Neutral Citation Number [2024] EWHC 1600 (SCCO)
Case No: SC-2023-APP-000092

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 07/06/2024

Before :

COSTS JUDGE NAGALINGAM

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Between :

Lansdowne Group Limited (1) John Kelly (2)	**Claimants**
- and -	
Weightmans LLP	**Defendant**

- -
- -

Judith Ayling KC (instructed by **Croft Solicitors**) for the **Claimants**
Imran Benson (instructed by **Weightmans LLP**) for the **Defendant**

Hearing dates: 30/11/2023

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Approved Judgment

This judgment was handed down remotely at 4pm on 21 June 2024 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:

1. Weightmans, the Defendant in this Solicitors Act 1974 ('the Act') claim, entered into a retainer with the Claimants to act for them in complex and high value litigation, the outcome of which is set out in a judgment dated 19 July 2022 under case reference [2022] EWHC 1879 (Comm). The Claimants were ultimately unsuccessful, following judgment that the sued defendants had not breached their fiduciary duties and there had been no misrepresentation.

2. The Defendant raised and issued some 44 invoices during the retainer period, against which payments of approximately £2.24m have been made by the Claimants. The last 6 invoices were not paid, leading to the issuance of Part 7 proceedings by the Defendant in which a default judgment was obtained in the sum of £618,125.86, plus interest and costs, on 30 March 2023.

3. The Claimants issued Part 8 proceedings, seeking a stay of the Defendant's Part 7 proceedings, delivery up of the Defendant's full file of electronic papers, and a decision as to which of the Defendant's invoices ought to be the subject of an assessment under the Act.

4. The Defendant proposed a draft order which sought to separate their invoices into 4 distinct categories. Bills which are statute barred under s70(4) of the Act, and those requiring that special circumstances be shown under the various sub sections of s70(3).

5. On 3 May 2023, following a directions hearing, the Claimants were given permission to amend their claim to include delivery of a bill of costs compliant with section 69 of the Solicitors Act 1974, upon the Claimants' contention that the bills delivered are not statute bills and therefore not capable of assessment under section 70 of the act.

6. The claim was also amended to correct a date error in respect of invoice 1931283, and to add 3 further invoices taking the amended total to £2,964,894.13. Directions were thereafter given for a hearing to determine the status of the bills.

7. The issue before the court as at the time of this hearing concerns the status of the Defendant's various invoices, namely whether they are interim statute bills under the Solicitors Act 1974 or requests for payments on account. In the case of the latter, whether the delivered invoices form a *Chamberlain* Bill such that assessment may be ordered, subject to conditions where applicable.

The Claimants' Submissions

8. Ms Ayling KC represents the Claimants and confirmed that the single issue before the court, as of today, is the status of the Defendant's invoices. The Claimants seek delivery of a bill because they state that none of the delivered invoices amount to statute bills, and nor does the agreement between the parties permit the raising of interim statute bills.

9. Ms Ayling KC confirmed that the parties had agreed terms to amend the claim form to add 3 invoices, as per paragraph 4(d) of her skeleton argument, based on 3 July 2023 as the delivery date and the Claimants to meet the costs of the amendment.

10. An early issue arose concerning the 2nd Claimant's second witness statement, dated 22 November 2023, and only filed a day before this hearing. Ms Ayling KC sought permission to rely on this statement primarily due to references to e-mails exchanged between the parties from around May to July 2021. In particular, the e-mail of 27 June 2021 which was said to be a response to an e-mail from the Defendant dated 24 June 2021.

11. On the basis that the parties had mutually agreed to stand down their witnesses and not undertake any cross-examination, I permitted the exhibits to Mr Kelly's second witness statement only, on the basis that those documents really ought to have formed part of the agreed bundle in any event.

12. The substance of the statement was not permitted and has not been reviewed in arriving at this judgment.

13. Ms Ayling KC also sought to correct the Claimants' case summary where it said that no balancing bill was sent. She cites paragraph 4(d) of her skeleton argument, being invoice 2122301 and said to be headed as a final invoice (in the sum of £8,846.04).

14. Ms Ayling KC set out three limbs to the Claimants' case, which I summarise as follows:

    (i) Is there a contractual right to render interim statute bills. Is an express right clear from the documents. If not, can an agreement be inferred from acquiescence.

    (ii) If a right to render interim statute bills arises, were the bills raised in fact interim statute bills? Issues of:

        (a) Overlap

        (b) Retentions

    (iii) If the primary arguments at 1 and 2 above do not succeed, the secondary argument is one of a *Chamberlain* bill.

15. With regard to the question of delivery and status as an interim statute bill, Ms Ayling KC submits the burden of proof is on the Defendant, and that any ambiguities should be resolved in the Claimants' favour. Reliance is placed in *Romer v Haslam* [1893] 2 QB 296 and the judgment of Bowen J (at 298-299), where the court found that "[the solicitor] must make out as to each document of the series that there has been such a delivery of a bill of costs as to satisfy the law".

16. As to the status of the bills raised by the Defendant, Ms Ayling KC relies on *Boodia (1) & Boodia (2) v Richard Slade* [2023] EWHC 2963 (KB), in terms of under what circumstances an interim statute bill is permissible. That is, where there is an express agreement, a natural break, or by acquiescence.

17. Ms Ayling KC submits there is no express agreement, and no question of there being a natural break, which leaves only acquiescence – in which case what has been asked of a client should be demonstrably clear and unequivocal.

18. Ms Ayling KC relies on the notion of hardship and the role played in seeking to establish acquiescence. She referred to paragraph 39 of *Boodia* which sets out:

> "39. In *Erlam*, extracts from two cases emphasised the hardship to a client of receiving interim bills whilst being represented in an ongoing adversarial case as follows:
>
> "(i) In *Harrod's (Buenes Aires) Ltd v Another* [2014] 6 Costs LR 975, the prejudice involved in receiving interim statute bills rather than requests for payments on accounts was recognised by Mr Justice Jacob:
>
> > "Much more significantly, it fails to take into account the modern practice of solicitors sending bills on a regular basis which are complete bills, not interim bills. 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. It may well be that the court would regard ongoing litigation as, itself, 'special circumstances'.
>
> (ii) In *Masters v Charles Fussell and Co* (unreported) Costs Judge Rowley recognised the same problem;
>
> > "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 to be a self-contained bill for a period and for which the time limit for challenge begins to run immediately."

19. Ms Ayling KC submits that in *Masters*, there was a contractual entitlement to have monthly bills and there was provision about the ability to seek assessments under the Solicitors Act 1974. The case was based on a contractual entitlement to raise interim statute bills, but the terms did not say, unlike in *Slade v Erlam*, that the monthly bills would be final for the period to which they related.

20. Ms Ayling KC also placed reliance on paragraphs 56 to 64 of *Boodia*, which I also consider are helpful to set out in this judgment in so far as the judgment discusses "The effect of the express term":

> "56. The case law draws attention to how onerous it is to allow an arrangement whereby a client would have to preserve their ability to have a statutory challenge to the solicitors' fees by bringing proceedings against their solicitor whilst they are acting in adversarial proceedings against "an enemy". This has the capacity to impose significant pressure on the client. At the very time when they need the loyalty and commitment of the solicitor, they risk losing all of that by being in battle both with the enemy and with the person who ought to be their friend, namely their solicitor. Further, whilst the pressure of one battle can be great, the pressure of having to wage two battles at the same time might be much greater.

57. These considerations are telling in cases where there is any ambiguity. That might arise in circumstances where there is an ambiguous consent to rendering interim statute bills. It might arise where there is another attempt to say that there was an entitlement to render such bills, such as where there has been a natural break in the proceedings or where conduct, even acquiescence, is said to have given rise to an entitlement to render such bills. It is in such cases that the impact of being forced to have an assessment of fees against a solicitor has been a telling consideration to the effect that any such right may be limited to be a right to request payments on account, rather than to render interim statute bills. It follows that the situation described in the paragraph immediately above has led to an inability to establish interim statute bills.

58. The Respondent submits, and I accept, that it is necessary to be cautious about attempts to apply dicta in cases where there is no express consent to interim statute bills warning about the difficulties for a client who unknowingly becomes exposed to the difficulties referred to in cases such as *Adams v Al Malik*. There may be a difficulty in a case which purports to contain express consent, but where the words are ambiguous. If a solicitor is to rely on express consent, the wording must be clear enough to show a contractual intention to entitle the solicitor to render interim statute bills which are final for the particular stage of the work. The Court will recognise an entitlement to render such bills.

59. An entitlement based on clear wording is what was found in *Erlam*. It is a particularly pertinent case because the terms are almost identical to the instant case. It is the same firm of solicitors with like terms. A contractual term which is clearly incorporated to the effect that there is an entitlement to render interim bills which are final for the particular stage of the work that is effective. Instead of having an entire contract, the parties are contracting so that there might be stage payments. There is no authority that requires that there should be an explanation of section 70 and how assessments work. The Solicitors Act 1974 (and prior statutes from which section 70 is derived) do not provide any such express obligation, whilst being prescriptive as to what is to be part of a bill. There is likewise no express obligation to this effect in the Code of Conduct.

60. The reasoning that there is no requirement to have informed consent in the Solicitors Act or in the Solicitors Conduct Rules as a pre-condition of an interim bill is telling. The wording of the term is sufficiently clear to tell an informed observer that the solicitor has an entitlement to render monthly bills which are final for the particular stage of work. There was sufficient reasoning in *Erlam* to make this out, even although the eventual finding was that the terms of the CFA replaced the original retainer.

61. Likewise, the reasoning in *Ivanishvili* is telling not just in following *Erlam* and identifying the reasoning in *Erlam* as not being obiter, but in the entirety of the reasoning at [74-79], as quoted in full above. I find persuasive the reasoning of Costs Judge Leonard at [75] that the question of informed consent " has no bearing upon the appropriate interpretation of a contract of retainer". Likewise, there is force in the reasoning at [77] to the effect that "there is no statutory or regulatory obligation upon a solicitor whose retainer incorporates such a clear contractual term to spell out the full legal consequences of the delivery of such bills."

> 62. Whilst noting the points made about fighting the solicitor and the adversary at the same time, there are other points which reduce the impact of this, namely:
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> (i) if the interim bill is final, the solicitor does not have the opportunity to seek a higher remuneration at a later stage as a result of the bill being final and not just a request for money on account;
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> (ii) if the bill is to be challenged at the time, then the challenge will occur at a point in time when memories are much more fresh than if the dispute has to be dealt with potentially years later;
>
> (iii) in considering fiduciary duties of solicitors, leaving aside professional and duties under the Code of Conduct which are different, Sir Geoffrey Vos MR stated that solicitors act for themselves in negotiating a new fee arrangement with a client and have the freedom to negotiate a new retainer in their own interests. Enhanced obligations such as informed consent arising from a fiduciary duty relationship do not apply where solicitors are stipulating the terms on which they will act: see *Belsner v CAM Legal Services Ltd* [2023] 1 WLR 1043 at [72]-[81] and especially at [79] and *Motto v Trafigura Ltd* [2012] 1 WLR 657 at [108]-[110] per Lord Neuberger MR. Further, as Sir Geoffrey Vos MR said in *Belsner* at [80] "… the consequences of the breach of a professional duty, even one given effect by statute, are different from the consequences of breaches of fiduciary duties."
>
> 63. Leaving aside purposive matters, the true construction is that the terms of the contract are sufficiently clear to have the meaning found in *Erlam* and in Ivanishvili. In a case where the contract terms are clear, and where the express consent is by the express terms of the contract, the reasoning in those cases seems correct. The purposive approach cannot enable one party (or the court) to re-write the terms of the contract or override the express consent of the parties.
>
> 64. Where the retainer clearly stated that the parties had made a retainer on terms enabling a solicitor to issue interim final statutory bills, the Court ought to give effect to the contractually agreed retainer and to the entitlement of the Respondent to have negotiated such terms. I conclude that the Costs Judge was entitled to determine the matter, as she did, namely that to find that (a) there was no requirement of informed consent, and (b) the Respondent was entitled to render interim final statutory bills."

21. Ms Ayling KC submits that if the Defendant is relying on acquiescence or inferred reliance then the burden is on the Defendant to demonstrate this, including that the Claimants' rights to assessment were explained to them.

22. However, Ms Ayling KC acknowledges that if an express right to raise interim statute bills is established then there is no requirement to give that explanation.

23. Ms Ayling KC submits that the Defendant did not have an express right to deliver interim statute bills and if there is any ambiguity then this application should be resolved in favour of the Claimants. In this regard, Ms Ayling KC focused on the fact

that Mr Kelly is not a lawyer, whereas the Defendant is a professional firm of solicitors.

24. She also observed that if Mr Kelly had followed the Defendant's complaints procedure, the time taken would have unwittingly caused him to give up the right to a statutory assessment because of time limits under the Solicitors Act.

25. Ms Ayling KC referred me to the original retainer letter dated 28 May 2019 (bundle page 1,011), and in particular the second paragraph of the third page of the letter (bundle page 1,013) which states:

> "It is our practice to interim bill cases monthly unless there is a good reason not to. Bills are payable within 14 days unless otherwise agreed. Failure to pay will attract interest."

26. Ms Ayling KC submits that it is not clear that a right to raise interim statute bills, complete and final for the period covered, is being asserted and the phrase deployed is consistent with an intention to final bill at the end.

27. The terms and conditions sections of the retainer letter is referenced on page 4 of the same (bundle page 1,014) with the full terms and conditions document attached (bundle page 1,017). Ms Ayling KC drew particular attention to the final paragraph of section 6 of the terms and conditions, which provides:

> "However we charge, we will provide you with details of the time spent and fees incurred to date on a regular basis or on request. We will agree with you the timing and frequency for submission of bills. If for any reason we cease acting for you, unless agreed otherwise, we will charge you for the work done and expenses incurred."

28. Ms Ayling KC submits this is far from suggestive of an express agreement that interim statute bills, complete and final for the period covered, would be raised and sent.

29. Ms Ayling KC then referred me to section 11 of the terms and conditions (bundle page 1,019) which provides:

> "Unless otherwise agreed (perhaps in the CCL), we will submit a statutory interim bill for our charges and expenses at the end of every 28 days while the matter is in progress. We may submit other bills if we need to incur substantial expenses on your behalf. We will send a final bill after the matter has concluded."

30. Ms Ayling KC submits that the language of this clause is consistent with a 'reckoning up' at the conclusion of the matter, and is inconsistent with interim statute billing. She says this does not amount to the assertion of a contractual right and express agreement to raise interim statute bills.

31. With regard to any questions about a bill, Ms Ayling KC observed that the 4th bullet point under section 11 of the terms and conditions states:

> "If you have any queries about your bill, you should contact the supervising partner or manager straightaway. Their name appears in our initial letter to you. If

> you wish to dispute the amount we have charged, you should be aware of the following rights of challenge"

32. Ms Ayling KC submits that there is no clear explanation of the Solicitors Act 1974 or the Claimants' rights under the same.

33. The Defendant's complaints procedure (referenced in section 11 of the terms and conditions) appears at section 19 (bundle page 1,022) of the same document and states "If when we tell you that we have finished investigating your complaint (usually within eight weeks) you are unhappy with our conclusion you may write to the Legal Ombudsman..".

34. Ms Ayling KC observed that eight weeks would take a client outside of the 1 month limit under which they have an absolute right to assessment under the Solicitors Act 1974, and yet there is no mention of the act within section 19 of the terms and conditions. Section 19 also states that contact with the Legal Ombudsman should be made within 6 months of the last contact with the Defendant.

35. Ms Ayling KC reiterated that upon a close analysis of the funding agreement there is no express right to raise interim statute bills.

36. Relying on *Romer*, Ms Ayling KC submits that it is for the Defendant to establish that each invoice met the statutory criteria for delivery, and if it did, then the Claimants contend that the burden of establishing that an interim invoice is in fact an interim statute bill also rests on the solicitor, as per the judgment of Bowen LJ at 298-299: "[the solicitor] must make out as to each document of the series that there has been such a delivery of a bill of costs as to satisfy the law".

37. Further, Ms Ayling KC submits that a payment on account does not equate to an interim statute bill having been raised.

38. As to inference, Ms Ayling KC relies on *Abedi v Penningtons* [2000] EWCA Civ 85, at page 219, where LJ Brown found:

> "For my part, I would accept Mrs Giret's initial submission that agreement ought not readily to be inferred from the mere fact of payment being made in response to the submission of interim bills, not least where, as here, (a) the bills were for the most part in round figures and rendered on a monthly basis, and (b) payments were affected by lump sums rather than being specifically attributable to individual bills. After all, as Bowen LJ pointed out in *Re Romer & Haslam* (in a passage at p.298 I have not previously cited):
>
> Payment on account by the client in respect of the separate bills is not to that each of them was a separate bill of costs under this Act; it may be consistent with a clear understanding between the parties that the ultimate bill sent in should be the ultimate bill of costs, and that the payments were to be considered as made against that bill. It must always be a question of fact whether a document is a separate bill of costs or, so to speak a chapter in a volume. In determining whether a document has been delivered as a bill of costs, it must not be forgotten that the onus of showing that it has been lies on the solicitor.."

39. Ms Ayling KC then referred to the witness statement of Mr Kelly dated 3 July 2023, which sets out payments on account made in the total sum of £2,240,679.18 (as against requests for payment, at that stage, of £2,964,894.14).

40. This statement expresses that Mr Kelly never understood the invoices he had received to be interim statute bills, but rather that they were a series of requests for payments on account. This is less to do with any technical arguments as to the status of the invoices, and more to do with Mr Kelly's view that he had never agreed to the raising of interim statute bills, either expressly, impliedly or by inference.

41. Ms Ayling KC submits there is nothing in the Defendant's witness evidence to support the contention that an agreement to raise interim statute bills arose through acquiescence, or could be inferred from conduct.

42. As to the format of the invoices, Ms Ayling KC took me to invoice number 01881496 (bundle page 78) dated 28 June 2019 by way of example. This is marked as "Interim Invoice", as opposed to 'interim statute invoice/bill', and Ms Ayling KC argues that the presentation of this invoice is consistent with it being a request for a payment on account, or in other words, an 'on account bill'.

43. At the foot of page 1 of the invoice is a boxed section titled "Notice to Client (About your and our rights in relation to this Invoice)". Thereafter, a list of options are set out being the Defendant's complaints procedure, the making of a complaint to the Legal Ombudsman, or finally by applying for assessment under "Part 111 of the Solicitors Act 1974", which Ms Ayling KC accepts is clearly an unintentional mistype but nevertheless one a lay client will unlikely realise is an error.

44. Citing the guidance in *Boodia*, Ms Ayling KC submits that the invoices are insufficient in terms of the adequacy of the notice given to the Claimants as to theirs and the Defendant's stated rights upon issue of the invoice.

45. Ms Ayling KC also observed that at the foot of page 1 of the invoice is stated "Payment terms: 14 days from receipt of Invoice". Ms Ayling KC contrasted this with invoice 02001309 dated 26 February 2021 (bundle page 328) which is also described as an "Interim Invoice" but where the payment terms state "Payment Terms: Payable on presentation, unless otherwise agreed."

46. Ms Ayling KC submits that this variation in payment terms further demonstrates there is no right from either conduct or acquiescence to raise interim statute bills.

47. As to whether the bills raised are interim statute bills is a matter of fact, and Ms Ayling KC submits that the test is not what the Defendant intended to do but what they in fact did.

48. Ms Ayling KC referred to the Defendant's skeleton argument at paragraph 23 where it states:

> "The second, more substantive point, is that on a few occasions a bill will include time spent in a period covered by an earlier bill. The total amount so recorded is £10,860 + VAT about 0.4% of the total billed. The practical explanation is that the bills are generally issued immediately after the end of the billing period and on

occasion the lag between time being incurred and it making its way on to the system meant that bits were omitted (the time recording software requires an entry to be "closed" before it is formally allocated). So it is extra work being recorded. Not a change to the charges for the work already billed. The client retains a right to challenge the time and in fact, by including it in the later bill, the time limit for any challenge is extended. More importantly not only is this sort of software issue perfectly common it is de minimis and the law does not trifle with such matters. Subsequent events are irrelevant to the objective meaning of the contract and that this occasionally happened does not mean the relevant earlier bill somehow is deprived of status as a statutory bill. The status of a bill is not contingent on what a future bill might say. All that said, the Firm is equally disinclined to argue about trifling amounts and so readily abandons the costs recorded in overlapping periods (the £10,860 + VAT)."

49. Ms Ayling KC submits that such submissions do not permit the Defendant to escape the factual question of whether a bill is an interim statute bill, citing the relevant legal principles as to the status of a bill as set out in paragraphs 13 to 17 of *Bari v Rosen* [2012] 5 Costs LR 851. She submits that, on the facts of the index case, interim statute bills have not been delivered.

50. Ms Ayling KC submits that to qualify as an interim statute bill, an invoice must be complete and final for the work it covers.

51. Again citing Simon Brown LJ in *Abedi v Penningtons [2000] EWCA Civ 85* at p206-207 citing Cordery on Solicitors re interim statute bills: "Although they are interim bills they are also final bills in respect of the work covered by them. 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".

52. Citing *Bari*, Spencer J, re the definition of an interim statute bill: "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. They are complete self-contained bills of costs to date".

53. Ms Ayling KC stressed that there is to be no adjustment for the outcome, but rather each interim statute bill must be complete, self-contained and final for the period covered.

54. Citing *Richard Slade v Boodia* [2018] 5 Costs LR 1185, Newy LJ at paragraph 1; "Where a solicitor has delivered such a [statute] bill to his client, he can potentially sue on it, but he cannot subsequently charge any more for the work in question…" and at paragraph 31 "… 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".

55. Citing *Ivanishvili v Signature Litigation Limited* [2023] EWHC 2189, Costs Judge Leonard at paragraphs 60, 88 and 92:

"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."

"88. … the proposition that the Defendant's monthly invoices were to be final is inconsistent with the wording of the June 2016 Retainer to the effect that a final invoice would be sent when the work encompassed by the retainer had, or was about to be, completed."

"92. It seems to me that an insurmountable difficulty for the Defendant in pursuing this line of argument is that the monthly bills rendered and paid under the terms of the June 2016 Retainer were rendered by the Claimant and paid by the Defendant under the terms of a CFA which provided that they were not to be final. Payment without demur, under those circumstances, cannot be taken of evidence of an agreement to the contrary."

56. Ms Ayling KC invited me to consider invoice 02122301, marked as "Final Invoice" and dated 16 November 2022. She submits that the terminology of a "Final Invoice" is demonstrable evidence of a 'reckoning up' at the end of a matter, consistent with having requested payments on account throughout a matter and seeking a balancing payment at the end.

57. With respect to the Defendant's de minimis argument in respect of invoices where there is an overlap, Ms Ayling KC rejects that such a principle exists. She accepts that Costs Judge Leonard looked at principles of de minimis overlap in *Ivanishvili*, at paragraphs 50-56 of his judgment. However, Ms Ayling KC disagrees with the conclusion drawn by Costs Judge Leonard and, in any event, reminds me that I am not bound by that decision.

58. With respect to those invoices where the issue of an overlap arises, Ms Ayling KC referred me to the Defendant's case summary at paragraph 27 (bundle page 46) which states:

> "..it is denied that overlap of time periods between bills automatically means that those bills cannot be interim statute bills. It is acknowledged that a statute bill must be a final bill for the period which it covers and therefore that work falling within the period of an interim statute bill cannot be included in a subsequent bill."

59. Ms Ayling KC submits this is a key acceptance by the Defendant of the Claimant's position, i.e. that it is not a question of intention, but rather fact as to whether an invoice is a statute bill or not.

60. Turning to the Claimants' case summary, Ms Ayling KC invited focus on paragraphs 21 to 33 (bundle pages 30 to 31) which demonstrates where overlap time entries have arisen, as summarised at paragraph 26 of the Claimants' skeleton argument which highlights 13 examples.

61. Ms Ayling KC submits those 13 examples represent a non-exhaustive list which rebuts any argument that the incidents of overlap in this matter were either isolated or minimal.

62. Invoice number 01881496 dated 28 June 2019 in the total sum of £8,232 was followed by a further invoice dated 10 July 2019, bearing the same invoice number but in the sum of £16,706.40. Both invoices are stated to cover the period from 22 May 2019 to 25 June 2019. The later invoice includes all entries that appear in the earlier invoice, with some alterations made to rates and/or time.

63. The second version of invoice number 01881496 additionally shows work carried out between 26 June 2019 and 9 July 2019.

64. Ms Ayling KC could only speculate that the second version of this invoice was intended to replace the earlier version, but nowhere on the version dated 10 July 2019 is any clear indication that it is intended to be a replacement invoice, nor is a credit note for the earlier version supplied.

65. Ms Ayling KC observed that the Defendant's case summary includes no explanation with respect to there being two versions of the same invoice, or the fact that on the second version there has also been a change to the period covered (time entries show the additional period 26 June to 9 July 2019) yet the face of the second version of the invoice still states it covers the period 22 May to 25 June 2019.

66. Ms Ayling KC then drew my attention to invoice 01895847 dated 30 August 2019 and said to cover the period from 31 July to 22 August 2019. This was then contrasted with invoice 01910869 dated 31 October 2019 and said to cover the period from 16 August 2019 to 29 October 2019.

67. Ms Ayling KC observed that, on the face of it, the latter invoice purports to cover 6 days of the period covered by the earlier invoice. The earlier invoice includes 4 entries that fall within the 16 August to 29 October 2019 date range on the face of the later invoice. The later invoice incudes one entry that falls within the date range of the earlier invoice. As such, both are said to overlap.

68. The next example that Ms Ayling KC took me to was invoice 01935982 dated 28 February 2020 and covering the period from 31 January to 27 February 2020. This invoice contains 3 entries on 27 February 2020. This was to be contrasted with invoice 01940839 dated 31 March 2020 and said to cover the period from 27 February to 30 March 2020, and containing 2 entries on 27 February 2020. Ms Ayling KC submits this is a further example of an impermissible overlap.

69. Ms Ayling KC then drew my attention to invoice 01949221 dated 29 April 2020 and said to cover the period from 19 December 2019 to 27 April 2020. She observed that, on the face of it, that means there was an overlap with the preceding three invoices (01931283 – 18 December 2019 to 29 January 2020, 01935982 – 31 January to 27 February 2020, and 01940839 – 27 February to 30 March 2020). Within these invoices, the Claimant has identified entries appearing on 3, 16 and 18 March 2020 (invoices 01949221 and 01940839).

70. Numerous further examples are set out ay paragraph 26 of Ms Ayling KC's skeleton argument and I do not consider it assists to list them all here. They demonstrate examples of overlapping, and a haphazard approach to the crediting and reissuing of invoices.

71. Collectively, Ms Ayling KC contend these examples demonstrate the consistent sweeping up of time not dealt with or not included in earlier invoices.

72. Ms Ayling KC also takes issue generally with paragraphs 22 to 23 of the Defendant's skeleton argument (quoted above) in that it seeks to provide an explanation but it is not supported by evidence from the Defendant. The skeleton argument speaks of when bills are "generally issued" and a "software issue" but with no evidence and nothing specific to how these particular Claimants were billed.

73. In any event, Ms Ayling submits it matters little because ultimately the Defendant has failed to explain or justify how an overlap on multiple bills is consistent with the issue of interim statute bills, complete and final for the period they cover.

74. It is not sustainable for the Defendant to make out an argument that where work done on one date appears in more than one bill it will result in one of those bills being statute barred from assessment and the other one is not.

75. Ms Ayling KC roundly rejects the Defendant's de minimis argument as an attempt to backdate amendments to issued invoices via a skeleton argument, when it was unclear what was being amended, and additionally advised that those instructing her had not yet had time to work out how the precise figure of £10,860 referenced in the Defendant's skeleton argument was arrived at.

76. The term 'retention invoices' stems from the Defendant's claim form in associated proceedings for the outstanding fees, now stayed. It relates to invoices 02001309 dated 26 February 2021, invoice 02007405 dated 31 March 2021, invoice 02016133 dated 30 April 2021, and invoice 02021049 dated 28 May 2021.

77. Mark Surguy's evidence recalls an agreement with Mr Kelly that there would be a 10% retention from current (at the time) outstanding fees until the initial disclosure process had been completed, but that the 10% balance was never paid and so had to be pursued by the Defendant's credit control department.

78. However, it is accepted there is no attendance note, letter or e-mail in which the Defendant can demonstrate Mr Kelly's agreement to a 10% retention or term of it. That said, on the Defendant's own case, those four invoices cannot be deemed final for the period concerned when they were potentially subject to adjustment dependent on the outcome of (part of) the litigation.

79. In this regard, Ms Ayling KC relies on *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 as to the requirement for certainty, in particular paragraphs 46 and 47 of Sir Geoffrey Vos MR's judgment which provides:

> "46. The client argued that certainty is needed. I agree. Properly drawn bills ought in future to state the agreed charges and/or the amount that the solicitors are intending by the bill to charge, together with their disbursements. They should make clear what parts of those charges are claimed by way of base costs, success fee (if any), and disbursements. The bill ought to also state clearly (i) what sums have been paid, by whom, when and in what way (i.e.) by direct payment or by deduction), (ii) what sum the solicitor claims to be outstanding, and (iii) what sum the solicitor is demanding that the client (or a third party) is required to pay.

> 47. The practice of imposing conditions on the face of a statutory bill is and unhelpful. If conditions are to be imposed, they should be transparent. If, for example, the bill is for £5,000, but the solicitors wish to say that they will accept £4,000 in full and final settlement if payment is made within 14 days, that should be clearly stated."

80. Ms Ayling KC submits that a bill which can be adjusted based on a later outcome cannot, by definition, be an interim statute bill.

81. Ms Ayling KC wished to stress that the Claimants' primary position is that the Defendant has no express right to raise interim statute bills and that in any event no interim statute bills have been delivered to date, such that an order should be made now for a delivery of a bill.

82. The Claimants' secondary position is that a *Chamberlain* bill has been delivered, and in that case no earlier than 16 November 2022, being the professed date of the 'Final Invoice'. Ms Ayling KC observed that were the court to adopt this position, the Defendant accepts a delivery date of 17 November 2022 in terms of the date from which the time limits under the Solicitors Act 1974 would run, if the bills are not statute bills.

83. Ms Ayling KC referred me to paragraphs 45-47 and 56 of *Bari*. The question posed therein in was, having found that purported interim bills were requests for payments on account, was the judge entitled to treat them as a series of bills culminating in a final statute bill? The judgment also concluded that whilst *Chamberlain* bills were unusual, they were not rare.

84. Ms Ayling KC observed that no solicitor sets out to create a *Chamberlain* bill. *Chamberlain* concerned a case where there were no natural breaks. In *Bari*, the earlier bills were treated as non-statute bills because there was no contractual right to issue interim statute bills.

85. However, before the court should consider this secondary position, Ms Ayling KC submits consideration must be given to the issue of overlap. Ms Ayling KC submits the fact that some of the bills in the chain demonstrably overlap, either in terms of stated periods covered or actual work done, means the chain has been broken such that a *Chamberlain* bill cannot be concluded.

86. Put another way, Ms Ayling KC submits that there is nothing in terms of conduct that turns this into a *Chamberlain* bill such that time has begun to run for the purpose of the Solicitors Act 1974, and there are in any event are too many flaws in the invoices to treat them as a run of bills, when one looks at the content of the bills and the absence of a contractual right to raise them.

The Defendant's Submissions

87. Mr Benson concurs with Ms Ayling KC as to the parameters of this hearing.

88. As to the burden of proof, Mr Benson relies on section 69 of the Solicitors Act 1974, subsection (2E) and Costs Judge Leonard's analysis of the same at paragraphs 6 to 8 of *Ivanishvili*. The upshot of that reference is an invitation that if each bill has been

validly signed and delivered (under the requirements of the act), then it is not necessary in the first instance for the solicitor to prove the contents of the bill and it is to be presumed, until the contrary is shown, that it is a bill bona fide complying with this Act.

89. The approach adopted in *Ivanishvili* was that the burden is on the Claimant to show that the bills are not statute bills.

90. Mr Benson invited focus on the language contained in the relevant bundle of documents, their natural meaning, and potential rival meanings.

91. Starting with the client care letter (bundle page 1,011) dated 28 May 2018, he invited focus on the "Private costs" section of the letter and referral to "Our charges are fully explained in our Terms of Business."

92. Page 3 of the client care letter sets out "It is our practice to interim bill cases monthly unless there is a good reason not to. Bills are payable within 14 days unless otherwise agreed." Mr Benson submits this is a clear assertion of the Defendant's intended billing practice and observes the Claimants signed up it.

93. The terms of business (bundle page 1,017) run to 36 clauses. Mr Benson submits that the 1st paragraph of clause 11 is the complete answer to the question of whether a right to raise interim statute bills exists under the terms of the retainer, and that the Claimants cannot offer a rival meaning for that phrase. Mr Benson questions what else could it mean.

94. The paragraph in question states:

> "Unless otherwise agreed (perhaps in the CCL), we will submit a statutory interim bill for our charges and expenses at the end of every 28 days while the matter is in progress. We may submit other bills if we need to incur substantial expenses on your behalf. We will send a final bill after the matter has concluded."

95. Mr Benson submits that the Claimants' failure to offer a rival meaning is an implicit acceptance of the Defendant's interpretation.

96. The Defendant accepts that they did not give the Claimants a full explanation of their assessment rights under section 70 of the Solicitors Act. However, citing *Slade v Erlam* [2022] EWHC 325, *Boodia,* and *Ivanishili v Signature Litigation LLP* [2023] EWHC 2189 (SCCO), Mr Benson submits that the case law supports the view that firms do not need to advise a client of such rights upon the issue of statute bills on an interim basis, nor are they under any obligation to explain how to challenge a bill.

97. Mr Benson referred me to paragraph 15 of the Claimants' skeleton argument, which states:

> "The Cs contend that the D did not have an express right to deliver IS bills. That right does not arise clearly and expressly without ambiguity."

98. Mr Benson submits this is not the correct test. The test is to look at the language and work out the meaning. The court should not hunt for ambiguity, it should hunt for meaning.

99. Mr Benson referred to *Boodia (1) & Boodia (2) v Richard Slade* [2023] EWHC 2963 (KB), at paragraph 58 where it states:

> "The Respondent submits, and I accept, that it is necessary to be cautious about attempts to apply dicta in cases where there is no express consent to interim statute bills warning about the difficulties for a client who unknowingly becomes exposed to the difficulties referred to in cases such as *Adams v Al Malik*. There may be a difficulty in a case which purports to contain express consent, but where the words are ambiguous. If a solicitor is to rely on express consent, the wording must be clear enough to show a contractual intention to entitle the solicitor to render interim statute bills which are final for the particular stage of the work. The court will recognise an entitlement to render such bills."

100. Returning to the Terms and Conditions, Mr Benson invited me to consider the second paragraph of clause 11 (bundle page 1,019), which states:

> "We reserve the right to ask you to pay us money on account of both profit costs and disbursements before we incur them".

101. Mr Benson submits this demonstrates an express provision, reserving the right to be paid in advance, including profit costs. Mr Benson sought to highlight the distinction between a payment on account and when a payment is made in arrears (in response to receiving an interim statute bill).

102. Mr Benson accepts that, on occasion, judges have lamented the operation of the Solicitors Act 1974 in terms of client protection. However, Mr Benson also observed those very same judges also applied the law to disputes such as this justly.

103. For example, HHJ Gosnell sitting on appeal in *Slade v Erlam* [2022] EWHC 325 explained:

> "[25] … When dealing with a client's right to seek an assessment of costs from his or her solicitors the Act seeks to strike a balance between allowing a reasonable time for a client to question the quantum of costs whilst protecting solicitors from having to deal with stale allegations of overcharging. Whilst the Act purports to regulate those rights it does not go so far as to oblige the solicitor to advise the client of these provisions in terms, nor to explain in plain English what the actual consequences of the application of those terms are for the client. I am personally sympathetic to the argument that it probably should.
>
> [28] … In the absence of such amendment however the situation remains that there is no statutory or regulatory obligation to advise a client what the legal consequences are likely to be for him or her when a solicitor serves an interim statute bill. It is not normal for provisions explaining the legal consequences of contractual terms to be implied into a contract unless there is some additional statutory or regulatory obligation to do so as a result of a perceived need for consumer protection. Whilst there may be such a need here it has not resulted in any changes to the Act or relevant regulatory reform. In the absence of such, I take the view that if there is a clear contractual term reserving the right of a solicitor to deliver interim statute bills then he is entitled to do so, without having to spell out what the legal consequences of such an act would be for the client.

> [29] In this case the provision reserving the right to deliver interim statute bills is set out in paragraph 15 above. The wording is clear, and in my judgment, contains no room for ambiguity. It makes it clear that they "are detailed bills and are final in respect of the period to which they relate" which is sufficient explanation to justify the delivery of an interim statute bill in my judgment."

104. Mr Benson submits this train of thought is cemented by Costs Judge Leonard at paragraph 16 of his judgment in *Ivanishili*, where at paragraph 79 he found:

> "[79] Whether a contract empowers a solicitor to render interim statutory bills falls, in my view, to be determined upon the normal principles of contractual interpretation. As HHJ Gosnell found, a solicitor and a client can agree that the solicitor may render interim statutory bills without delving into the legal consequences of that agreement. There is no requirement that the agreement itself should do so, and the client's subjective knowledge of the legal position is not to the point. If the retainer provides for the solicitor to deliver complete, final interim statutory bills for a given period, that will be sufficient."

105. Mr Benson submits that not only is the language of the retainer "perfectly clear", it is arguably clearer than the agreement before the court in *Slade v Erlam*.

106. In his analysis of the Claimants' arguments as to rights and obligations, Mr Benson rejects the contention that the client care letter, when read with the terms and conditions, is not sufficiently clear.

107. Mr Benson accepts that there is no explanation of what "statutory interim bill" means, nor what the effect of the same would be. However, he submits there is no obligation to provide such explanations. For the same reasons, he says there is no requirement to refer to specific provisions of the Solicitors Act 1974 in detail. Reference to the legislation generally is sufficient.

108. As to the terminology of a 'final bill', Mr Benson submits that a neutral and natural meaning should be applied. Final in this context means the last bill, not a 'reckoning up' as the Claimants would have it.

109. Mr Benson submits that the inclusion of details of the Defendant's complaints procedures and the Legal Ombudsman is not only good practice, but a requirement by the Legal Ombudsman. He therefore resists any criticism of his client for the provision of such information alongside references to the Solicitors Act 1974.

110. Mr Benson submits that the retainer contract expressly entitled the Defendant to issue interim statute bills. The Defendant is not arguing there was an implied agreement. The Defendant's position is either there was an express agreement or not.

111. Thereafter, in terms of the options open to me, Mr Benson submits that I can find that all of the issued bills were interim statute bills, that only some of them are (looking at each bill on its own merits), that a *Chamberlain* type scenario has arisen, or that none are interim statute bills but rather requests for payment on account. They are certainly some of the options available to me.

112. Mr Benson, helpfully, accepts that the subjective intention of the author does not trump what the relevant retainer documents actually say or allow for. He invites me to consider all the factors and weigh up the outcome.

113. In Mr Benson's view, those factors are:

1. The retainer describes what will happen. Interim statute bills or requests for money up front, and ultimately the Defendant never asked for money up front.

2. The bills sent always had a detailed time recording attached, which is an indication of being a statute bill.

3. The bills presented initially sought payment within 14 days, and then later changed to payment upon presentation. Either way, the stipulation of payment terms is consistent with the raising of interim statute bills.

4. The bills are self-contained.

114. Mr Benson relies on *Abedi v Penningtons* [2000] 2 Costs LR 205, where at page 209 of the decision Brown LJ found:

> "The majority of the bills were sent on a monthly basis and were in a round figure, purporting to cover the work done during that month (or, as the case might be, during the two or three month period to which some of the bills related). To take an example, there was a bill dated 3 January 1997 in the sum of £3000 for the "provision of legal services" between 6 December 1996 and 3 January 1997, those services then being detailed. There was no question of these bills being submitted as "bills on account", mere requests for payment on account with each successive bill giving credit for sums paid previously and each being subject to an adjustment in a final bill. Rather each bill constituted a clear demand for payment."

115. Mr Benson submits that in the index case, no payments on account were requested. This indicates the issued bills were intended to be interim statute bills.

116. Mr Benson also submits that each issued bill gave the Claimants notice of their right to seek an assessment, though he accepts the wording is "not emphatic".

117. As to the consequences of notifying a client as to their right or options, Mr Benson cites further *Ivanishvili v Signature Litigation Limited*, at paragraphs 54 and 55:

> "54. I heard submissions about the import of the following words, which appear in small print at the foot of each invoice:
>
> > "You are also entitled to invoke our complaints handling procedures and may be entitled to have our charges reviewed by the court by way of the assessment procedure under sections 70, 71 and 72 of the Solicitors Act 1974."
>
> 55. It seems to me that wording (and similar wording in the June 2016 Terms) is entirely neutral, and has no bearing upon the status of the invoices. A complaint can be made about anything and the word "may", in relation to the possibility of

> detailed assessment, leaves the status of the bill entirely open. It has the appearance of standard wording that can be attached to any invoice without leaving the solicitor open to accusation of misleading the client or leaving the client uninformed."

118. In any event, Mr Benson argues that if the Defendant is correct with respect to their being an express right to raise interim statute bills, then there is no obligation for bills to set out the client's right to challenge the bill.

119. Mr Benson acknowledged and accepted the mis-type of "111" instead of "III", but submits that nothing more than neutral weight be given to the content of the 'Notice to Client' box on the front page of each invoice.

120. As to invoice 02122301, dated 16 November 2022, Mr Benson says that "Final invoice" means the last one. He submits that if the intention had been to treat that invoice as being final in a series, then it would have set out the full date range covered, and set out all sums received to date such that only the balance owed is shown as the final figure.

121. Mr Benson relies on earlier arguments (set out above) as to the burden being on the Claimants to show that the invoices delivered to them were not interim statute bills.

122. As to any incidents of overlap, the Defendant accepts what the invoices say factually. The Defendant also accepts the general proposition that once a bill has been issued, the solicitor is stuck with it, including where it is too low.

123. The intended effect is to stop the solicitor from adding to it later. That is the reason why, at paragraphs 21 to 24 of the Defendant's skeleton argument, the Defendant "gives up" the "costs recorded in the overlapping periods" of £10,860 plus VAT. However, all that means is that the associated time/costs would be struck from the bill on assessment. Mr Benson argues that does not alter whether a bill is a statute bill or not. A statute bill cannot retrospectively become not a statute bill.

124. Mr Benson points out that the Defendant is not hiding anything in their breakdowns, and has conceded any overlapping time. The figure of £10,860 plus VAT has been calculated by the Defendant as a genuine effort to identify and concede any such time. However, Mr Benson accepts (as the Claimants' skeleton argument appears to show) that more examples of overlapping invoices may have been identified.

125. Notwithstanding any such further examples, Mr Benson maintains the de minimis argument as per paragraph 23 of the Defendant's skeleton and submits the number of overlaps is so modest such that it ought not to lead to concern that the Defendant did something not permitted by the retainer contract.

126. Mr Benson submits that the Defendant has largely complied with the solicitor/client contract, save for in relation to 0.4% of the billed costs, and reiterated that an overlap does not stop bills being interim statute bills. Indeed, he argued that even if the overlap were half a million pounds as opposed to circa £10,000, he would still maintain that the earlier bill was a statute bill and a hard cap, and in doing so a client would avoid being billed an extra £½m by operation of the contract.

127. With reference to bundle page 51, Mr Benson drew my attention to invoices 02001309, 02007405, 02021049, and 02027286. These are 4 invoices which include work undertaken in advance of a June 2021 application for disclosure made by the Defendant on behalf of the Claimants.

128. Mr Kelly's 2nd witness statement was intended to put the work around the June 2021 application in context but I directed that I would have regard for the exhibits only.

129. The application was unsuccessful, which led to dissatisfaction expressed by the Claimants. The Defendant sought to reflect that dissatisfaction by offering to reduce the invoices relating to the failed application by 10%. The Claimant had no issue with paying these invoices but sought a larger discount.

130. The Defendant elected to not allocate any retained sums to these 4 invoices because they knew the Claimants disputed the level of discount to be applied to the same.

131. If I were to rule that interim statute bills have been raised, the Defendant has deemed those invoices as unpaid, challenges to which they agreed could be left until the end because of the Claimants' dispute over the outcome of the disclosure application.

132. During the course of the hearing, the judgment in *Karatusz v SGI Legal LLP* [2022] EWCA Civ 1388 was added to the authorities bundle by Mr Benson with my permission. There, the Master of the Rolls sought to set out guidance to assist future drafters of statute bills.

133. Whilst acknowledging the rather onerous burden that guidance would seem to suggest, Mr Benson observed that the interim invoices in the index matter pre-date any such guidance being handed down by the higher courts, which incidentally was stated as applying to cases "in the future".

134. Mr Benson submits the index matter is generally distinguishable in terms of type of cases and background, and in any event concerns bills which are in the past, i.e. they pre-date *Karatusz*.

135. Mr Benson also cited *Romer v Haslam* [1893] 2 QB 286:

> "Whether in the case of a series of bills each bill has been sent in as a final bill, or whether they are mere statements of account showing how far the expenses have gone up to the time of sending them in, is a question of fact to be determined on the evidence in each case, and it is a question which cannot be determined in any case upon the finding of the Court in any other case. The Court cannot lay down rules as to what is conclusive evidence binding subsequent Courts in subsequent cases; neither in equity nor in Common Law Courts can one judge bind another on a question of fact, whether the facts may or may not look exactly alike.
>
> It becomes, therefore, a question of fact in the present case whether the solicitors ever sent in a final bill before the last one."

136. Mr Benson submits that "in the full weigh up", the Defendant has issued interim statute bills.

137. In the event I am against the Defendant with regards to the delivery of interim statute bills, Mr Benson submits that the invoice dated 16 November 2022 is "clearly a final bill", forming a *Chamberlain* series.

138. With regard to the implications of judgment that a *Chamberlain* bill has been created, Mr Benson observes that on 30 March 2023 the Defendant obtained judgment on 3 of the issued bills, including the 16 November 2022 bill. In the circumstances, Mr Benson submits that a hearing would be required to decide whether special circumstances arise such that assessment should be ordered.

The Claimants' response

139. Ms Ayling KC observed that a *Chamberlain* bill does not result from some bills being statute bills and some being requests for payments on account. *Romer* doesn't support such an approach and indeed no decided authority says as such.

140. The question is what was the overall agreement? There was certainly no overall arrangement to mix interim statute bills and requests for payments on account, and in any event no such argument appears in the Defendant's skeleton argument.

141. Relying on paragraph 56 of *Boodia*, Ms Ayling invites consideration of the overall arrangement a client and solicitor enters into, and the potential to jeopardise that arrangement, under the section of the judgement dealing with "(a) The effect of the express term", which has already been outlined above.

142. As to the burden of proof, Ms Ayling relies on her skeleton argument. She does not accept that Section 69, 2E to be the complete answer the Defendant says it is in terms of where the burden lies.

143. It remains the Claimants' contention that the Defendant did not have an express right to deliver interim statute bills. No such right arises clearly and expressly, without ambiguity, when the retainer documentation and issued bills are looked at together.

144. Ms Ayling KC submits that the issue of ambiguity is important because it is resolved in the client's favour, not in the sense of a paying party v receiving party, but in a contractual sense. She relies on paragraph 40 of *Boodia* where in it states:

> "40. There was a reference by HH Judge Gosnell in *Erlam* to the case of *Vlamiki v Sookias and Sookias* [2015] EWHC 3334 (QB). *Vlamaki* was different from the instant case in that it was conceded in that case that any ambiguity on a fundamental aspect of the terms and conditions that cannot otherwise be resolved is to be determined against the solicitors: see the judgment in *Vlamaki* at [15-16]. This reflected the approach taken by Spencer J in *Bari v Rosen* [2012] 5 Costs LR 851 at [33-35]. In *Erlam*, HH Judge Gosnell recorded without expressing a different view Mr Williams KC's submission that *Vlamaki* at [23] "is an example of a case where there was ambiguity in the retainer letter and both the Master and the Judge on appeal found that the retainer did not say that each interim bill would be a final bill for the period it covered. There was no additional finding that the client needed to know what the legal effect of that was". *Vlamaki*

> suggests that in the case of an ambiguity the issue should be resolved against the solicitors, but that does not apply where the retainer is not ambiguous about the right to submit interim statute bills."

145. Ms Ayling KC also referred to pages 49 to 52 of the bundle and observed there is no dispute that 11 of the disputed invoices are unpaid, including the final invoice. She submits this does not count in the Defendant's favour.

146. Ms Ayling KC concluded by conceding that if the court finds that a right to raise interim statute bills arises, and that any of the delivered bills are interim statute bills as a matter of fact and paid over 12 months before the Claimants made their claim, then the Claimants are statute barred from seeking assessment in respect of those invoices.

147. As to the manner in which the Defendant seeks to explain any overlaps in the invoices, Ms Ayling KC submits it isn't good enough for the Defendant to seek to simply to "knock the time off" on an informal basis. A bill containing errors should be withdrawn, a credit note issued, and a new bill delivered.

148. Further, the deemed finality of an interim statute bill is betrayed where a solicitor thereafter seeks to introduce the notion of catch-up billing.

Decision

149. The sums at stake in this application are substantial. However, that is not the basis upon which this decision is made. Ultimately, there are three key issues to resolve.

150. Does an express right to raise interim statute bills arise as a consequence of the agreement between Solicitor and client in this matter. There being no dispute as to delivery, were the invoices delivered, as a matter of fact, interim statute bills. If they were not, do the delivered invoices amount to a chain of bills culminating in a final bill such that at that point the court may conclude that a *Chamberlain* bill has been delivered.

151. *Bari v Rosen* [2012] EWHC 1782(QB) usefully sets out "The Relevant Legal Principles" in Solicitors Act disputes, at paragraphs 13-17 as follows:

> "13. The relevant principles of law and practice governing the issue and assessment of solicitors' bills of costs may be summarised as follows for present purposes. Where a solicitor issues to his client a bill of costs which complies with the requirements of the Solicitors Act 1974 it is known colloquially as a "statute bill". Section 70 (1) of the Act gives the client the right, within one month of delivery of the bill, to apply to the High Court for the bill to be assessed, without requiring any sum to be paid into court. If no such application is made, the absolute right to assessment is lost. However, if a statute bill has not been paid and the client applies to the High Court for assessment of the bill within twelve months from delivery of the bill, the combined effect of section 70 (2) and (3) is that the High Court may allow assessment (and I am advised by my assessors usually does allow assessment), on such terms as the court thinks fit. If the bill remains unpaid and 12 months have expired from delivery of the bill, the court may only order an assessment if special circumstances are shown.

> 14. The position after a statute bill has been paid is somewhat different. The client still has the absolute right to an assessment before the expiry of one month from delivery of the bill. After that, but only up to 12 months from the date of payment, if the client applies for assessment, special circumstances need to be shown. No assessment at all can be ordered after the expiration of 12 months from payment. Section 70(4) creates an absolute bar. For completeness I should mention that there are additional provisions where the solicitor has obtained judgment on the bill, but this does not arise in the present case.
>
> 15. 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.
>
> 16. Interim statute bills issued during the currency of the retainer can arise in only two ways: by agreement, as already explained, or by natural break, i.e. at a natural break in protracted litigation or other work. It is common ground that none of the bills in the present case was issued at a natural break in the work conducted by the solicitor for the client. The defendant's case is that he had a contractual entitlement to issue interim statute bills because of the terms of the retainer.
>
> 17. Even if there was a contractual right to issue interim statute bills, it would be a question of fact whether any individual bill issued to the client was a statute bill. If there was no contractual entitlement to issue an interim statute bill, any interim bill issued could be no more than a request for payment on account."

152. The index matter is not concerned with the raising of bills at a natural break. The Defendant is very clear that they believe they had an agreement to issue interim statute bills, and they acted in accordance with that agreement.

153. The starting point is inevitably the retainer documentation.

154. At page 2 of the client care letter dated 28 May 2019, the e-mail addresses of 3 members of the Defendant's legal team are provided as points of contact. In this regard, the Defendant is clearly alive to the importance of establishing correct e-mail addresses and explicitly sets out that contact via such means is acceptable.

155. Under the "Private costs" section of the client care letter, at page 3 of the same, it sets out a modest initial budget of £10,000 + VAT "to cover information gathering and some preliminary analysis".

156. The letter speaks of the client retaining "control of the cost", and in that context the Defendant's Mr Surguy wrote "I will report the value of the work-in-progress each month so that you can keep a handle on the rate at which costs are being incurred.

This is a rough guide only at the present time as the information is of necessity going to be collected progressively."

157. Given that thereafter invoices were raised on a monthly basis, it is difficult to see why the Claimants would not have viewed those invoices as anything other than the very "work-in-progress" reports that Mr Surguy referred to under the "Costs" section of the client care letter.

158. The client care letter does not speak in definitive or conclusive terms with respect to payments. Instead it speaks of the Defendant's "practice to interim bill cases monthly", but with the caveat that in some circumstances there may be "a good reason not to". It also explains that, unless otherwise agreed, bills are payable within 14 days. The client care letter does not mention that bills may be sued upon for payment later than 14 days, only that interest will be added.

159. I am not clear on how reference to paragraph 58 of *Boodia* assists the Defendant. The index matter is a case in which the Defendant purports that the retainer contains express agreement. Thereafter, it is not so much a case of 'hunting for ambiguity', but rather establishing if there is an express agreement to raise interim statute bills, which in turn must be complete and final for the period covered. If that cannot be established, whether by omission or due to ambiguity, the outcome is the same.

160. In that regard, I concur with Mr Benson that there will either be an express agreement or not. Where ambiguity is observed, it will be resolved in the lay client's favour.

161. Mr Benson said that the court should not hunt for ambiguity, I should hunt for meaning. I am inclined to agree. However, where a party submits that a clause or section of a solicitor and client agreement is ambiguous, the court is obliged to consider that clause or section.

162. Similarly, in a dispute such as this, the court will be disinclined to consider retainer documents on a piecemeal basis or simply the sections of the same either party wishes to draw attention to. When the question is as stark as whether or not a contractual right exists to raise interim statute bills, clearly the whole contract will be considered. If anything, that is more a benefit to the Defendant than the Claimants.

163. In my view, and without having to "hunt" for it, the contract in this matter does not expressly provide for the raising of interim statute bills, and if it does then it is in ambiguous terms at best. That is the case even when put in the full collective context of client care letter, terms & conditions, bills as they appeared upon presentation, and the contemporaneous correspondence I have been taken to.

164. The witness evidence tells me nothing that the documents don't already assist me with. It is noteworthy that neither party saw any utility in cross examination of Mr Kelly or Mr Surguy in this regard. Clearly, neither could speak to the contemporaneous retainer documentation, other than potentially as to intent.

165. In terms of context, the client care letter at page 4 makes explicit reference to the "Terms and Conditions of Business".

166. The final paragraph of section 6 of the terms and conditions states:

"However we charge, we will provide you with details of the time spent and fees incurred to date on a regular basis or on request. We will agree with you the timing and frequency for submission of bills. If for any reason we cease acting for you, unless agreed otherwise, we will charge you for the work done and expenses incurred."

167. I agree with the Claimants that this is far from suggestive of an express agreement that interim statute bills, complete and final for the period covered, would be raised and sent. Provision of "details of the time spent.. on a regular basis.." is consistent with "report[ing] the value of work-in-progress each month so that.." the Claimants could "keep a handle on the rate at which costs are being incurred".

168. Section 11 of the terms and conditions states:

"Unless otherwise agreed (perhaps in the CCL), we will submit a statutory interim bill for our charges and expenses at the end of every 28 says while the matter is in progress. We may submit other bills if we need to incur substantial expenses on your behalf. We will send a final bill after the matter has concluded."

169. Ms Ayling KC submits that the language of this clause is consistent with a 'reckoning up' at the conclusion of the matter, and is inconsistent with interim statute billing. She says this does not amount to the assertion of a contractual right and express agreement to raise interim statute bills.

170. Section 11 of the terms and conditions carries the title "Billing arrangements and payments on account", with no distinction drawn between the two, for example by addressing them in separate sections of the terms.

171. In my view, section 11 fails to adequately distinguish between what is a 'payment on account' and what is a 'billing arrangement', nor does it adequately explain what the 'billing arrangement' is and means for the client? There is also the caveat of "Unless otherwise agreed…", and rather than exhaustively listing where it might be 'otherwise agreed', it simply states "(perhaps in the CCL)". Given the content of the client care letter (as set out above), it remains unclear that the Defendant's intention was to issue interim statute bills, final, complete and self-contained for the period purportedly covered.

172. The inclusion of the provision "We may submit other bills.." in the same paragraph suggests that further bills could arise for the same period. To put it another way, the provision does not explicitly make it clear that such a bill may be treated as complete and final for the period covered. Indeed, it arguably suggests the opposite.

173. A lay client is not necessarily expected to understand the correct legal terminology. A solicitor is. Referral to "a statutory interim bill" is similar but not the same terminology as an "interim statute bill", such that a lay client could reasonably be expected to treat the terms as meaning the same thing.

174. Further, the caveat of "Unless otherwise agreed (perhaps in the CCL)" means that one must consult the client care letter for any such agreement. There, one finds, and in the context of the client exercising a control over their liability for costs, the words "I will report the value of work-in-progress each month so you can keep a handle on the rate

at which costs are being incurred", accompanied by notification that "This is a rough guide only.."

175. Why, in those circumstances, should the Claimants have concluded that each bill sent was complete and final for the period covered? Why should the Claimants have not concluded the invoices were anything more than "the value of work-in-progress" reports, delivered monthly, and a "rough guide only"?

176. Section 11 of the terms and conditions proceeds to refer to the Defendants' complaints procedures, the Legal Ombudsman, and then states that the Claimants "..may.. [have] a right to object to a bill by… applying to the court for an assessment of the bill under Part III of the Solicitors Act 1974."

177. In this regard, I accept there is reference to the act but with no clear explanation of the Claimants' rights under the act.

178. With regard to any client questions about a bill, the 4th bullet point under section 11 of the terms and conditions states:

"If you have any queries about your bill, you should contact the supervising partner or manager straightaway. Their name appears in our initial letter to you. If you wish to dispute the amount we have charged, you should be aware of the following rights of challenge".

179. The Defendant's complaints procedure (set out at section 19 of the terms) states "If when we tell you that we have finished investigating your complaint (usually within eight weeks) you are unhappy with our conclusion you may write to the Legal Ombudsman..".

180. Eight weeks would take the Claimants outside of the 1 month statutory limit under which they have an absolute right to assessment under the Solicitors Act 1974. Section 19 also states that contact with the Legal Ombudsman should be made within 6 months of the last contact with the Defendant.

181. When looked at in full, the section 19 information demonstrates how rather than the terms and conditions being explicit as to the Claimants' rights, they arguably give the impression that any dispute as to a bill ought to be first explored though a complaints process lasting up to eight weeks, and then via the Legal Ombudsman up to 6 months after that expiry of that eight weeks.

182. So, whilst I accept that the Defendant was not obligated to advise the Claimants as to their rights, the information provided in the terms and conditions, which was ultimately consistent with the "Notice to Client" (about rights) contained at the foot of each invoice, either ultimately leads a client into taking a path that unwittingly gives up some or all of their rights under the time limits contained in the Solicitors Act 1974, or is otherwise consistent with an agreement that interim statute bills were not being raised and a final bill would be delivered at the end of the matter.

183. In terms of whether an obligation does arise, I observe that in *Adams v Al Malik*, Mr Justice Fulford (as he then was) expressed the view that not only does a solicitor have an obligation to advise a client of their rights under the act, but also to explain what

the legal consequences of the service of an interim statute bill would be, a view echoed by Costs Judge Rowley in *Masters v Charles Fussell*.

184. In any event, paragraphs 28 and 29 in *Slade v Erlam* demonstrate the clear distinction between what is expected, and what is the reality in the index case. In *Slade*, HHJ Gosnell said "..if (emphasis added) there is a clear contractual term reserving the right of a solicitor to deliver interim statute bills then he is entitled to do so, without having to spell out what the legal consequences of such an act would be for the client". The "if" is important, as is the reference to "clear".

185. HHJ Gosnell went on to say "The wording is clear, and in my judgment, contains no room for ambiguity. It makes it clear that they "are detailed bills and are final in respect of the period to which they relate" which is sufficient explanation to justify the delivery of an interim statute bill in my judgment".

186. In my view, in the index matter I consider the wording is not clear, and does give room for ambiguity.

187. On the one hand, the Defendant places great faith in the notion that there is no burden or statutory requirement to advise a client with respect to the specific provisions of the Solicitors Act, which in effect confers certain protections on both solicitors and clients. However, the Defendant has presented a form of advice as to what a client ought to do if they have "any query about [their] bill".

188. Thereafter the client is advised to chronologically contact the managing or supervising partner, then utilise a complaints procedure which has a self-imposed 8 week deadline for a response, then deferral to the Legal Ombudsman, and finally referral to the Solicitors Act 1974.

189. Any client who followed that advice was bound to find themselves falling foul of at least the absolute right to an assessment conferred by section 70(1) of the act, and thereafter left to the mercy of the court's discretion or potentially the higher bar of having to demonstrate special circumstances.

190. As such, whilst I concur with previous judicial comment that there is no statutory requirement to advise a client as to their specific section 70 rights under the Solicitors Act, it strikes me there is a potential special circumstances argument where the following of advice voluntarily given by a solicitor places a client outside of the time limits which would otherwise permit them to an absolute right to assessment.

191. In any event, I do not consider that the Claimants are arguing that the Defendant was obligated to spell out their rights under section 70 of the Solicitors Act 1974, nor explain how to seek an assessment of costs under the act. However, once the Defendants had elected to spell out the Claimants' options both in the terms and conditions, and at the foot of each invoice, the Defendants adopted at least some responsibility to ensure the information provided would not lead the Claimants into unwittingly giving up the Solicitors Act rights.

192. In any event, and notwithstanding any criticism I make about the information provided in order to challenge a bill, I find that the terms and conditions and client care letter clearly envisage the same are to be read together, and when looked at

collectively I cannot conclude that the retainer in this matter gives rise to an express right to raise interim statute bills.

193. I then turn to the issue of whether the invoices delivered were interim statute bills.

194. Whilst the Defendant contends that, as per paragraph 8 of *Ivanishvili*, the burden is on the Claimants to show that the disputed bills are not interim statute bills, the practical reality is that it is question of fact – and one which both parties have an interest in proving or disproving. This is likely why the Defendant has in any event sought to discharge that burden in their submissions, rather than absolve themselves from all responsibility in aiding the court's exercise of the necessary analysis required.

195. One then turns to the actual bills themselves. I cannot see, nor do I recall being taken to, a single invoice which on its face states it is an "interim statute bill", or indeed a "statutory interim bill (to adopt the language of section 11 of the terms and conditions).

196. Taken in conjunction with the guidance (at the foot of each invoice) that any challenge to an invoice should, in order, firstly follow the Defendant's complaints procedure, then refer to the Legal Ombudsman, and finally seek an assessment under a misquoted section of the Solicitors Act, the guidance the Defendant elected to provide undermines client protections under the act – if each issued invoice is a bona fide interim statute bill.

197. Mr Benson described the notice of rights on the face of each invoice as "not emphatic". I have already commented on the impact of the advised sequence in which the Claimants were advised to challenge the invoices.

198. Additionally, those with professional legal costs law expertise will plainly know there is no Part 111 of the Solicitors Act 1974, and that the intention was presumably to refer to Part III. However, a lay client cannot be expected to understand this was an error. So, not only was the wording "not emphatic", it was, in at least one instance, plainly incorrect.

199. Mr Benson argued that "neutral weight" be given to the 'Notice to Client' section of each invoice. Even if such "neutral weight" were to attach, it does not escape the fact that read in its natural order those words would, in my view, lead any reasonable lay client to follow the sequence suggested by their acting solicitors and thereby unwittingly give up some or all of the rights they would otherwise have under the Solicitors Act 1974.

200. Further, the argument that the absence of requests for payments on account indicates an intention to issue interim statute bills, is an invitation to infer what the invoices were intended to be. There must be certainty when one is asking the question of whether or not an interim statute bill has been delivered. As I have reflected above, the terms and conditions could have distinguished between "payments on account" and "billing arrangements" by dealing with the same in separate distinct sections. Instead the terms draw no adequate distinction between the two.

201. Further, it strikes me would not be onerous for each invoice to bear the words, "This is an interim statute bill", if that was the intention, followed by an extract of the

relevant provisions showing the time limits under the Solicitors Act 1974. This may not be a requirement, but it is a step that would surely benefit the solicitor as well as the client (versus requiring the court to address disputes such as this). Instead, one is left to consider inference and I am not prepared to infer than an invoice is an interim statute bill.

202. As to the "Final invoice", I accept that either party's interpretation of the meaning of 'final' could be accepted. That is why setting the same within its proper context is important. That requires analysis of the retainer and ultimately what is consistent with the same. In the index matter, I consider the Claimants were entitled to consider the "Final invoice" as the last one that would be raised, such that they now had certainty as to the total costs incurred.

203. As to the effect of payment of invoices, per *Abedi*, I find that the mere payment of invoices received during the course of the litigation is not conclusive as to there being an agreement to raise interim statute bills. Whilst payments in this regard could be said to be consistent with such an agreement, they could equally be said to be consistent with an agreement to make payments on account as the case progressed.

204. The primary question remains whether or not an express agreement exists. In this case I have found, without hesitation, that no express agreement has been demonstrated. However, I can conceive of circumstances where conduct through payment of invoices may be a factor which weighs in the balance. It is not a factor which carries sufficient weight in this instance.

205. The fact that the Claimants made payments against the sums they were advised of does not create an equivalence that what was delivered was a compliant interim statute bill, nor that there was an express agreement that interim statute bills could be raised.

206. For the avoidance of doubt, and preferring the Claimant's submissions as to whether an implied agreement arises in the absence of an express contractual right, I do not consider that an agreement can be inferred from the Claimants' conduct or via acquiescence. In fairness to Mr Benson, he made it clear that the Defendant's primary case was that there was either an express agreement or there wasn't.

207. I now turn to the issue of retentions.

208. Invoice 02001309 dated 26 February 2021, invoice 02007405 dated 31 March 2021, invoice 02016133 dated 30 April 2021, and invoice 02021049 dated 28 May 2021, have been termed the "retention invoices" in the Defendant's stayed Part 7 proceedings.

209. The Defendant's evidence is that there was an agreement with the Claimants that there would be a 10% retention from the outstanding fees (as they then were) until the initial disclosure process had been completed, but that the 10% balance was never paid and so had to be pursued by the Defendant's credit control department.

210. The Defendant has accepted these bills could be left until the end because they knew those bills were being disputed. The Claimants' willingness to pay something towards these bills would remain consistent with the understanding they were making

payments on account which would realistically represent what they would be paying in the final wash up.

211. On the Defendant's own case, those four invoices cannot be deemed final for the period concerned when they were potentially subject to adjustment dependent on the outcome of that part of the litigation. In any event, there is no attendance note, letter or e-mail in which the Defendant can demonstrate an agreement to the contrary.

212. In effect, that means any such invoices are deemed unpaid and would therefore fall under a potential special circumstances argument, had I found an agreement to raise interim statute bills arose. There is still some relevance, however, to the role these bills play in a potential *Chamberlain* bill argument.

213. With regards to overlapping bills, the Defendant relies on the conclusions drawn by Costs Judge Leonard in *Ivanishvili* as to the practical impact on the status of invoices delivered.

214. *Ivanishili c*oncerned a series of bills, largely raised on a monthly basis, which identified the period to which they applied. Each was accompanied by a detailed narrative and was presented as a demand for payment.

215. The last two invoices in that series overlapped. The penultimate invoice covered the period from 1 to 31 August 2022 , whereas the last invoice covered the period from 26 August to 26 September 2022. The overlap was thought to be caused by a time-recording error and the judgment records that there was no dispute that the amount of work involved in the overlap period was “minimal”. Costs Judge Leonard found:

> “53. In my view this was an error with no real significance. I am unable to accept Mr Mallalieu’s suggestion that it evidences an understanding on the Defendant’s part that it was free to render more than one bill for the same period.”

216. In *Ivanishili*, work was conducted under a retainer dated June 2016, through to a final invoice covering work up to 26 September 2022. As such, a single example of overlap, caused only by a time-recording error, in an amount that the parties agreed was minimal, in a 6 year period may well have led to the conclusion that it “was an error of no real significance”, in terms of disrupting the terms under which an entire set of bills might be viewed.

217. However, it seems to me Costs Judge Leonard would have been entitled to rule that at least one of the overlapping bills was not an interim statute bill by reason of the overlap, without upsetting the status of the other earlier bills.

218. Whilst not binding, if anything the case highlights the importance of looking behind the reasons an overlap has arisen and ensuring any subsequent decisions are consistent with what the retainer permits, and indeed with how the invoice in question is presented.

219. It seems to me that part of the Defendant’s overlap argument is that the Claimants are only making this argument because it suits them, but if the later invoices were for say a few hundred thousand pounds more, then the Claimant would be arguing that the

earlier bills were interim statute bills, complete and final for the period covered, and no more fees could be added to the same.

220. This is pure speculation of course. This court can only deal with the facts and submissions before it.

221. The Defendant, at paragraph 23 of their skeleton argument, describes the sum of £10,860 + VAT as a "trifling amount". This is in the context of bills running to well in excess of £2m in total. However, on any measure, £10,860 + VAT is not a 'trifling' amount of money.

222. Further, simply conceding the overlapping amounts does not repair the damage done. If anything, the Defendant has unequivocally conceded errors in those bills such that, by definition, they cannot be deemed final for the period they purport to cover. As such, they are not statute bills, interim or otherwise. The correct course of events would have been to withdraw such bills, present new correctly drafted bills, and either issue credit notes for the full amount or, with the client's agreement, for the overcharged amounts only.

223. Ultimately, I am not satisfied that the Defendant has presented a clear and compelling argument as to why any bills which feature an overlap can still be a valid interim statute bill. Reliance on a single non-binding decision of another Costs Judge, where the cause of the overlap was far removed from the facts of the index case and solitary as opposed to multiple, is in no way persuasive.

224. In the index matter, and on the Defendant's own evidence, adjustment of nearly £11,000 to issued invoices are sought. Whilst this may represent a small percentage of the overall fees incurred, it can hardly be described and dismissed as de minimis. For many consumers of legal services that sum could represent their entire bill.

225. One is also minded to consider the formality required to correct a bill, with generally either the consent of the parties required or an order of the court (see the White Book 2023, Volume 2, 7C 109). As I understand matters, and reminding myself this is the Claimants' application, I do not understand the Defendant to be seeking an order to correct the overlapping bills. Rather that the incidents and total amount of overlapping sums in such bills is so de minimis that the court may disregard the same as such.

226. In support of a secondary *Chamberlain* argument, Mr Benson submits that the last invoice is "clearly a final bill". However, at the time, the Defendant's argument is that multiple earlier invoices were also 'final', only to the period they purported to cover. Of course, as discussed above, there are multiple examples where those bills proved in fact not to be 'final'.

227. Thus in one sense the use of the word "final" on the last invoice is arguably an acceptance that the previous bills had no finality about them. Alternatively, and the view I have concluded, it simply meant it was the last invoice the Defendant intended to send. I do not consider it was intended to complete a series or create a final bill that incorporated all the earlier bills.

228. In addition, I agree with Ms Ayling KC's analysis of the bills as a "broken chain" such that a *Chamberlain* bill cannot be deemed formed. As set out at paragraph 26 of

the Claimants' skeleton argument, and at least implicitly accepted by the Defendant at paragraph 23 of their skeleton argument, there are simply too many occasions where the issued invoices could not be considered to be interim statute bills due to overlap (discussed above) such that the chain has been broken on multiple occasions.

229. A *Chamberlain* bill does not arise in this matter.

Next steps

230. Upon the handing down of this judgment an order will be made for the delivery of a bill, pursuant to CPR 46.10.

231. The parties are invited to agree a directions order in this regard. Such order will include a provision for "Costs reserved", such that the parties will have an opportunity to address the court in relation to the costs of this element of the assessment proceedings, if not agreed.