Case No: SC-2020-APP-000266

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 11/01/2021

Before:

COSTS JUDGE ROWLEY

- -

Between:

Zulfikar Masters	**Claimant**
- and -	
Charles Fussell & Co LLP	**Defendant**

- -
- -

Robin Dunne (instructed by **Clear Legal Ltd**) for the **Claimant**
Anthony Jones (instructed by **Charles Fussell & Co LLP**) for the **Defendant**

Hearing date: **15 October 2020**

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. By an order dated 23 April 2020, District Judge Bellamy transferred proceedings from the Sheffield District Registry to the Senior Courts Costs Office for determination of preliminary issues and for the further conduct of these proceedings. The preliminary issues (described as a single "preliminary issue" in the order) were defined as follows:

> (a) The status of the bills referred to in the claim form, that is whether they are
>
> (i) interim statute bills
>
> (ii) one or more in a series of "on account bills" as per Chamberlain v Boodle and King, or
>
> (iii) none of those
>
> (b) In light of the court's finding on issue (a)
>
> (i) whether or not and on what terms the claimant may be entitled to assessment and
>
> (ii) if they are required, whether or not special circumstances exist so as to justify an assessment, or
>
> (iii) if the bills are neither interim statute bills nor a Chamberlain series, whether an order for delivery of a statute bill ought to be made.

2. Witness statements were produced by the claimant and by Charles Fussell, the senior partner of the defendant, together with exhibits of relevant documents. No cross examination of the witnesses was undertaken as the facts were very largely uncontroversial. Moreover, the questions posed by the preliminary issues are on matters of law rather than fact. Indeed, at the hearing of the preliminary issues, neither Robin Dunne, counsel for the claimant nor Anthony Jones, counsel for the defendant, referred me to many documents over and above the retainer documents which are at the centre of the preliminary issues.

3. The claimant instructed the defendant in respect of three litigation matters. The first and main piece of litigation was the defence of a claim from Porter Capital Corporation in the Chancery Division. Subsequently there were bankruptcy proceedings brought in respect of the judgment obtained by Porter Capital and further enforcement proceedings under section 423 of the Insolvency Act 1986.

4. As far as the defendant's retainer with the claimant is concerned, there are three distinct periods involved. The first runs from February 2012 to December 2012 (for which there are 11 relevant invoices starting on 5 March 2012 and concluding on 7 January 2013). The second period runs from January 2013 until March 2018 and the third runs from January 2018 until the defendant was disinstructed in late 2019. Although there appears to be an overlap between the second and third periods, the dates I have given reflect the fact that work at the beginning of 2018 was only billed in arrears and by that time work was already being done for the third period.

5. For work done in the first period, the defendant was instructed under a private paying retainer. For the second period, the claimant and defendant entered into a discounted CFA. For the third period, the defendant says that the parties returned to the terms of the privately paying retainer originally used. The claimant says that in fact there was simply an oral agreement rather than a reversion to the first arrangement. There is no substance to this disagreement, at least as far as the preliminary issues concerned, if I conclude that the first retainer did not entitle the defendant to render interim statute bills to the defendant anyway. If I do find the defendant had such an entitlement, then there is the potential for disagreement as to whether or not the parties reverted to that agreement or to a new agreement largely made orally but for which the hourly rates at least were reduced to writing.

The first retainer

6. The terms on which the defendant was instructed by the claimant in respect of the original Chancery Division proceedings are set out in a letter dated 16 February 2012. Relevant extracts from that letter are as follows:

> "**Bills and paying us**
>
> We propose to send monthly invoices for our fees and disbursements incurred on this matter. We will address our invoices to you.
>
> We will, upon request, provide you at any stage with an up-to-date statement of the costs incurred and our estimate of the likely costs up to any particular stage of the matter.
>
> Payment of our invoices should be made in full within 14 days of receipt.
>
> …
>
> **Payment on account of costs**
>
> In accordance with our usual practice we should be grateful if you would provide us with a payment on account of our future costs, including disbursements, of £10,000, and we will require that amount to be maintained in our client account for the duration of the engagement. Depending upon how the matter develops, you may need to increase the payment on account to a higher figure. We will discuss this with you if it becomes necessary."

7. Paragraph 5 of the terms and conditions enclosed with the engagement letter contained the following:

> "Bills and payment
>
> Our bills will be rendered in arrears and will include all charges and out-of-pocket expenses incurred up to the date indicated on

> the bill. In all cases, bills will clearly specify the period to which they relate and what services they cover.
>
> …
>
> *Timing of payment* – We request that our bills are paid no later than 14 days after the date they are issued. If in any particular case you anticipate payment will be delayed, please discuss this with us at the earliest opportunity.
>
> …
>
> *Outstanding bills* – If you have not agreed with us any alternative arrangements and any bill owed to us remains outstanding for more than 14 days after it is issued, the firm reserves the right to charge interest on the outstanding amount (including VAT, disbursements and other expenses, at the statutory rate applicable to judgment debts from time to time in force.)

8. Paragraph 6 of the terms and conditions was headed "Your statutory rights in relation to our bills" and said:

> "If you are unhappy with our bills, you have certain rights.
>
> …
>
> (ii) In contentious matters, you have a right, subject to certain criteria, to apply for taxation of our bill by the Court. This is governed by section 70 of the Solicitors Act 1974.
>
> We will be happy to explain these rights further to you, if you wish. If you would like to discuss any of our bills, you should in the first instance contact Charles Fussell."

9. Paragraph 9 under the heading "Resolving problems" said this:

> "We operate a procedure to help address any issues which you would like to raise. To discuss any aspect of a matter we are handling or have handled on your behalf, please feel free to contact Charles Fussell at any time. If for any reason the firm is unable to resolve a problem, a complaints and redress scheme is provided by the Solicitors Regulation Authority, which regulates the firm.
>
> You have certain rights if you disagree with any bill from the firm, provided that it does not relate to a matter in litigation. You have the right to ask the firm, within one month of receiving a bill, for a certificate from the Solicitors Regulation Authority stating that in its opinion the fees are fair and reasonable and, if not, what amount would be fair and

> reasonable. You also have the right to have the bill assessed by the courts, whether matters are in litigation or not."

The second retainer

10. The relevant clauses of the CFA are paragraphs 3, 4 and 5. The first subparagraph of paragraph 3 sets out the hourly rates that are to be charged. The second subparagraph of paragraph 5 deals with the risk factors for the success fee. The remainder of those three paragraphs are as follows:

> 3.2 We have agreed to discount our Basic Charges by 25% to £318.75 per hour for our Senior Partner, £281.25 per hour for other partners, £225 per hour for associates with 2 to 4 years' PQE, £150 per hour for associates with up to 2 years' PQE, £131.25 per hour for trainee solicitors and members of ILEX and £93.75 per hour for paralegals (the "Discounted Charges"). Again, VAT may be applicable in each case. These are the charges, together with disbursements, that we will invoice to you an ongoing basis throughout acting for you in this matter and which you are liable to pay irrespective of the outcome of the Claim.
>
> **4. DISBURSEMENTS**
>
> We will invoice you on a monthly basis for all disbursements (including, but not limited to, barristers' fees, Court fees, experts' fees, any fees payable to a mediator or other ADR organisation, courier and copying charges) which we incur in acting for you in the Claim and you are liable to pay all our disbursements on receipt of our invoice for same irrespective of the outcome of the Claim.
>
> **5. SUCCESS FEE**
>
> 5.1 In the event that you are successful in your defence of the Claim, which occurs in the event you win a trial and at least some of your costs are ordered to be paid by Porter or Porter withdraws or otherwise discontinues its claim and agrees to pay at least some of your costs, we will charge you and you will be liable to pay a success fee, which will be an amount equivalent to the amount by which our Basic Charges have been discounted plus 25% of our Basic Charges (the "Success Fee"). This will amount to £212.50 per hour for our Senior Partner, £187.50 per hour for other partners, £150 per hour for associates with 2 to 4 years' PQE, £100 per hour for associates with up to 2 years' PQE, £100 per hour for trainee solicitors and members of ILEX and £62.50 per hour for paralegals,

> plus VAT (if applicable) in each case, in addition to our Discounted Charges.

11. Reference was also made by the advocates to clause 8 of the agreement and in particular 8.1 and 8.1.2 which are as follows:

> 8.1 You acknowledge that, prior to signing this Agreement, we have verbally explained to you the effect of this Agreement and in particular the following:
>
> …
>
> 8.1.2 the circumstances in which you may seek assessment of our charges and disbursements and the procedure for doing so;

The third retainer

12. As I have indicated above, the third period during which the defendant was retained by the claimant is, according to the defendant, governed by the first retainer since the parties reverted to that agreement once the CFA came to an end. The claimant says that it was a different, oral agreement and in that respect relies upon an email dated 9 February 2018 from Simon Winter, a partner at the defendant, to the claimant, which concluded:

> "I understand from Charles that you and he have agreed that there is no longer any prospect of any real victory or recovering costs from Porter and so we should no longer apply the 25% CFA discount and revert to our usual rates on this case. Our usual rates have in fact increased quite substantially since we entered into the CFA in 2013 – my rate (for example) is now £425 per hour rather than £375 – but, in light of your long-standing relationship with the firm, we have decided to hold those rates at the levels given in the CFA for now."

13. Since it is convenient to do so at this point, I also set out paragraph 34 of Mr Fussell's second witness statement which was relied upon by Mr Dunne in relation to his argument as to the nature of the third retainer:

> "The Claimant further relies on the fact that my firm acted jointly for him and for his wife in the final set of proceedings but we did not send her a separate engagement letter. This was an oversight on my firm's part: we promised her an engagement letter but overlooked dealing with it in circumstances where the Claimant and his wife had been subject to a proprietary freezing injunction which required urgent attention."

The law

14. Mr Dunne and Mr Jones were agreed as to the law in relation to these issues. In order for a bill rendered by a solicitor to a client to be an "interim statute bill" it has to have certain characteristics. Absent those characteristics, the bill is not counted as a "statute" bill and as such the various provisions of the Solicitors Act 1974 ("the Solicitors Act") do not apply to it. A non-statute bill is often described as a request for payment on account in order to distinguish it from an interim statute bill.

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.

16. If a bill rendered is an interim statute bill, then the provisions of section 70 of the Solicitors Act apply in respect of the time periods in which any application needs to be made by the client for an assessment of the bill. An application within a month of delivery of the bill will allow an assessment as of right. Where, as here, the invoices have largely been paid, any application after a month but before the end of 12 months will require the court to find that there are "special circumstances" for an assessment to be ordered. After the period of 12 months, s70(4) stipulates that there is no jurisdiction for the court to order any assessment of a bill that has been paid. Some of the later bills in this case have not been paid and, in respect of those bills, the timescales are more generous and, importantly, s70(4) does not apply to oust the court's jurisdiction after a period of time.

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…"

19. To the requirements set out by Mr Dunne (at paragraph 15 above), Mr Jones added that the invoice must be payable rather than merely seeking a payment on account. In this respect, the work would have to be charged in arrears to show that the work had actually been done.

20. Furthermore, according to Mr Jones, the bill needed to be "assessable". If it were not, then a Solicitors Act assessment could not take place. The effect of this point was that the client needed to be provided with sufficient information either on the face of the bill, or its attachments, or from the client's knowledge of relevant matters as described at length in the case of Ralph Hume Garry (a firm) v Gwillim [2003] EWCA Civ 1500.

21. Finally, in respect of the law, even if a bill exhibits all the characteristics of an interim statute bill, it may still not count as such if the solicitor does not have the right to render such an invoice rather than simply request a payment on account. The ability to render an interim statute bill can occur during what has been described as a "natural break" in the proceedings but there is no suggestion of that having occurred here. It is also possible for the entitlement to occur through conduct but again that was not suggested. As Mr Dunne fairly described it, the defendant's argument is entirely that they were entitled contractually to render interim statute bills and did so.

Submissions on the first retainer

22. Given that there was little dispute in the evidence and that the law applying to these issues was also essentially agreed, it is not surprising that the submissions by both advocates were succinct. There were some attempts to widen out the arguments in favour of the parties' positions. For example Mr Dunne argued optimistically that the engagement letter and the terms of conditions were inconsistent and in such circumstances the engagement letter should apply. In fact, as Mr Jones pointed out, it seemed clear on the face of the documents that the terms and conditions were there to provide detail in comparison to the general statements contained in the engagement letter as would be expected. But those attempts to widen the argument on both sides did not seem to me to add very much.

23. The core position of Mr Dunne was that neither the engagement letter nor the terms and conditions provided the information to the client which would make it plain to him that the bills he was receiving on roughly a monthly basis were statute bills and for which the time period in which to challenge them ran from the moment he received each one.

24. Mr Jones's core argument was that in fact each invoice received by the claimant was a self-contained bill which provided more than enough information for the claimant to consider whether to seek to assess it. He referred to the wording in the terms and conditions at paragraph 5 – in particular about the invoices being rendered in arrears; being comprehensive in their periods and subject matter – as well as the wording of paragraph 6 about the client's entitlement to an assessment under the Solicitors Act. By these terms, Mr Jones submitted, the defendant had made it plain to the claimant that it was going to render interim statute bills. To the criticism that the Solicitors Act time periods were not spelt out, Mr Jones referred to the phrase "subject to certain criteria" in paragraph 6 and to the comment immediately below it about the client being able to ask Mr Fussell for any further information required.

Decision on the first retainer

25. I have no doubt that the defendant intended the arrangements with the client to be one where interim statute bills were delivered and therefore, if necessary, could be sued

upon for non-payment. The terms of the invoices themselves seem to me to be clearly an attempt to produce a self-contained bill for the period involved and there is a detailed list of the activities carried out during that period and the overall time taken. I accept Mr Jones's submission that the bills would be assessable under the Solicitors Act.

26. However, I consider that the defendant's argument runs aground when contemplating the practical difficulty of the client bringing a challenge whilst litigation is continuing. Mr Dunne relied on paragraph 20 of Jacobs J's decision in Harrods v Harrods (Buenos Aires) Ltd [2012] 5 Costs LR 851:

> "That causes difficulty when you have litigation which is ongoing. The client is called upon by these provisions to challenge an interim bill within one month, if he wants to do it as of right; and if he does not challenge it within 12 months then he has to show "special circumstances" to challenge his solicitors bill. That puts him in an impossible position. Either he challenges his solicitors' bill – the very solicitor who is now acting for him – and continues using that solicitor at the same time; or he has to change solicitor, all in the middle of litigation when he is facing another enemy."

27. The difficulty in a client suing his solicitor while still instructing him is immediately apparent and does not really require High Court authority. It is often prayed in aid as a special circumstance when the challenge is outside the initial month. It seems to me to be self-evident that most clients would expect any issues with costs of this sort to be dealt with either by communicating with the solicitor to resolve perceived problems or at the end of the case when the inevitable conflict between solicitor and client would be less problematic. Whether a proactive approach of approaching the solicitor was undertaken or the client simply waited till the end of the case, the one month time limit would have been long gone by the time the client considered whether to challenge the bill in court.

28. It is for this reason that in order to "make it plain" to a client that he is receiving an interim statute bill, it seems to me that the information given at the outset needs to make clear that there are time limits and indeed give some indication of what those time limits are. The idea that several months, or, in this case, years after the engagement letter and terms and conditions were provided, the client ought to be alive to the fact that he has an entitlement under the Solicitors Act if he challenges bills promptly, seems to me to be far-fetched. There is no mention of the Solicitors Act on the invoices even to prompt such a recollection.

29. Consequently, in my view, although the solicitors intended the bills to be interim statute bills, they cannot be treated as such so as to preclude the client from an opportunity to challenge those costs. Consequently, they are akin to requests for payments on account albeit that I appreciate entirely that this is not the intended nature of the invoices that have been rendered for the payments made to date.

Submissions on the second retainer

30. Mr Dunne submitted that none of the provisions of the CFA entitled an interim statute bill to be rendered in the first place. There was nothing even similar to the original terms and conditions for the defendant to fall back upon. Mr Jones's response to this was to indicate that the terms in the CFA were supplemented by the original terms and conditions to the extent that they dealt with matters outside the CFA. As such the second retainer was an elaboration of the first rather than a completely new arrangement.

31. Mr Dunne also submitted that, based on the case of Sprey v Rawlison Butler [2018] EWHC 354 (QB), a discounted CFA could not form the basis of an agreement which entitled the solicitors to render interim statute bills. In this case, the solicitors were entitled to payment of 75% of their fees as the case progressed. The remaining 25% of those fees and a further 25% of the total fees by way of success fee would also be paid in the event of a successful outcome. In Mr Dunne's submission, these facts were on all fours with the case of Sprey.

32. Mr Jones distinguished the case of Sprey from the circumstances of this case. Here, according to Mr Jones, there was no suggestion of any fees being paid retrospectively. The agreement was simply saying that in the future the solicitors would charge the client additional sums. Therefore, it could not properly be construed as looking retrospectively after the case ended as some CFAs did. It was just an agreement with an additional charge on a particular contingency. Come what may, the solicitors would be entitled to 75% of their usual fees together with 100% of the disbursements. If certain circumstances eventuated in the future, the solicitors could put in another bill for an additional amount for the base fees and also for the success fee. This clear structure meant that the bills delivered during the proceedings were final for the periods in which they were set out. The further bills related to the future agreement. Mr Jones submitted that there was no general rule that an interim statute bill could not be rendered in a CFA case; it depended upon the terms.

33. During the course of the submissions, Mr Dunne also developed the suggestion that in fact no fees whatsoever might be charged by the solicitors given that the CFA appeared to have been terminated in a manner which was not envisaged by that agreement. The "murky" circumstances of the termination as described by Mr Dunne were categorised as being "absolutely obvious" by Mr Jones. By the beginning of 2018, he said, it was obvious to both parties that the claim would not end successfully and so the parties agreed that a new arrangement was required.

Decision on the second retainer

34. Mr Dunne's point regarding termination was also raised as a special circumstance and I have dealt with it later. I do not need to consider it for the purposes of my decision on the second retainer.

35. In Sprey, as here, the solicitors were originally instructed on a private paying, or conventional, retainer before moving onto a discounted CFA. Nicklin J described the terms of the CFA as follows:

> "8. The CFA provided that the Appellant would be liable to pay the Respondent at discounted rates (40% of the normal

> rates) if he lost the claim. If he won, he was liable to pay the Respondent at normal rates plus a success fee of 50%.
>
> 9. The Respondent billed the Appellant monthly, at the full rate during the conventional retainer, and at the 40% discounted rate during the period covered by the CFA ("the 40% invoices"). In October 2015, the Respondent billed the Appellant the balance between the normal rate and the discounted rate ("the balancing invoice") and, in January 2016, the success fee. The Appellant paid all of the bills apart from (a) the last four of the 40% invoices, (b) the balancing invoice and (c) the success fee."

36. At paragraph 5 of his judgment Nicklin J had described statute bills in this way:

> "A statute bill cannot subsequently be amended without the consent of the parties or an order of the court, which will be granted only in exceptional circumstances: ***Polak v Marchioness of Winchester [1956] 1 WLR 819***. Statute bills are final bills in respect of the work that they cover, in that there can be no subsequent adjustment "*in light of the outcome of the business*". They are complete self-contained bills of costs to date: ***Bari v Rosen*** [2012] EWHC 1782 (QB)."

37. In his conclusions, Nicklin J said at paragraph 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 the Appellant made payments on account under the express terms of the Client Care Letter."

38. Nicklin J described the heart of an assessment as being whether the sum charged by the solicitors to the client was reasonable. He then said that the charge for work done at 40% of the normal rates might well have been reasonable but, at 100%, it was not reasonable. Translating that comment to this case, the 75% of the fees might be reasonable but 100% might not be. The client could not possibly know until the end of the case because he did not know until that point whether he was liable for any more than 75% of the fees.

39. 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.

40. Although the parties in Sprey specifically agreed that the terms of the conventional retainer would continue, save where altered by the terms of the CFA, that is not, in my view, the usual approach. There is certainly nothing in the terms of the CFA which suggest this has occurred and which might give the solicitors any entitlement to render interim statute bills. In any event, for the reasons I have given, the first retainer itself did not provide that entitlement and as such, no term imported from that agreement could assist the defendant in raising interim statute bills under the second retainer.

The third retainer

41. As I indicated above, if I found that the first retainer did not entitle the solicitors to render interim statute bills, then there could be no prospect of the third period being covered by an entitlement to render such bills even on the defendant's case.

42. In any event, I prefer the claimant's position in respect of the third retainer. I do not accept that, where a CFA replaces a privately paying retainer in its entirety, the original retainer subsists in some fashion so that it can be simply continued with once a CFA has ended. That is different from, for example, the situation in Garnat Trading & Shipping (Singapore) PTE Ltd v Thomas Cooper (a firm) [2016] EWHC 18 (Ch) where a CFA was carved out for a discrete application and the privately paying retainer was used for the remainder of the work. In my judgment the original retainer here ended when the CFA was entered into by the parties.

43. Furthermore, the retainer for the third period had both the claimant and his wife as clients of the defendant. Whilst, as I understand it, the claimant's wife denies any liability to the defendant for its bills, it seems to me that the defendant certainly thought that both the claimant and his wife were their clients in relation to that particular retainer and that in itself makes it of a different nature from the original retainer. Therefore, even if the CFA had somehow existed throughout the second period, it does not seem to me that the original retainer could be considered to be effective for the third period.

44. Indeed, the only agreed element of the retainer in writing concerned the hourly rates set out in Mr Winter's email referred to above. But even those rates are based on the CFA rather than the original retainer and as such there is no vestige of an agreement based on the original terms between the parties. There could only be a contractual entitlement to render interim statute bills in an oral retainer if it had been expressly agreed at the time: there was no suggestion that this had occurred here.

45. Consequently, I find that none of the three retainers entitled the defendant to render interim statute bills to the claimant during the course of the retainer.

Chamberlain bill(s)?

46. The second option for categorising the invoices rendered by the defendant is that they are a series of on account bills which together can be taken as amounting to a final statute bill in accordance with the Court of Appeal's decision in Bartlett Beardslee Chamberlain III v Boodle and King (sued as a firm) in March 1981.

47. In that case, the Master of the Rolls, Lord Denning, was faced with four invoices rendered by the defendant solicitor during the retainer and which the defendant said were self-contained complete bills for the relevant periods, much as was said by the defendant here. At the time of the Chamberlain decision, the ability of solicitors to render interim statute bills was much less commonly included in solicitor's terms and conditions. As such, a solicitor usually had to rely upon the concept of a "natural break" in the litigation to render an invoice at any point earlier than the end of the matter.

48. In Chamberlain, the solicitors said that there was in fact a Contentious Business Agreement which prevented the client from challenging its terms given the certainty set out in that agreement. Lord Denning did not think there was any such certainty and as such the solicitors' primary argument failed. The next question he had to consider was set out as follows:

> "The next point in the case is whether the bills were four separate bills or whether they were one. If they were four separate bills, the client would have to demand taxation of each within a month of receipt. If they were one bill, divided into separate parts, as long as he demands taxation within a month of the final account, then he has a right to taxation."

49. Lord Denning took the view that the litigation was one continuous dealing and so the work done by the solicitor did not divide itself naturally, or indeed otherwise, into any breaks at all. Consequently, he concluded:

> "When the bills were delivered, they were delivered each time as part of the running account – "account rendered" being carried on in each to the next. I agree with the judge on this point too that this should be regarded as one bill although divided into parts. As this is one bill, and the client demanded taxation within the month, he is entitled to have the whole of it taxed."

50. There is no suggestion in the Chamberlain case that the individual invoices that were rendered were not capable in theory of amounting to interim statute bills. The question was simply whether or not the solicitors were entitled to render them during the course of the retainer. That is the position here since there is no argument put forward by Mr Dunne that the invoices do not amount to interim statute bills if they could have been rendered as such. As I have said above, the solicitors clearly intended them to be interim statute bills and it seems to me that there is no reason in principle why the Chamberlain approach should not apply in these circumstances.

51. The last invoice was dated 31 October 2019 and these proceedings were commenced on 29 November 2019. On the basis that proceedings were commenced within a

month of the last invoice then, in line with Chamberlain, the client is entitled to have the solicitors' invoices assessed.

52. However, there is a novel argument put forward by Mr Fussell in his first witness statement at paragraphs 24 and 31 in respect of Chamberlain bills. For example, at paragraph 24 he says:

> "If the Court should find that there were not interim statute bills but interim bills, I submit that the Court should construe all such bills as a "Chamberlain" series which became complete when the last such bill was rendered. That bill covered work in December 2017 and was rendered on 8 January 2018… As the client account ledger…shows, that bill was paid in full on 21 March 2018."

53. It did not seem to me that Mr Jones put much emphasis on this argument and, in my view, he was right to take that approach. It relies upon the concept of the invoices not being chapters of a book, as it is sometimes described, but in fact chapters of a trilogy with each book standing separately for the purposes of calculation of the time limits under the Solicitors Act. Although the solicitors were only retained once in relation to the Chancery proceedings and then the subsequent subsidiary proceedings, the court would be required to find that there were three separate retainers here for the argument to have any merit.

54. The word "retainer" is often used to mean both the retention by the client of their solicitor and also the terms upon which the solicitor is employed, particularly regarding remuneration. Indeed, I have used this shorthand within this decision. In this situation, the word retainer clearly envisages the instruction of the solicitor until his disinstruction or the matter comes to a conclusion. The fact that the parties alighted on different funding arrangements at different points does not mean that there were in fact three retainers and in my judgment the series of invoices runs all the way from the first invoice dated 5 March 2012 until the seventy seventh dated 31 October 2019.

55. Mr Dunne described Chamberlain bills as being a useful mechanism for parties who are already before the court to have bills assessed rather than having to go away and have a new bill formally served. It was not a construct which was meant to enable solicitors to gather together a number of invoices which had not been considered to be interim statute bills individually in order to categorise them as such collectively.

56. The artificiality to which Mr Dunne referred seems to me to relate to instances where the invoices are not clearly interim statute bills because they, for example do not provide sufficient information in the manner required in the case of Ralph Hume Garry v Gwillim. But it does not seem to me that there is any artificiality in circumstances such as exist here where the solicitors were not entitled to render interim statute bills but have nevertheless provided their client with documents that could otherwise be described as such. In those circumstances, it would be pointless to require a final statute bill to be served, or indeed simply the re-service of all the bills that had previously been rendered.

The terms of the Claimant's entitlement to assessment

57. Given my conclusions on the preliminary issues set out at (a), I can take the options for the preliminary issues at (b) fairly quickly. There is no need for an order for delivery up of a final statute bill because the invoice dated 31 October 2019 will serve perfectly adequately for that purpose.

58. Similarly, there is no need for the claimant to demonstrate that any special circumstances exist because the proceedings were brought within a month of the final statute bill being delivered. Standard directions regarding the breakdown of costs and cash account, points of dispute and replies together with the setting down of the case for a detailed assessment if required can be given together with the usual orders regarding a stay of any other proceedings et cetera.

59. For the avoidance of doubt, and in case the decisions I have come to are appealed, I should deal with the question of the existence of special circumstances.

60. The decision of Lewison J (as he then was) in Falmouth House Freehold Co Ltd v Morgan Walker LLP [2010] EWHC 3092 (Ch) was cited, as is usually the case, as setting out the test to be applied as to whether the circumstance in the case amounts to a special circumstance for the purposes of the Solicitors Act. The circumstance has to be "special" but does not have to be "exceptional". It needs to be something which, compared with the ordinary case, is something which justifies a detailed assessment of the costs notwithstanding the time limits in s70(3) of the Solicitors Act.

61. The claimant, in his witness statement, pointed to the size of the overall bill (£930,104.41); the lack of costs estimates; and alleged discrepancies in the bills and some queries regarding overcharging. To this list, Mr Dunne, during his submissions, added the query about the termination of the CFA in circumstances where that occurred in a manner not apparently anticipated by the agreement itself.

62. Mr Jones accepted that the estimates given were not regular throughout the proceedings but submitted that it was insufficient to amount to a special circumstance given the antiquity of the bills being considered. He did not think that the allegedly "substantial burden" placed on the claimant by the size of the invoices rendered nor the number of proceedings involved nor indeed changes in retainer were sufficient to amount to special circumstances either. He was rather more scathing about the evidence regarding alleged discrepancies and overcharging.

63. In Falmouth House, Lewison J said the following regarding the size of the bills:

> "Morgan Walker argue that the fact that there are large sums involved is not a special circumstance and rely for that proposition on the decision of Mr John Martin QC in Winchester Commodities Group Ltd v RD Black and Co [2000] BCC 310. However, in that case Mr Martin held that the stark level of the fees in issue was "at first sight a good point"; but that for seven particular reasons on the facts of that case the point turned out to be of little substance. That case is not authority for the proposition that the amount of fees in issue is irrelevant to the question whether there are special circumstances. In Re Robinson (1867 – 68) LR 3 Ex 4 the Court of Exchequer held that a large charge calling for

> explanation was a special circumstance. In my judgment Master Simons was entitled to take it into account."

64. The fees in dispute in the Falmouth House case were £201,417.07. In the Winchester Commodities case, the relevant invoices amounted to roughly £430,000. Whilst the size of the bills rendered may not amount to a special circumstance in itself, it is certainly a relevant factor for the costs judge to consider.

65. The admitted lack of estimates seems to me to be magnified by the prism of the size of the overall invoices rendered in this case. The scope for the sum that it is reasonable for the client to pay to be at variance to the invoices rendered is increased by that size.

66. Furthermore the obvious difficulty in clients bringing proceedings on a monthly basis against their solicitors in order to protect their Solicitors Act rights regarding assessment is always a powerful argument in respect of special circumstances. That is particularly so where the overall sums claimed are large.

67. It is these factors which, to my mind, demonstrate that special circumstances exist to have invoices which are caught by section 70(3) assessed. I say nothing regarding the alleged discrepancies or overcharging as they are really a matter for detailed assessment. The question of whether the solicitors were entitled to end the CFA or whether ending it by agreement is a valid termination is also a matter for detailed assessment.

68. Therefore, if an appeal court found that the defendant was entitled to render interim statute bills and that those which were paid less than 12 months before proceedings were brought (if any) together with those which have not been paid required special circumstances for the bills to be assessed, then I would find that those circumstances exist.