Neutral Citation Number: [2020] EWHC 1079 (QB)

Case No: QA-2019-000297

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
On appeal from the Senior Court Costs Office
Master Nagalingam
PN1806498

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/05/2020

Before :

MRS JUSTICE EADY
Sitting with MASTER BROWN (Costs Assessor)

- -

Between :

RIPPON PATEL AND FRENCH LLP	**Appellant/ Defendant**
- and –	
RONALD MOWLAM	**Respondent /Claimant**

- -
- -

Mr Jack Holborn (instructed by **Rippon Patel and French LLP on a direct access basis**) for the **Appellant**
Mr Paul Parker (instructed by **Furley Page LLP**) for the **Respondent**

Hearing dates: 28 April 2020

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Approved Judgment

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MRS JUSTICE EADY DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 am on Wednesday 6 May 2020.

MRS JUSTICE EADY:

Introduction

1. This is an appeal against the Judgment of Master Nagalingam, handed down on 20 September 2019 after a hearing on 10 April 2019. The Judgment concerns the Respondent's Part 8 claim, made on 5 November 2018, for a detailed assessment of the Appellant's bill, delivered 17 September 2015. The Appellant is a firm of solicitors; the Respondent a former client. The Master found that the bill had not been paid and that "special circumstances" existed such that a detailed assessment, pursuant to section 70 of the Solicitors Act 1974 ("the SA 1974"), should be carried out (see paragraph 1 of the Master's Order, seal dated 4 October 2019).

2. The Appellant appeals on the grounds that: (1) the bill had been paid more than 12 months prior to the application, thus meaning that no detailed assessment could be ordered (see section 70(4) SA 1974) (ground 1); alternatively (2) the Master was wrong (both in law and in his reasoning) to find that "special circumstances" existed such as to justify a detailed assessment under section 70(3) SA 1974 (ground 2); and/or (3) the Master failed to take into account the Respondent's delay in making the application (grounds 3 and 4); alternatively (4) he erred in failing to order the Respondent to pay security for costs and/or in failing to limit the assessment solely to the question of VAT (ground 5). By Order dated 17 December 2019, Stewart J gave permission for this appeal to proceed.

3. Given restrictions necessitated by the current Coronavirus pandemic, and with the agreement of the parties, the hearing of the appeal took place by video (using Skype for Business); it remained, however, a public proceeding and the hearing, its mode and its timing, was published in the cause list, giving an email contact for any person who wished to "attend".

4. Representation at the hearing was as it had been before the Master.

The Legal Framework

5. Section 70 SA 1974 provides for the assessment of solicitor-client bills. Relevantly, it states as follows:

> "70 Assessment on application of party chargeable or solicitor.
>
> (1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.
>
> (2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—
>
> (a) that the bill be assessed; and

(b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.

(3) Where an application under subsection (2) is made by the party chargeable with the bill—

(a) after the expiration of 12 months from the delivery of the bill, or

(b) after a judgment has been obtained for the recovery of the costs covered by the bill, or

(c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill.

no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.

(4) The power to order assessment conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill."

6. The issues raised by this appeal focus on sub-sections (3) and (4).

7. Sub-section (4) removes the court's power to order an assessment of a solicitor's bill under section 70 if the application has been made over 12 months from the payment of the bill. It is common ground between the parties, that a partial payment of the bill will not constitute payment for these purposes: it is merely a payment on account (and see paragraph 36.23 *Friston On Costs* (3rd edition, 2018)).

8. Pursuant to sub-section (3), where the bill has not been paid but the application for assessment is made more than 12 months after the bill was delivered, the court will not make an order for assessment unless satisfied that "special circumstances" exist. The term "special circumstances" for these purposes is not defined, but in *Falmouth House Freehold Co Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch), Lewison J (as he then was) provided some guidance on how it should be approached:

> "13. Whether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case, in order to decide whether a detailed assessment in the particular case is justified despite the restrictions contained in section 70 (3). In *Re Cheeseman* [1891] 2 Ch 289 the Court of Appeal held that it would not interfere with the decision of the first instance judge on whether special circumstances existed except in a strong case. All the more so, in my judgment, where the value judgment has been made by a specialist costs judge. …"

9. The observations made by Lewison J as to the respective roles of the first instance and the appellate courts reflect earlier statements to similar effect, see (for example) per Beatson J (as he then was) in *Kundrath v Harry Kwatia & Gooding* [2005] 2 Costs LR 279:

> "8. The discretion of a Costs Judge in relation to the existence of special circumstances is a broad one which is not to be

> interfered with lightly by an appellate court. For a modern statement of the approach see *Arrowfield Services Limited v BP Collins (a firm)* [2003] EWHC 830 (Ch). In that case Mr Michael Briggs QC, sitting as a Deputy Judge of the Chancery Division, stated that the function of an appellate court is not to exercise any relevant discretion afresh but to review the decision of the Costs Judge and that the question whether in any particular case "special circumstances" are disclosed is a matter falling within the discretion of the Judge to whom the application is made rather than a pure question of law: see paragraph 7, citing *Re Hirst & Capes* [1908] 1 KB 982, 990. See also *Re Cheeseman* [1891] 2 Ch 289 and *Re Ward* (1910) 102 LT 881. The Deputy Judge stated that it follows that an appellate court can only interfere with the result if it is satisfied that a mistake of law or analysis has been made or the Costs Judge has otherwise decided the matter outwith the generous ambit of discretion afforded to him. In considering whether "special circumstances" are or are not shown in any particular case what is relevant is an assessment of the aggregate of the relevant circumstances rather than an item by item assessment of each circumstance: see paragraph 9, citing *Sanders v Isaacs* [1971] Ch 240."

10. Should the court find that "special circumstances" exist, it has a discretion under section 70(3) SA 1974 to make an order for assessment of the bill. In exercising that judicial discretion, questions of delay may be relevant where that has given rise to significant prejudice (see paragraph 15 *Kundrath v Harry Kwatia & Gooding* supra).

11. More generally, in exercising this appellate jurisdiction, the approach I am to adopt is that stated by Lord Fraser in *G v G* [1985] 1 WLR 647 at 652D-E:

> "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."

The Factual Background and the Master's Conclusions

12. The bill in issue in this appeal was dated 17 September 2015 and was for a total sum of £78,000 (£65,000 plus £13,000 VAT). By email the same day, the Respondent disputed that the fees billed had been agreed. He did not, however, seek a detailed assessment of the bill within a month (in which case, an assessment would have been ordered under section 70(1) SA 1974) or within a year from the bill's delivery (which would have given the court the discretion to order an assessment under section 70(2) SA 1974). The Respondent's application for a section 70 assessment was only made on 15 November 2018, after he had initially pursued a complaint against the Appellant to the Legal Ombudsman (that complaint having been submitted in September 2017, resulting in a final decision – not accepted by the Respondent – on 11 September 2018).

13. The Appellant's bill related to a property dispute between the Respondent and a third party, Hippolytus SA ("HSA"), which had led to legal proceedings in which the Appellant acted for the Respondent. Those proceedings had been due to be determined at a three-day trial in October 2015 but, following a mediation in September 2015, the Respondent and HSA were able to come to terms, entering into a Settlement Agreement (dated 16 September 2015) that (relevantly) provided that HSA would pay the Respondent "*the total sum of £145,000 (such sum includes £65,000 of [the Respondent's] legal costs) …*".

14. During the mediation hearing, counsel then acting for the Respondent had explained that, while his client's costs "*were more than £65,000*", the Respondent's lawyers – the Appellant at this hearing – "*would be happy to cap the costs at £65,000 for the purposes of a settlement*". It was in that context that HSA made the offer that ultimately appeared in the Settlement Agreement (set out above).

15. In the Appellant's attendance note of the (otherwise privileged) discussions that then took place between the current parties at the mediation hearing, it is recorded as follows:

> "… The sum of £140,000 was acceptable to Mr Mowlam since it would include the £75,000 which he wanted to settle the case and which he had confirmed in one of his emails … a day before the mediation and also in an earlier email …. Our costs were estimated at £65,000 (as stated in the Costs Schedule attached to the Allocation Questionnaire and agreed and approved by Mr Mowlam) …."

16. As the Master observed (see paragraph 95 of his Judgment), the settlement ultimately reached with HSA gave the Respondent £80,000 in damages (slightly more than his £75,000 minimum) after payment of the £65,000 costs referenced in the agreement.

17. The Master did not consider the Respondent would have been unaware that his solicitors would have to charge/apply VAT (paragraph 94 of the Judgment) but found the settlement agreement was ambiguous as to whether VAT was already included within the stated figure for costs (paragraph 96). Observing that the Respondent had "*brought this action to recover damages, not to avoid paying VAT on legal costs*", the Master considered the relevant question was how much he had expected to recover in damages, noting that "*[on] the face of it the balance between the global figure and the deducted damages leads to a costs figure*" (paragraph 94).

18. As already recorded, the Respondent first raised his disagreement with the Appellant's bill on the day of its delivery. By email to the Appellant on 14 December 2015, he further detailed his position as follows:

> "You will recall, when we discussed the down side of my likely legal costs in this matter, you estimated your costs at a maximum of £30,000 at your standard charge out rate. Whereas Radcliffes Le Brasseur [the solicitors for HSA] were estimating their likely legal costs to be in the region of £65,000 at their standard charge out rate for a top London property lawyer in a prestige practice. You stressed that this was the

> figure I should expect to pay if we lost the claim. Whereas we agreed that your costs estimate should match theirs, pari passu, for approval by the Court, although we both agreed your actual costs would not reach this level.
>
> I am not seeking to re-negotiate your costs, simply to keep to what we originally agreed. …"

19. I note that a costs budget was prepared by the Appellant, although ultimately this was not the subject of approval by the court nor was any costs management order made. In his witness statement in support of his claim for a section 70 assessment, the Respondent questioned the costs claimed by the Appellant (see paragraph 22 of that statement), observing that deducting trial and trial preparation costs (£35,000) from the budget would leave only actual budgeted costs of £47,145 (net of VAT) as at the time of settlement, and further questioning whether a lesser amount would have been allowed had the court made a costs management order.

20. For its part, the Appellant objects to any suggestion that the costs for which it has billed were not in fact incurred, observing that some trial preparation costs would inevitably have been incurred by September 2015, and pointing out that further costs had also been incurred (outside the costs budget) in respect of the mediation.

21. Returning to the narrative, on 16 December 2015, payment of £145,000 was received by the Appellant from the solicitors for HSA and the Respondent agreed that the Appellant should retain:

> "£65,000 plus £13,000 VAT in your clients account until such time as we have resolved the question of your actual costs in this matter and how we can deal with the question of VAT".

Going on to observe:

> "As you know, I am concerned that it will be difficult for me to reclaim such a large amount of VAT from HMRC without provoking an inspection. Most of our recent sales have been from abroad, from where we cannot collect VAT to balance out this £13,000 output."

See the Respondent's email of 16 December 2015.

22. By further email to the Appellant on 17 December 2015, the Respondent clarified that payment to him of the remaining £67,000 (£145,000 less the £78,000 claimed by the Appellant in respect of fees and VAT) was agreed as "*an interim payment until we can discuss this and agree your actual costs in this matter*".

23. The Master concluded that, whilst it had been agreed that HSA should pay the settlement sum to the Appellant in one single amount (comprising damages and costs), this was "*a matter of routine administration pending resolution of a dispute as to how much of that single payment ought to be deducted to discharge [the Appellant's] costs*." (Judgment, paragraph 86). At most, the Master held, the Respondent had thus agreed to part payment of the sum owed to the Appellant, pending resolution of what sum was actually owed and whether that sum included

VAT (Judgment, paragraph 87). On that basis, the Master found that the bill had not been "paid" for the purposes of section 70(4) SA 1974 (Judgment, paragraph 88).

24. Turning then to consider whether any "special circumstances" existed such as to warrant the exercise of the court's discretion under section 70(3) SA 1974, the Master rejected a number of the Respondent's arguments in this regard, but considered there was an issue in relation to the level of costs and the position in relation to VAT, observing that:

> "99. The question of factors which relate to the assessment of costs as opposed to the right to an assessment outside of the time limits … is a nuanced one."

25. On this issue, the Master found that the Respondent had raised "*an arguable point as to the terms of the settlement agreement and the level of remuneration for costs out of the total monies received (for damages and costs)*". That, alongside "*the uncertainty as to the costs incurred at the point of settlement*" led the Master to conclude that "special circumstances" had been demonstrated in this case, such that the Respondent was entitled to an order for assessment (see paragraph 100 of the Master's Judgment).

The Arguments on Appeal; Discussion and Conclusions

Ground 1: whether the bill had been paid (section 70(4) SA 1974)

26. By this ground, the Appellant contends that the Master erred in law, or reached a conclusion that no reasonable tribunal could reach, in finding that the bill had not been paid. The Appellant argues that payment had been made out of sums paid by HSA. Although £13,000 remained in its client account (representing the VAT element of the bill; it appears that the sum of £65,000 has already been transferred to the Appellant's account), this was simply an accounting exercise: the money was there for the Appellant, having been "paid" in the sense that it was deducted from the settlement sum. The Appellant had agreed to keep it within the client account when the Respondent initially raised a dispute but he had failed to pursue that dispute within the necessary 12 months of payment and the Appellant would be entitled to remove that sum from the client account.

27. I am not persuaded by the Appellant's arguments in this regard. Proceeding on the basis that there has been payment in respect of £65,000 (although the basis on which this was transferred out of the client account is not entirely clear to me and a payment made without the knowledge of the client would not be sufficient, see paragraph 36.22 *Friston On Costs*), that still leaves the sum of £13,000 outstanding. For the purposes of section 70(4) SA 1974, "payment of the bill" must mean the entire sum due under that bill: as Mr Holborn acknowledged in oral argument, part payment is not sufficient. Payment into a client account is plainly not a payment into the solicitor's own account (and see rules 2-8 of the Solicitors Regulation Authority Accounts 2011 Rules); even if "*the principle [sic] sum has been paid*" (Appellant's Skeleton Argument, paragraph 10), that does not mean there has been payment of the sum billed. The Master neither erred in law in reaching his decision on this question nor was his conclusion perverse; ground 1 is duly dismissed.

Ground 2: special circumstance (section 70(3) SA 1974)

28. Accepting that a finding of "special circumstances" for the purposes of section 70(3) SA 1974 involves a value judgement (see *Falmouth House v Morgan*, supra), the Appellant contends that the Master's approach to the VAT issue in this case demonstrated an error of law and a flaw in his reasoning. It is said that, given that the VAT issue effectively lay at the heart of the Master's finding of "special circumstances", that error vitiated his conclusion on this question.

29. In making good the Appellant's case in this regard, Mr Holborn observed that a finding that the Respondent had an expectation of recovering £80,000 damages did not mean that the VAT element of the Appellant's bill was to be deducted from the £65,000 settlement monies designated for costs; indeed, that would have been quite wrong in the circumstances of this case. As was common ground, the Respondent was registered for VAT purposes and would thus be able to reclaim the VAT element of the Appellant's bill from Her Majesty's Revenue and Customs ("HMRC"). That being so, it would have been wrong (offending against the indemnity principle) for the costs claimed against HSA to include any element for VAT; as paragraph 2.3 CPD 44 (General Rules About Costs) provided:

> "2.3 VAT should not be included in a claim for costs if the receiving party is able to recover the VAT as input tax. Where the receiving party is able to obtain credit from HMRC for a proportion of the VAT as input tax, only that proportion which is not eligible for credit should be included in the claim for costs."

30. It was the Appellant's case that the Master had thus erred (i) in finding that the settlement agreement had been ambiguous with regards to whether VAT was included within the stated figure for costs (Judgment, paragraph 96) – it was not: VAT could not be included in any claim for costs against HSA; (ii) in failing to recognise that the Respondent would still recover £80,000 in damages, having reclaimed the £13,000 VAT from HMRC.

31. Accepting that the Respondent was registered for VAT and that paragraph 2.3 CPD 44 applied, Mr Parker nevertheless countered that the attack under ground 2 was on a value judgement made by the Master and evinced no error of law.

32. In this regard, it was the Respondent's case that the Master's finding of "special circumstances" was not dependent on the VAT issue in the way the Appellant's argument suggested. Whilst finding that the position in respect of VAT in the settlement agreement had been "ambiguous" (Judgment, paragraph 96), the focus of the Master's reasoning was on the Respondent's understanding as to what he would recover by way of damages under the terms of that agreement. Even if the Appellant's references (in the mediation discussions) to a cap on costs did not amount to an estoppel, the Respondent had been entitled to place reliance on what had been said and might have taken a different view as to the settlement offer had the position relating to VAT been explained to him (and see *Mastercigars Direct Ltd v Withers LLP* [2009] 1 WLR 881 at paragraph 100). It had, however, never been explained to the Respondent that his recovery of the £80,000 damages agreed (£145,000 less the sum of £65,000 expressly attributed to "costs") was dependent upon his reclaiming

£13,000 VAT from HMRC. Although he was registered for VAT, the Respondent had raised entirely legitimate reasons why he might not recover the sum of £13,000 from HMRC: such a large sum might invite a VAT inspection and the Respondent would not simply be able to reclaim that amount from VAT paid on his outputs given that these were largely in respect of services provided overseas (and, therefore, not susceptible to VAT), see the Respondent's email of 16 December 2015. As the Master had found, together with the more general uncertainty that arose as to the actual level of costs that had been incurred by the time of the settlement, this gave rise to an arguable question as to what had been understood by the Respondent when entering into the settlement agreement. This, the Master had permissibly found, was such as to amount to "special circumstances" in this case.

33. In replying to these submissions, Mr Holborn contended there had been a shift in the Respondent's position: before the Master, his case had been that the settlement agreement was ambiguous on the issue of VAT; he was now saying that, although there had been no ambiguity in the settlement agreement (accepting that paragraph 2.3 CPD 44 applied), he had not understood the VAT position. There was, however, no evidence that this was the case: the Respondent's position in the contemporaneous documents was that he objected to paying the VAT, not that he had not understood the terms of the settlement agreement.

34. I do not consider the Respondent's case has fundamentally changed on this issue. Whilst it is correct to say that the Respondent had taken a number of other points before the Master, the question of his understanding as to the VAT position had plainly been raised in argument (see, for example, the record of Mr Parker's submissions at paragraphs 26(v) and 35 of the Judgment below) and was referenced in the Respondent's witness statement (see paragraphs 28-30 and 31). This was, further, a question that can be seen to have been raised by the contemporaneous documentation. There had been a clear reference in the mediation discussions to costs being capped at £65,000 (and there is no suggestion that any clarification was then provided to the Respondent to the effect that this would only refer to costs net of VAT). The Respondent had, moreover, immediately questioned the level of costs billed by the Appellant and had gone on to identify reasons as to why he might not be in a position to recover £13,000 VAT from HMRC (see his email of 16 December 2015). The point may have been given greater focus on appeal but that can be seen as inevitable given that the Respondent had sought to rely on a wider range of factors before the Master.

35. The Master was plainly concerned as to the Respondent's understanding of the position regarding VAT and the overall level of costs. Accepting that he must have been aware that his solicitors would have to charge VAT, the Master considered that the Respondent's focus would have been on the amount of damages he was to receive under the terms of the settlement agreement. Thus, considering matters from the Respondent's perspective, the Master found it significant that the only reference to costs in the settlement agreement had been limited to the sum of £65,000, which would leave the Respondent with £80,000 in damages. The Appellant says that this fails to address the fact that VAT could not have been included in the costs claimed against HSA (see CPD 44) but I do not read paragraph 95 of the Master's Judgment as directed at the position of the third party; it is, rather, focused on the understanding of the Respondent. The Appellant seeks to suggest that the terms of the settlement

agreement made it obvious that the Respondent had agreed its costs of £65,000 plus VAT but, as the Master found, the VAT position for the Respondent was not obvious without further clarification as to what this would actually mean for him.

36. Accepting that there was no express explanation of the VAT position at the point when the Respondent agreed to the settlement terms, the Appellant objects that the Master was nevertheless wrong to find that this raised any material issue in respect of the damages that the Respondent would recover. Given that he was registered for VAT, the Appellant contends that the Master ought to have found that the Respondent would still recover £80,000 damages after he had reclaimed the £13,000 from HMRC.

37. Although it may be correct that the Respondent would be entitled to seek to reclaim the VAT element from HMRC, it seems to me that the point is rather more nuanced than the Appellant's argument allows. In his further objections to the Appellant's bill, on 16 December 2015, the Respondent had identified reasons why the reclamation of £13,000 VAT was not straightforward from his point of view. Whether or not he might ultimately have been able to recover that sum from HMRC, he was raising points of concern that were relevant to the question of his understanding at the time of entering into the settlement agreement. If – for the reasons identified in his email of 16 December 2015 – the Respondent did not seek to reclaim the £13,000 VAT from HMRC, this would plainly have had a material impact upon his damages under the agreement. On the basis of the information available to the Respondent at the time of the settlement agreement, the Master was thus entitled to find that he had raised an arguable point in this regard.

38. More than this, however, the Master considered that the Respondent had raised legitimate questions as to the level of costs incurred at the point of settlement. Conscious that he was not conducting an assessment of those costs, the Master acknowledged that the relevance of this issue to a claim under section 70(3)(a) SA 1974 was nuanced (see paragraph 99 of the Judgment below). Taking this point together with the question the Respondent had identified in respect of what he had understood to be the level of damages and costs due under the settlement agreement, the Master concluded, however, that these were factors that amounted to "special circumstances" on the particular factual matrix of this case.

39. This was a value judgement by the Master. Exercising his costs expertise, the Master had found that issues had been raised both as to the overall level of costs billed by the Appellant and as to the Respondent's understanding of the costs position (and how this was to be addressed so as not to impact upon his overall damages) at the time he entered into the settlement agreement with HSA. Without carrying out a detailed assessment of the costs billed, the Master was entitled to find that there was uncertainty as to the overall level of costs incurred at the point of settlement. He further permissibly had regard to the cap that was said to have been applied to costs in the mediation discussions and to consider how that might have impacted upon the Respondent's decision to enter into the settlement agreement (not an irrelevant consideration given the concerns expressed in the Respondent's 16 December 2015 email). These were matters that the Master was entitled to find made this other than a "*run of the mill*" case (see *Falmouth House v Morgan Walker*, supra) and gave rise to "special circumstances" for section 70(3) SA 1974 purposes. For all those reasons, ground 2 is dismissed.

Grounds 3 and 4: the period of, and reasons for, delay

40. Under these grounds, the Appellant objects that the Master failed to take into account the period of delay (over three years) when considering whether "special circumstances" existed. Such delay, the reasons for it, and the inevitable prejudice thus caused are, the Appellant contends, material issues in the exercise of the discretion afforded by section 70(3) SA 1974 (see paragraph 15 *Kundrath v Henry Kwatia & Gooding*). In the present case, given the early identification of the dispute between the parties and the fact that the Respondent had known of his right to seek an assessment, there was no good reason for the delay, which had given rise to a loss of interest on the Appellant's part. Although the Master had regard to the Respondent's delay when considering the question of costs (see paragraphs 101-104 of the Judgment), there was no indication that this was something he had taken into account when finding that "special circumstances" existed for the purposes of section 70(3) SA 1974.

41. I am not sure that the issue of delay necessarily goes to the question whether there are "special circumstances" for these purposes. That said, having found that there are "special circumstances", it is apparent that the court retains a discretion as to whether to make an order for assessment under section 70(3) SA 1974, and I can see that delay (and any consequential prejudice) may be relevant to that exercise of discretion.

42. In the present case, the Appellant criticises the Master for failing to expressly refer to delay when finding that there were "special circumstances" and deciding to order a detailed assessment. It is, however, apparent that this was an issue that had been addressed in argument and was in the Master's mind in determining the Respondent's claim. Indeed, having found that "special circumstances" existed (paragraph 100), the Master immediately went on to reference the Respondent's delay in making his claim (paragraph 101). Adopting a holistic approach to the Judgment (as I am bound to do), I do not infer that the Master overlooked the issue of delay in one paragraph only to bring it to mind (and into play) in the next. Rather, it is apparent that the Master did not consider that the question of delay should impact upon the making of an order for assessment but took it into account on the question of costs.

43. In the circumstances of this case, that was a permissible approach. I note that, in *Kundrath v Henry Kwatia & Gooding*, in determining that a detailed assessment should be ordered, Beatson J considered that although there had been an unexplained delay, there was no evidence that this had caused any significant prejudice. In the present case, there was some explanation for the Respondent's delay, albeit this did not cover the entirety of the period in issue and, as the Master found, was plainly not caused or contributed to by the Appellant. There was, however, no material prejudice to the Appellant occasioned by that delay. The loss of interest to which Mr Holborn makes reference has not been quantified but seems likely to have been minimal. The Appellant was aware of the dispute throughout and there were some attempts to resolve matters by other means, including a complaint to the Legal Ombudsman. Mr Holborn says that the Appellant also faces prejudice in that it now has to engage in the process of detailed assessment but that is not a prejudice that arises from any delay on the Respondent's part. In these circumstances, the Master was entitled to find that delay in this case was not a factor that impacted on the making of an order for detailed assessment. Grounds 3 and 4 are dismissed.

Ground 5: alternative terms for the order for assessment

44. Finally, the Appellant argues that the Master erred in directing that there should be an assessment without considering and/or ordering that it proceed on terms, either (a) that the Respondent make a deposit for security for the Appellant's costs of the assessment, and/or (b) that the assessment proceed solely on the VAT issue (all other sums having been paid for more than 12 months and no "special circumstances" otherwise arising).

45. The first point to note is that these were not points taken by the Appellant below. The Appellant points out that the order for an assessment is discretionary and section 70(3) SA 1974 explicitly provides that, if the discretion is exercised, the assessment may proceed on terms as to costs. That may be so, but the Master was not obliged to take a point for the Appellant that had not been raised before him; he did not err in law in determining the case as it had been argued rather than some other.

46. More particularly, the Appellant had not identified before the Master any proper basis for considering that there should be security for costs. The Appellant is obviously protected to some degree by the fact that it holds monies in its client account. In oral argument, Mr Holborn sought to suggest that more recent events raised further doubt as to the Respondent's ability to pay any sums held to be due but a reference to such matters by counsel during the course of a hearing is insufficient; there is no proper evidential basis on which I could make such a finding.

47. As for the suggestion that the Master ought to have limited the assessment solely to the question of VAT, that fails to engage with the entirety of the Master's reasoning on "special circumstances". The Master did not base his finding solely on the issue of VAT but saw this as interwoven with the broader question raised as to the level of costs incurred at the point of settlement. In the circumstances, I cannot see how the Master can be said to have erred in failing to limit the scope of the assessment; certainly this was not a suggestion made to him at the time and it is hard to see how it is a direction that would follow from his reasoning.

48. For the reasons I have thus given, ground 5 is also dismissed.

Disposal

49. I therefore dismiss the appeal. Given my decision, my preliminary view would be that costs should follow the event and be subject to detailed assessment if not agreed. I have, however, not heard from the parties on the terms of my Order and should they wish to make further representations in this regard, they should do so in writing within seven days of the handing down of this Judgment.