



Neutral Citation Number: [2024] EWHC 512 (SCCO)

Case No: H27YX765

SCCO Ref: SC-2021-APP-001162

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

The Royal Courts of Justice, Strand
London, WC2A 2LL

Date: 07/02/2024

Before :

COSTS JUDGE NAGALINGAM

Between :

Laytons LLP

Claimant

- and -

Mr Shaun Terence Savage (1)
Mr Anthony Simon Christofis (2)
Mr Matthew John Williams (3)
Horsham Holdings Limited (4)
North Street Horsham Development LLP (5)
Dauida Properties Limited (6)
DNG Bedford Properties (3) Limited (7)
Oxford Property Investments Limited (8)

Defendants

Stephen Innes (instructed by **Laytons LLP**) for the **Claimant**
Andrew R. Nicol (instructed by **DLA Piper UK LLP**) for the **Defendants**

Hearing dates: 07/12/2024

Approved Judgment

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

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COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

1. This judgment concerns two applications. One made by each party.
2. Sequentially, the applications addressed in this judgment were made by the Claimant on 2 October 2023 and the Defendants on 23 October 2023.
3. The Claimant's application concerns the admissibility of a report the Defendants wish to rely on. The Defendants' application is for specific disclosure.
4. The hearing of these applications led to the adjournment of an assessment of damages hearing (the Claimant having sued under Part 7 for payment of their outstanding fees), with the intended date for that assessment being instead utilised to hear the applications.

Mr Innes' submissions

5. Mr Innes submits that the Defendants are seeking to impermissibly include a report from Kain Knight (the report). He says that the background to this dispute is important in order to understand the context in which the application to admit the report should be considered.
6. The Defendants instructed the Claimant to act on their behalf between August 2019 and November 2020, during which time 32 invoices were raised in the total sum of £820,064.00. In February 2021, the Claimant brought a claim in the county court relating to the last 22 invoices, for unpaid sums totalling £365,148.02.
7. In April 2021 the Defendants served a Defence which sought to challenge the funding arrangement in place and raised an argument that the Claimant's fees were challenged during the lifetime of the retainer. The Defence also set out arguments for a detailed assessment of the Claimant's fees and a limit to the amount that may be recovered by way of interest on unpaid bills.
8. In June 2021, the Claimant alerted the Defendants to the need to apply for a detailed assessment if they wished to avoid the Claimant's fees being assessed under the Part 7 procedure.
9. In August 2021, and reflecting the agreement of the parties, HHJ Saggerson ordered the transfer of the proceedings to the Senior Courts Costs Office (SCCO) in anticipation of there being an application for detailed assessment by the Defendants. No such application was made and the SCCO made an unless order in December 2021 (on terms which specified a deadline for the Defendants to issue a Part 8 costs only claim or face being debarred from pursuing the same).
10. Mr Innes observed that not only was no application made in time, the Defendants did not make an application for relief until over 10 months after the default had taken place. The application for relief was refused and the court ordered there be judgment for the Claimant with associated directions to carry out the assessment of damages.
11. Mr Innes wished to stress that this is the *Claimant's* claim for 22 unpaid invoices, and there is no scope to bring into question the paid fees which do not form part of the Part 7 claim.

12. Mr Innes observed that that since the Defence was served in April 2021, the Defendants have been raising the prospect of a detailed assessment and yet never applied for one, even when under the spectre of an unless order. The Defendants were subsequently debarred from that opportunity, and showed no urgency in seeking to obtain relief from sanction.
13. Mr Innes observed that my order dated 9 March 2023 was for a common law assessment, based on the Claimant's itemised bill, and not a gross sum bill. In this regard, he says the Defendants are not in the dark as to how the sums claimed are broken down. The Defendants have sufficient detail to make challenges within the parameters allowed for by the 9 March 2023 order.
14. Mr Innes also observed that at no time during the course of the hearing on 9 March 2023 did the Defendants seek any directions for disclosure, nor did they apply to vary or appeal the order made. They are fixed with the terms of that order.
15. Mr Innes then directed me to the report itself, providing his analysis of the same. He submits that paragraph 7 of the report sets out something akin to an expert declaration but with no reference to a duty to the court, and that paragraph 8 references a statement of truth despite the report not containing one, nor being signed.
16. Mr Innes takes issue with paragraph 11 of the report where it states "We have been instructed to provide an opinion on the costs claim as a whole, in accordance with paragraph 3 of Costs Judge Nagalingam's Order". Mr Innes submits that my order did not require a report be produced. He also observes that the report is held out to be "opinion" evidence only.
17. Mr Innes is particularly troubled by paragraph 12 of the report which, amongst other things, expressed the opinion that "limiting the common law assessment in the manner specified by Costs Judge Nagalingam may seriously prejudice the Defendants' position". Mr Innes is concerned that the report is therefore an inadmissible attempt to widen the scope of the common law assessment, in circumstances where the scope of the assessment has in fact been limited by the Defendants' own conduct in not taking the necessary steps to secure a detailed assessment of the disputed fees.
18. Mr Innes thereafter observed that paragraphs 13-16 of the report raise issues which go beyond those raised in the Defence, and beyond the scope of the order dated 9 March 2023.
19. Mr Innes noted that paragraphs 20-29 of the report address hourly rates but observed that hourly rates is not one of the issues for determination set out in the 9 March 2023 order.
20. Mr Innes accepted that paragraphs 38-44 of the report were capable of coming within the scope of the 9 March 2023 order but that evidence as to costs estimates was already addressed in the Defendants' witness evidence. The same was true of paragraph 45 of the report, which addresses interest.
21. Mr Innes also accepted that paragraph 45 was capable of falling within the scope of the 9 March 2023 order insofar as it addresses the terms and conditions associated with the representation agreement.

22. Mr Innes referred to the 4th witness statement of Ms Wyzykiewicz, dated 23 October 2023, and in particular paragraph 31.1 of the same which comments, in relation to the report that:

“it has always been the Defendants' intention to file the Report with its evidence. The fact that the Defendants would instruct a costs lawyer to assess the invoices was raised with the Claimant on multiple occasions and the Claimant had every opportunity to raise an objection to this. The Claimant only decided to take issue with the Defendants instructing a costs lawyer to prepare the Report after the Report was filed. The Claimant is therefore estopped from taking any issue with the Report”.
23. Mr Innes submits that in taking this stance, the Defendants have ignored they are subject to a debarring order. It was not for the Claimant to object to something the Defendants were already debarred from doing, nor for the Claimant to waste costs in telling the Defendants something they ought to already know.
24. Mr Innes also takes issue with paragraph 31.2 of the same statement, where it sets out that “at the common law assessment hearing, the Court will need to assess the reasonableness of the invoices rendered in the context of the work undertaken by the Claimant. The Report provides the requisite background to assist the Court in carrying out its assessment”.
25. Mr Innes submits this proposition is not correct. The Defendants are limited to the scope of the 9 March 2023 order and the court will not be conducting a general assessment of reasonableness.
26. Mr Innes also takes issue with paragraph 31.3 of the statement, which provides that “the contents of the Report would have formed part of the Defendants' Points of Dispute in a statutory assessment context. The Defendants still have a right to file evidence akin to points of dispute in a statutory assessment from specialist costs lawyers. Simply because the nature of the assessment has changed does not mean that the Defendant is barred from filing the contents of the Report with the Court”.
27. Mr Innes sought to remind the court that this is not a statutory assessment. Points of dispute are not evidence and in any event there is no directions for points of dispute, nor for anything akin to points of dispute.
28. The Claimant's stance is that they object to the inclusion of the Kain Knight report and had not responded to the report or rebutted it because of that rejection.
29. Mr Innes accepted all 4 appendices to the report could form part of a hearing bundle, but it's the report itself which the Claimant objects to being admitted.
30. With respect to the Defendants' application for specific disclosure, Mr Innes submits that the Defendants fails to recognise the scope of the common law assessment. This is not a solicitor and client assessment and the court will not be conducting a detailed assessment of the Claimant's fees.
31. In so far as the supporting witness statement to the application talks of “reasonableness”, Mr Innes submits that the terms of the order dated 9 March 2023 are clear and ultimately does not permit what the Defendants are now seeking.

32. Further, Mr Innes says that the Claimant is concerned that the scope of the Defendants' application appears to seek the inclusion of invoices which are already paid, and thereafter impose an unrealistic timetable akin to points of dispute and replies, and one that is unlikely to be capable of allowing the 22 January 2024 hearing date to be kept.
33. Mr Innes sought to remind me that the Defence to the Part 7 proceedings is dated 8 April 2021 and there have been multiple hearings since because the Defendants had consistently stated an intention to pursue an order for detailed assessment.
34. Mr Innes observed that ultimately the Defendants failed to pursue a detailed assessment and are now attempting to re-open the issue by the back door. In effect, the Defendants are trying to recreate what would happen in a detailed assessment hearing.
35. The Defendants already have the benefit of specific issue-based directions which provide for witness statements, which may be supplemented by exhibits, the opportunity to cross-examine witnesses, and for skeleton arguments.

Mr Nicol's submissions

36. Mr Nicol submits that the Claimant's concerns that the Kain Knight report is seeking to widen the scope of, or go behind the 9 March 2023 order, are without foundation. He says that is not the purpose of the report, and the Defendants are simply seeking to put the Claimant to proof as to the quantum of damages sought.
37. With regard to the "reasonableness" of the fees, the Defence, and the scope of the order dated 9 March 2023, Mr Nicol submits the question has always been whether the fees were excessive. Mr Nicol submits that has always been the scope of the assessment.
38. Mr Nicol also queries how can the court decide what is reasonable and what is excessive based on the Claimant's demands for payment only.
39. Mr Nicol acknowledges that the Defendants have lost the right to a statutory assessment and they accept this reality. He observes that under a statutory assessment there are control mechanisms for disclosure and putting documents before the court, whilst protecting legal professional privilege.
40. Mr Nicol submits that if there is to be no traditional detailed assessment, then there should either be a formal disclosure stage or at least sufficient documentary evidence before the judge in order to carry out the task envisaged.
41. Mr Nicol, whilst accepting that the SCCO guide is not binding, submits the same is nevertheless instructive, and the spirit of the guide should be followed with respect to the sharing of information by way of voluntary disclosure, citing paragraph 18.3 of the guide.
42. The Defendants also accept that their own tardiness has denied them the opportunity of a statutory assessment, and the consequences of the 1/5th rule. However, Mr Nicol says this takes nothing away from a consumer complaining about the value for the service they have received.

43. Mr Nicol says that the consumer is the vulnerable person in such a scenario and should therefore have the protection of the court.
44. With respect to the mode of hearing, Mr Nicol argues that a common law assessment is overwhelmingly CPR driven in terms of approach, and the court needs the best available evidence before it to make decisions.
45. Mr Nicol observed that in a period of just over a year, the Defendants repeatedly set out their budgetary constraints and concerns, yet the Claimant incurred circa £820,000 of fees in that period. He says the question for the court is whether the Defendants' expressed budgetary concerns were accounted for, and were the charges excessive? In this respect, Mr Nicol questions the practical difference between unreasonable and excessive.
46. Mr Nicol considers that the Claimant is arguing that all the court needs to do is look at the demands for payment, and without any context of the earlier (paid) demands, decide what to allow for the later demands.
47. He reflects that argument was raised by the Claimant at the 9 March 2023 hearing, and reminds me that the recital to the subsequent order reads that the court "may have regard not only to the invoices which are the subject of the Claimant's claim but also to earlier invoices delivered by the Claimant and paid by the Defendants".
48. Citing the case of *Connollys (a firm) v Harrington* [2002] ALL ER (D) 268 (May), Mr Nicol submits that background and context are important. He submits that the exercise envisaged by the order dated 9 March 2023 would be rendered futile, and the task ahead impossible, if the earlier invoices cannot be seen in their proper context.
49. Mr Nicol stated that no one is suggesting that Kain Knight are experts (for the purpose of the exercise the court is faced with).
50. However, Mr Nicol submits that the 9 March 2023 order points to what evidence the court will need to see to decide the issues between the parties, and that those issues cannot be considered in a vacuum. He submits that the Kain Knight report will assist, has the same standing as submissions made on the day of the hearing, and that ultimately the Defendants are just being up front about what they intend to say.
51. As to the events of March 2023, and the Claimant's criticism of not securing directions for disclosure when the 9 March 2023 order was made, Mr Nicol is instructed that his clients did not anticipate that the Claimant would refuse to disclose the documents the Defendants are now seeking.
52. Mr Nicol wished to make it clear that the Defendants were not asserting a right to have the earlier invoices assessed but rather makes a request for disclosure of documents supporting those earlier invoices so they could be considered in context.
53. Mr Nicol then sought to address the question of what level of detail do I, as the costs judge conducting the common law assessment, need in order to make my decisions. Mr Nicol submits it is a question of relevance.

54. Mr Nicol submits that the Defendants raised the issue of disclosure in early 2023 and, from the Defendants' perspective, the Claimant's resistance seems to be based on their assertion that the files are in storage and difficult to retrieve.
55. Mr Nicol submits that the Defendants simply wish to see the files which were presumably used to draw the itemised invoices. He observes this is not an inter partes assessment and as such there should be no issue with privilege.
56. He also rhetorically asks what's the downside for the Claimant in producing the documents, and how does it assist the Claimant not to produce evidence. Mr Nicol considers that the Claimant leaves itself open to an adverse inference being drawn if they maintain their current stance.
57. Mr Nicol submits that ultimately, the Kain Knight report acts as a springboard for what will be said at the 22 January 2024 common law assessment hearing.
58. With regards to approach at the assessment, Mr Nicol, in consistency with Mr Innes, advised there was little he could find in terms of authoritative guidance as to conducting a common law assessment of solicitors' costs when it was the solicitor suing for their fees under Part 7.
59. Mr Nicol cites *Friston on Costs*, and the observations expressed therein that non-statutory assessments are a "*less rigorous process*" in which the court "*tends to paint with a broader brush*", but argues that even in a "*rough and ready*" assessment the court is assisted by the best evidence available.
60. As to approach, Mr Nicol referred me to the case of *Turner & Co v Palomo SA* [2000] 1 WLR 37 where the defendant complained that the claimant firm's charges were excessive. Mr Nicol draws analogy with reference to the word 'excessive' in the filed Defence in the index matter.
61. In *Turner & Co*, the claimant's response had been to send "a full break-down of their charges and of the time that they had spent up to May 1996, which was the period covered by the Bills then outstanding".
62. In response, the defendant, Palomo SA, obtained a sworn affidavit from an independent solicitor said to be experienced in the matters upon which *Turner & Co* had been instructed and who concluded that *Turner & Co*'s fees were excessive. The independent solicitor had requested sight of *Turner & Co*'s working papers but that request was refused.
63. In the *Turner & Co* case, the independent solicitor's affidavit was considered admissible. Mr Nicol submits the report of Kain Knight carries the exact same status, albeit, I observe, he uses the terminology of "the Kain Knight statement" (in his skeleton argument at paragraph 30).
64. Mr Nicol is frank in his acceptance that the Kain Knight report ventures beyond the direct scope of the order dated 9 March 2023 but nevertheless maintains that the "core of the report" should be accepted as admissible.
65. Mr Nicol confirmed the Defendants' acceptance that the assessment will be "rough and ready", but that does not mean the court should not have the best evidence before

it. All the Defendants wish to do is properly evidence the contentions made in their Defence. This is ultimately why both disclosure is sought and admittance of the Kain Knight report pursued.

Mr Innes' response

66. Mr Innes submits that the Defendants are trying to talk me into conducting a traditional detailed assessment with no points of dispute or points of reply, and with full disclosure ordered.
67. Mr Innes cited the case of *Devonshires Solicitors LLP v Elbishlawi & Anor* [2021] EWHC 173, where the court, applying *Turner & Co*, held that where detailed breakdowns had been provided, but no specific points had been taken in relation to particular items on the bills being excessive, there should be summary judgment for the amounts claimed in those invoices. Where it was unclear whether details of invoices had been provided, there should be summary judgment for a sum to be assessed by a costs judge.
68. Mr Innes sought to remind the court that in the present case, the Claimant has served detailed, not gross sum bills, and it has provided detailed breakdowns where the bill served was not already itemised.
69. He submits that paragraphs 9 and 10 of the Defence do not descend to any real detail, and that the Defendants are inviting too wide an interpretation of the 9 March 2023 order (where it refers to paragraphs 9 and 10 of the Defence).
70. Citing paragraph 10 of the Defence in particular, Mr Innes submits that context is important because it was drafted at a time when the Defendant anticipated pursuing the detailed assessment route and anticipated that a Solicitors Act detailed assessment hearing would take place.
71. In particular, Mr Innes observed that paragraph 10 of the Defence refers to “excessive and/or disputed” whereas the 9 March 23 order includes reference to “disputed” only.
72. With respect to disclosure, Mr Innes observed that before the 9 March 2023 hearing the Claimant had already made it explicitly clear they objected to disclosure, yet the Defendants failed to secure such a direction when the hearing took place, and failed to appeal or otherwise apply to vary the order to secure the disclosure sought.
73. Finally, Mr Innes asks what would an order for disclosure lead to at this stage, and after all this time. He submits it would invariably lead to a further witness statement on behalf of the Defendants which was equivalent to points of dispute.
74. Mr Innes further submits that such an order would inevitably lead to the loss of the single day listed for the common law assessment, and see that replaced with a lengthier hearing in which there would be considerable argument over the application of principles akin to detailed assessment notwithstanding the existence of an order debarring the Defendants from pursuing that very outcome.

75. Mr Innes submits that paragraph 3.2 of the 9 March 2023 order is of limited scope by design. It is not intended to be a springboard to an item by item analysis of whether the costs are excessive.

Mr Nicol's response

76. Mr Nicol submits that the 9 March 2023 order is very specific at paragraph 3, which refers to paragraph 10 of the Defence, and that paragraph 10 of the Defence refers to "Excessive", hence the necessity of the Kain Knight report and the application for disclosure.
77. He reiterates that the Defendants accept there will not be a line by line assessment, that instead the assessment will be "rough and ready", looking at big ticket areas only, so that damages in the form of the Claimant's fees can be assessed.

Decision

78. As outlined above, this judgment concerns two applications. One made by each party.
79. Sequentially, the applications addressed in this judgment were made by the Claimant on 2 October 2023 and the Defendants on 23 October 2023.
80. The Claimant's application concerns the admissibility of a report the Defendants wish to rely on. The Defendants' application is for specific disclosure. However, before descending into the detail of those applications and the parties' submissions as to the same, it is helpful to set out the relevant chronology in this matter.
81. This began with service of the Claimant's Part 7 claim dated 23 February 2021. Thereafter, and following discussions between the parties, His Honour Judge Saggerson, sitting in the Central London County Court on 9 August 2021, ordered that upon the parties having agreed the matter be transferred to the Senior Courts Costs Office, "This action be transferred to the Senior Courts Costs Office for directions as to the case management of this action, including as to which invoices may be subject to detailed assessment and on what terms".
82. The terms of the order are permissive and at that stage there was no order for detailed assessment. The order was made because at that stage the Defendants had indicated an intention to issue a Part 8 claim seeking a Solicitors Act assessment of the Claimant's fees.
83. A directions hearing was subsequently listed before me on 16 December 2021 where it was recorded that the Defendants had failed to make any application for a detailed assessment of any of the Claimant's invoices.
84. An unless order was subsequently made which provided the Defendants until 4pm on 21 January 2022 to "make an application pursuant to section 70 of the Solicitors Act 1974 for detailed assessment" failing which they would be "debarred from seeking a detailed assessment under s70 of the Solicitors Act 1974 of any of the Claimant's invoices which are the subject of the Part 7 proceedings."

85. The order dated 16 December 2021 also provided directions in anticipation of compliance by the Defendants, or otherwise the listing of a directions hearing in the existing Part 7 proceedings in the event of non-compliance.
86. The Defendants failed to make an application for detailed assessment. In addition, the anticipated directions hearing in the event of non-compliance was repeatedly delayed due to matters beyond the control of the parties.
87. On 7 December 2022, and before a directions hearing could take place, the Defendants made an application for relief from sanctions. Specifically, an application seeking relief from the debarring effect of the order dated 16 December 2021.
88. On 12 January 2023 the Defendants' application for relief was dismissed and permission to appeal was refused, with reasons provided as per Form N460.
89. On 9 March 2023 a directions hearing took place where the parameters of a common law assessment of the Claimant's fees were the subject of submissions and thereafter the following order:
 - “1. There be judgment for the Claimant against the Defendants for a sum to be assessed.
 2. There be a one day assessment of damages hearing on the first available date convenient to the parties after 9 March 2023.
 3. The issues to be determined when assessing the amount of damages to be paid by the Defendants to the Claimant be limited to:
 - 3.1. The terms of the Representation Agreement between the Claimant and Defendants, in particular, whether the same limited the Claimant to charge fees consistent with those set out in paragraph 9 of the Defence;
 - 3.2. The extent to which the Claimant's fees were demonstrably disputed by the Defendants as per paragraph 10 of the Defence; and
 - 3.3. The rate of interest payable on the Claimant's invoices.”
90. The order also made provision for witness statements, cross examination of witnesses, skeleton arguments and addressed an interim payment application made by the Claimant.
91. An assessment of damages hearing was subsequently listed for September 2023 but re-listed to 7 December 2023 due to the Claimant's counsel being unavailable. However, before that hearing proceeded, the parties agreed an extension of time for compliance with directions such that the 7 December 2023 date also had to be re-listed. In the circumstances, the time allocated on 7 December 2023 was utilised to hear these applications and the assessment of damages hearing was re-listed to January 2024.

92. Under the terms of the directions order dated 9 March 2023, the Defendants were to file and serve any witness evidence they sought to rely on by 18 July 2023. That time was extended by agreement to 8 August 2023.
93. The Defendants subsequently served a witness statement from Shaun Savage, dated 8 August 2023, which exhibited a number of pages of documents and communications relating to the funding arrangement between the parties.
94. At the same time the Defendants filed and served a report they had obtained from Kain Knight, a firm of costs lawyers, also dated 8 August 2023. The report is 10 pages long and is supported by 36 pages of exhibits comprised of a title page (1 page), my order dated 9 March 2023, (3 pages), a costs budget from the Business and Property Court in Wales (9 pages), a copy of the representation agreement (21 pages), and copy e-mail correspondence (2 pages). The copy representation agreement and e-mail correspondence are the same as those appended to Mr Savage's witness statement.
95. The Claimant's application seeks an order that the report of Kain Knight have no standing, that the Defendants are not permitted to rely on it, and payment of the Claimant's costs of opposing the report.
96. In addressing the Defendants' arguments in opposition to the Claimant's application, I observe that paragraph 11 of the report states "We have been instructed to provide an opinion on the costs claim as a whole, in accordance with paragraph 3 of Costs Judge Nagalingam's Order".
97. I do not understand on what basis the Defendants have arrived at the conclusion that paragraph 3 of the order dated 9 March 2023 required them to obtain an opinion from a costs lawyer, or any costs professional for that matter.
98. Paragraph 3 of the 9 March 2023 order sets out the issues the *court* is to determine. That determination will be made with reference to the evidence before the court. The evidence the Defendants may rely on is the witness evidence permitted under paragraph 4 of the order dated 9 March 2023, supplemented by the skeleton argument permitted under paragraph 7 of the same order.
99. There is nothing in the order dated 9 March 2023 which could reasonably lead to the conclusion that a report had been ordered. For the avoidance of doubt, no report has been ordered.
100. I additionally observe my order dated 18 October 2023 permits the Defendants to cross-examine the Claimant's Geraint Thomas at the common law assessment hearing.
101. I accept that, for the avoidance of any doubt at the assessment hearing, the Claimant needed to make the application to ascertain the status of the Kain Knight report, the report having been obtained and served at the same time as the Defendants' witness evidence.

102. Any comment I make in relation to the report should not be taken as any criticism of Kain Knight, who have acted in good faith by producing a report upon the instructions of a professional client.
103. In reality, the Claimant should have no concerns that such a report is capable of widening the scope of an existing order. It isn't. The order is the order, and whilst, as acknowledged by Mr Innes, elements of the report address the issues to be addressed (as identified in the 9 March 2023 order), where those issues are not addressed in the report I imagine they will inevitably be articulated in some other form of words in the skeleton argument I have already directed provision for.
104. If a party wishes to express opinion, whether in the form of a report, statement or otherwise, on matters outside of the scope of an order, then those points won't be considered and at best, little to no weight will be attached to the same. Similarly, the exhibits to the report are more sensibly focused on discussions for what should be included in the hearing bundle for the final hearing.
105. The comparison the Defendants seek to draw with the case of *Turner & Co* highlights the contrast between evidence and opinion. In the case of *Turner & Co*, an affidavit was admitted which was ultimately the evidence of a solicitor experienced in the field and location of the same work undertaken by the claimant firm in that case.
106. In the index matter, the order of 9 March 2023 includes a direction that "The Defendants do file and serve any witness evidence by 4pm on 18 July 2023". In this respect there is already analogy with the type and medium of evidence permitted in *Turner & Co*.
107. Perhaps more importantly, the directions order dated 9 March 2023 contains no provision for expert evidence.
108. Further, it does not escape one's eye that the Defendants, between their application, skeleton argument and oral submissions, ultimately seem to have confused themselves as to what the Kain Knight report is. In oral submissions Mr Nicol expressed the sentiment that no one is professing the Kain Knight report to be an expert's report. Even if I have misunderstood Mr Nicol's submissions, I have no hesitation in concluding that it is not an expert's report.
109. Further, it is clearly not a witness statement. At best, it is an opinion, and in fairness to Kain Knight the report itself in fact professes to be nothing more than an opinion.
110. In my view the report has no standing in this case whatsoever. It may be a document which helps the Defendants organise their thoughts, but ultimately the report represents a tale of what might have been. It is predicated on the Defendants having actually taken the steps necessary to secure a statutory assessment, whilst completely ignoring the fact those steps were not taken.
111. The report also presumes to dictate to the court what should happen, without accepting the reality of the historical assessment chronology, the fact that the intended exercise is an issues-based common law assessment, and the very specific directions set.

112. It strikes me that ultimately, the content of the Kain Knight report might otherwise form either something of a speaking note for the Defendants' instructed advocate at the common law assessment, or the basis of the Defendants' skeleton argument – which is of course a feature of the directions set out in the 9 March 2023 order.
113. Taking all of the above into account, I direct that the Kain Knight Report dated 8 August 2023 has no standing, that the Defendants are not permitted to rely on the Kain Knight report at the assessment of damages hearing once re-listed, and that the Defendants pay the Claimant's costs of the Claimant's application to be summarily assessed if not agreed.
114. That of course does not prevent the Defendants from consulting the report when preparing their skeleton argument but the Defendants ought to now understand that at the common law assessment only submissions related to the limited issues based directions contained at paragraph 3 of the order dated 9 March 2023 will be considered.
115. When this judgment is handed down in its final form a separate order reflecting my decision at paragraph 113 above will be sent to the parties.

Disclosure

116. I agree with Mr Innes that paragraphs 9 and 10 of the Defence don't descend into any real detail. One must recall that at the time the Defence was prepared, all indications from the Defendants were that not only did they intend to defend the Part 7 claim but they also intended to bring their own claim for a detailed assessment of the disputed fees. It was in that context that paragraphs 9 and 10 of the Defence were crafted.
117. Paragraph 9 of the Defence, in its native form, states that:
- “The Defendants sought representation from the Claimant based on a recommendation that the Claimant was expert in dealing with shareholder disputes. It is admitted that the Defendants entered into the representation agreement. Prior to the representation agreement being entered into it was made clear to representatives of the Claimant at a meeting at the Claimant's offices in late August 2019 that the Defendants could allocate £25,000 a month for legal fees for a period of 3 – 4 months. The representatives of the Claimant present at said meeting gave assurances that this amount would be sufficient to resolve the dispute with the third party who would at that stage be desperate to agree a resolution in terms favourable to the Defendants. The Defendants will call evidence from those present at said meeting to give evidence as to the representations made and the agreement reached”.
118. Paragraph 3.1 of the order dated 9 March 2023 directs that in terms of paragraph 9 of the Defence, the issue to be determined when assessing the amount of damages to be paid by the Defendants to the Claimant is limited to “The terms of the Representation Agreement between the Claimant and Defendants, in particular, whether the same limited the Claimants to charge fees consistent with those set out in paragraph 9 of the Defence”.

119. The assertion of the Defendants is therefore, in broad terms, that they entered into an agreement which they expected to cost approximately £25,000 per month in legal fees and on the basis payments would not be required for more than 4 months.
120. It is on that basis that the directions order dated 9 March 2023 was made. Clearly, the representation agreement and related funding documents will be held by both the Claimant and the Defendants, and so form part of the bundle at the common law assessment hearing. There is provision for witness evidence on this particular issue (to which any relevant exhibits may be attached), an opportunity to cross examine the witnesses each party relies on, and provision for skeleton arguments.
121. Paragraph 10 of the Defence, in its native form, states that:

“In the event the Claimant took longer than represented to reach an agreement in the dispute (not on favourable terms to the Defendants as represented) and at far greater cost than represented. Throughout the period that the Claimant represented the Defendant[s] the level of fees charged by the Claimant to the Defendant were excessive and/or disputed and the Defendants informed representatives of the Claimant on several occasions that the fees charged would be reviewed by a legal costs expert. The Defendants have sought advice from Pendragon Drafting Ltd, Law Costs Draftsmen and have been advised to have the costs claimed against them by the Claimant subjected to detailed assessment by a costs judge”.
122. Paragraph 3.2 of the order dated 9 March 2023 directs that in terms of paragraph 10 of the Defence, the issue to be determined when assessing the amount of damages to be paid by the Defendants to the Claimant is limited to “The extent to which the Claimant’s fees were demonstrably disputed by the Defendants as per paragraph 10 of the Defence”.
123. Where Mr Nicol queries the practical difference between something being unreasonable and excessive, he both ignores the limited basis of the directions order dated 9 March 2023 and conflates the past trajectory of this litigation with the present.
124. For a long time, the Defendant’s intention was that this matter would proceed to a Solicitors Act assessment. Neither the court nor the Claimant stood in the way of that path. The fact that the Defendants took no steps to secure an order for detailed assessment is a factual reality of the present.
125. The Defendants’ failure to make the necessary applications in time, and thereafter fail to secure relief from sanctions, meant that not only did the path of this litigation turn back to being managed within the Part 7 proceedings, but with the addition of very specific, issues-based directions.
126. The Kain Knight report, which has no standing as per my decision above, is an attempt to repair the damage that was done a long time ago. Two different courts and judges have given the Defendants’ enough bites of the cherry.
127. In his submissions, Mr Nicol asks how the court can conduct the exercise in question based on consideration of the demands for payments only. This stance ignores the fact that the bills in question are not gross sum bills. They are either itemised bills, or bills

where further detail has been provided upon request. The level of detail provided ought to leave the Defendants in no doubt as to the work done on their behalf.

128. I am also concerned that the Defendants have not yet grasped what the “exercise in question” is.
129. In my view the Defendants consistently ignore the limiting effect of paragraph 3 of the order dated 9 March 2023. It is not a direction that paragraphs 9 and 10 of the Defence will be considered in their native form at the assessment, but rather that those paragraphs will be considered on the limited terms permitted by the 9 March 2023 directions order.
130. The order of 9 March 2023 does not include a direction that the court will consider the issue of whether the costs are excessive. At the common law assessment the court will be concerned with the charging agreement and the extent to which, if at all, the Defendants disputed the sums they were being billed.
131. No one could reasonably argue against the proposition that, as Mr Nicol put it, “a court is assisted by the best evidence available”. However, that argument is made very much from the Defendants’ perspective and in circumstances where the Defendants, through their own conduct, have lost the opportunity for a statutory assessment and all the mechanistic controls that would have come with the same.
132. The reality is that a court is assisted by evidence *relevant* to deciding the issue in hand, not the issues that one party or another *wish* to be decided. The terms of the 9 March 2023 order are clear in their parameters and were very much designed as such. That order was not appealed nor was any application to vary or set aside the order made.
133. Ultimately, the evidence necessary is driven by the needs of the case.
134. The Defendants could have been more comprehensive in the Defence if they wished, and they had multiple opportunities to place these proceedings on a traditional assessment footing in which case they would have been at liberty to prepare and rely on formal points of dispute. The Defendants repeatedly failed to take that opportunity.
135. Nevertheless, the Defendants have the opportunities afforded by the direction for witness statements (to which relevant exhibits may be attached), the opportunity for cross-examination, the provision for skeleton arguments and of course there will be consideration of the Part 7 pleaded statements of case of the parties.
136. In all the circumstances, and exercising my discretion under CPR 31.12, I am satisfied that the task before the court can be justly carried out not only without the report referenced above, but also without ordering specific disclosure or specific inspection.
137. I additionally observe that the Defendants’ application is vague as to its parameters when the draft order is read in conjunction with the Form N244 and supporting witness statement. In this regard I note the Defendants make reference to “the underlying dispute” at paragraph 1 of their proposed draft order, in circumstances where it is abundantly clear that the Defendants do not accept that the underlying dispute is now limited to the issues defined in the order dated 9 March 2023. In that

regard, I also find the Defendants' application lacks certainty, but to be clear my decision below would be the same even had the application been drafted as eloquently as Mr Nicol's submissions put the Defendants' case.

138. In all the circumstances, the Defendants' disclosure application is dismissed, and the Defendants shall pay the Claimant's costs of and occasioned by the disclosure application, to be summarily assessed if not agreed.
139. A separate order reflecting paragraph 138 above will accompany the handing down of this judgment in its final form.
140. The parties will thereafter receive notice of the re-listed common law assessment of damages hearing in due course.