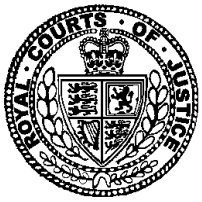

Neutral Citation Number [2024] EWHC 1107 (SCCO)
Case No: SC-2023-APP-000539

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 10 May 2024

Before : Costs Judge Brown

- -

Between :

LISA PICKERING **Claimant**

- and –

THOMAS MANSFIELD SOLICITORS LIMITED **Defendants**

- -
- -

Craig Ralph, instructed by Arch Law, for the Claimant
Robert Marven KC instructed by and for the Defendants

Hearing dates: 20 March 2024
Draft distributed: 3 May 2024

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Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Costs Judge Brown :

1. By her original Part 8 claim issued on 22 June 2023 in Sheffield County Court the Claimant sought, as her primary remedy, the assessment of various invoices delivered by her former solicitors, the Defendant (numbered 33663, 33664, 33661 and 33662) ('the invoices'). There was some delay in the matter being transferred and listed before myself in the SCCO. In the event the Claimant's primary claim is now for the delivery of fresh 'statute' or 'statutory' bills, it being said the invoices delivered are not statute bills compliant with the provisions of the Solicitors Act 1974 ('the 1974 Act') are not therefore bills capable of assessment; in the alternative, and if the invoices are statute bills, the Claimant seeks their assessment.

2. I am required to determine whether the invoices delivered are statute bills and if I take the view that they are, to determine whether an assessment should be permitted only on terms as to payment of a (further) interim payment and, if so, in what amount. I am also, I think, asked to consider whether, independently, a (further) interim payment should be made against the sums claimed in the invoices.

Background

3. In or about February 2021 the Claimant approached the Defendant solicitors to act in place of other solicitors in what, has been described by the Defendants, as being in the nature of a family dispute. The dispute, or disputes, had already resulted in two High Court actions, for current purposes called 'Property proceedings' and the 'Portbond proceedings'. The Defendants also say that (albeit this may be disputed at least in part) that the Claimant instructed them in other (possibly connected) disputes including in particular an unfair prejudice claim called the 'Caprina proceedings' and a dispute with her previous solicitors[1],

4. On or about 5 April 2023 the Defendants delivered the invoices to the Claimant). They were accompanied by timesheets or ledgers (an earlier email is said by the Defendants to have delivered invoices seeking sums on account). There is a dispute as to what sums the invoices claim but **t**he Defendants say the invoices are in the total sum of £2,533,579.14 and that some £1,175849.50 has been paid on account.

5. The Defendants argue that the invoices delivered are statute bills; so there is no basis for the court to order the delivery of a further statute bill. They dispute any suggestion that their costs are excessive, but say that they are prepared to refrain from issuing debt proceedings and consent to an assessment of the final invoices on condition of a further payment on account. The payment on account they seek is some £980,000, or such other sum as I should consider appropriate.

6. Although the sums involved are large, if I were to find the bills were indeed statute bills the task left for me ism essentially, an everyday one normally undertaken in a directions hearing listed for not more than an hour. Not infrequently a client may still be involved in litigation (as may be well the case here) when seeking a solicitor/client assessment, and it has long been recognised that the remedy sought here is intended to be a quick and cost-efficient alternative to ordinary proceedings.

[1] See w/s Paul Thomas for a description of the other issues

Are the invoices statutory bills?

7. Mr. Ralph's argument was that as a matter of law the invoices delivered could not be statute bill because the invoices did not, he argued, provide adequate information of the sums that been paid on account and they could not be reconciled with various payments made on account paid under earlier invoices. In support of this argument he relied upon a passage or passages in *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388.

8. Whilst not dealt with in any detail by the parties (it was raised by myself in the hearing), it is perhaps helpful to make some mention- albeit briefly- of the statutory background, being Part III of 1974 Act. The Part is headed *Remuneration* and at least as regards the relevant provision of this Part it is generally regarded as a consolidating Act. The Part is in three sections. The first and second sections deal with claims for remuneration pursuant to contentious and non-contentious business agreements. Such agreements are generally enforceable but only to the extent that they are in writing and satisfy the requirement of fairness and reasonableness[2]. The provisions permit solicitors to sue on such agreements and limit the extent to which challenge could be made to the costs on the basis of the agreement. In contrast , the third section of this Part is concerned, at least to some extent, with an assessment of a statute bill of costs: such assessments are, of course, generally referred to as 'Solicitors Act' or solicitors/client assessment. A Solicitors Act assessment of a bill is however generally understood as an assessment of the reasonableness of the charges in a solicitor's bill for fees and disbursements[3].

9. Ordinarily, of course, a Solicitors Act assessment is carried out having regard to the presumptions set out in CPR subrule 46.9. Paraphrased in broad terms, there are presumptions that the sums claimed are reasonable in amount and reasonably incurred if they were incurred with the express or implied approval of the client, and a presumption that costs have been unreasonably incurred if they are of an unusual nature or amount and the solicitor did not tell the client that as a result the costs might not be recovered from the other party[4]. Thus, whilst not a matter of argument in this case, and it is at least somewhat tangential to the issue I am now addressing, in *EVX v Smith* [2022] EWHC 1607 (SCCO) I came to the view that hourly rates may be assessed as unreasonable and not payable if they were unusual and the explanation that they might not be recovered from the other side had not been given. As Fletcher–Moulton LJ had explained in *Clare v Joseph* [1907] 2 KB 369 (see p376), a case expressly dealing with the introduction of the provisions dealing with business agreement which I have referred above (the Attorneys and Solicitors Act, 1870), solicitors were understood to be in a position of undue influence and for that reason were not generally permitted to rely upon any agreement with a client as entitlement to costs[5] (see too *Friston*[6]*)* (It will be appreciated that the provisions relating to a Solicitors Act assessment are of some considerable antiquity evolving centuries before, it might be observed, the principles of contract had been developed).

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[2] See sections 57, 58 and 61 of the 1974 Act in particular.

[3] See too judgment of Erle CJ as *Philby v Hazle* (1860) 8 CB (NS) 647.

[4] See further *McDougall v Boote Edgar Esterkin* (a Firm) [2001] 1 Costs L.R. 118, Herbert v HH Law Ltd [2019] EWCA Civ 527 [37] and [38] for the requirement that any approval requires informed consent and the need for a full and fair explanation.

[5] Albeit see now *Belsner v Cam Legal Services* Ltd [2020] EWHC 2755 (QB) [67] to [81]

[6] See inter alia [1.82] and [1.83].

10. The importance of what might perhaps otherwise appear as a diversion from the issue which I am required to deal with now, is that a claim by a solicitor for remuneration is generally (if it is not on a business agreements) understood to be founded on the delivery of a bill, not a contract[7]. If no bill has been served the court can order one to be provided. But unless the solicitors has delivered a bill a claim for costs is defective. The importance of the delivery of a compliant 'statute' bill lies not just in informing the client what is due, but is an element of the cause of action. Thus, the definition of what constitutes a bill, or 'statute' bill, for these purposes is an important one in determining whether there is a proper cause of action either on the part of the solicitors for payment of fees and disbursement or on the part of the client for an assessment; it is not merely evidence of a debt.

11. This is all clear from and reflected in section 70 of the 1974 Act. This section provides time limits for applications for an assessment by the client: they operate by reference to the delivery of a bill[8]. I set out substantially the whole of this provision below and have included parts of the section dealing with what is referred to as the '1/5th' rule (being perhaps a relevant consideration):

> ***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]6 as the court may think fit.*

[7] See *Walton v Egan* [1982] 1 QB 1231 at pages 1237G - 1238 A).
[8] See for instance subsection 6 by which the Court may allow an action to be commenced or to be continued for part of the costs in a bill

(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.

(5) An order for the assessment of a bill made on an application under this section by the party chargeable with the bill shall, if he so requests, be an order for the assessment of the profit costs covered by the bill.

(6) Subject to subsection (5), the court may under this section order the assessment of all the costs, or of the profit costs, or of the costs other than profit costs and, where part of the costs is not to be assessed, may allow an action to be commenced or to be continued for that part of the costs.

(7) Every order for the assessment of a bill shall require the costs officer to assess not only the bill but also the costs of the assessment and to certify what is due to or by the solicitor in respect of the bill and in respect of the costs of the taxation .

(8) If after due notice of any assessment either party to it fails to attend, the officer may proceed with the assessment ex parte.

(9) Unless—

(a) the order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) the order or assessment or an order under subsection (10) otherwise provides,

*the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth**]**, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.*

(10) The costs officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such order as respects the costs of the assessment as it may think fit.

(11). . . . . .

*(12) In this section "profit costs" means costs other than counsel's fees or costs paid or payable in the discharge of a liability incurred by the solicitor on behalf of the party chargeable, and the reference in subsection (9) to the fraction of the amount of the reduction in the bill**]**shall be taken, where the assessment concerns only part of the costs covered by the bill, as a reference to that fraction of the amount of those costs which is being assessed.*

12. Despite the central place of a bill in this scheme, and acknowledging the requirement that bills be signed in section 69, there is no clear definition in the 1974 Act as to what in substance constitutes a statute bill.

13. Section 69(2E) of the 1974 provides:

'Where a bill is proved to have been delivered … 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, to be a bill bona fide complying with this Act.'

14. Mr. Marven KC says on the back of this provision that a bill is presumed to be a statutory

bill, and it is for the client to show the contrary.

15. Section 68 of the 1974 provides as follows:

> *Power of court to order solicitor to deliver bill, etc.*
>
> (1) *The jurisdiction of the High Court to make orders for the delivery by a solicitor of a bill of costs, and for the delivery up of, or otherwise in relation to, any documents in his possession, custody or power, is hereby declared to extend to cases in which no business has been done by him in the High Court.*

16. It is perhaps apparent from this provision, which appears to recognise the power of the High Court to order delivery of a bill but does not of itself provide such a power, that what lies behind the source of the power is the inherent jurisdiction of the court. In any event in *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500, Ward LJ conducted a detailed survey of the statutes and authorities relevant to the issue as to what constitute a bill. His judgment at [32] (cited with approval in *Boodia v Richard Slade and Co* [2018] EWCA Civ 2667 by Newey LJ at [18]) provides as follows:

> *"Against that background the principles to be deduced from those cases appear to me to be these. (1) The legislative intention was that the client should have sufficient material on the face of the bill as to the nature of the charges to enable him to obtain advice as to taxation. The need for advice was to be able to judge the reasonableness of the charges and the risks of having to pay the costs of taxation if less than one-sixth of the amount was taxed off. (2) That rule was, however, subject to these caveats: (a) precise exactness of form was not required and the rule was not that another solicitor should be able on looking at the bill, and without any further explanation from the client, see on the face of the bill all information requisite to enable him to say if the charges were reasonable; (b) thus the client must show that further information which he really and practically wanted in order to decide whether to insist on taxation had been withheld and that he was not already in possession of all the information that he could reasonably want for consulting on taxation. (3) The test, it seems to me, is thus, not whether the bill on its face is objectively sufficient, but whether the information in the bill supplemented by what is subjectively known to the client enables the client with advice to take an informed decision whether or not to exercise the only right then open to him, viz, to seek taxation reasonably free from the risk of having to pay the costs of that taxation. (4) A balance has to be struck between the need, on the one hand, to protect the client and for the bill, together with what he knows, to give him sufficient information to judge whether he has been overcharged and, on the other hand, to protect the solicitor against late ambush being laid on a technical point by a client who seeks only to evade paying his debt.'*

17. And at [70] he said this:

> *"This review of the legislation and the case law leads me to conclude that the burden on the client under section 69(2) of the Solicitors Act 1974 to establish that a bill for a gross sum in contentious business will not be a bill "bona fide complying with this Act" is satisfied if the client shows: (i) that there is no sufficient narrative in the bill to identify what it is he is being charged for, and (ii) that he does not have sufficient knowledge from other documents in his possession or from what he*

> *has been told reasonably to take advice whether or not to apply for that bill to be taxed. The sufficiency of the narrative and the sufficiency of his knowledge will vary from case to case, and the more he knows, the less the bill may need to spell it out for him. The interests of justice require that the balance be struck between protection of the client's right to seek taxation and of the solicitor's right to recover not being defeated by opportunistic resort to technicality.'*

18. Importantly, Ward LJ suggested at the end of his judgment that as solicitors do generally keep ledgers or time sheets, to avoid the argument of the sort that had arisen in that case, solicitors should attach print outs of their ledgers or time sheets (adjusted as necessary to take out administrative matters) to their bills. Accordingly, in general a bill counts as a statute bills if the solicitor provides with the bill time sheets or ledgers. As a matter of general practice time sheets are appended to bills and indeed, as I have recorded, that is what occurred in this case.

19. In *Karatysz v SGI Legal LLP* [2022] EWCA Civ 1388 the court was concerned with the "*amount of the bill*" for purposes of the 1/5th rule (see above section 70 (9)) and in determining which party should pay the cost of an assessment (subject to special circumstances). The solicitors argued that the bill was a claim for a sum equivalent to the amount of costs recovered from the other side (to the claim on which the solicitors were instructed) plus 25% of the damages together with the costs an ATE premium. If that were the <u>amount of the bill</u>, the deduction achieved in the assessment was less than 1/5th. The client's case was that the amount of the bill was the sum asserted in a schedule or ledgers attached to the bill; this was, as I understand it, the <u>amount actually assessed</u>, and if that were the <u>amount of the bill</u> the deduction achieved exceeded 1/5th. The Court of Appeal agreed with the solicitors that the amount of the bill was limited to the amount claimed.

20. It was in the context of this dispute that the Master of the Rolls, Vos MR, said this (at [46]):

> *"The Client argues that certainty is needed, I agree. Properly drawn bills ought in future to state the agreed charges and/or the amounts that the solicitors are intending by the bill to charge, together with their disbursements. They should make clear what parts of those charges are <u>claimed</u> by way of base costs, success fee (if any), and disbursements. The bill ought <u>also</u> to state clearly (i) <u>what sums have been paid, by whom, when and in what way</u> (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 <u>required to pay</u>.*
> (my underlining)

21. Mr. Ralph for the Claimant argued what was said in *Karatysz*, this passage in particular, is a development of the common law addressing what constitutes a statue bill for the purposes of a Part III of the 1974 Act.

22. It is clear however that the Court of Appeal in *Karatysz* was at least primarily concerned with the construction of the phrase "*the amount of the Bill*" for the purposes of s70(9) of 1974 Act - the '1/5th rule'. What was said about the requirements of bill was on any view plainly obiter, as Mr. Ralph accepts. It seems to me however that the Master of the Rolls went out of his way to make clear that the only question he had to decide is the meaning "*amount of the bill*" see [31]; in the conclusion of his judgment he said that "*points made about gross sum bills*

and the legal (as opposed to good practice requirements for the content of bills were not in the grounds of appeal and we have not therefore decided them". [48].

23. Neither *Ralph Hume Garry* nor *Boodia* nor any other cases dealing the requirements for a statute bill[9] were referred to in the judgment. The comments relied upon by Mr. Ralph are not necessary for the reasoning supporting the outcome appeal. Moreover, in my judgment it is plain that the Court was not seeking to revisit the guidance given in *Ralph Hume* as to what constitutes a bill.

24. Mr. Marven is, I think, right to say that Master of Rolls was concerned with best practice. His comments must be seen in the context of an expensive dispute over a small amount of money where there was uncertainty arising from the bills as to what was being claimed. The guidance was intended to avoid disputes of this sort, where solicitors are effectively seeking payment of the amount for the ATE premium and sum for other costs up to 25% of the damages. It is clear from the terms of guidance that it was as to what ought to happen 'in future'. A ruling as to the state of the law applies retrospectively because it is to be understood as stating what the law always has been (*Re Spectrum Plus Ltd (In Liquidation)* [2005] UKHL 41, [2005] 2 AC 680 at [12]-[16]) but that was not the case here.

25. It is not uncommon for time sheets or ledger or indeed Breakdowns (see CPR 46.10) to exceed the amount claimed, the solicitors are in effect saying that they did more work than claimed for in the bill, and thus there is what might be viewed as a 'cushion' over and above the amount claimed. In these circumstances if the bill is reduced by 1/5th the court has to deduct more than this sum from the ledgers or Breakdown. That phenomenon is well known. It might in some circumstances lead to a finding of *special circumstances* but the statutory provisions and the guidance now given are clear, as the court emphasised: it is the claim in the bill that counts, not the amount in the Breakdown or ledger.

26. In the circumstances I cannot take the passages relied as a basis for doubting the guidance in *Ralph Hume* and importing what appears to be accepted would be a new stipulation for a solicitor's bill.

27. I accept that a bill has to be complete. In *Cobbett v Wood* [1908] 2 KB 420 a bill in respect of the outstanding sum owed by the client where sums had have been paid *inter partes* (i.e. by the other side in the litigation) and received by the solicitor was not complete as the solicitors were understood to be claiming the whole of the sum against the client (and the *inter partes* payment was to be regarded as an interim payment against that sum). The 'amount of the bill' is the full sum claimed as payable and any payments against that are merely interim payments; thus the meaning of the phrase 'amount of the bill' is answered by asking what the bill was demanding to be paid (or to have been paid even if that sum had been paid), as appears in *Karatysz* at [36].

28. I might add that the 1/5th rule applies against the full amount claimed in the bill, not the amount claimed less the interim payment. Thus, it might be observed, a precise understanding of the amount of the interim payment is not necessary to form at least some view as to whether the bill may be vulnerable to a 1/5th reduction.

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[9] See also *In re Romer & Haslam* [1893] 2 QB 286, 297, *Chamberlain v Boodle & King* [1982] 1 WLR 1443, 1446 B-D and *Bari v Rosen (t/a Rosen & Co Solicitors)* [2012] EWHC 1782 (QB), [2012] 5 Costs LR 851 at [53]-[56].

29. I might also add, perhaps (as with the reference to the statutory background above) unnecessarily, that I would be concerned that if this new stipulation were to be imported into the definition of a statute bills it could be problematic. In more complex cases where, such as here, there may be multiple streams of work which might generate different series of bills, and there might be difficulties in determining what sums have been received on an interim basis against certain claims in bill, so that there might be issues as to whether an interim payment are properly attribute to work claimed in any particular bill. Solicitors often themselves allocate interim payments to different work streams with little input from client (as might be suspected happened in this case). Because of the role that a statute bill has in determining where a cause of action is made out, any rule that meant that the interim payments had to be stated on a bill of costs might generate significant disagreement as to the status of a bill and thus as to whether claims by solicitors or clients said to be founded on a statute bill are properly made out. It strikes me that this could have significant adverse effects upon the ability of parties to resolve issues as to costs.

30. Indeed, albeit not mentioned in argument (and I add this by way of further reinforcement only), it is perhaps relevant to note that the standard directions on a Solicitors Act assessment provide for the service of a Cash Account. This direction might be said presume that in the absence of such an Account there might be legitimate room for doubt about the amount already paid on account; it strikes me that any such disagreement can ordinarily be resolved in a Solicitors Act assessment without difficulty or the need to refer to the bills themselves.

31. Needless perhaps to say, if I were wrong about the above and the passages relied upon could be understood to be a (binding) statement of the law, there might be a substantial basis for thinking that the decision was *per incuriam*, because *Ralph Hume* and *Boodia* were binding on the later Court of Appeal in *Karatysz*[10] (see *Willers v Joyce (No 2)* [2016] UKSC 44 at [8] if authority is needed on this point). But for reasons which I have already stated I think the judgment of the Court of Appeal is quite clear on this point.

32. It strikes me that the bills in this case could have been drafted in a clearer way. It is however sufficiently clear from the addendum pages to the bills and the time sheets that they are final bills which comprehend all of the costs of the particular matters on which the Solicitors say they were instructed. It is also clear that solicitors were also giving credit for the interim payments already made against those claims.

33. It seems to me that the information is probably sufficiently clear on the bills in the terms required by *Karatysz* when all the documentation is considered. But in any event, it is sufficiently clear on the information known to the Claimant (I note that Claimant's own unamended Claim Form expressly stated the total of the bills were for £2,533,79.14). In short, the invoices together with their enclosures made it sufficiently clear what had been paid and provided sufficient information to the Claimant to enable her to take a decision as to whether to apply for assessment. But I am, further, satisfied that in any event the Claimant had sufficient knowledge of the interim payments.

34. These was no issue raised by Mr. Ralph that the necessary features of a statute bill identified by Ward LJ in *Ralph Hume Garry* were not otherwise present.

35. In the circumstances it seems to me that the invoices delivered must be regarded as

statute bills.

Should I make any assessment conditional upon payment of a further sum by way of interim payment? If not, should I order a further interim payment?

36. It is, I think, common ground that I have a discretion to require payment on account of bills delivered as a condition of an assessment. Section 70 of the 1974 Act provides in terms, that where, as here an application is made over one month from the delivery of the bills and within one year, "*the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order- that the* [bills] *be assessed".*

37. I understand that the Claimant was substantially successful in the *Property* proceedings and her other brother, John Hughes, was ordered to pay 80% of her costs. The Claimant was not successful in the *Portbond* proceedings and was ordered to pay costs on the indemnity basis. The *Caprina* proceedings were ongoing when the Defendants ceased to act.

38. The Claimant has now instructed other solicitors, Arch Law, and the Defendants have asserted a lien over the papers. It appears that on 18 April 2023 Arch Law contacted counsel's chambers in an attempt to get the Caprina papers from counsel but the Defendants objected to the papers being passed over. The underlying papers have not therefore been released to the Claimant.

39. Soon after instruction, on or about 5 June 2023, Arch Law confirmed that they were instructed in relation to the Defendants' invoices and sought their agreement that the final invoices were not statutory bills indicating that they were considering issuing proceedings for a Solicitors act assessment. By letter dated 12 June 2023 the Defendants agreed to assessment being ordered but only on condition that within a further 14 days (i.e., by no later than 11 July 2023) the Claimant makes a payment on account of the unpaid invoice sums, namely £975,000. As appears above the application for an assessment was made fairly shortly thereafter. I note that if I were to order a further interim payment in the sum sought that would take the total payment to their bills to over £2m- some 75% of the outstanding fees and about 85% of the sums claimed in the invoices.

40. The Defendants contend that they not should be put to the trouble of having to justify their costs in circumstance where they say there is no creditable challenge to them (asserting that many of arguments so far raised are without merit) unless the assessment is made conditional on a substantial payment on account. They say that they have incurred substantial amounts (around £290,000) for disbursements, in particular counsel's fees, from their own resources for which they remain unpaid. Mr. Marven says in terms that the Defendants face what he says is the deeply unfair prospect of being put to the considerable costs of an assessment, without them being able to recover those costs or the assessed sums found to be due on their invoices. They also say the Claimant has declined, despite a number of requests, to confirm that she will not resile from various undertakings in respect of arrangements made in respect of a property *Edlington*, which was to be their security for their fees and disbursements and argue that there is a real risk that the Claimant will take any steps open to her to avoid making payment to the Defendant.

41. I have considered all these points which were developed further in the hearing and the (many) points raised by the Defendants in the witness statements they have served. They

perhaps require me to deal with the matters in rather more length and detail than would ordinarily be the case.

42. One particular difficulty with an argument which Mr. Marven might have been understood to be advancing was the suggestion (perhaps) that the Defendants should make payment for sums on the bill which might represent some security for costs (noting his points about unfairness). No application has been made for security for costs under CPR 25. Although not addressed in any detail it is important to note the prohibition in section 70 on making an order on terms as the costs of assessment; this might be understood (indeed is generally understood, and I am not sure Mr. Marven suggested otherwise) as preventing the court from ordering security of the costs of the assessment. It is not perhaps to be overlooked that for current purposes although the solicitors are the defendants to the application for an assessment, the costs sought in the invoices are claimed by them and thus it may be said that they are in substance to be regarded as the claimant; in general, of course, a claimant is not generally entitled to security of costs in pursuing its own claim. In the event I did not understand, and despite the terms in which Mr. Marven put his argument, that I was being asked to make an order that required the Claimant to give security for costs. Mr. Marven's contention was perhaps best understood as being that the Defendants should receive an interim payment of the sums due on the bills because the Defendants were likely, if not bound, to recover substantially more than they have so far received by way of interim payment and that such a payment should be a condition of an assessment.

43. It is correct that the Claimant has been provided with the time sheets and has now had access to legal advice. Further, the very premise of a finding that the invoices are statute bill is that the client has that they provide sufficient detail to enable him or her to take advice in the terms set out in *Ralph Hume*. Nevertheless I have some concerns about any expectation that there be a comprehensive analysis at this stage in a case such as this. I would be surprised if the Claimant did not herself have fairly detailed knowledge of what went on but any advice that may be given to her as to the amounts payable on the basis of the times sheets I have seen would necessarily be highly preliminary.

44. No doubt before giving anything like a detailed advice to the costs claimed, there would need to be consideration of a Breakdown and indeed, ordinarily, some consideration of the underlying papers (including attendance notes) would be required. My understanding is that standard directions in Solicitors Act assessment are often agreed on the basis that there is to be an inspection of the underlying papers for the purposes of the costs claim only, even where a lien is being exercised (although I have heard no argument on that yet and make no determination on it in this case). In any event neither party provided me with what might considered in any way a comprehensive analysis of the costs claimed. One might have thought that as the party insisting on a condition applying to an assessment some burden would rest on the Defendants to demonstrate the likely recovery. However, and be that is it may, I understand that an analysis of costs would be a significant undertaking as the material is substantial: there are some 23 pages of time sheets in respect of the invoice relating to the Property Proceedings and some 37 pages of sheets in respect of the *Portbond* proceedings alone. In any event even if the burden rested on the Claimant (of demonstrating that conditions are not appropriate), I am not satisfied that at this stage and in the circumstances of this case, neither party can be expected to have provided the court with any detailed analysis setting out their case at this stage.

45. I am told by the Defendants that the proceedings were complex and wide ranging. I

have received a large amount of material for the purpose of the directions hearing (two witness statements have been served on behalf of the Defendant and one on behalf of the Claimant), I have not, of course, seen the underlying papers. The witness statements of Mr. Paul Thomas (a consultant within the Defendant's firm) deal with various aspects of the case and provide some but perhaps limited assistance on the nature of the underlying litigation. As I understand it, and as indicated above, the disputes arose in the context of a family rift. The Claimant was one of four children of Carles and Nora Hughes who left businesses and property to their children. She had, as I understand it, acted at one stage as a financial director in the business or businesses. I further understand that the Property proceedings gave rise to a nine day trial in which the Claimants' brother, John Hughes, raised an issue estoppel in relation to ownership of the property, *Edlington*. The *Portbond* trial lasted 12 days. The latter giving rise to the lengthy judgment which I am told was 145 pages in length in which the learned Judge rejected a claim that the Claimant was excluded from management as result of theft of stock.

46. Even making all due allowances for all these and other points made by the Defendants in the course of hearing and might be apparent from the documents, the level of costs claimed strike me as perhaps more appropriate to heavy and high level commercial litigation, whereas, notwithstanding the courts and context in which disputes were resolved, the background to this claim is a family dispute. There is, moreover, at least some suggestion in the papers that there was a similar factual background to the different proceedings and perhaps (I do not know this for sure) to some extent overlapping issues of facts in the various proceedings; and, if that is so, it may impact substantially on the reasonableness of the costs.

47. It appears that senior counsel was instructed at least for a substantial period separately on a Direct Access basis in, I think, the *Portbond* proceedings. I am told he has been paid in full and his fees have not, perhaps substantially or wholly, been charged in these invoices. That too might make the sums claimed in these proceedings perhaps more remarkable, or at least suggest a greater need for explanation as to the level of costs claimed.

48. It is also perhaps of note that in the *Property* proceedings the solicitors were instructed after issue of the claim and shortly before trial in the *Property* proceedings, which was listed for early/mid-2021. As I understand it *Portbond* proceedings were also underway (I understand it was listed for trial in 2022), in any event after preparation of the Statement of Case. The limited period of instruction further accentuates the concerns.

49. Mr. Ralph was keen to know whether and to what extent the proceedings were costs budgeted. As I understood it he was concerned that costs budgets or costs management orders might indicate some form of yardstick by which the Defendant's claim could be considered (and see too *JXC v NIS* (2023] EWHC 1000). Mr. Marven told me (on instructions) that there was no costs budgeting in either the *Property* or the *Portbond* proceedings or indeed in the *Caprina* proceedings for the period in which the Defendant was instructed. There is reference in a skeleton argument served on behalf of the Claimant, apparently prepared for the *Portbond* proceedings (and exhibited by the Defendants for other purposes, see page 92 of bundle 1); it refers to the costs of the other side in these proceedings being budgeted in the sum of around £220,000. I, of course, make no findings in relation to this or any other such matter but it appears from the rest of the skeleton argument and from what I have been told by Mr Marven (on instructions) that no costs management order had been made in these proceedings. It seems that the costs budgets were exchanged but costs management did not progress beyond that. It also appears that something similar may happened in the *Property* proceedings; and if the *Caprina* proceedings were costs budgeted it was after the Defendants ceased to be

instructed.

50. A Solicitors Act assessment is, of course, a quite different exercise from *inter partes* costs budgeting not least because of the different basis of assessment and but also because it is carried out retrospectively -and so the court will know what in fact happened: a lot could have changed after budgets were served. It is not necessary for me to take any particular view about this in coming to my decision and I do not do so, given the other matters I have referred to in this judgment and upon which I have based my decision. Indeed in this case there appear to have been costs estimates given to the Claimant (which I will turn to shortly) which would perhaps have to be considered in this context. However I might note that if budgets were being exchanged- albeit back in 2019 – of anything close to the figures suggested it might perhaps add to a concern about the Defendant's invoice in respect of the Portbond proceedings (which appears to be approaching £1.3m for fees and expenses).

51. As to costs estimates or costs indications, I take fully into account all that was said. They can, of course, be highly relevant in a Solicitors Act assessment. I can see that the £750,000 figure in a letter of 9 June 2022 might be an estimate in relation to unpaid fees at time when interim payments had been made (see first witness of Mr. Thomas [53]). I agree also that even if that were a cap, it would not necessarily be an impediment to a payment on account of £750,000. Mr. Marven has referred me to a number of estimates and other costs information which he says were given to the Claimant at various stages. However it is not, I think, appropriate for me to proceed on the basis that the mere fact that the costs now claimed may be close to the estimates which he referred to (given at various stages of the litigation) therefore the costs claimed are reasonable. Moreover, the Claimant has herself raised concerns about the costs information provided (or the lack of it) and it may be necessary to look at the extent of the costs information provided in more detail at all stages (including at the outset of instruction).

52. I should perhaps add that a preliminary consideration of the time sheets would appear, at the very least, to confirm my concern that there is scope for considerable reduction of sums claims in the bill.

53. There appears to be very considerable involvement of one fee earner (Mr. Thomas) at £575 per hour particularly in the *Portbond* proceedings. The extensive involvement of fee earners at high or substantial hourly rates may be the subject of scrutiny, particularly so in a case where two counsel were also instructed. It is possible, I suppose, that senior counsel was heavily involved not just at the trial but in the lead up to it. But in any event junior counsel, whose fees are charged in the invoices, seems to have been significantly involved in at least the *Property* and *Portbond* cases and this might invite questions as to the level of solicitor time as substantial rates.

54. I am not persuaded that just because the assessment is a Solicitors Act assessment on a indemnity basis, a certain percentage recovery of costs is likely. Whilst doubt will be exercised in favour of the solicitor, nevertheless issues that commonly arise in an *inter partes* assessment might also arise here such as whether or not work ought reasonably to have been delegated to junior fee earners (work on bundles and the first draft of witness statements, for instance). Similarly, issues as the reasonableness of the time spent on various tasks can play a very significant factor in a Solicitors Act assessment (in this case the time sheets in part reveal large, apparently rounded, blocks of time for the senior fee earner and might appear relatively opaque without a consideration of the underlying documentation or attendance

notes). The extent to which these sort of issues can play a role in determining the level of reasonable costs is, of course, case specific and the information available in my judgment suggests that there is the potential for significant deductions.

55. I am told that Mr. Thomas, who is charged as a Grade A fee earner, attended at a number of hearings. The Claimant says that a number of judges were critical of this - which the Defendant denies. Whoever is right about this, the associated charges may be challenged in assessment. Moreover, the Claimant says various judges were also critical of the level of the Claimant's costs generally at various hearings. This has not been confirmed but I think if it were so, it would at least support my preliminary concerns.

56. There are perhaps other points to be mentioned albeit at the preliminary stage: the possible charging for work before the retainer letter had been sent; and the extent of the costs of consequential hearings/work in respect of enforcement in the Property proceedings might also at least merit some scrutiny. I am not intending anything like comprehensive recitation of the information provided in the course of the hearing and the material in the bundles (consisting of over 800 pages) which I was left to consider. Nor, of course I am setting out of all the points that have been made might be made one way or the other (as to the extent of the factual enquiry involved in the case, the extent of the disclosure, the state of the papers when received etc). I take all these points into account, It is however perhaps sufficient to say that that my overarching concern about level of these costs, and thus the potential for very significant reductions (even allowing only for fairly conventional type challenges), has not been allayed by consideration of the material provided to me.

57. Indeed a preliminary consideration of the information available suggests there might even be room for challenge in respect of hourly rates. In this case the retainer letter of 1 March 2021 appears to indicate that the hourly rate of the senior fee earner, Paul Thomas, would be £375 per hour. But shortly afterwards, in or about August and September 2021 this rate was increased to £575 per hour. My attention was drawn to a letter Mr. Thomas appears to have written to the Claimant seeking to justify this increase rate on the basis that this new rate was the rate that he charged other clients (he also indicated an expectation that he intended to recover the rate from the other side by negotiation or in taxation). For reasons which I have set out above, even if the Claimant can be taken to have approved the increased rate, there might be issues as to the reasonableness of the rate not least (given the circumstances in which the Defendants have sought, in the course of litigation, to make the additional charge). It is not necessary for me to say anything about the other rates charged but, needless perhaps to say, if there were any basis for a challenge to the rate of this particular fee earner, this could also have a significant effect on the amount payable.

58. Further, whatever view may be taken about the extent to which any of the previously mentioned challenges might reduce the costs claimed, there are other features of this particular case to which I have should have regard in considering whether to order a further interim payment.

59. The Claimant describes the trial in the *Portbond* proceedings as a car crash. Indeed she has, through her solicitors, made allegations of negligence in a letter of 19 February 2024. Mr. Marven says that the Claimant has now had a very considerable period of time to advance any negligence claim, the letter is not a protocol letter and, he says, such allegations are not matters for a Solicitors Act assessment. In general allegations of negligence might justify staying costs proceedings but in this case there has been no request for me to do.

60. It is not necessary for me to set out the allegations. I agree that in general terms I should be wary about assuming there is any basis for such allegations ,particularly given the stage they have reached. But, as Mr. Ralph pointed out, in this case no issue is taken with the substance of at least some elements of the complaints (albeit I understand causation is denied) – indeed, there is at least some suggestion that in consequence of the allegations made by the Claimant, the Defendant have sought to blame junior counsel for what appears to be possible problems about the way in which the case was pleaded. Indeed I am told that the trial judge in the *Portbond* proceedings, was highly critical of the way the case was presented and pleaded on behalf of the Claimant.

61. A particular issue the Claimant raises is as to the costs of expert evidence in the *Portbond* proceedings. It is suggested that the trial judge did not permit her to rely upon a forensic accountancy report obtained by the Defendant because, I am told, the evidence went beyond the terms of an order (presumably a case management order). It is said that the costs of the relevant accountancy evidence was £80,000 in the letter of 19 February 2024 (albeit higher figures are mentioned elsewhere). This matter may well require particular consideration. Indeed there may be a need to consider not only the disbursements themselves but the associated fees of counsel and solicitors.

62. At this stage it is obviously not appropriate for me to form any view about any of these matters. Indeed I did not understand Mr. Ralph to say that a court dealing with costs in a Solicitors Act assessment has jurisdiction to consider allegations of negligence. However in an assessment a court is obviously required to consider the reasonableness of the time spent and the charges which the solicitors require the Claimant to pay. It strikes me that if the trial judge did make the comments attributed to him, it might indicate that some scrutiny is required of the relevant costs and in any event that I should at least, for these further and independent reason, exercise some considerable caution before forming any view at this stage as to the level of costs that might be payable following an assessment.

63. In short, on the issue of quantum alone and for the multiple reasons set out above (whether considered in aggregate or independently) I am not satisfied on the available information that there is or might not be a creditable challenge the level of these costs or, with at least a significant degree of confidence, that the Defendants are indeed likely to recover more than, or appreciably more, than has already been paid.

64. I have fully in mind the suggestion that Claimant's brother David Hughes had an interest in the outcome of the proceedings and that he appears to have been a significant source of funding for the Claimant (apparently via his company Yorkshire Metals Limited) of the sum so far paid. It is said that only a small proportion had been paid by the Claimant personally, some funds coming from *inter partes* payments. If a client were unlikely to be able to comply with a condition imposed that could be a serious objection to an assessment being ordered on condition of a further payment but that is said not to be the case here. The Defendants' case is however that it is clear that there are others including the Claimant's brother are so wealthy that sums involved could be readily raised. But self-evidently simply because the Claimant may well be able to raise the funds to pay over sums of this order is not, in isolation, a reason to require payment to be made.

65. In general, there is no expectation that clients, or for that matter solicitors, come to a directions hearing with extensive evidence dealing with the parties' respective financial

viability (and the ability to pay or repay an interim payment). And if that were the norm it would turn was what was normally short directions hearing into a lengthy hearings with consequently high levels of costs and arguments about disclosure and this might go a long way to thwarting the underlying aims of the statutory scheme. Thus, in general terms I think I should be wary about making an assessment conditional on any particular payment.

66. Moreover in this case the solicitors have had some time to sort out the security for their fees and disbursements. As is well known, it is open to a solicitor (in contentious business) to require payment of costs on an interim basis and to require security for their fees and disbursements as a condition for acting: see section 65 of the 1974 Act (noting that failure to comply with a request for an interim payment may permit a solicitor to terminate a retainer). One might anticipate that in substantial litigation such as this, matters as security are considered when the retainer is entered into. In this case it appears the Defendants' requests for security, which were apparently made in the course of litigation after the retainer was entered into, were acceded to. In November 2021 the Claimant provided an undertaking to the Defendants that their costs would be paid out of the proceeds of sale of a residential and equestrian estate known as *Edlington*, the subject matter of the *Property* proceedings. Then, on 9 June 2022 the Claimant appears to have given a second undertaking for £750,000 out of the proceeds of sale of *Edlington*, and this was intended as security for the Defendant's costs in taking the *Portbond* proceedings to trial.

67. The Defendants say that Lupton Fawcett, other solicitors acting for the Claimant, have failed, in answer to letters of request in or about February 2023 to provide the Defendants with assurances that no payment would be made in relation to the Claimant's entitlement from the sale of *Edlington* without the Defendant's consent. Indeed shortly after these requests, the Claimant complaint complained to the Defendant. I am asked to infer in the circumstances that the Claimant does not intend to abide by the undertakings given.

68. The Claimant has however said in her witness statement dated 26 February 2024 that she intends to abide by her undertakings. Although she has not provided any explanation as to the failure to provide the assurances sought, given the various issues that have arisen between the parties and the background of further litigation I think I should be wary about placing too much reliance on this failure. *Edlington* remains unsold and there is, as I understand it, no imminent prospect that it will be sold (the Defendants' case appears to be that the Defendant was dragging her heals over the sale). The security, such as it is (Claimant's interest in the property which appear to be of substantial value 50%), remains and will remain at least for a good while. Mr. Marven did not argue that the undertakings were worthless (albeit not as I understand it given to the court). His point was not that the undertakings were not a form of security but that they did not mean the Claimant was not required to pay the Defendants until after the sale of the property sums which were due. However property was considered adequate security when the solicitors committed themselves to doing the work, and it is not clear why it should be inadequate when there is a challenge to invoices.

69. In these circumstances I am not satisfied that *Edlington* does not, as things stand, remain sufficient security for costs. In any event to the extent that there were any significant continuing issues about security it would not follow for the reasons given that an assessment should be conditional upon payment of a further sum. It is to be emphasized that the Defendant's case, as I understand it, has been focused on the requirement of a further interim payment. They have not sought to address whether in respect of their claim for costs in Property proceedings a charge might arise under section 73 of the 1974 Act against *Edlington*

(as property recovered through their work); nor was it suggested, as I recall, that such undertakings as have been given to them by the Claimant may also be made to the court.

70. Further, I am not persuaded that the attempt to set off "*Thomas Mansfield's costs*" (as Mr. Marven might be understood to have put it), that is to say the cost order in the Claimant's favour in the *Property* Proceedings, against adverse costs liabilities in the *Portbond* proceedings and in the *Caprina* proceedings, indicates bad faith, as I rather took him to imply. I am not sure that it is inappropriate for her to seek a set off. Indeed some set off has been permitted. Quite apart from the fact that the relevant order was in the Claimant's favour substantial interim payments have, the Defendants themselves say, been made by the Claimant in respect of the *Property* proceedings. I recognise that a set off might have reduced the sums that might be made available to meet the costs claimed in these invoices, nevertheless there is as I have said, in my view, substantial security for the Defendant's costs.

71. I have fully in mind the case intimated in the Claimant's statement of 26 February 2024 to the effect that she was told that if she did not win the *Portbond* proceedings should would not pay anything. The Defendants say, on the back of this allegation, that the Claimant is now seemingly denying any liability for the *Portbond* costs. The assertion that the Claimant would not have to pay anything is, they say, implausible: if there were any substance in it, it would have been mentioned at an earlier stage and it is in any event inconsistent with *inter alia* an estimate of £1.2m to take the Portbond proceedings to trial; indeed they say, inter alia, there was no suggestion that the Claimant would never have to pay from her own resources. I am not, of course, in a position make any finding on this and the various points made. Mr. Marven suggests (as I understand it) that it is an attempt to run a specious argument and, as I understand it, this should be weighed in the balance in the exercise of my discretion. If there is no merit in this point then I suspect this will become evident fairly soon. I am not, however, in any position to make any finding about it - albeit I think Mr. Marven's points indicate that I should be wary about attaching any weight to the contention that nothing is payable in respect of the *Portbond* proceedings. The reason for my decision in respect of the request for a further interim payment, places no reliance on this contention. However I do not think I can be satisfied that it indicates that the Claimant would not abide by the undertakings she has given or that she is, as is suggested, determined to pay nothing more whatever her actual liability.

72. As I have already noted, a sum has already been paid by way of interim payment which one might expect to be deployed to pay disbursements. I acknowledge that the sum so far paid is less than 50% of the sums claimed, and Mr. Marven says that a reduction of 50% might be said to be at least outside the norm on an assessment on the indemnity basis. However I have not been satisfied with the requisite degree of confidence that a further sum will be due and that a further payment should be made now. Further, I am not persuaded that the security identified in the course of the retainer by the parties will not continue to be available at least for some significant period. Accordingly for these various reasons, I am not persuaded at this stage to make an order for a further payment.

73. I might add, albeit it is no more than additional reason supporting my conclusion, that there was no evidence before me to say that the solicitors would be unable to repay sums if the interim payments made were excessive. But I should perhaps be wary about proceeding as if this were a matter of certainty in circumstances where there is little visibility (I have not received any evidence as to the size or viability of the Defendant firm).

74. I might also add, albeit again it is no more than an additional reason supporting my

conclusion, that neither party suggested to me that the issue as to whether any further interim payment should be made could not be revisited. It is, in any event, not clear why I should be precluded at the very least from making an order for a further interim payment on the claim if it is appropriate to do so at some later stage after the request for hearing. Any such order would presumably be enforceable in the normal way. The preparation of Breakdown and Points of Dispute in this case may be significant pieces of work but there may well be reasonable expectation for them to be undertaken in this case in relatively short measure, so that a clearer view can be taken fairly soon.