claimant's favour. But there has been substantial argument on the point and I think in the event I should do so.

76. I have referred in detail to the matters that have been set out in Mr Marshall's witness statement, and I accept that there is a clear foundation for the concern that Mr Erlam does not have a full and complete recollection as to things that happened. I have to say that in my experience it is not unusual, indeed quite common, for clients not to remember the detail of events in the course of litigation. The discrepancies that are noted are substantial but there appears to be an element of what might be called 'venting' and I am not satisfied that I should take from what was asserted and what actually happened as, in all the circumstances, wholly undermining the credibility of Mr. Erlam, as Dr Friston argues, or that Mr. Erlam's recollection cannot in other respects be relied upon.

77. I have, moreover, looked closely at all the relevant documentation. I will refer to some of it. There is a relatively extensive amount, that does not mean that I have not considered it all.

78. I note, on 13 July 2016, Mr Erlam wrote to Mr Marshall in an email, saying:

> *"I am conscious of the fact that you will need to be paid a fee for sorting this matter out. Please will you let me know what has been charged to date and, if you can, how much more you feel needs to be done on the work to settle the whole matter."*

79. Then, at page 347 of the bundle, there is a lengthy email from Mr Erlam to Mr Marshall of 6 September 2016 including the following passage:

> *"The sensible thing would be to strike a deal, but that must allow us to pay [the direct access barrister] and, of course, your service must be paid for too. We have two supporters who lent money when we really needed it. By the way, can you inform us where we are with your charges? Thank you for not pressing your charges on us at this difficult time."*

80. The passage, of course, indicates there was a liability to pay fees then but that the Claimant had not been pressed for payment. The email goes on:

> *"A deal would involve, say, everyone halving their demands and agreeing to leave the matter and move on."*

81. Then, at page 349 of the bundle, at paragraph 8 of an email of 6 September 2016 from Mr Erlam to, it would seems, a fellow client:

> *"We will, of course, have a bill to meet from Andrew Marshall."*

82. Dr Friston, in his skeleton, put this as, "*We also, of course, have a bill for…*" in the present tense, whereas Ms Bedford noted that it was in the future tense, "We *will* have a bill". She also relied upon the fact that it was in the singular, pointing to an understanding that any bills in the interim would not be final.

83. There is then an email of 27 March 2017 which contained the following passage:

> *"Please can you do a calculation of how the costs will work out? How much is your bill likely to be [?] How much does [the direct access barrister] want and, more importantly, how much will he settle for? Obviously, we will settle your bill in full first. It has been good value because we have got assets in. Slade? we need a plan by the time the house is sold, as you warned me. I don't see why I should not get my money back. If as seems likely we will not get our money back from the bankruptcy eventually, everyone apart from you must take a haircut. How short a haircut? You must have a plan, if I know you quite well these days."*

84. Both sides making reference to this as supporting their case, Ms Bedford in particular relying upon the use of the word 'bill' in the singular *(*amongst other points).

85. Then is an email of 19 October 2017 [at page 127], this from Mr Erlam stating as follows:

> *"Andrew agreed with me when I gave him instructions, also again separately with Debbie Simone and Azmal Hussain [sic] shortly afterwards, that he would wait for payment until 3 Grace Street was sold and when the proceeds were recovered. This was an amendment to the contract, no monies therefore yet due to EMM Legal."*

86. I was also referred to the witness statement of Mr Pavlou, who, as I have already indicated, attended a meeting with Mr. Marshall. He says in his short witness statement, dated 30 April 2019, that he was closely involved in the election petition case. He describes his first meeting with Mr. Marshall as being one also attended by Mr. Erlam. He says he went to Mr. Marshall's office and was taken across the road to a coffee shop to discuss the case and goes on to say:

> *"When questioned about fees, Mr Marshall said it would not be much, as it was a simple and straightforward case, and Mr Erlam could deal with these fees once the house was sold."*

87. Ms Bedford relies in particular an email dated 15 December 2016 to Mr Erlam from Mr. Marshall as supporting her case as to the alleged gentleman's agreement. Mr. Marshall says in it:

> *"Dear All*
>
> *Andy was present at a hearing before Master Teverson and conducted from my side by Katie Grey.*

> *The short and relevant version is that the Master granted the order for possession of sale of 3 Gray Street to the four claimants for you and permitting the house to be sold for not less than £475,000.*
>
> *The legal costs of the application were granted in full*
>
> *Once therefore the property is sold the following place in this order, the legal costs of the application and the ongoing (reasonable) costs to bring about the sale of the property are paid.*
>
> *The priority debts, i.e. the mortgage paid off.*
>
> *The four claimant's debt owed is paid off."*

88. Ms. Bedford says that this email was consistent with Mr Marshall having an understanding that the solicitors would wait for realisation of the assets before being paid.

89. I understood Dr Friston to acknowledge the force of point that the material might at least show an agreement to forbear from seeking payment under the bills, albeit that his instructions were that there not been such an agreement. It seems to me clear, looking at all the matters including the note of the meeting of 20 July 2016, that there probably was an agreement to forbear from seeking payment under the bills. This is notwithstanding the point that Dr Friston made as to the inherent improbabilities of a solicitors in this case making such an agreement, given the background of non-payment of fees. It seems to me that Mr. Marshall did have it in mind that he would wait for payment.

90. I understand, of course, that payments were anticipated, as is evidenced by the Crowdfunding email. Some payments were anticipated. It was not a case of the solicitors not necessarily being paid anything as the matters went on, but it does seem to me that documentation points to there having been an agreement to forbear from the pursuit of those fees. This was consistent with an anticipation that fees would be paid from the realisation of the assets, in particular 3 Grace Street.

91. Dr Friston argued, rightly in my view, that a distinction is to be made between an agreement to forebear and an agreement that the bills were not final bills but part of a running account (in other words, an agreement that time was not running in relation to any challenge to these bills, that being the net effect of the bills not being statute bills).

92. However, it is important for me to stand back and look at this matter having regard to all the circumstances. It does seem to me that in any discussion in which it is being suggested that the solicitors were insisting on payment, there is substantial room for confusion as to precisely what the effect of this may be upon the ability to challenge the bills and any time limits for challenging the bills. Moreover, it does seem to me, on balance, likely that whatever precise words were used at these discussions and whatever information was conveyed to Mr Pavlou and Mr Erlam, it conveyed to them that the bills would be dealt with or "sorted out" at the end.

93. Dr Friston said that there was no substantial evidence that Mr Marshall did not have the assets, or the other clients did not have the assets, to pay these bills as the matter went on.

But the evidence of Mr Erlam and the general documentation available points to there having been a concerns about the ability to pay these bills and an anticipation that they would be dealt with at the end. The email in December 2016 seems to be consistent with that.

94. It may be that Mr Marshall intended to talk only about payment terms, but I accept that both Mr Pavlou and the Claimant did reasonably understand that they were being told that the matter would be sorted out more generally at the end when there were assets to be realised.

95. Whilst I accept nothing was written down to confirm this, whatever words were used, the objective signals Mr. Marshall gave, were such that both Mr Pavlou and Mr Erlam understood, as they say in the witness statements, that the bills would be dealt with at the end and legitimately and reasonably went away from the meeting with the expectation that any challenge to the bills under the Solicitors Act could wait until then.

96. Dr. Friston asserted that Mr Pavlou was a friend of Mr Erlam. There was, as I have noted, no cross-examination in relation to this matter. It may be that he was a friend. The fact that he attended with Mr Erlam at these meetings rather suggests that he was sympathetic to his cause and it may well be a reasonable inference to make that he may have had a natural inclination to support Mr Marshall in relation to these matters. I am satisfied however, looking at the documentation, that his understanding is likely to be correct.

97. So, if it were necessary to make findings on this matter, I would make findings in the Claimant's favour on this issue as well.

98. Even if I were wrong about that and the objective signals from Mr. Marshall were not as I have described them, I nevertheless accept that Mr Erlam did actually understand that things would be sorted out at the end. That is not to say that payments would not be made. Some payments were expected. There was an anticipation that there would be interim payments, with some money coming for Crowdfunding but that he would not lose his right to challenge these bills.

99. I should perhaps add, in the interests of completeness , that I was not satisfied, on the decision provided to me, *Kingston Solicitors v Reiss [2014[6 Costs LR 998*, that there is any principle of law that merely because there was an agreement to forbear or defer payment due under a bills, that would of itself mean that the bills could not be statute bills. It seems to me readily apparent that the decision does not support that proposition and I do not think it is necessary for me consider this in detail. Indeed, it would be a slightly odd situation if solicitors serve what is clearly a statute bill but then later agree to defer payment, that the bill then ceases to be a statute bill. So I am not with Ms Bedford on that particular point.

100. I am with her in relation to her broad point. It follows from all these findings, and looking at the factual matrix of this matter, that the relevant bills were served as a running account leading only later to a final bill.

(3) Special Circumstances

101. It is not strictly necessary for me to deal with the issue of special circumstances. I have however formed a clear view about special circumstances,

102. Although not a point raised by either side, it does seem to me that it is a feature that I should mention, that the bills have become paid bills. Payment has been made from the sale of 3 Grace Street after proceedings were issued in this case, and the Defendants say they are entitled to move the sums received *inter partes*, from the client account to meet the bills. Ordinarily if bills are unpaid even if a client has lost a right to assessment, the solicitors would still have to sue on the bills and if unpaid, the bills might be assessed in the normal common law way under the principles of *Turner* v *Paloma* [2000] 1 WLR 37. As they appear now to have been paid it is not clear how, if no order were made for assessment, these bills could now be challenged. I say this by way of an aside to my reasons but I think it is appropriate for me to refer to it..

103. There is no disagreement as to the test to be applied in considering whether special circumstances exist. I remind myself that the threshold is 'special', not 'exceptional' circumstances. In *Stone Rowe Brewer v Just costs* [2015] EWCA Civ 1168 , the Court of Appeal approved the following formulation taken from the judgment of Lewison J, as he then was, in in *Falmouth House Freehold Co. Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch :

> *"…whether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified, despite the restrictions contained in Section 70(3)".*

104. It is agreed that the factors proffered as special circumstances are to be taken, or may be taken, in aggregate, rather than as individual isolated factors. It is common ground also between the advocates in this case that under section 70(3) and 70(2), I have to exercise a discretion in deciding whether, even if I were to find special circumstances, the bills should proceed to assessment.

105. Firstly, I think these bills do call for an explanation.

106. Ms Bedford argued that the bills relating to the sale of the property were for substantial sums for the sale of a property worth £450,000 or thereabouts. I was taken by Ms Bedford through various entries in the bills. I do not propose to go through them all in detail: it appears that builders attended on the premises from about 20 March 2017 - reference is made to three hours of fee-earner charging at £225 per hour obtaining quotes for a cleaning of 3 Gray Street and a valuation. Then on 22 March 2017, there is an entry for 74 units, 7.4 hours, are charged *at £225 per hour,* for attendance at 3 Grace Street: allowing entry to building, supervising, checking on builders' work, allowing entry to, this is I think the valuer to value the property, taking photographs of the work being carried out and other such entries. There were quite a number of entries in April. There was collection of the keys and oversight of the installation of a new floor for the boiler and other matters- three hours or so; attending Grace Street to remove rubbish and other matters. Then there is reference on 11 July 2017 to personal attendance meeting with client re the "*approach to fees"* and the split from the proceeds of sale, and EMM's fees (an explanation being this

re the costs of the sale which comes out of the house proceeds first): this may be read as, in part, a charge for work in respect of the solicitors' own fees. In any event, there are extensive attendances of the sort that, to my mind, call for an explanation.

107. Dr Friston's case is that the charges are all explained. He makes reference to the Order of Master Teverson and says, in effect, that the Defendants were in the position of a trustee and required to ensure that the property was sold. There was infighting, or lack of cooperation, as between the clients that made the situation difficult. He says he is supported what is said in the judgment of the Deputy Master Linwood on 19 June, 2019 postdating the events in which reference is to the lack of cooperation, and perhaps more, in relation to these clients.

108. Dr Friston also, in response to the points that were made by Ms Bedford, said that there were quite a number of complications with the property, that there was a problem with the boiler, and I think there was a problem in the kitchen- which had to be replaced, matters of that sort. I do not think the information that I have is sufficient to determine the issues arising. The matters call for an explanation. It is said that even if some of this were fee-earning work, that the hours spent, as I understand it, are substantial. The question is raised as to why someone legal expertise need to attend the property to oversee these works. It may be that the keys could have just been picked-up by the builders, or like from the solicitors' offices, as might normally be expected to be the case. I think there is a real substantial basis for this concern. I accept that in broad terms in considering special circumstances, the court must be wary about allegations of excessive fees. Essentially, Dr Friston says, rightly in my view, that a bare unsubstantiated allegation of excessive fees are not, in many circumstances, enough, but there is more than that in relation to these fees.

109. There is some evidence, and I am not going to go through it, from the client, that much of this work was done without proper instructions from the clients and there are some quite strongly-worded emails from the clients in relation to this matter. I do not consider it appropriate at this stage for me to say who is necessarily right in relation to this matter, but there is certainly, it seems to me, an issue arising which justifies a detailed assessment. This may lead to a substantial, not a trivial, deduction in costs.

110. Dr Friston, as I understand it, put it to me that acting as a trustee or a quasi-trustee there would be a good reason why, given the infighting or lack of cooperation, steps might legitimately have been taken without instruction. That may, or may not, be the case, but– and it is not necessarily fundamental to my reasoning- I think if matters were done without instruction and the solicitors proceeded as trustees, this might be in itself be a special circumstance calling for some scrutiny of these fees.

111. In relation to the costs and appeal proceedings, I bear in mind the description that is given by Mr Marshall of the work that he did. He says he successfully dealt with the costs dispute with Richard Slade, there was a close analysis of the contract and the bills such the clients were not immediately sued, as was threatened, and payment postponed. He represented the clients with counsel before Mr Rosen QC, sitting as a High Court Judge in the Chancery Division, at the appeal from a Master in respect of the ownership of properties which was won with costs against the other side, with the same fully recovered. He represented the clients with counsel before the Master and obtained an order for sale of the property. He represented the clients with counsel before the property to obtain an order for the possession of the property, and he also says there were various other matters such assisting

the client with Freedom of Information requests, etc, potentially as to causes of action in the bankruptcy proceedings. I take into account all these matters. I think Ms Bedford is right about the points she makes. This is essentially a matter for me, looking at or drawing the conclusions seems to me appropriate from the information but the total amount of costs do look high, even against these descriptions, or at least call for an explanation sufficient to justify a detailed assessment. I say that without making any findings as to the reasonableness of the costs; that would be to pre-empt the detailed assessment.

112. It was in respect of an invoice relating to the judicial review that the amalgamated worklog did not seem to tally. This perhaps occupied a disproportionate amount of time in the argument (and it is perhaps my fault that this was so). An issue was raised about this matter. Some of my concerns were allayed on being provided with further information by Dr Friston. Nonetheless, Dr Friston did say to me at the outset that the bill was served on the basis that the work done in the bill was on the instructions of Mr Erlam, whereas I think the first entry is for a detailed email identifying willing parties to the JR, which suggests that this might not, indeed, be the case. The sums involved in relation to this bill are, I accept, small, but nonetheless it seems to me that there was, even though the sums were small, in relation to these entries sufficient to justify a detailed assessment.

113. I take Dr Friston's point about the change from, as it were, charging 25% of costs. This seem to be prompted in part by Mr Erlam's letter, but it was nonetheless not entirely clear or sufficiently bottomed out why the billing for JR was on the basis of a 50-50 split and other costs seemed to be on the basis of joint liability.

114. I would not necessarily consider this an independent reason justifying an assessment, but nonetheless there does seem to be an error in relation to bills, 2765 and 2769, which were served in relation to some of the three matters, covering the same period as the other. This may be problematic for reasons which will be apparent from the things I have already said, if they were statute bills. Again, I am not sure this was completely bottomed out and it may be that there is a further explanation to be provided. Dr Friston said that it must have been obvious on receipt of these bills that there had been a mistake. Initially, I think his case was that there was obviously a mistake as to the dates but as I recall, he later said the bill did not relate to the matter to which it was referenced albeit that this should have been clear from the worklog. I could not really make this out from the worklog, and I had concerns about the amalgamated worklog generally (although I am not suggesting for a moment that any of the parties have not done their best to try and agree it). I do not think, as Dr Friston argued, that I can take what was said by Ms Bedford in her skeleton argument, which he suggested indicated the matters were entirely clear, a sufficient answer to this point. It seems to me Ms Bedford might well herself have been mistaken, in the passage of her skeleton that was relied on, in attributing the work to a particular matter, or a client reference. Indeed some of the rest of her skeleton argument was not consistent with an understanding that the matters were sufficiently clear. It is not appropriate for me to make final findings in relation to this matter, but it does seem to me that at least some of this may need to be looked at further.

115. There was some complexity arising out of the multiplicity of bills served over this period: 21 bills, in respect of four clients. This also inclines me towards the view that a detailed assessment is justified. Of course, the fact there are a number of bills means that each individual bill is smaller than might otherwise be the case, but the way the matter has been billed makes the task on the part of the clients in assessing what work has been done

perhaps more difficult. In any event, I would not rely upon that as an independent special circumstance, but it seems to confirm my view that the bills called for explanation.

116. Secondly, as to estimates, the retainer does provide for estimates in two parts. The Terms of Business said:

> *"In many cases, we should be able to give you an indication of likely costs of the matter at the outset. The estimate should not be regarded as a firm quotation, unless we specifically say it is. If a case proves substantially more complex or time-consuming than expected, we reserve the right to increase an estimate previously given and notify you promptly of the revised figures".*

117. There is also reference to provision of indications of future costs in the documentation. Ms Bedford also made reference to the SRA obligations in this regard. She says that there were requests for estimates of costs, or indications of future costs, and that they were not provided and these constitute special circumstances. Dr Friston's riposte to this was: firstly, estimates could not have reasonably been provided in this case; secondly, in any event, the requirement to provide estimates was substantially met by the interim billing, providing an indication of the work that had been done and costs; and, thirdly, there was no prejudice to the client.

118. I am not satisfied that an estimate could not be provided the work covered by these bills. All estimates of this sort are conditional and provisional. Costs budgeting is frequently undertaken in relation to matters of some complexity, and I do not accept this is a matter in which a solicitor could not going forward provide an estimate. I do not accept that the provision of interim bills provides a substitute for the provision of estimates because interim billing by its nature is an indication of the work that has previously been done, whereas what estimates seek to achieve is control of costs going forward. Nor do I accept there is no potential prejudice. An indication or estimate of costs enables the client to control costs, as seems to me was potentially illustrated by what happened in relation to the sale of property. It enables the clients to question why the solicitors are proposing to having a fee-earner at £225 per hour attending the house to oversee building work? And to suggest that perhaps one of them could attend to check the work was done properly - if it were necessary for somebody to attend. Without estimates the client did not have the facility to control costs, which the contract perhaps envisaged. To that extent it seems to me that these are matters which, independently of the matters I have dealt with, provide a further special circumstance.

119. Further, and thirdly, there is the 'gentleman's agreement' point. It does seem to me, for the reasons which were identified in paragraph 22 in Master Gordon-Saker's judgment in *Ratcliffes*, there are difficulties for a client in the course of a continuing retainer in challenging costs; and, as Ms. Bedford put it, it would 'rock the boat'. It may well have been envisaged in this case that everything would be concluded in a fairly short time period, but in fact for reasons which perhaps were not envisaged it appears to have gone on for longer than anticipated. Further, even if I am wrong in my conclusion about the 'gentleman's agreement' and the Defendants had not conveyed the information that the charges would be sorted out on conclusion, if the solicitors had, as I found, agreed to forbear from seeking payment, it does seem to me, that the solicitors could be expected to have pointed out to their client the need to challenge the fees as and when the bills have been served, and that if they did not do so they would lose the right to challenge them. It

comes back to the points that Ms Bedford made in respect of the contract and the need to make things clear at the outset. I refer also to the observations by the Senior Master in *Ratcliffes* that normally practice of solicitors is to provide that information about the client's right to seek assessment under the Solicitor Act.

120. I do not think it is necessary for me to deal with all the other points. I am not persuaded that the fact that Mr Erlam appears to have to pursued the underlying proceedings out of a sense of public duty changes the nature of the arrangements as between the solicitor and the client. I am not satisfied that that amounts to a special circumstance. There are other matters that have been addressed in detail, but I consider are generally supportive of the conclusions reached.

121. Essentially there were as I have sought to explain, a number of special circumstances, which all independently justify, it seems to me, a detailed assessment in relation to all of the bills caught by section 70(3). Certainly, taken in aggregate, in my view they constitute circumstances which are clearly outside the 'run-of-the-mill'.

(4) Discretion

122. Dr Friston says there is no presumption, even in respect of bills which were delivered within one year of the issue of proceedings, that there should be an assessment. The court should take into account all the circumstances and the matters when exercising its discretion. It is said that the client has not put any sufficient case that the bills were excessive and a number of vague and incorrect assertions have been made. He says the fact that other clients have not applied for assessment is irrelevant in the circumstances. He says with regards to the fees claimed in the bills served within 12 months of issue that they are at the tail end of a complex matter and I would be required to consider, on assessment, all of the circumstances of the underlying matter: he says that this would be a disproportionate exercise. He points to the Claimant being wrong, or markedly wrong, on a number of points, being a matter I can take into account in all the circumstances. Also, he points to the general background being that the Claimant has not paid others fees and is in dispute with others.

123. I take into account all the matters that have been put before me by Dr Friston. However, it seems to me that they are at least in part met by the findings I have in relation to special circumstances. I think these bills call for explanation to a sufficient extent to justify an assessment.

124. It is, in my experience, relatively rare for the court to refuse an assessment for bills which are challenged by way of an application within 12 months of delivery. I do not think in any event any delay is a point which should weigh substantially against the clients in relation to this matter. It is said by Dr Friston that, as early as August/September 2017, Mr Erlam was raising points about the bills; in particular in an email of 22 August 2017, he wrote:

> *"I refer you to my earlier statement, stating clearly that our instructions are that NO further chargeable work must be done without our express prior permission. This is a very reasonable condition, especially given the way the bill has escalated astronomical levels and now, neither proportionate nor reasonable."*

125. Further, Dr Friston relies on a letter from the Claimant's current representatives in March/April 2018 indicating the prospect of a challenge. Dr Friston says that having access to independent advice is all more reason why an application should have been made earlier. I take these matters into account. The other point to be made is that the solicitors, the Defendants, are on notice of a concern about the bills, this having been raised at a relatively early stage in August/ September and they were on notice of an application, or the potential for an application, in April. That reduces the prejudice to them caused by the delay.

126. In any event, it seems to me, taking into account all those circumstances, that I should exercise my discretion in favour of an assessment in relation to the bills, including those caught by section 70(3).

-conditions

127. I am not satisfied that it is appropriate for me to apply conditions in this case. At least some of the bills have been paid, or substantially paid, so it does not seem to me clear that an interim, or a further interim on account, is appropriate or necessary. It is not clear to me that in respect of bills caught by section 70(2) the terms of this section give me the jurisdiction to impose an order for security for costs. The provision does place restrictions on the terms that can be imposed. I was not addressed on this in any detail. In any event, I am not satisfied this is an appropriate case for any security for costs to be ordered in all the circumstances that I have set out in respect of the issue of special circumstances.

Conclusion

128. That is my rather lengthy judgment in relation to the points that have arisen. I hope I have addressed all of the substantial or central points.

129. There will be an order for assessment of the bills.

(Hearing continues)

This Judgment has been approved by Master Brown.