Neutral Citation Number [2024] EWHC 2823 (SCCO)
Case No: SC-2023-APP-000448

**IN THE HIGH COURT OF JUSTICE**
**SENIOR COURTS COSTS OFFICE**

Thomas More Building, Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2024

**Before** :

**COSTS JUDGE NAGALINGAM**

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**Between :**

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| **Blue Manchester Limited** | **Claimant** |
| **- and –** | |
| **Howard Kennedy LLP** | **Defendant** |

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**Mr James Wibberley** (instructed by **Child & Child**) for the **Claimant**
**Dan Stacey** (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing dates: 07/03/2024

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# Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE NAGALINGAM

## Costs Judge Nagalingam:

1. This decision follows an order made on 29 August 2023 concerning the proposed assessment of 23 bills delivered by the Defendant to the Claimant. For the purpose of this judgment, the bill numbering below follows that adopted in the Part 8 claim form (save for where reference is made to the full six-digit bill number).

2. Bills 16 to 23 are already subject to an order for assessment and therefore do not fall to be considered at this stage. Any assessment of bills 1 to 15 are contingent upon the outcome of a series of preliminary issues which are addressed in this judgment.

3. The central question concerning bills 1 to 15 is:

   "..whether Section 70(3)(a) of the Solicitors Act 1974 is engaged in relation to [bills 1 to 15] and if it is whether special circumstances exist that require that provision to be disapplied".

4. Put in simple terms, whether bills 1 to 15 qualify as interim statute bills, and if they do whether special circumstances arise such that this court ought to exercise its discretion to order assessment of those bills.

5. The numbering of the bills in the table below is taken from the Part 8 claim form, which also sets out the original bill numbers and dates. As such, this judgment concerns the following bills:

| Claim Form Numbering | Original Bill Number | Date of Bill |
|---|---|---|
| 1 | 415819 | 29/01/2021 |
| 2 | 417072 | 26/02/2021 |
| 3 | 420387 | 30/04/2021 |
| 4 | 421306 | 27/05/2021 |
| 5 | 424942 | 29/07/2021 |
| 6 | 424096 | 26/07/2021 |
| 7 | 426607 | 26/08/2021 |
| 8 | 428702 | 29/09/2021 |

| | | |
|---|---|---|
| 9 | 430902 | 28/10/2021 |
| 10 | 432630 | 29/11/2021 |
| 11 | 433481 | 20/12/2021 |
| 12 | 435274 | 28/01/2022 |
| 13 | 436935 | 25/02/2022 |
| 14 | 438475 | 30/03/2022 |
| 15 | 443586 | 30/06/2022 |

6. For the avoidance of doubt, bills 1 to 15 were rendered more than 12 months before the Claimant's application was filed.

**Background**

7. The Claimant owns a building in Deansgate, Manchester. The building is operated by the Hilton Group and used as a hotel. The Claimant and the Hilton Group fell into a dispute, which culminated in the commencement of an ICC Arbitration by the Hilton Group against the Claimant. The Claimant instructed Howard Kennedy LLP (the Defendant) to act on its behalf.

**Summary of the Claimant's case**

8. It is the Claimant's case that in or around November 2020, after the Claimant had filed its response to the arbitration (but prior to sight of the Hilton Group's evidence), the Defendant provided a costs estimate. This is found at pages 409-410 of the hearing bundle and sets out an ultimate figure of £909,357.20. It is a detailed document which breaks down all the constituent parts of the Defendant's costs estimate and the Claimant's case is that it proceeded to instruct the Defendant on the basis of that estimate.

9. Insofar that it is alleged that the Claimant was told that by around March 2021 the Defendant's fees to date were in the region of £750,000, the Claimant does not accept it was told that further fees of around £1.1m would be required to take the matter to a conclusion. The Claimant says such a figure was never formally communicated in writing either.

10. The Claimant does accept that by late Spring / early Summer 2021 the costs were escalating, and that an agreement was struck for the Claimant to enter into a no-win, reduced fee agreement with the Defendant.

11. The Claimant relies on an engagement letter dated 7 May 2021 (page 82 of the hearing bundle) which provides that "This engagement letter sets out the basis on which we will carry out work for you in this matter, and subject to the terms of the Conditional Fee Agreement which we have agreed will apply to our fees from 21 December 2020."

12. The CFA itself is found at page 103 of the hearing bundle and is dated 1 July 2021. It was signed on 16 July 2021.

13. The Claimant's case is that the CFA provided for discounted rates which equated to around 87.5% of the Defendant's "Normal rates", and that the where the "Win the Arbitration" clause of the CFA was triggered, the Defendant was entitled to uplift their fees in line with their "Normal rates".

14. Paragraph 9 of Mr Wibberley's skeleton argument sets out, "It is the effect of the contingent element of D's fees which forms the primary basis of the dispute between the parties".

15. The arbitration did not result in a success (as defined by the CFA), as per the ICC Arbitration decision dated 23 September 2022, which is found at page 378 of the hearing bundle. The Claimant says that no further sums were payable under the CFA following that decision. This is not in dispute.

16. The Claimant points to the Defendant having now raised charges in excess of £2.2m and argues this is "far in excess of even the updated costs estimate [the Defendant] says that [the] Claimant was given".

**Mr Wibberley's submissions**

17. Mr Wibberley appears on behalf of the Claimant, and submits that the Defendant has 3 hurdles to surmount with regard to whether valid statute bills have been presented:

    - How can a statute bill also purportedly not be a final bill;

    - As a matter of contract, that's what the Defendant has permitted for and done;

    - Even if the terms and conditions permit that, is that in fact what the invoices do?

18. Mr Wibberley says that the Solicitors Act 1974 is a statutory framework which exists to protect solicitors as well as clients, e.g. protection against the risk of a double assessment, i.e. seeking an assessment of a discounted bill and then also seeking assessment of the same work when a top up bill is received.

    <u>The case law</u>

19. With reference to *Boodia v Richard Slade and Co Solicitors* [2018] EWCA Civ 2667; [2019] 1 WLR 116, Mr Wibberely relies on paragraph 31, which provides:

    "Slade J considered that "application of the principle explained in *Bari v Rosen* leads to a requirement that to constitute a statute bill it must contain all costs relating to a defined period" (paragraph 53 of the judgment). To my mind, however, that is to

attribute to the words "complete self-contained bill of costs" a significance that they do not have. *Bari v Rosen* was not concerned with whether a statute bill had to extend to both profit costs and disbursements, and no such issue arose either in *Davidsons v Jones-Fenleigh* or *Adams v Al Malik*. The point being made in *Davidsons v Jones-Fenleigh*, echoes of which can be found in the later authorities, was essentially that, for a bill to be treated as a statute bill, it must be apparent that it is not merely seeking a payment on account but is intended to be complete and final as regards its subject matter. The cases do not appear to me to assist with whether a statute bill has to include everything (profit costs and disbursements) attributable to the period covered by the bill."

20. Mr Wibberley submits that any bill delivered should be final for what the client is being billed for. For example, if a bill purports to include both base costs and disbursements, then the bill should be final for all base costs and disbursements incurred in the period the bill is said to cover, i.e., "it must be apparent that it is not merely seeking a payment on account but is intended to be complete and final as regards its subject matter"

21. Mr Wibberley then cited *Sprey v Rawlinson Butler LLP [*2018] 2 Costs LO 197. He accepts that *Sprey* is not on all fours with the index matter (because of differences in the terms and conditions) but submits *Sprey* still sets out general propositions as to how the court should treat an additional charge or top-up charge.

22. Mr Wibberley explained that *Sprey* concerned an agreement to discount the 'normal' rates by 40% for the purpose of billing whilst the case progressed.

23. In *Sprey*, the intention was that the bills would be due for immediate payment. Paragraph 16 of that decision references clause 4.3 of the solicitor/client agreement (in that matter) which provided that "Rawli[n]son Butler LLP will bill the Client at the Discounted Rates on a regular (usually monthly) basis, together with any Disbursements as and when incurred. All such invoices are payable by the Client upon delivery. The amounts billed in this way will be payable by the Client regardless of the outcome of the Claim."

24. The clause dealing with the client's "Right to apply for an assessment" in *Sprey* is referenced at paragraph 16(vii) of the judgment, which provides:

> "11.1 The Client has the right to an assessment by the court of the amount of the fees, Success Fee and/or Disbursements which are payable by the Client under this Agreement, by making an application under section 70 of the Solicitors Act 1974. There are time limits for such an application, including the absolute right to assessment if the Client applies to the court within one month of delivery to the Client of the bill of costs, and a gradual reduction of the right the longer it is left thereafter, which Rawli[n]son Butler LLP will inform the client about if asked. The Client is, of course, welcome to seek advice from another law firm about this but would have to pay for such advice."

25. Mr Wibberley thereafter draws attention to Nicklin J's analysis at paragraphs 22 and 23 of his judgment:

> "22. I do not agree with the Master's reading of clauses 4.3 and 11.1 and his conclusion that the CFA permitted the Respondent firm to render monthly statute bills. In my judgment, clause 4.3 is neutral as to whether the 40% invoices were statute bills or not. The agreement to pay at the 40% rate is equally consistent with the Appellant making payments on account at that rate. I am satisfied, however, clause 11.1 gives a clear indication that the 40% invoices submitted by the Respondent were not statute bills. Clause 11.1 informed the Appellant that he had the right to challenge the bills rendered by the Respondent firm under s.70 Solicitors Act 1974. This was described as the "*right to an assessment by the court of the amount of the fees, Success Fee and/or Disbursements which are payable by the Client under this Agreement*."
>
> "23. The Success Fee could only by payable in the event of success (i.e. at the conclusion of the case, whether or not the CFA had been brought to an end at an earlier point). Unless the three billable items referred to in this clause are read disjunctively, the right to challenge those items arose only at the end of the case. That would mean that the interim bills were not statute bills but requests for payment on account or (more likely in the circumstances) *Chamberlain* bills."

26. Drawing analogy with the index matter, Mr Wibberley submits that the "only sensible interpretation" of the CFA in the index matter is that the sums payable under the same were only known when the case concluded.

27. Further citing *Sprey*, at paragraph 25, "At the heart of an assessment is whether the sum charged by the solicitors to the client is reasonable. The charge for work done at 40% of the normal rates might well be reasonable, but at 100% not reasonable. A client would not know until the end of the claim (or earlier termination) at which rate he was being charged."

28. Mr Wibberley submits that the court should be concerned with the question of whether the overall charge for the work done is reasonable, but observes that under a discounted CFA the reasonableness of the charges can only considered at the conclusion (of a discounted basis / success basis case).

29. Mr Wibberley also cites the importance of considering the structure of the CFA. Citing *Sprey*, at paragraph 28:

> "28. Finally, this construction of the CFA is consistent with the principle that a statute bill cannot subsequently be amended (see paragraph 5 above). The effect of the clauses I have identified was that the 40% invoices were liable to be later changed. What was ultimately to be paid for the work that was the subject of any 40% invoice would not be known until the Appellant won or lost the claim or terminated the CFA. Mr Marven submits that this construction would mean that the Respondent was not entitled to be paid. If by that he means that the Respondent lacked an enforceable right to payment of its fees (under s.69 Solicitors Act 1974), then that is right. But the consequences of that principle are not as harsh as they might appear. It does not mean that the Respondent was not entitled to some form of payment. The Respondent could always insist that the Appellant make payments on account under the express terms of the Client Care Letter."

30. Mr Wibberley then cited paragraph 33 of *Sprey*, in terms of how a court should approach the issue of how bills are presented as compared with what the funding arrangement allows for:

> "33. "… Here, the weight that might normally be attached to the fact that the 40% invoices were expressed to be "final", were submitted in precise sums, were to be paid immediately and were for defined work that had been carried out in the relevant period has to be assessed in the context of the CFA. It was obvious to the parties that, under the CFA, come what may, the Appellant was going to be liable to pay the Respondent firm's fees at the Discounted Rate. However, the nature of the CFA meant that sums paid in purported settlement of the 40% invoices were necessarily payments on account and the bills themselves Chamberlain bills. In my judgment, the behaviour of the parties cannot, in this case, alter the express agreement that they had reached in the CFA as to the status of the bills that were rendered."

31. Mr Wibberley submits that, ultimately, adding an additional charge is amending a statute bill, which can't be done because statute bills are meant to be final.

32. Mr Wibberley then invited consideration of *Masters v Charles Fussell & Co LLP* [2021] EWHC B1 (Costs), in which the court was invited to distinguish *Sprey*. Reliance was placed in particular on paragraphs 15, 17 and 18 which provide:

> "15. Mr Dunne described the requirements of an interim statute bill as requiring it to be a self-contained bill which is complete in respect of both the period which it covers and in its subject matter. The Court of Appeal decision of *Richard John Slade (trading as Richard Slade and Company) v Boodia & Anor* [2018] EWCA Civ 2667 clarified that an interim statute bill could relate simply to solicitors' charges or counsel's fees or disbursements without having to contain all three elements to the extent that they existed for a particular period. However, other than this, the sum claimed must be complete and not subject to any subsequent adjustment."

> "17. The Draconian nature of the time periods in limiting a client's ability to obtain an assessment of a solicitor's statute bill has led the courts to require solicitors to "make it plain" to their clients if they intend each bill rendered to be a self-contained bill for a period and for which the time limit for challenge begins to run immediately. The alternative approach for solicitors is to render a series of requests for payments on account with a final statute bill provided at the end of the matter. The time for challenging the solicitors' fees would then only begin to run once the final invoice had been delivered."

> "18. Mr Dunne relied specifically on the words of Fulford J (as he then was) at paragraph 48 in the case of *Adams v Al-Malik* [2003] EWHC 3232 (QB) where he said:

> > "In particular the party must know what rights are being negotiated and dispensed with in the sense that the solicitor must make it plain to the client that the purpose of sending the bill at that time is that it is to be treated as a complete self-contained bill of costs to date…""

33. Mr Wibberley submits that the onus is on the solicitors to make the client's assessment rights clear, in particular when an assessment may be requested. He also cited paragraph 39 of *Masters*, where Costs Judge Rowley found that:

> "Save that the percentages were different in *Sprey*, I cannot see that there is any difference between that case and this one in the nature of the arrangement between the solicitor and the client. Whatever percentage is charged as the case goes along, the balancing charge paid at the end will be treated, based on the authority of *Sprey*, as adjusting the earlier invoice in respect of the work done for a particular period and as such is inconsistent with a self-contained bill having been rendered."

34. Mr Wibberley sought to emphasise the argument that a solicitor cannot retain the ability to re-visit and vary an invoice, whilst also declaring it carries the status of a final statute bill.

35. Mr Wibberley also relies on the decision in *Ivanishvili v Signature Litigation LLP* [2023] EWHC 2189 (SCCO), in arguing that interim invoices raised in a CFA case cannot carry the status of interim statute bills.

36. Paragraphs 25 and 40 of *Ivanishvili* address the original retainer terms and the updated terms. Mr Wibberley submits the case bears "remarkable similarities" to the present case, and cites paragraph 42 insofar that it demonstrates that it was the solicitors' intention to raise interim statute bills.

37. For the actual effect of the retainer, Mr Wibberley referred me to paragraphs 57-60 of the decision (which I have set out below):

> "57. In arguing that none of the Defendant's invoices, as rendered to date, have been final the Claimant has put much emphasis upon the fact that they only represent a part of the Defendant's potential fees for the work done during the period specified by each invoice. Accordingly, on the Claimant's case, none of them have the finality that is an essential characteristic of an interim statutory bill.
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> 58. Mr Williams submits that where an agreement provides for payment A to be made on a specified date, but also for payment B to be made at a later date, depending upon outcome, then an invoice for payment A is nonetheless the final invoice for payment A.
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> 59. The difficulty with that argument is that it goes directly against the concept of finality explained by Spencer J in *Bari v Rosen* and Simon Brown LJ in *Abedi v Penningtons*, as quoted above.
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> 60. The test is not whether a given invoice is final for the charges it represents, but whether it incorporates a final charge for the work it represents. Bills may be described as final for the period they cover, but that amounts to the same thing: they are final and complete for any work performed during that period."

38. Mr Wibberley invites the application of the "test" set out at paragraph 60 of *Ivanishvili*, and submits it is important to consider the substance of what is being charged for.

39. As to the approach to be adopted, Mr Wibberley refers to paragraph 71 of *Ivanishvili*, which provides:

> "It might be possible for a solicitor and client to agree some arrangement to the contrary. Assuming however that it is possible to limit the Claimant's statutory rights by agreement, then one would at the very least expect such an agreement to be in very clear terms. There is no such agreement in this case. The premise that the Claimant's statutory rights would be limited in respect of any future bills seems rather to represent an attempt by the Defendant to overcome some of the difficulties raised by the proposition that invoices representing only a part of the potential full charge for its work are nonetheless final."

40. Mr Wibberley agrees, and submits that parties cannot contract out of the statutory right to assessment, but that even if they could then it would need to be done in very clear terms.

41. In terms of what might 'conceptually' be permitted, Mr Wibberley cites paragraph 84 of *Ivanishvili*, which found that "Assuming that it is possible to agree that interim statutory bills may be rendered for any unconditional element of a solicitor's charges under a CFA, one would expect the relevant retainer to contain clear terms overcoming the difficulties of reconciling the conditional element of any CFA with the concept of a complete and final interim bill".

42. In then seeking to highlight the importance of what the retainer terms permit, Mr Wibberley cited paragraph 105, where Costs Judge Leonard "…found that the terms of the June 2016 Retainer are in themselves inconsistent with any right on the Defendant's part to render interim statutory bills, but also that the "usual invoicing and payment terms" upon which the Claimant was to pay the Discounted Rate of 65% of the Standard Fee became, from 19 September 2021, the May 2021 Terms."

43. As to the approach this court should take to interpretation, Mr Wibberley submits that the notion of finality is important. Citing paragraph 110 of *Ivanishvili*:

> "That aside, it is difficult to see how paragraph 6.4(a) could work. Paragraph 6.1 (as in the June 2016 Terms) provides that the Defendant's monthly invoices will cover all work undertaken during the relevant period. Paragraph 6.4 (a), on its face, provides for those monthly invoices to be final bills but at the same time not final, conferring upon the Defendant the right to render an unlimited number of purportedly final bills for the same work. This is the antithesis of completeness and finality, as they are understood for the purposes of identifying a statutory bill."

44. As to the variation of statute bills, Mr Wibberley relies on paragraphs 112 to 114 of *Ivanishvili*, with the starting point being that "a statutory bill being final for the relevant period, the solicitor who renders the statutory bill is bound by it and cannot vary it unilaterally."

45. I observe that Costs Judge Leonard thereafter addressed the issue of whether, in principle, a solicitor and client could agree to vary a statute bill before it had been delivered. His conclusion was that firstly, the retainer would need to expressly allow for such a variation, but also that "if it is agreed in advance that a bill is subject to

variation then it cannot be described as final, and if it is not a final bill it cannot be a statutory bill."

46. Finally, Mr Wibberley cited paragraphs 118 to 120 of *Ivanishvili* with regards to the importance of clarity in the terms of a retainer:

"118. My conclusion is that paragraph 6.4(a) of the May 2021 Terms lacks the necessary clarity to confer upon the Defendant's monthly invoices from 19 September 2021 the status of interim statutory bills."

"119. As a further point I refer back to Spencer J's confirmation, in *Bari v Rosen*, that it does not follow from the fact that a contract of retainer confers upon a solicitor the right to render interim statutory bills, that a given bill is in fact an interim statutory bill."

"120. It seems to me that the true position is that (as Mr Mallalieu suggests) the Defendant, from 19 September 2021, rendered interim non-statutory bills in accordance with the provisions of paragraph 6.4(b) of the May 2021 Terms, but omitted to label them as such. That conclusion appears to me to be consistent with the evidence of Mr Huntley to the effect that he had always understood the Defendant's monthly invoices to be "final". Under those circumstances it would not have occurred to him to consider whether paragraph 6.4(b) imposed upon the Defendant an obligation to identify its monthly invoices as "payment on account" invoices."

47. Mr Wibberley submits this mirrors the index matter, in that what the Defendant issued were not in fact statute bills, but mis-labelled requests for payment.

The Hearing Bundle

48. Mr Wibberley then sought to navigate the hearing bundle, starting with page 82, being the client care letter dated 7 May 2021, and in particular paragraph 5 of the same which states:

"The contents of this letter and our Terms of Business are subject to the attached Conditional Fee Agreement dated 4 May 2021 and should be read subject to that agreement which take precedence over the terms of this letter insofar as they differ."

49. In bare language, he says this means the CFA trumps the terms and conditions referenced in the client care letter.

50. Mr Wibberley then invited consideration of page 3 of the client care letter (bundle page 84), and the section 'The Timing of our Bills', insofar as that sets out that "The status of our bills is explained in paragraph 5 of our Terms of Business".

51. The CFA document is dated 1 July 2021 and begins on page 103 of the hearing bundle. Mr Wibberley cited clauses 4.3 and 5.1 in particular, which state:

"4.3 We will bill you at the discounted rates, together with any disbursements, on a monthly basis. The amounts billed in this way will be payable by you regardless of the outcome of the Arbitration."

> "5.1 If you Win the Arbitration (as defined in paragraph 1 above), you will be liable for our fees at the normal rates (up to a maximum of the sum of our discounted rates and the Capped Balance), together with disbursements. We will invoice you for the balance of our normal rates (up to the Capped Balance over and above the discounted rates) which will be due for immediate payment."

52. Mr Wibberley submits that the provision of clause 5.1 means that any reference to a bill in clause 4.3 cannot mean a statute bill (as per the requirements of a statute bill as described in *Bari v Rosen*). Instead, the effect of these clauses is that clause 4.3 amounts to requests for payments on account, and clause 5.1 creates conditions that would amount to a Chamberlain bill.

53. Mr Wibberley then referred me to clause 10, which is the "RIGHT TO APPLY FOR AN ASSESSMENT" and sets out that:

> "You have the right to an assessment by the court of the amount of the fees and/ or disbursements which are payable by you under this agreement, by making an application under section 70 of the Solicitors Act 1974. But there are time limits for that application, including an absolute right to assessment if you apply to the court within one month of delivery to you of the bill of costs, and a gradual reduction of the right the longer it is left thereafter, which we will inform you about if asked. You are of course welcome to seek advice from another law firm about this but would have to pay for that."

54. Mr Wibberley takes issue with clause 10. Firstly, because the Claimant could only know the "amount of fees and/ or disbursements" once the arbitration had concluded, and secondly, because clause 10 refers to "the bill of costs", i.e. a single bill, whether that be a substantive final bill or to create a Chamberlain Bill.

55. Mr Wibberley submits that the reason the Defendant's terms of business make provision for payments on account (clause 8 of the terms of business) is that generally it allows a solicitor to terminate the retainer if payments are not made. He says that such a clause gives a retainer 'teeth', that such a scenario is in fact covered under clause 16 of the terms of business.

56. Mr Wibberley then referred me to clause 17.1 of the CFA, which provides that "This agreement constitutes the entire agreement between the parties and supersedes and extinguishes all previous agreements, promises, assurances, warranties, representations and understandings between us, whether written or oral, relating to its subject matter, except for the client care letter which accompanies this agreement, as varied by this agreement." He says both parties are bound by this clause.

57. Turning to clause 5 of the terms of business (hearing bundle page 90), Mr Wibberley submits the wording of the second paragraph is very similar to that in Ivanishvili, where the court found for the Claimant. The relevant wording reads:

> "Unless otherwise stated, each bill issued to you is a final bill covering the total charge for the work carried out within the stated period. Further, unless otherwise stated, each bill has the status of a statute bill which means that in the event of non-payment we are entitled to issue proceedings for recovery through the courts after the expiration of one month from the date of delivery of the bill. A statute bill also gives

you certain rights to have the bill assessed by the court under the Solicitors Act 1974 if you consider that you have been incorrectly charged. The rights to have a bill assessed are however subject to time limits and lost if action is not taken by you promptly. You should note that your right to have a bill assessed is separate from your right to complain as set out in Section 31 of these terms of business. If the 'value' or 'importance' element is achieved only as a result of the completion or final settlement of the case, and has not been taken into account in earlier bills, we reserve the right to take it into account in our concluding bill. We may also include in a later bill any specific expenses or disbursements incurred in an earlier period but not previously billed."

58. Mr Wibberley stressed that a bill is not a final bill if it isn't a statute bill. He submits that the notion of a later "concluding bill", which seeks payment for work which "has not been taken into account in earlier bills", is effectively a 'reckoning-up' bill which would mean that the earlier bills could not be taken to be "final".

59. Mr Wibberley then turned to the bills themselves, and in particular the small print at the foot of each bill which states:

"Unless otherwise stated, each of our bills has the status of a statute bill (but is not necessarily a final bill in the matter) which means that in the event of non-payment we are entitled to issue proceedings for recovery through the courts after the expiration of one month from the date of delivery of the bill."

60. Mr Wibberley submits it is nonsense for the Defendant to explicitly acknowledge the bills delivered were "not necessarily a final bill" and at the time assert an entitlement to enforce their rights under the Solicitors Act 1974.

61. Mr Wibberley submits that the Defendant is trying to have their cake and eat it, because they want the enforcement rights of the Solicitors Act as and when each invoice was raised, but also want to reserve the right to add charges to those very same bills.

62. Mr Wibberley then sought to contrast the bills dated 27 May 2021 and 26 July 2021 (hearing bundle pages 158 and 193). The 27 May 2021 bill is described as being for the "Provision of legal services for the period to 25th May 2021".

63. The next bill is dated 26 July 2021 (i.e. preceded only by the 27 May 2021 bill). Therefore deemed to cover the period since the May 2021 bill up to 22 July 2021 (including June 2021). The covering letter states "Please find enclosed a note of our fees and costs for the period from our last invoice in relation to the above matter" and the bill itself states "Provision of legal services for the period to 22nd July 2021".

64. However, Mr Wibberley also observes the bill dated 29 July 2021 (hearing bundle page 177) and notes that it is stated to be for the "Provision of legal services for the period to 22nd June 2021". He accepts this may be the product of a mistake, if the Defendant sent the invoices out of order. However, he argues that the fact is either an error took place or the bills being delivered were not in fact final for the periods they purported to cover.

65. Mr Wibberley asked how can it be that the Defendant wants to assert that the 26 July 2021 bill was final for the period covered (i.e. up to 22 July 2021), but then at a later date seek the recovery of further costs up to 22 June 2021, unless these invoices were to be treated as requests for payments rather than final statute bills?

66. Mr Wibberley submits this highlights the absurdity of the Defendant's stance, that the index matter purports to permit for the delivery of bills covering costs *and* disbursements, yet from time to time throughout the conduct period there have been claims for disbursements appearing in one invoice which were in fact incurred during the period covered by earlier invoices.

67. He submits that, again, this is consistent with not raising final bills for the period intended to be covered. Otherwise, how could the Defendant later claim for disbursements which should have appeared in an earlier invoice?

Re Special circumstances:

68. As to whether special circumstances arise such that an assessment of any of the bills numbered 1 to 15 should be permitted to proceed, Mr Wibberley referred to the Defendant's letter before claim dated 12 May 2023, and in particular paragraph 2.1 of the same which concerns overcharged and undercharged invoices:

> "2.1.1 In respect of invoices numbered 415819, 417072, 420387 and 421306 dated 29 January 2021, 26 February 2021, 30 April 2021 and 27 May 2021, respectively, you were inadvertently overcharged in relation to our fees only in the sum of £40,250.54 plus VAT; and
>
> 2.1.2 In respect of subsequent invoices, in relation to our fees only, you were undercharged by a total of £918.43."

69. Mr Wibberley drew my attention to paragraph 2.3 of the same letter, which set out how the "overpayment" (of £47,198.53) had been credited against outstanding sums that were due on older bills, "the Credit having been applied to the oldest invoices first."

70. He says this demonstrates the Defendant's acknowledgement that at least 4 "so-called statute bills which were final for the period covered", were in fact wrong, and additionally raises a concern as to the accuracy of the other invoices.

Costs estimates

71. Mr Wibberley accepts that the court will not make a factual finding in this judgment but rather it is a question of assessing whether there is an issue caused by the estimates that were or were not provided, which may then be explored further on assessment.

72. With reference to page 424 of the hearing bundle, Mr Wibberley submits he can demonstrate that at the discounted rates, the Defendant's charges amount to approximately £2.05m excluding VAT. That figure was calculated by discounting from a full rates schedule of costs produced during the arbitration.

73. Mr Wibberley submits that figure is approximately £175k less than what the Claimant has been charged.

74. Mr Wibberley also referred to paragraph 4 of his skeleton argument, in which reference is made to the Defendant's budget for own costs in the arbitration being £909,357.20, and the reliance the Claimant placed on that figure in continuing to instruct the Defendant.

75. Further, whilst Mr Wibberley observed that the Defendant's witness evidence sets out why they got the estimates wrong, he submits that the Defendant does not adequately address the fact that the Claimant continued to instruct the Defendant based on those estimates.

76. Mr Wibberley submits that charges which are double the initial estimate of costs calls for an explanation and that the Defendant's witness evidence is not sufficient enough an explanation.

77. Mr Wibberley referred to an internal e-mail from the Defendant's Duncan Bagshaw to Lauren Hill-Cottingham dated 25 March 2021, which is essentially an attendance note of a purported discussion between Mr Bagshaw and John Christodoulou following a call in which the Defendant realised their estimate was too low.

78. Mr Wibberley submits that this e-mail is problematic for the Defendant, because whilst it makes reference to a call to the client in which fees and estimates were discussed, it amounts to an internal memo/e-mail recording a call, drafted in a shorthand format only, and for whatever reason was never confirmed in writing with the client.

79. The Claimant denies, or does not recall, receiving such an estimate (which, according to the internal e-mail of 25 March 2021) was to inform the Claimant that fees of £760k had been incurred to date and that further fees of £1.1m would be required to complete the case. The Defendant does not purport to have communicated this information in writing to the Claimant. All that exists is a single internal e-mail to a colleague saying the conversation took place, with no acknowledgment by the Claimant of that conversation.

80. Mr Wibberley also observed that if the Defendant was at "£760k to date all" in by 25 March 2021, it meant the Defendant had already substantially exceeded their initial assessment (once counsel's fees were accounted for). That would mean the Defendant only gave a revised estimate after the initial estimate had already been exceeded.

81. And even then the revised estimate referred to in the 25 March 2021 e-mail was itself well exceeded.

82. Finally, Mr Wibberley referred to an e-mail from Duncan Bagshaw to Christopher Christou dated 1 July 2021, which he submits demonstrates that the Defendant only formally updated the estimate *after* they had undertaken additional work, and more could yet to be incurred.

83. The e-mail shows how much work had been billed since the 25 March 2021 estimate and set out that £456,309.05 is due in respect of "Invoices outstanding", and an estimate of £1,085,935 in additional fees to take the matter to trial.

**Mr Stacey's submissions:**

84. Mr Stacey appears on behalf of the Defendant. He spoke of a 5 stage pathway:

- Is there an arrangement to deliver statute bills;
- Address the case law to demonstrate that the cases relied on by the Claimant are not on point;
- Deal with the conceptual point re CFA interim bills;
- Are the bills delivered in fact statute bills;
- If yes, do special circumstances arise.

85. With regards to what constitutes an interim statute bill, Mr Stacey referenced paragraph 15 of *Bari v Rosen* [2012] EWHC 1782 (QB); [2012] 5 Costs LR 851, where Spencer J found:

> "The basic principle is that a solicitor's retainer is normally an entire contract under which the solicitor is entitled to claim remuneration only when all the work has been completed or the retainer has been terminated. A solicitor is not entitled generally to any payment on account of his costs other than disbursements. However, a solicitor may contract with his client for the right to issue statute bills from time to time during the currency of the retainer. Such bills are known as "interim statute bills". They are nevertheless final bills in respect of the work they cover, in that there can be no subsequent adjustment in the light of the outcome of the business. They are complete self-contained bills of costs to date."

86. Mr Stacey submits the decision underlines the commercial freedom of parties to enter into a contract, provided its lawful.

87. Mr Stacey referenced clause 4.3 of the CFA (which I have quoted above) and submits that consultation of the terms of business is necessary to understand how clause 4.3 was intended to operate.

88. He observed that section 5 of the terms of business includes the provision that "Unless otherwise stated, each bill issued to you is a final bill covering the total charge for the work carried out within the stated period. Further, unless otherwise stated, each bill has the status of a statute bill which means that in the event of non-payment we are entitled to issue proceedings for recovery through the courts after the expiration of one month from the date of delivery of the bill".

89. Mr Stacey also wished to highlight that section 5 also addressed the Claimant's rights under the Solicitors Act 1974, and their right to complain.

90. Mr Stacey stressed that it was important to recall no success (within the terms of the CFA) was achieved such that there was no trigger for an additional / top-up payment. This meant there was no need to revisit any of the bills.

91. With further reference to the terms of business, Mr Stacey drew focus on section 8 of the terms of business, "PAYMENTS ON ACCOUNT":

> "We may at any time require you to pay us a reasonable sum on account to cover the likely cost of work to be done and specific expenses and disbursements which we expect to be incurred, plus VAT on those costs and other items. We will, where time permits, allow 14 days for payments on account to be made, but sometimes this may not be possible. Please send such monies to our client account detailed at paragraph 6."

92. Mr Stacey submits that references within this section to work "to be done" and "to be incurred" demonstrates payments on account were only ever intended to relate to prospective work, whereas interim bills were raised for work already done.

93. Mr Stacey also drew attention to the CFA, and submits the CFA document itself makes no provision for payments on account, but rather focuses only on bills and payment of bills.

94. Mr Stacey says the Defendant's case is that clause 4.3 of the CFA and sections 5 and 8 of the terms of business are sufficient to demonstrate the Defendant's right to deliver interim monthly statute bills.

95. Mr Stacey also relies on *Ivanishvili*, and in particular at paragraph 81 (under CFA and Interim Bills), where Costs Judge Leonard reflected on the Nicklin J's analysis in *Sprey*:

> "81. Mr Williams submits that although that judgment is widely cited as authority for the proposition that it is not possible for a solicitor acting under a Conditional Fee Agreement to render an interim statutory bill, Nicklin J's judgment did not go that far. His findings were based upon his conclusion that the terms of the CFA did not permit the delivery of interim statutory bills."

96. Mr Stacey submits that the question of how the court should treat a claim for a balancing payment is irrelevant, because no balancing payment was sought in the index matter because success wasn't achieved.

97. Mr Stacey then took me to the engagement letter dated 7 May 2021 (hearing bundle page 82) and submits that the content of the same is consistent with the three clauses he referred to earlier (see above) from the CFA and terms of business.

98. Mr Stacey referred to the 5th paragraph of the engagement letter:

> "The contents of this letter and our Terms of Business are subject to the attached Conditional Fee Agreement dated 4 May 2021 and should be read subject to that agreement which take precedence over the terms of this letter insofar as they differ."

99. Mr Stacey submits that means that the CFA takes precedence over the engagement letter, but not the terms of business.

100. Next, turning to the terms of business, Mr Stacey invited consideration of clause 6 (hearing bundle page 90), which covers "PAYMENT OF OUR BILLS – INTEREST PAYABLE BY YOU – PAPERS". Mr Stacey submits that clause 6 is consistent with the issuance of bills for money due and owing, rather than requests for payments on account.

CFA

101. With regard to the construction of the CFA, Mr Stacey submits that the bulk of the fees, i.e. 87.5%, were payable in any event; the product of an agreed 12.5% discount pending the outcome of the arbitration process.

102. Mr Stacey sought to distinguish between conditional fees and discounted rates and normal rates.

103. Citing clause 4.2 of the CFA, Mr Stacey invited consideration of the table therein which demonstrated the "Normal rates" and the "Discounted rates" (being the normal rates multiplied by 87.5%).

104. Mr Stacey then referenced clause 4.3 of the CFA, and in terms of what the Claimant would have been expected to pay in any event: "we will bill you at the discounted rates, together with any disbursements, on a monthly basis. The amounts billed in this way will be payable by you regardless of the outcome of the Arbitration" and clause 5.1 with reference to 'normal rates':

> "5.1 If you Win the Arbitration (as defined in paragraph 1 above), you will be liable for our fees at the normal rates (up to a maximum of the sum of our discounted rates and the Capped Balance), together with disbursements. We will invoice you for the balance of our normal rates (up to the Capped Balance over and above the discounted rates) which will be due for immediate payment."

105. Mr Stacey submitted that the decision in *Ivanishvili* is relevant in terms of the importance of defining what is claimed as of right, and what is claim*able* contingent on a certain outcome.

106. With reference to clause 7 of the CFA, Mr Stacey says it is clear this is not a success fee case; "There is no success fee applicable to this agreement". He also cited clause 10 (set out above) regarding notification of the Claimant's right to apply for an assessment.

107. In so far as clause 10 refers to "the bill of costs", Mr Stacey submits that nothing turns on the use of such terminology when read with clause 4.3 of the CFA and the terms of business generally.

108. Mr Stacey submits that to read clause 10 of the CFA as referring to a single bill of costs would be inconsistent with clause 4.3 and the terms of business. He observes that the Claimant's position is that the disputed bills can only be requests for payments on account, not interim statute bills, but submits that the CFA makes no reference to payments on account. Therefore it ought to be clear that the parties were agreed on the issuance of interim monthly statute bills that fell to be paid.

109. Mr Stacey also relies on clause 17 of the CFA, the "ENTIRE AGREEMENT" clause, and submits that the Claimant's case is "conceptual at best".

The case law

110. Mr Stacey submits that the decision in *Sprey*, referencing paragraph 13 of the same, is distinguishable because the agreement makes no mention of a right to raise interim statute bills. Paragraph 13 of *Sprey* comes after the question; "Did the agreement allow the solicitors to render interim statute bills under the CFA?", and is followed by "13. Logically this issue comes first. If the agreement between the parties did not permit the rendering of interim statute bills, then that would be the end of the matter."

111. Thereafter Mr Stacey cited paragraph 16(vii) of the *Sprey* judgment in which clause 11.1 of the *Sprey* CFA is reproduced under the section "Right to apply for an assessment". In *Sprey*, Costs Judge Rowley concluded that, when read together, clauses 4.3 and 11.1 created a right to raise interim statute bills.

112. Whilst Nicklin J disagreed with that conclusion, Mr Stacey considered there are distinguishing factors. Firstly, the CFA in *Sprey* included provision for the recovery of a success fee. A success fee is only payable in the event of success, whereas the discounted fees in the index matter were payable in any event. Secondly, the discount in *Sprey* was far greater than that in the index case. As per paragraph 25 of *Sprey*:

"25. It was also at that point that the Appellant's right of assessment arose under clause 11.1. This is also consistent with my construction of the CFA as a whole. At the heart of an assessment is whether the sum charged by the solicitors to the client is reasonable. The charge for work done at 40% of the normal rates might well be reasonable, but at 100% not reasonable. A client would not know until the end of the claim (or earlier termination) at which rate he was being charged. On Mr Marven's construction of the CFA, the Appellant progressively lost the right to challenge the bills as the claim went on."

113. Mr Stacey observed that if the same scenario as the index matter was considered in those terms, the court would be looking at an additional 12.5%, *if* a top up was claimed. Thus *Sprey* concerned a rise from 40% of normal fees to 100% of normal fees plus a success fee, whereas the index matter concerned a potential rise from 87.5% to 100% of normal fees (and where ultimately normal fees were not claimed).

114. In further seeking to distinguish *Sprey*, Mr Stacey cited paragraph 28 in so far that it was found "…this construction of the CFA is consistent the principle that a statute bill cannot subsequently be amended". The Defendant's argument being that they are not seeking to amend the bills.

115. Mr Stacey wished to stress that the Defendant is not seeking to argue there was an inferred agreement to raise interim statute bills. The Defendant's case is that there was an explicit agreement to raise interim statute bills.

116. With regards to the decision in *Ivanishvili*, Mr Stacey invited focus on paragraphs 9-14 of Costs Judge Leonard's judgment, which are concerned with "Contracts of Retainer and Interim Billing". In summary, these paragraphs deal with what is meant by an "entire contract", i.e. the contract must be completed (such that a solicitor could

typically only raise a bill at the end of a matter), but also the circumstances under which bills could be raised during the currency of the contract of retainer, e.g. where there are natural breaks or under a contractual right. These paragraphs also explore notions of what is meant by bills being final in respect of the work covered by them.

117. Citing paragraph 31, which sets out part of the "Our invoices and payment terms" element of the original retainer in *Ivanishvili*, Mr Stacey submits there were similarities with the retainer in *Sprey* – in terms of monthly delivery of invoices, a final invoice at the end, provision of a narrative and breakdown, and payment required in 30 days.

118. Mr Stacey then cited paragraphs 40 to 42 of *Ivanishvili* in terms of the effect of updated terms of business, and in particular with regard to the raising of monthly invoices and the status of such invoices as a consequence of the updated terms. He draws analogy with clause 6.4(a) of the updated terms of business in *Ivanishvili* (which sought to make more clear that monthly invoices were to be treated as interim statute bills and final for the period covered), but distinguishable where an additional clause made provision for "interim 'payment on account' invoices".

119. As to the relationship between earlier bills and a final bill, Costs Judge Leonard in *Ivanishvili* rejected the assertion that the issuance of a later final bill which included a top up element of earlier bills could not lead to the conclusion that the top up element could not be assessed simply because the earlier bills were by then statute barred from an assessment.

120. Citing paragraphs 81 to 84 of *Ivanishvili*, Mr Stacey sought to highlight that in both *Sprey* and *Ivanishvili*, the court did not go so far as to say that, as a matter of fact, one cannot raise interim statute bills under a discounted fee agreement, but rather that it was also a relevant factor to consider if the CFA permitted for the raising of interim statute bills.

121. In this regard, Mr Stacey submits a relevant consideration is what the parties agreed to.

122. Thereafter, citing paragraphs 105 to 110 of *Ivanishvili*, Mr Stacey stressed the importance of arriving at the correct interpretation of the funding documents. In particular he relies on paragraphs 106 and 107 which found:

> "106. Paragraph 6.4(a) of the May 2021 Terms provides that "generally" the Defendant's monthly invoices will be interim statutory bills and that they should be taken to be interim statutory bills unless stated otherwise. Paragraph 6.4(b) provides, as an alternative, interim "payment on account" invoices, to be identified as such. Paragraph 6.4(d) offers a partial explanation of the time limits appropriate to applications for the assessment of statutory bills.
>
> 107. Paragraph 6.4(b) makes specific reference to the delivery of "payment on account" invoices for charges rendered under CFAs or in contingency fee cases. Mr Williams submits that this is an entirely neutral clause which deals generally with payments on account, and that there is nothing in it to suggest that it is intended to have particular application to arrangements such as the June 2016 Retainer."

123. In seeking to conclude why the retainer in *Ivanishvili* was ultimately not analogous with the index matter, Mr Stacey cited the findings of the judge at paragraph 110:

> "110. That aside, it is difficult to see how paragraph 6.4(a) could work. Paragraph 6.1 (as in the June 2016 Terms) provides that the Defendant's monthly invoices will cover all work undertaken during the relevant period. Paragraph 6.4 (a), on its face, provides for those monthly invoices to be final bills but at the same time not final, conferring upon the Defendant the right to render an unlimited number of purportedly final bills for the same work. This is the antithesis of completeness and finality, as they are understood for the purposes of identifying a statutory bill."

124. In Mr Stacey's word, such an approach was "objectionable and confusing", but that crucially no such clause is present in the index case. He submits that the lack of necessary "clarity to confer upon the Defendant's monthly invoices… the status of interim statutory bills" (as per paragraph 118, *Ivanishvili*) is not present in the index matter. He submits there is no lack of clarity and no ambiguity when comparing the case before this court with that in *Ivanishvili*.

Are these interim statute bills?

125. As to the question of whether the disputed bills have all the necessary elements of a statute bill, Mr Stacey took me to page 127 of the hearing bundle, the invoice dated 26 February 2021.

126. Mr Stacey submits that in any event the wording of the bill small-print is consistent with the terms of business, client care letter and the CFA. In his view, the important element of the small-print was that it said the bills had the status of a statute bill.

127. *Re Masters v Charles Fussell & Co LLP [2021] EWHC B1 (Costs)* – Mr Stacey submits the decision loyally and accurately follows *Sprey*. However, he says that the index matter is one in which there was never any intention that the bills be subject to future adjustment. Rather that each bill delivered was intended to be self-contained and, as a matter of fact, remained as such.

Special Circumstances

128. As to special circumstances, Mr Stacey addressed the issue of the Defendant's calculation error by citing the Defendant's letter to the Claimant dated 12 May 2023, which was sent regarding unpaid invoices, and before Part 8 proceedings had been contemplated.

129. Mr Stacey said that the Defendant had acted properly in notifying the Claimant of errors - which the Defendant had identified.

130. He cited paragraph 2.1.1 of that letter and observed the 4 invoices referred to therein are also the first 4 invoices identified in the Part 8 claim form. Mr Stacey submits that the admitted error (being an overcharge of £40,250.54 plus VAT) was not so big an error that the Claimant lost all faith in the accuracy of the Defendant's billing, and therefore does not amount to a special circumstance.

131. Mr Stacey also relied on the footnote on the 3rd page of the 12 May 2023 letter which explains the error, being the application of 96.07% of the time spent rather than 87.5%.

132. I asked Mr Stacey if, when one discovers an invoice error on old paid bills, should one credit note those bills or give credit against later bills? Mr Stacey's said there was nothing improper or unprofessional in crediting the overcharge against later bills. He said there was no obligation to raise a fresh invoice and credit note.

Estimates

133. With regards to estimates of costs, Mr Stacey noted what is said by Mr Christopher Christou at paragraphs 27-30 of his witness statement dated 25 October 2023. For ease of reference I have set out those paragraphs below:

"27. There is also an issue with the extent to which HK's fees have exceeded, by some margin, the initial estimate that was provided to BML. HK prepared, in/around November 2020, a budget for the Arbitration which is at pages 32-33 of CC1. The Court will see that this was a comprehensive budget which covered experts' fees, counsels' fees, HK's fees and a sum for unknown contingencies and totalled of £909,357.20 exclusive of VAT. However, as can be seen from the breakdown at page 34 of exhibit CC1, the fees in fact billed by HK to BML under the invoices covered under this Part 8 Claim total £1,586,008.51 exclusive VAT. This figure does not take into account invoices delivered before January 2021 and it can be seen from the costs award at page 10 of exhibit CC1 that the total costs claimed by BML (and therefore incurred with HK) in the Arbitration were in fact over £2.3m."

"28. In the May 2020 terms of business (at DB1 page 29 ) at clause 4, HK stated "We aim to give you the best possible costs information, both at the outset and when appropriate as the matter progresses, about the likely overall cost of the work we are doing for you." I do not consider that HK complied with this provision."

"29. I also understand that HK was subject to the following provision of the Solicitors' Code of Conduct:

> "You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as the matter progresses, about the likely overall cost of the matter and any cost incurred.""

"30. I do not consider that BML was provided with information about the costs of this matter as the case developed so that informed choices could be taken. I also do not consider that appropriate updates were provided about the likely overall costs of the matter."

134. Mr Stacey observed that despite what Mr Christou says, there is no reference in his witness statement to the 'alleged' March 2021 meeting and no mention of the e-mail of July 2022 estimate. Therefore the Claimant has not, in evidence, rebutted what is declared in Duncan Bagshaw's 1st witness statement, nor is there any response to Duncan Bagshaw's 2nd witness statement (in which the 'alleged' conversation about increased estimates is mentioned).

135. Mr Stacey pointed out that Duncan Bagshaw's 2nd witness statement is dated 17 November 2023, and therefore postdates Mr Christou's statement. Mr Stacey submits that Mr Bagshaw's 2nd witness statement, starting at paragraph 16, demonstrates a Defendant who had held up their hand to admit to an under-estimate, but had also provided an explanation as to why the estimate needed to be revised up.

136. Mr Stacey relies on his skeleton argument at paragraphs 50 and 51 as to the complicating factors that made the provision of accurate estimates difficult in this matter.

137. Citing paragraph 19 of Mr Bagshaw's 2nd witness statement:

> "As at November 2020, we therefore had not appreciated the full complexity of the case, considering the number and nature of issues raised, and the evidence deployed in support of them by Hilton. Furthermore, the November 2020 Estimate was based on certain provisions and assumptions which turned out not to apply, due to the Claimant's instructions to us. For example, it was assumed that the documents in the case would run to no more than 3000 pages. We also underestimated the time which would be required to be spent by counsel. However, upon receipt and review of the Memorial, it became clear that to ensure that the case was sufficiently resourced, due to the complex issues and sheer volume of documents, and to ensure that simple or voluminous work was not being done at higher rates, we would require three barristers. As such, later in the proceedings, and on the instructions of the claimant, we engaged a third barrister, in order to have counsel available at a range of fee rates to do different levels and types of work."

138. Then citing paragraph 20 of the same witness statement:

> "As the matter progressed, and we confirmed the issues that the Claimant would want to raise in its defence to the claim and in its counter claim, the complexity of the matter increased. To illustrate this complexity, it is worth noting that the trial bundle for the arbitration consisted of double-sided volumes from A-Q with many of the sub-volumes being over 20 lever-arch files. Without manually going through all of the volumes, which would be disproportionate exercise, I anticipate that the bundles comprised of at least 20,000 pages. To give some examples of what we did which went beyond the anticipated work included in my original estimate (which work was done on the Claimant's instructions and with their understanding that this would cause an increase in fees): …"

139. Mr Stacey highlighted the increase from 3,000 pages to 20,000 pages as an example of why the estimate had necessarily increased, and submits that it was in fact because of the increase in costs that the Claimant approached the Defendant for a discount.

140. Mr Stacey observed that the evidence in Mr Bagshaw's 2nd witness statement does not appear to be challenged by the Claimant, and that it is unclear what the Claimant's position is regarding the provision of further inputs, specifically in response to paragraph 24, where Mr Bagshaw states:

> "Probably the most important of these discussions occurred on 25 March 2021 when I had a call with Mr John Christodoulou and Mr Christou in which we had a discussion about costs. I explained to Mr Christodoulou and Mr Christou that the fees incurred to

date were in the region of £750,000, of which £360,000 was outstanding for unpaid bills. I also informed them that the fees "to complete the case" would be "something like" £1,100,000 (a total of over £1.8 million). At that point, we had recently, on 12 March 2021, submitted the Claimant's first Memorial in the arbitration. The Memorial was accompanied by factual evidence, including the 120-page witness statement of Ms Brown, and two expert reports. The Memorial itself was 123 pages long and which, in addition to responding to the Claimant's claim for approximately £20 million, also made counterclaims valued at approximately £17 million."

141. Mr Stacey submits that the e-mail at page 440 of the hearing bundle is effectively a contemporaneous memo of what happened, and that the court can reasonably conclude that the conversation took place referred to therein took place.

142. Citing the later e-mail, from the Defendant to the Claimant dated 1 July 2021 (hearing bundle page 443), Mr Stacey said that the Defendant is not disputing an increase but submits that it better to revise the estimate and demonstrate the revision to the Claimant, than to do nothing. The important thing is the Claimant saw what the further fees would be.

143. Mr Stacey further submits that, in any event, there was not such a great discrepancy in estimates to amount to special circumstances, and that we don't know that the Claimant would have acted any differently had more accurate estimates been provided in the first place, or sooner.

**Mr Wibberley's response:**

Special circumstances

144. Mr Wibberley submits that until the Defendant served their skeleton argument for this hearing, the Claimant wasn't even aware the Defendant intended to argue that bills 1 to 6 were statute barred.

145. As to the footnote at the third page of the Defendant's letter dated 12 May 2023, Mr Wibberley says the information provided is simply a mathematical calculation of what the amount charged was as a percentage of what the amount at normal rates would have been. No actual explanation has been provided as to how the erroneous figure came to be in the first place, nor any explanation as to what the figure equating to 96.07% relates to.

146. Mr Wibberley explained that the Claimant wasn't previously concerned with where the credit was applied, because the Claimant's case is no costs fell payable until the matter had concluded. At best, the Defendant has engaged in a practice which may permit of the creation of a Chamberlain bill.

Errors

147. Mr Wibberley said that the Claimant paid the bills before they even knew they were overcharged, and was subsequently informed that the overcharge was a percentage calculation error only.

148. With regard to the extent to which reliance was placed on estimates, and the impact on the amount of costs to be paid, Mr Wibberley submits that the forum for deeper exploration of that factor is upon a detailed assessment of the costs.

149. It is the fact there is an issue with the estimates which requires exploration which is of itself a special circumstance, i.e. the order for assessment is necessary to explore that issue.

150. Of the March 2021 estimate, Mr Wibberley observed that not even the internal e-mail/memo document breaks down the further £1.1m estimated, and that by the time the July 2021 estimate was sent to the Claimant, they had no time left to digest, react and decide what to do next regarding costs and legal representation going forward, because of matters pressing in the case.

The absence of a balancing payment

151. Mr Wibberley submits that, as a matter of fact, had the Defendant achieved a success then they would have been entitled to raise a balance / top-up bill. The effect of such a bill would have been an upward revision to all previous bills sent. This is why those bills were 'on account' bill, precisely because they could be revised up.

152. Mr Wibberley submits that the parties entered into an agreement which meant it was possible for a top-up bill to be raised at the end. That was the parties' intention.

153. With further reference to the CFA, Mr Wibberley cited clause 4.3 and how the term 'bill' is interpreted. Clause 4.3 provides "we will bill you at the discounted rates, together with any disbursements, on a monthly basis. The amounts billed in this way will be payable by you regardless of the outcome of the Arbitration."

154. Mr Wibberley submits this doesn't mean bill in the sense of a noun, i.e. a bill, but rather it means bill in the sense of a verb, i.e. to bill, to charge, to invoice etc. To put it another way, he says that "We will bill you…" in this context is no different to saying "we will charge you…", "we will invoice you…".

155. Mr Wibberley submits that clause 5.1 of the CFA is definitive in explaining at what point the Claimant finally knows their true costs liability, i.e. when the arbitration was won or lost.

156. Finally, Mr Wibberley rejects the assertion that *Ivanishvili* can be wholly distinguished from the index case because *Ivanishvili* still dealt with the concept of raising a further charge for work already done.

**Decision**

157. These costs only proceedings have been brought by the Claimant, who sought an order for detailed assessment of a total of 23 bills the Defendant had sent them within a bill date range of 29 January 2021 to 28 October 2022.

158. Although each bill has it's own six-digit reference number, I have adopted the numbering (1-23) from the list of disputed bills set out in the claim form. By agreement, bills 16-23 of that list (dated 29 July 2022 to 28 October 2022) shall be subject to a Solicitors Act assessment of the profit costs only.

159. Bills 1 to 15 are all dated more than 12 months before the date of the Part 8 claim form. The Defendant's case is that bills 1 to 15 are all compliant interim statute bills, that the funding arrangement with the Claimant permitted them to raise interim statute bills, and that there are no special circumstances such that the court might otherwise be minded to exercise its discretion and order assessment of some or all of the 15 bills in dispute.

160. Although I have adopted the terminology of "bill", I acknowledge that at times the Claimant has preferred the terminology of "invoice", and that in many such assessments both terms are used interchangeably when describing the same document, and depending on how each party views that document.

Bills 1 to 15

161. The disputed bills are contained in a list above. In terms of presentation, each bill is consistent. Each bill has a section for "Bill status:" and in each instance, the Defendant has recorded that status as "Interim Statute". Of course, simply writing the words "interim statute bill" or similar does not make that document a compliant statute bill. It does, I accept, provide an indication of what the document is intended to be.

162. I say "intended" because each bill also includes the words "This invoice is due for immediate payment".

163. Each bill is signed, and where applicable also appends a "Time Detail" printout in lieu of a bill narrative.

164. As such, the bills delivered bear all the hallmarks of a valid statute bill.

Agreement to raise interim statute bills

165. The Claimant first engaged the Defendant in November 2018, and this is when the Defendant sent their original terms of business. However, the terms under which the Defendant acted for the Claimant were altered on 7 May 2021 and on the basis that the altered terms would apply from 21 December 2020. As such, it is the altered terms which apply to bills 1 to 15.

166. Under section 5 of the letter dated 7 May 2021, the agreement states that "Payment of our fees, and the amount of those fees, is subject to the terms of the attached Conditional Fee Agreement". Within section 5 is a sub-section named "The Timing of our Bills". This sets out that:

> "We will send you bills (at the Discounted Rates set out in the Conditional Fee Agreement) on a monthly basis. We will send you bills for any additional fees which become due under the Conditional Fee Agreement when they become due.
>
> We may bill you at any time for disbursements or specific expenses incurred already, or shortly to be incurred.
>
> The status of our bills is explained in paragraph 5 of our Terms of Business."

167. The 7 May 2021 letter, 5th paragraph, sets out the relationship between the client care letter, terms of business and the CFA. In so far that Mr Stacey argues that the CFA takes precedence over the letter, but not the terms of business, I disagree.

168. The Defendant clearly sets out that "The contents of this letter and our Terms of Business are subject to the attached Conditional Fee Agreement dated 4 May 2021 and should be read subject to that agreement which take precedence over the terms of this letter insofar as they differ." I do not consider the Defendant intended to create a scenario whereby there was no means by which any tension between the terms of business and the CFA could be resolved. The CFA represented a change to the funding model between the parties and it is perfectly logical that the CFA terms would take precedence where any terms differed.

169. What I can say with certainty is that nothing in the letter dated 7 May 2021 alone creates an agreement for the raising of interim statute bills.

170. The terms of business which accompanied the 7 May 2021 letter addresses the delivery of bills at section 5 of the same. It strikes me that the key sentences of that section are that "Bills will usually be rendered on a monthly basis or more often in litigation and in some other matters, where a significant amount of work has been carried out." and that "Unless otherwise stated, each bill issued to you is a final bill covering the total charge for the work carried out within the stated period."

171. Section 5 also states that "unless otherwise stated, each bill has the status of a statute bill which means that in the event of non-payment we are entitled to issue proceedings for recovery through the courts after the expiration of one month from the date of delivery of the bill.", before referencing the Solicitors Act 1974 and informing the Claimant they had "certain rights" under the same.

172. The terms of business governing bills 1 to 15 deal with the actual payment of bills at section 6 of the same, and in so far as the Defendant relies on section 6 of the terms of business, I note that the 3rd, 4th and 5th paragraphs of the same have no bearing on my decision. The 2nd paragraph concerns the potential use of client monies in one matter to pay for another matter. It is therefore only the 1st paragraph which is of any potential relevance.

173. The 1st paragraph of section 6 of the terms of business provides that payment of bills are due on delivery, and that interest will be applied if a bill is not paid within 1 month. The section also permits the retention of the papers until a bill is paid in full, and the use of client monies (held or received) to pay bills, after the client has been advised of the bill in question.

174. It is not clear to me that section 6 can be read as relating only to the issuance of interim or final statute bills. Section 6 addressed the payment of bills generally. Section 5 in my view simply acknowledged that different types of bills may be raised. These include, unless otherwise stated, statute bills and final bills.

175. There is nothing controversial about Mr Stacey's submissions as to clauses covering payments on account. Payments on account are commonly collected for work to be done / costs to be incurred. However, the index bills do not purport to be requests for payments on account of work to be done. The Claimant's case is that they were

requests for part payment of work that they accept had already been done. The different between the parties is the status of those bills.

176. The terms of business are not drafted in a way that means it was illogical or contractually impermissible for the Claimant to treat the bills in question as requests for payment for work done, without at the same time treating them as statute bills to which time limits for challenge automatically applied.

177. That leaves the CFA to consider. The CFA, at clause 2.1, confirms it covers all work from 21 December 2020 onwards. Clause 4.2 sets out the 'normal' rates the 'discounted' rates. As set out above, clause 4.3 provides "We will bill you at the discounted rates, together with any disbursements, on a monthly basis. The amounts billed in this way will be payable by you regardless of the outcome of the Arbitration".

178. Whilst Mr Stacey is correct that the CFA does not refer to payments on account, it is also true to say that the CFA is not concerned with payments generally. Clause 4.3 references billings. The only extent to which clause 5 deals with payment is in terms of immediate payment being due for the balance of normal rates if the arbitration was won.

179. Clause 5 deals with the Claimant's liability for the Defendant's fees and provides that "5.1 If you Win the Arbitration (as defined in paragraph 1 above), you will be liable for our fees at the normal rates (up to a maximum of the sum of our discounted rates and the Capped Balance), together with disbursements. We will invoice you for the balance of our normal rates (up to the Capped Balance over and above the discounted rates) which will be due for immediate payment."

180. Other than clause 5, there is nothing in the CFA which explicitly explains at what point any bill raised takes on a particular status, save for where clause 10 addresses the Claimant's 'right to apply for an assessment'. That is presented in the following terms:

> "You have the right to an assessment by the court of the amount of the fees and/ or disbursements which are payable by you under this agreement, by making an application under section 70 of the Solicitors Act 1974. But there are time limits for that application, including an absolute right to assessment if you apply to the court within one month of delivery to you of the bill of costs, and a gradual reduction of the right the longer it is left thereafter, which we will inform you about if asked. You are of course welcome to seek advice from another law firm about this but would have to pay for that."

181. So where does that leave us? My conclusion is that the letter dated 7 May 2021, attached terms of business and subsequent CFA combine to create a right to raise interim statute bills. However, that is not a clear right and in my view it falls to the Defendant, in these circumstances, to be have been clear as to the true status of the bills being raised.

182. In my view, and when taken in combination with the fact that all of the bills in question were being paid at discounted rates (and so in the knowledge that further charges could be raised relating to the same work), it was incumbent on the Defendant

to be clearer both in their dealings with the Claimant and the language of the relevant funding documents.

183. Thus, and contrary to the arguments put forward by Mr Stacey, where clause 10 of the CFA talks of "an absolute right to assessment if you apply to the court within one month of delivery to you of *the* (emphasis added) bill of costs", the Claimant was entitled to conclude this was a reference to a single bill of costs to be delivered upon conclusion of the proceedings.

Status of the bills

184. Insofar as Mr Wibberley addressed me on the conceptual question of whether parties can contract out of their statutory right to assessment, my understanding is that the Defendant does not argue such a point but rather says that the Claimant is simply too late to seek an assessment of the bills which this judgment relates to.

185. As I have already reflected, each bill includes a reference to the "Bill Status" being "Interim Statute", but also describes the same document as "invoice". Simply stating that an invoice is an 'interim statute bill' does not make it as such. However, as I have already observed, the bills in question have all the hallmarks of a statute bill.

186. One then considers the small print to those bills, and therein observes some consistency with the wording of the terms of business, in so far as reference is again made to "Unless otherwise stated.." In the case of the bills delivered, this was in terms that:

"Unless otherwise stated, each of our bills has the status of a statute bill (but is not necessarily a final bill in the matter)…"

187. When one reads such a term, one can't help but agree that it seems the Defendant wanted the option to enforce payment one month after the request for payment, whilst openly expressing a right to raise further charges covering the same period and/or for the same work.

188. One also pauses to consider what that meant for the Claimant. Presumably the Claimant could have sought assessment of any one of the original bills, and then sought a second assessment if it later transpired that bill wasn't in fact final (in this case, where a success was achieved).

189. With regards to the interaction between section 5 of the terms of business, and the wording of the CFA in this matter, I agree with the Claimant that the CFA 'stated otherwise' in that it provided for terms which enabled the raising of a final charge for the work carried out in the period stated by each bill which could only be determined at the end of the arbitration.

190. I also agree with the Claimant that the fact that the Defendant made it clear on the face of every bill that they were "not necessarily a final bill" means those bills lacked the necessary certainty to carry the status of being interim statute bills.

Ability to raise statute bills in a discounted CFA setting

191. Mr Stacey cited paragraph 81 of *Ivanishvili* but this section of the judgment cannot be read in isolation, nor was it a finding made by the court. It is a reflection of counsel's submissions in that case. Thus whilst Costs Judge Leonard agreed with the general proposition put forward by counsel in *Ivanishvili*, he also reflected (at paragraph 82), that Nicklin J's analysis in *Sprey* was more nuanced:

> "82. I agree, but at paragraphs 25 and 40 of his judgment Nicklin J highlighted the difficulties of reconciling the necessary qualities of completeness and finality in an interim statutory bill, with the fact that under a CFA, a solicitor's charges are not finalised until its conclusion..:
>
> "At the heart of an assessment is whether the sum charged by the solicitors to the client is reasonable. The charge for work done at 40% of the normal rates might well be reasonable, but at 100% not reasonable. A client would not know until the end of the claim… at which rate he was being charged…"

192. I accept there is no entitlement or claim for a success fee in the index matter. I also accept there is a significant difference when seeking to contrast 40% and 100%, as against 87.5% and 100%. However, the point is that the "client would not know until the end of the claim… at which rate [they] were being charged…".

193. In terms of the Claimant's knowledge, a key plank of the Defendant's case is to invite this court to conclude that the question of how to treat a balancing or 'top-up' payment is now irrelevant, because no balancing payment was sought (as a consequence of the success provision of the CFA not being achieved).

194. The problem with that line of argument is that it doesn't extinguish the fact that finality in the bills could not be known until the matter had concluded. If there was any doubt about that, one only needs to read the small-print on the face of every bill.

195. Otherwise, a scenario is created whereby the time for challenging a bill runs from one date in the event of non-success, but a later date in the event of success, even though the Defendant's argument is that the bill in either case is essentially the same (save for the application of some formulaic adjustments).

196. Thus, and as much of the case law suggests, unless the parties had contracted into the scenario the Defendant now seeks to argue for, there seems to me to be no force in the argument that a discounted rates bill can be declared 'final' on two separate dates and yet still meet the criteria of an interim statute bill.

197. This is the paradox the legislation seeks to avoid, or else there is a lacuna in the Solicitors Act which the Defendant has not directed me to. Had the Claimant been successful in their case, the Defendant would have raised a balancing top up bill, which would have covered *all* work done and therefore would open up all time charged under those bills to be assessed. At that point, the Claimant would have had an absolute right to an assessment within one month of delivery of that bill.

198. That being the case, how can it then be the client's assessment rights are entirely contingent on the outcome of (in this case) the arbitration, such that there is in-built jeopardy in choosing when to challenge bills – bearing in mind that in a time sensitive

deadline driven financially valuable case a client will naturally want their solicitors to be focused on their case, not a solicitor/client dispute.

199. The hurdle the Defendant has repeatedly failed to overcome is the parallel reality in which they were inviting the Claimant to exist. One where in the event of one outcome (i.e. success), then the charges for a particular period of time would increase (by the application of a top-up charge), but in the event of another outcome (failure), the charges would remain the same. On the Defendant's case, that left the Claimant in a scenario in which the time limits under the Solicitors Act could start to run from two different dates depending on the outcome of the litigation. In my view, absent an explicit agreement to such an arrangement, that means bills 1 to 15 are incapable of being interim statute bills and therefore such status is not conferred on any of the same.

200. In my view the Defendant has acknowledged the potential for a two tiered system of assessment rights which is entirely dependent on the outcome. If permitted, it would make it very difficult for a client to decide when to challenge bills.

201. I am also not persuaded that there is some form of 'tipping point' in discounted fee agreements whereby one percentage difference leads to a two tier system but another doesn't. In any event, at the level of sums incurred by the Defendant in this matter, a 12.5% 'top-up' was always going to be lead to significant extra sums being sought from the Claimant.

Special circumstances:

202. Even if I am wrong in the conclusions I have drawn above, I consider special circumstances arise such that I would have exercised my discretion to order assessment in any event.

Overcharging

203. I have reflected on the fact that the Defendant's admission of an overcharge was made in circumstances where the Claimant had not taken any issue with the original charge and paid it. That means that the Claimant has benefitted from the Defendant's discovery and issuance of a credit against later unpaid bills.

204. In the same way that had the Defendant discovered they undercharged for the periods covered by those earlier bills, they could not go back and ask the client for more (on the Defendant's case anyway), the fact of an admitted overcharge, since credited in full, does not in my view open up those bills to an assessment where they are deemed paid in full and more than 12 months has passed prior to the claim form being filed.

205. However, it seems to be there is sufficient doubt as to the allocation of monies, as well as the fact that overcharging took place, that I would have been minded to find that special circumstances arose so that on an assessment of costs of any of the bills potentially effected could be reviewed and if necessary, assessed.

Estimates

206. Mr Stacey presented as strong an argument as I think was possible with regard to estimates but ultimately the Defendant cannot ignore the contemporaneous evidence in this respect, or indeed where the evidence is lacking.

207. It seems inexplicable and arguably inexcusable that the Defendant would so drastically alter their estimate and not formally confirm this in writing to the Claimant. The correspondence central to the increase in estimated costs is an e-mail dated 25 March 2021, referenced above and exhibited to Mr Bagshaw's 2nd witness statement.

208. When referencing that correspondence, Mr Stacey was alive to ensuring that Mr Wibberley did not attempt to give evidence in response, and was also keen to observe that the Claimant had not put in any evidence to rebut the reference to the telephone conversation about estimates.

209. In this regard I take into account my specific directions ahead of this hearing, which only provided the Defendant with a right to reply. I also take into account that in deciding whether special circumstances arise, I am not required to make any findings of fact as to the provision of estimates at the this stage but rather whether circumstances arise which would warrant the opportunity of a closer inspection of the work done via the mechanism of a detailed assessment.

210. What is clear to me is that the drastically altered estimate was not communicated to the Claimant in writing. That is not disputed, or at least the Defendant cannot disprove it.

211. The key correspondence in terms of a change to the estimate is in fact an e-mail dated 25 March 2021 (found at page 440 of the hearing bundle). This is not an e-mail from the Defendant to the Claimant, but in fact between Duncan Bagshaw and Lauren Hill-Cottingham. In other words, it is an internal e-mail between a Partner and a legal assistant/paralegal.

212. Even absent the Defendant's failure to confirm to the Claimant in writing a change to the estimate, the adequacy of the internal communication dated 25 March 2021 is questionable.

213. Firstly, the reference to "£760k to date all in" isn't explained in any detail at all. At best, it is open to considerable interpretation.

214. Secondly, the reference to "£360 for all work billed and unpaid" is, in my view, likely to be missing a "k". Either way, the lack of any apparent effort to descend into detail is unhelpful.

215. Thirdly, the note records "DB did discuss with ST". That is a reference to an internal discussion between partners Duncan Bagshaw and Simon Taylor, and thereafter reflects comments attributed to Christopher Christou and John Christodoulou, but without explicitly confirming if this was a the result as a conversation with them.

216. Fourthly, the reference to "DB says to complete the case it will be something like £1.1m" does not include any reference to agreement by the Claimant, and does not

descend into any details as to what the £1.1m includes or excludes, or what work the figure does and doesn't cover.

217. Paragraphs 5 to 7 of the 25 March 2021 e-mail represent Mr Bagshaw's account of concerns the Claimant had raised in terms of a lack of contact from Mr Taylor, the level of discount to be applied to fees to be paid, and a perception that the Defendant was unconcerned with the affordability of the proceedings.

218. The mention of a 10% discount is not explained, in terms of whether it was agreed or whether the Claimant had signalled an intention to apply a 10% reduction before making any payments.

219. At page 442 of the hearing bundle is an e-mail, the following day (26 March 2021) from Christopher Christou of the Claimant to Duncan Bagshaw. In this e-mail, Mr Christou acknowledges a conversation with Mr Bagshaw on 25 March 2021. However, that was reflected in terms of "I have spoken to our accounts team regarding payment of the invoice we discussed yesterday evening and they tell me I need a credit note for the 10% discount regarding your firm's fees. Can you please let me have this asap so I can finalise the payment".

220. Mr Christou makes no reference to a change to the estimate, only arrangements to pay an invoice.

221. Further, the Defendant's response of the same date raises further questions about how the delivered bills were to be treated. In that response, Mr Bagshaw explains that the Defendant cannot issue a credit note for a 10% reduction, but can agree to receive the invoice total less 10% for now. The purpose being to reserve a right to recoup that 10% at a later date.

222. Thus on 26 March 2021 Mr Bagshaw stated "The payment is for an amount less than the total, as a gesture pending resolution of the discussions regarding any discount" and asking "Is it not possible to make a payment towards an invoice but not representing the full amount of it?"

223. This is not the language of a solicitor who was treating the latest issued bill/invoice (at the time) as being final for the period covered.

224. Thus as to the extent to which the 25 March 2021 internal e-mail and subsequent communications inform me, I can be satisfied that a conversation between Mr Bagshaw and a representative of the Claimant took place. However, paragraph 24 of Mr Bagshaw's 2nd witness statement is, in my view, a reflection or inferred recollection based not on an actual attendance note of the conversation, but a brief internal e-mail of the same date. What inference or conclusions can I reasonably draw from a one sided brief short hand internal memo / e-mail as to what the Claimant's understanding was of what was discussed?

225. The answer, without something more, is none. The change in estimated costs is so significant that it requires an explanation, and in circumstances where there is no evidence that the revised estimate was discussed or otherwise confirmed in writing (and agreed by the Claimant), I am satisfied that the lack of clarity over the estimated

costs amounts to a special circumstance such that I would have been minded to order an assessment of the disputed unpaid bills in any event.

226. Insofar as Mr Wibberley drew my attention to some apparent billing errors, in terms of the Defendant seeking to recover fees for work they had neglected to remember to include in an earlier bill (as opposed to percentage calculation errors), I have elected not to address that point because my decisions above already provide the Claimant what they were seeking.

Next steps

227. Upon formally handing down this judgment, I will also make an order for a Solicitors Act assessment of bills 1 to 15. The parties are invited to make brief written submissions as to whether that order should include a provision for costs in the assessment, costs reserved, or some other order as to the costs of this particular step in the proceedings.