Case 50
Bari

v

Rosen (t/a RA Rosen and Co Solicitors)

[2012] 5 Costs LR 851

Neutral Citation Number: [2012] EWHC 1782 (QB)
High Court of Justice, Queen's Bench Division
28 June 2012

Before:
Spencer J (sitting with Master Simons and Mr Greg Cox as assessors)

Headnote

An appeal against an order within solicitor/own client proceedings relating to interim statute bills. The court considered whether the retainer permitted the solicitor to issue interim statute bills; whether, in that event, the Master was entitled to conclude that those bills could be properly treated as a series of bills culminating in a final statute bill, so that all bills could be subject of detailed assessment; and whether the Master was entitled to find that there were special circumstances to justify detailed assessment of the final bill outside the one month time limit. Appeal dismissed. The interim bills were not statute bills, but were sufficiently compliant to form part of a qualifying series of bills culminating in the final statute bill. The Master had been right to find special circumstances to justify detailed assessment outside the one month time limit. *(The last two paragraphs of this report have been renumbered from 66 and 67 in the original transcript.)*

Judgment

SPENCER J:

Introduction and Issues

1. This is an appeal against an order of Master Leonard dated 1 November 2011 in proceedings between a solicitor (the defendant) and his client (the claimant) in which the client seeks a detailed assessment of the solicitor's bills for work carried out on the client's behalf.

2. The appeal turns essentially on three issues. The first issue is whether the Master was entitled to conclude that the solicitor's retainer did not permit him to issue interim statute bills to his client. The second issue is whether, in that event, the Master was entitled to conclude that those bills could nevertheless properly be treated as a series of bills culminating in a final statute bill, so that all the bills could be the subject of detailed assessment. The third issue is whether the Master was entitled to find that there were special circumstances to justify detailed assessment of the final bill (and series of bills) outside the twelve month time limit prescribed by the Solicitors Act 1974.

3. I should say at the outset that the appeal raises no point of general principle but turns entirely on its unusual facts. I heard the appeal, sitting with my assessors Master Simons and Mr Greg Cox, on 25 May 2012 and reserved judgment.

4. We were assisted by detailed written and oral submissions from counsel, Dr Friston on behalf of the defendant and Mr Holmes-Milner on behalf of the claimant. By agreement, they provided further written submissions following the hearing. Despite the mass of factual detail, in the end the resolution of the three issues I have identified does not require a minute examination of all the material before me, although it has all been taken into account.

5. I remind myself that this appeal is limited by CPR 52.11 to a review of the decision of the Master and that the test I must apply, in deciding whether to allow the appeal, is whether, following that review, the Master's decision on any of these three issues has been shown to be wrong.

Factual Background

6. In outline the factual background can be briefly stated. Between about April 2008 and December 2009 the defendant, who is a sole practitioner, advised and acted for the claimant, a businessman with corporate interests. It is common ground that he did so under a general retainer, although there were at the outset three specific matters to be dealt with. One was a contemplated claim to remove a liquidator. Another was a potential dispute about a corporate indemnity. The third was an action for negligence against solicitors and counsel who had previously acted for the claimant (for convenience referred to as "the MRP claim", those being the initials of the firm of solicitors).

7. The crucial document is the retainer letter prepared by the solicitor dated 31 May 2008, countersigned by the client. I shall return to the key paragraphs of that letter shortly. It is also common ground that the original retainer, covering the three matters, was amended and expanded to cover a number of other miscellaneous matters, some contentious, some non-contentious.

8. Between 5 June 2008 and 3 March 2009 the defendant rendered a series of bills to the claimant. According to the claimant's amended particulars of claim there were twelve such bills, totalling £37,857.75. All these bills were paid very promptly, pursuant to an express term in the retainer letter that the client must pay each bill by return.

9. Some six months after the last of these bills was paid, the parties fell out. On 7 December 2009 the claimant confirmed that he no longer wished the defendant to represent him. The MRP claim was still proceeding. The claimant made proposals for payment of the defendant's outstanding costs but no agreement could be reached. Matters came to a head when the defendant sought outstanding costs of £12,900 plus disbursements and VAT, and exercised his lien over documentation pending payment. The defendant's final bill dated 22 January 2010 was for £15,987.50. On payment (under protest) of that sum, the relevant papers were released.

10. Another solicitor, Sarah Wootton, has since acted for the claimant. She endeavoured to settle the MRP claim but had difficulty identifying the relevant costs the claimant had incurred to the defendant as his solicitor in the litigation. The MRP claim was eventually settled, with MRP agreeing to pay the claimant's costs. When Miss Wootton referred the matter to a costs draftsmen she was advised that the papers available did not justify the costs which the

claimant was seeking against MRP. It was said that the defendant's records were in disarray, lacking in attendance notes or any formal time record.

11. In order once again to bring matters to a head, on the advice of Miss Wootton the claimant issued a Part 8 claim for detailed assessment of the final bill of costs dated 22 January 2010. That application was issued on 20 January 2011, just two days within the expiry of twelve months from the date of the bill. It is common ground that the final bill was, or fell to be treated as, a final statute bill in respect of which the claimant was entitled to detailed assessment pursuant to the provisions of s 70(3) of the Solicitors Act 1974, provided the court was satisfied that there were "special circumstances".

12. It [is] unnecessary to recite the procedural stages which followed. Suffice it to say that the claimant applied on 29 June 2011 to amend the particulars of claim to incorporate all the previous bills rendered by the defendant to the claimant from June 2008 onwards. Thus the application before the Master, which he heard on 22 July 2011, was an application for permission to amend the particulars of claim to embrace detailed assessment of the earlier bills as well.

The Relevant Legal Principles

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

14. The position after a statute bill has been paid is somewhat

different. The client still has the absolute right to an assessment before the expiry of one month from delivery of the bill. After that, but only up to twelve months from the date of payment, if the client applies for assessment, special circumstances need to be shown. No assessment at all can be ordered after the expiration of twelve months from payment. Section 70(4) creates an absolute bar. For completeness I should mention that there are additional provisions where the solicitor has obtained judgment on the bill, but this does not arise in the present case.

15. The basic principle is that a solicitor's retainer is normally an entire contract under which the solicitor is entitled to claim remuneration only when all the work has been completed or the retainer has been terminated. A solicitor is not entitled generally to any payment on account of his costs other than disbursements. However, a solicitor may contract with his client for the right to issue statute bills from time to time during the currency of the retainer. Such bills are known as "interim statute bills". They are nevertheless final bills in respect of the work they cover, in that there can be no subsequent adjustment in the light of the outcome of the business. They are complete self-contained bills of costs to date.

16. Interim statute bills issued during the currency of the retainer can arise in only two ways: by agreement, as already explained, or by natural break, i.e. at a natural break in protracted litigation or other work. It is common ground that none of the bills in the present case was issued at a natural break in the work conducted by the solicitor for the client. The defendant's case is that he had a contractual entitlement to issue interim statute bills because of the terms of the retainer.

17. Even if there was a contractual right to issue interim statute bills, it would be a question of fact whether any individual bill issued to the client was a statute bill. If there was no contractual entitlement to issue an interim statute bill, any interim bill issued could be no more than a request for payment on account.

The Retainer Letter

18. Against this background it is necessary to examine the terms of the defendant's retainer letter. The relevant paragraphs, under the heading "costs", were as follows. Emphasis has been added to certain words and phrases of particular significance which featured in oral argument.

> "For the High Court matter alone, my fee with you is at the rate of £300 per hour but I shall charge your company only at the rate of £225 plus VAT, per hour, pending recovery of any costs from the other party to litigation. My timed hours will be *regular enough* for you to peruse before payment and you should ask questions about times engaged if you wish. I shall send you *a regular statutory final bill*, which will not be altered subsequently. You should discuss with your accountants what after tax this case will cost you. My best estimate of costs is that I shall need 30+ hours in all for the foreseeable future. I cannot commit myself as yet. The charge to the company of £225 will be specified by a time sheet. I require payment of the bill by return and will argue about any aspect of the charges subsequently. You have a right to have an assessment of my bills *at any time* in the High Court. Ask for details from me at any time.
>
> *Apart from that*, all bills are self-contained. You and I will agree that each such subsequent bill is fair and reasonable when billed. The bills are for acceptance; but I do reserve my rights to charge as and when appropriate. You must pay any disbursements of any kind. I am not prepared to disburse out. All disbursements will be supported by a bill or record of indebtedness. Counsel's fees and copying, if used, are to be paid by you promptly and separately. I will discuss with you the right barrister to advise overall. I can make an inquiry once I send a brief to his clerk. As I say my best estimate of costs is that I shall need 30+ hours in all for the foreseeable future."

First Issue: Was the Defendant Contractually Entitled to Issue Interim Statute Bills?

19. Before the Master it was submitted on behalf of the defendant that this retainer gave him the right to issue interim statute bills, and the bills rendered were compliant with the requirements for statute bills. Accordingly, because no application to the High Court for assessment of these bills had been made within twelve months of payment, the right to assessment had been lost.

20. Before the Master it was submitted on behalf of the claimant that the defendant had no contractual entitlement to issue interim statute bills. In particular, such a right was fundamentally inconsistent with the express term of the retainer that the client had the right to an assessment of the solicitor's bills in the High Court "at any time".

21. The Master gave a very full and careful reserved judgment. He

concluded that the retainer letter, properly construed, did not provide for the defendant to render interim statute bills. He acknowledged that, on established principles, he had to interpret the terms of the contractual retainer by reference to the agreement as a whole and give effect to the presumed intention of the agreement, construed objectively by reference to the factual matrix at the time of the agreement. The parties' subjective intentions were not relevant (para 43).

22. The Master construed the retainer letter as a whole. For example, he noted that the letter used the phrase "regular *statutory* final bill", which pointed to the bills being interim statute bills (para 47). However, the bills could not properly be called "final" when, on his own case, the defendant reserved the right to render a further bill or bills covering the same period as and when the entitlement to a higher hourly rate crystallised (para 46).

23. The Master was particularly troubled by the term in the agreement that the client could have an assessment of the bills "at any time" in the High Court. This was, he concluded, completely contrary to the essence of an interim statute bill and the rights which go with it. The key passages of his judgment are as follows:

> "49. Accordingly if the bills rendered were to be statute bills one would expect any reference to timing to identify the statutory time limits that apply to the claimant's right to have them assessed on application, not an indication that such application could be made 'at any time'. The claimant's absolute right to assessment of a statute bill, on application under s 70(1) of the 1974 Act, expires one month from the delivery. Twelve months after delivery, in accordance with s 70(3), assessment of the claimant's application will be available only in 'special circumstances'. Twelve months after payment (and payment of each bill by return is a condition of the retainer) there will under s 70(4) be no prospect of assessment on the claimant's application.
>
> 50. It is not easy to reconcile the apparently contradictory provisions of the retainer agreement as to the nature of the bills to be rendered, and in my view it is only possible to do so by acknowledging those provisions are ambiguous and construing them *contra proferentem*. The retainer agreement cannot at once provide the claimant with a right of assessment 'at any time' and, at the same time, subject him to a statutory regime (to which it does not refer) under which his rights to apply

successfully for assessment of the defendant's charges are diminished by the passage of time, even as costs accrue.

51. It follows that the words 'at any time' must be read so as to preserve the claimant's right to assess the defendant's costs as a whole as long as the retainer continues. Accordingly the bills rendered to the claimant by the defendant between June 2008 and March 2009 were not statute bills. The contract of retainer did not provide for them to be statute bills.

52. To my mind the only arguable alternative construction of the May 2008 retainer agreement would be that it is designed to curtail the claimant's right to apply for assessment of the defendant's costs as time progresses, whilst incorporating an entirely misleading and contradictory provision to the effect that it does not. That is not, in my view a viable interpenetration, nor I would suggest one upon which a professional legal adviser could comfortably rely."

24. Dr Friston makes a number of criticisms of the Master's reasoning, and submits that his conclusion is fatally flawed. I should record that although, through ill health, Dr Friston did not appear before the Master, he had submitted a detailed skeleton argument for that hearing. Dr Friston did appear before the Master subsequently when there was a very full application for permission to appeal. Dr Friston provided a further detailed skeleton argument for that hearing. The Master helpfully provided detailed reasons for refusing permission to appeal in a further reserved judgment dated 1 November 2011. It is perfectly permissible to have regard to these expanded reasons for his conclusions.

25. Many of the submissions Dr Friston made before me echoed the submissions he had made to the Master. First and foremost, Dr Friston submits that the Master attached undue weight to the phrase "at any time" in the retainer letter. He submits that "at any time" simply means "without any limit of time" or "without having to wait" or "as soon as you wish". He submits that the Master's interpretation of the phrase as giving an open-ended right to apply to the High Court was tantamount to saying that the time limits prescribed by s 70 of the Act could be overridden by agreement.

26. The Master addressed both these points in his reasons for refusing permission. As a matter of simple interpretation, the words "at any time" and the words "without having to wait" do not mean

the same. The Master did not find that the claimant was contractually entitled to assessment without limit of time, nor did he find that the provisions of s 70 did not apply. It was inescapable, however, that the retainer letter was seriously misleading in creating the impression that "at any time", i.e. even after the one month deadline had passed, there was still an absolute right to have assessed in the High Court a bill of the kind which the retainer agreement allegedly entitled the defendant to issue, i.e. an interim statutory bill. As the Master correctly identified, the two things were quite inconsistent and incompatible.

27. Dr Friston submitted that the Master was wrong in law to resort so early in his reasoning to the *contra proferentem* rule of construction, which should always be a rule of last resort. This criticism does not bear close scrutiny. It is true that the rule is first mentioned early on in the Master's conclusions (at para 44) but that is merely a matter of style and presentation. Proper and fair analysis of his conclusions demonstrates that he did first attempt to reconcile the conflicting provisions of the retainer letter. Only when he was driven to the conclusion that there was a fundamental inconsistency and ambiguity did he turn, quite properly, to the *contra proferentem* rule. Dr Friston may not have conceded in so many words that there was a fundamental ambiguity in the meaning of the retainer arising from the phrase "at any time", but his concession (very properly made) during the hearing of the appeal that this phrase "could have been better worded" was an understatement.

28. Dr Friston developed in oral argument a submission not strongly advanced (if at all) in his various skeleton arguments, namely the inherent improbability that the parties had contracted for an unsatisfactory arrangement whereby the client would only ever be issued with bills amounting to mere requests for payment on account, with the consequence that until the end of the retainer (possibly many years in the future) there could be no certainty as to the client's final liability for costs. There are, it seems to me, two answers to this point. First, the inherent improbability of the parties intending to make such an arrangement cannot prevail if, by his choice of wording, the defendant had achieved just that. Secondly, although this was a general retainer, the three principal pieces of litigation referred to in the retainer letter would necessarily give rise to a "natural break" sooner or later, at which stage an interim statute bill could be issued. In other words, the spectre of a period of many months or years during which

the client could have no peace of mind that he had received a final and unalterable bill was more theoretical than real.

29. Dr Friston submitted that it was highly advantageous to his client to receive interim statute bills. It made for certainty and enabled the client to budget more easily. The Master addressed this point in his reasons for refusing permission:

> "The potential difficulties and expense faced by a client who can only challenge regular bills by instituting multiple assessment proceedings – against the same solicitor who is actively handling a number of current matter for him – are obvious. Further, the choice is between a right which begins to diminish after one month from the first regular bill and a right which does not begin to diminish until a later and, for the client, obviously more practicable time."

30. Dr Friston submitted that interim statute bills are very common indeed and he invited me to discuss that matter with my assessors. I did so. They advise me that although it is perfectly proper to issue an interim statute bill, the practice of doing so is not as common as Dr Friston suggests, for the very reasons explained by the Master. It can create an undesirable tension in the relationship between the solicitor and client.

31. Dr Friston submitted that I should not fall into the trap of regarding the relevant provisions of the Solicitors Act 1974 as consumer protection provisions. He relies upon a passage in the judgment of Ward LJ in *Garry* v *Gwillim* [2003] 1 All ER 1038 (quoted at para 37 of the Master's judgment). Ward LJ was addressing the test for determining whether a bill qualifies as a statute bill. To discharge the burden of proving that it does not, the client has to show (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 the bill to be taxed. In that context, Ward LJ said:

> "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."

32. Whilst recognising this balance, it is also worth noting the observations of Fulford J in *Adams* v *Al Malik* [2003] EWHC 2332

(QB), at para 48, in the context of a dispute as to whether a bill had been delivered at a "natural break" so as to make it a interim statute bill:

> "In particular the party must know what rights are being negotiated and dispensed with in the sense that the solicitor must make it plain to the client that the purpose of sending the bill at that time is that it is to treated as a complete self-contained bill of costs to date …"

33. In the course of argument I invited Dr Friston's attention to the opening words of the second paragraph of the relevant part of the retainer letter already quoted, "Apart from that, all bills are self-contained". It seemed to me that this choice of words, as a matter of plain English, acknowledged that what had gone before in the previous paragraph indicated that bills would *not* be self-contained. Dr Friston submitted that they were simply "meaningless words" which should be disregarded. Although it is not a phrase on which the Master focused in his judgment, it is another example of an unsatisfactory ambiguity.

34. Similarly, I invited Dr Friston's attention during argument to the use of the word "regular" in two places in the first paragraph of the retainer letter: "My timed hours will be *regular* enough for you to peruse before payment…", and "I shall send you a *regular* statutory final bill, which will not be altered subsequently". Dr Friston suggested that in the first phrase the word *regular* should be interpreted as "properly recorded". In the second phrase he submitted that the word *regular* is used in the temporal sense, in effect giving the sentence the meaning "I shall regularly send you statutory final bills, which will not be altered subsequently." This seems to be the way in which the Master interpreted the phrase (see para 47 of his judgment, and para 4 of his reasons for refusing permission). However, in my view the phrase is again ambiguous. The words "a regular statutory final bill" could equally mean "a statutory bill in proper form". On Dr Friston's approach the word "regular" has an entirely different meaning in the first phrase from its meaning in the second phrase two lines later. Again, although this was not a point upon which the Master focused, it is a further demonstration of an unsatisfactory ambiguity in the terms of the letter as a whole.

35. In the end it was for the Master to construe the retainer letter and find, if he could, what form of bill the contract permitted the

defendant to render during the retainer. The Master was entitled to conclude that there was ambiguity arising from the plain conflict between the purported contractual right to have a bill assessed at any time and the complete inability of a true interim statute bill to meet that expectation. He was not only entitled but bound to resolve that conflict in the claimant's favour. Dr Friston has failed to persuade me that there was any error in the Master's approach. He was perfectly entitled to reach the conclusion he did, which is the test. It is also the conclusion I would have reached.

36. Dr Friston submitted that any prejudice to the client arising from his being misled into thinking that he could apply for assessment beyond the time limits which in fact applied could be cured (at least within the twelve month period) by pleading special circumstances: *Arrowfield Services Ltd* v *BP Collins* [2003] EWHC 830; [2005] 2 Costs LR 171. The fact that discretionary relief might be available cannot, in my judgment, affect the construction of the retainer letter.

37. It follows that the defendant fails on the first issue. The Master was correct to find that the defendant had no contractual right to issue interim statute bills. There was no suggestion that the bills had been issued at natural breaks. Accordingly they had to be regarded as mere requests for payment on account.

38. In view of my conclusion on this first issue it is unnecessary to consider in detail whether the bills individually could or could not pass muster as interim statute bills, fulfilling the requirements identified by Ward LJ in *Garry* v *Gwillim*. The Master did carry out that exercise but, as he made clear at para 54 of his judgment, he did so only as a cross-check to see whether his conclusion that the contract did not permit the defendant to issue interim statute bills was supported by an analysis of the bills themselves.

39. Dr Friston attacked several of the Master's findings in respect of the individual bills. He pointed out features of the bills which positively militated in favour of classification as interim statute bills. For example, on occasions sums were rounded down, which Dr Friston submitted could only be consistent with the bill's being a final bill. He submitted that where a bill demanded payment in advance of disbursements this did not rule it out as an interim statute bill, as the Master concluded in two instances (see judgment paras 65 and 69). He submits that the defendant had made it clear in the retainer letter that

he was not prepared to "disburse out" or to afford a claimant any credit by maintaining an account.

40. However, it seems to me that a far more fundamental problem, if these were truly interim statute bills, was the failure on many occasions to provide a sufficient breakdown of hours by serving with each bill a time sheet, as the retainer letter promised. There was also a general failure sufficiently to distinguish work done on a particular case where the bill covered several separate cases.

41. Although, in the event, the question whether the individual bills passed the factual test of being statute bills in form was not an issue I needed to decide (for the reasons already explained), following the hearing of the appeal my assessors and I spent some considerable time examining the bills individually. I am indebted to them for their assistance. Their assessment supports the analysis of the Master. Some of the bills were clearly not interim statute bills, and the remainder were at best borderline. I do not propose to say any more about the form and content of the bills individually, because it was and is unnecessary for my decision.

42. I should, however, mention that one issue raised in the appeal was the effect, in law, of a failure to exhibit to each bill the statutory notice of the client's right under the Solicitors Act 1974 to seek assessment of costs in the High Court, and the right to obtain a remuneration certificate under the relevant regulations. We were provided with most of the original bills. Examination confirmed the Master's finding that, contrary to the defendant's assertion in his witness statement, not all the bills had the prescribed notice on the reverse, even when it was stated on the face of the bill that such notice was given on the reverse. Perversely the very first invoice (5 June 2008) had no such statement on the face of the bill but did have the prescribed notice on the reverse. In the original documents we examined, only one other bill had the statutory notice on the reverse.

43. At the hearing of the appeal we queried with counsel what effect, if any, the absence of the statutory notice would have on the rights between the parties. We are grateful for counsel's diligence in providing us with a detailed joint note, supported by authorities. What it comes to, in short, is that the requirement for any such notice in respect of non-contentious work ceased in August 2009 (which was after delivery of the last of the interim bills). The work done in the present case was largely but not exclusively contentious rather than

non-contentious. The consequence of failing to give notice, insofar as non-contentious bills rendered prior to 11 August 2009 are concerned, is that the solicitor is unable to sue for recovery of his fees without giving further notice and waiting for the expiry of one month. It is, therefore, clear that the presence or absence of the prescribed notice on the facts in this case would not have had any bearing on the question of whether a bill was or was not, in fact, an interim statute bill.

44. Finally in relation to this first issue, I should record that Dr Friston drew our attention to *Davidsons* v *Jones-Feneleigh* (1980) Costs LR (Core) 70. The Court of Appeal examined in that case the question of whether a series of bills should be treated as interim statute bills properly issued at natural breaks. At page 75 Roskill LJ said:

> "There is now no doubt, I venture to think, what the law is. In a case such as the present, a solicitor is entitled to select a point of time which he regards an appropriate point of time which to send in a bill. But before he is entitled to require that bill to be treated as a complete self-contained bill of costs to date, he must make it plain to the client either expressly or by necessary implication that that is his purpose of sending in that bill for that amount at that time. Then of course one looks to see what the client's reaction is. If the client's reaction is to pay the bill in its entirety without demur it is not difficult to infer an agreement that the bill is to be treated as a complete self-contained bill of costs to date."

Dr Friston's submission seemed to be that this passage provided some support for his case that the defendant had rendered interim statute bills, because the claimant's reaction had been to pay each bill in its entirety without demur. The difficulty with that argument, of course, is that the claimant was under a contractual obligation to pay each bill by return, on the promise that any argument about any aspect of the charges could take place subsequently.

Second Issue: Was the Master Entitled to Treat the Bills as a Series Capable of Assessment?

45. I turn to the second issue. Having found that these interim bills were merely requests for payment on account, was the Master entitled to treat them as a series of bills culminating in the final statute bill dated 22 January 2010, and to conclude that the whole series could be treated as one final statute bill?

46. The Master's conclusion, at page 72 of the judgment, was expressed in these terms:

> "The bill dated 22 January 2010 was a final bill rendered on the termination of the defendant's retainer by the claimant. It follows that all bills delivered by the defendant to the claimant must, as in *Chamberlain* v *Boodle and King*, be properly treated as a series comprising a single bill, delivered at the date of the last in the series. The defendant's charges to the claimant, if they are to be assessed, stand to be assessed as a whole."

47. A composite bill of this kind is known colloquially as a "*Chamberlain* bill". Dr Friston submitted that *Chamberlain* bills are very rare in practice. Again, that is not the experience of my assessors. Whilst no solicitor would set out to create such a series of bills, it does happen. Master Simons has certainly encountered such bills on several occasions.

48. Dr Friston has from the outset attacked the Master's conclusion on the second issue. He did so in his skeleton argument seeking permission to appeal from the Master, in his written statement for the renewed oral permission application before Mr Justice Nicol, and in his skeleton argument for the appeal. However, during the course of his submissions in oral argument at the hearing of the appeal he took an even more fundamental point. Dr Friston submitted that it was an "astonishing intellectual leap" on the part of the Master to find that he had the power to make such an order. If the bills were not interim statute bills, but only requests for payment on account, there was nothing lawfully to assess. The correct course would have been for the Master to invite the defendant to render formal bills, so that they could be assessed. There was no application for such an order. Accordingly the application to amend the particulars of claim to extend detailed assessment to these bills should have been dismissed.

49. At my request, since the hearing we have been supplied by the parties with all the various skeleton arguments which were before the Master. We are grateful. It would have been quite wrong to proceed without seeing precisely what submissions were made to him. The relevant history is as follows.

50. For the purpose of the hearing on 22 July 2011 before the Master, Miss Wootton submitted a skeleton argument dated 21 July 2011. That skeleton asserted that the invoices were interim bills on

account, not interim statute bills (para 5). At para 8(d) the skeleton stated:

> "Series of bills. There were no natural break[s] in the proceedings and it is evident that the bills were rendered almost on a monthly basis indicating that the matter was ongoing and that no natural break in the proceedings had occurred. *Chamberlain* v *Boodle and King* CA held that [where] a series of bills were rendered in the same matter they should be treated as one bill."

51. Dr Friston served a skeleton argument for that hearing, dated 20 July 2011. At para 5 he submitted:

> "The claimant appears to seek an assessment of the Old Bills whilst at the same time saying that they were not statute bills at all. It [is] assumed that this means that the claimant's primary case is that the Old Bills were not interim statute bills, but that in the alternative, they should be assessed on the basis of some discretionary (but unstated) jurisdiction."

The submission was developed further at para 22:

> "The claimant implies that … if the Old Invoices are [not] interim statute bills, then the court, should in some unspecified way, exercise a discretion to allow them to be assessed. It is established law that the court could not do this pursuant to Part III of the Solicitors Act 1974, so it is assumed that the claimant will be seeking to rely on some other legal mechanism by which the court can order there be an assessment. In the absence of any explanation of what that mechanism is said to be, the defendant can do little other than to reserve its position."

52. Before the hearing on 22 July 2011 Miss Wootton served a further skeleton argument, dated 22 July 2011, in response to Dr Friston's skeleton. At para 21, Miss Wootton submitted:

> "The claimant's case is that the bills delivered were interim bills of costs and therefore the court has a discretion to order the defendant to prepare a bill of costs."

53. In *Chamberlain* v *Boodle and King* [1982] 1 WLR 1443 the issue was whether successive bills of costs rendered by the solicitor to his client were to be regarded as instalments of a single bill or as separate bills. At page 1446A–C, Lord Denning MR said:

> "The next point in the case is whether the bills were four separate bills

> or whether they were one. If they were four separate bills, the client would have to demand taxation of each within a month of receipt. If they were one bill, divided into separate parts, as long as he demands taxation within a month of the final account, then he has a right to taxation. … [It] is a question of fact whether there are natural breaks in the work done by a solicitor so that each portion of it can and should be treated as a separate and distinct part in itself, capable of and rightly being charged separately and taxed separately. Applying that simple test, it seems to me that over this short time – the end of November 1978 to the beginning of May 1979 – this was one continuous dealing and work done by a solicitor, not dividing itself naturally or otherwise into any breaks at all. When the bills were delivered, they were delivered each time as part of the running account – 'account rendered' being carried on in each to the next. I agree with the judge … that this should be regarded as one bill in respect of one complete piece of work, although divided into parts. As this is one bill, and the client demanded taxation within the month, he is entitled to have the whole of it taxed."

54. It is explicit in Lord Denning's reasoning that the three earlier bills which had been rendered were not interim statute bills because there had been no natural breaks entitling the solicitors to issue three interim statute bills. Equally, it is implicit in Lord Denning's reasoning that if they were not interim statute bills, they must have been mere requests for payment on account. This is borne out by Lord Denning's description of the three earlier bills, at page 1444G–H:

> "The first was dated February 19, 1979. It totalled £2,373.36, less paid on account £1,000, which came to £1,373.36. The second was dated March 20, 1979, which came to a total of £12,041.58. That brought in the balance from the account rendered. The third was dated April 30, 1979, which brought the total up to £17,523.68. I should add that, before the final bill was delivered, all the litigation had been settled – rather to the surprise of the parties. There was no further litigation. That had finished by May 8. Then the final bill was sent on May 11. 'Received on account' was now £3,427.35. But the total bill came to £30,099.49."

It is seems from this description of the bills that they were indeed properly to be regarded merely as requests for payment on account.

55. In his reasons for refusing permission to appeal, the Master helpfully expanded upon his reasoning that these bills were to be

treated as a series capable of assessment as a single *Chamberlain* bill. At para 7 he said:

> "The second primary submission is that my conclusion that all the bills rendered to the claimant can be treated as a series concluding with the final bill of January 2010, is inconsistent with my finding that the pre-22 January 2010 bills are not statute bills. That seems to me to overlook the distinction between individual bills and a series of bills. An individually incomplete bill may form part of a complete series. A series of non-statute bills may be treated a series culminating in one final statute bill: *Chamberlain* v *Boodle and King* [1982] 1 WLR 1443."

56. I am satisfied that this expanded reasoning provides the correct answer to the point raised by Dr Friston. For the reasons already explained, it must logically follow that the three earlier bills in *Chamberlain* itself were not interim statute bills yet it was permissible to treat them as a series culminating in the final statute bill, and all four could properly be assessed as a single statute bill. In *Chamberlain* the reason why the earlier bills were non-statute bills which the solicitor had no right to issue was because there were no natural breaks. In the present case the reason why the earlier bills were non-statute bills was because there was no contractual right to issue interim statute bills. I cannot see that the distinction makes any difference.

57. It follows that the Master was also right to reject Dr Friston's submission that it was inconsistent to hold that the individual interim bills provided insufficient information to qualify them as interim statute bills, but to conclude that those very same bills could be sufficiently compliant (e.g. as to narrative) to form part of a qualifying series as a *Chamberlain* bill. Whether the earlier bills were or were not compliant was irrelevant.

58. There was clearly a sufficient nexus between these bills. There was even an overlap in time between the final bill and two of the earlier bills. The final bill was said to cover the period February 2009 to January 2010. The invoices dated 16 February 2009 and 3 March 2009 both included claims for work done in February 2009. All twelve of the earlier invoices were rendered within a period of nine months in total. They covered different pieces of work, but this was a general retainer.

59. In his oral submissions Mr Holmes-Milner described the Master's conclusion on this second issue as a "thoroughly elegant

solution". It was certainly a practical solution but it was also, in my judgment, perfectly correct in law. Dr Friston submitted that it resulted in unfairness to the defendant in that he was not afforded the opportunity to render fresh bills in substitution for the bills deemed to be mere requests for payment on account. The prejudice consisted of losing the opportunity to minimise the risk of falling foul of the "one-fifth" rule, with the costs implications that would involve. That was a new point. I can find no reference to any such submission by Dr Friston in any of his skeleton arguments. The Master heard the application on 22 July 2011. He handed down a reserved judgment dated 2 September 2011. There was a further hearing of the defendant's application for permission to appeal on 28 October 2011, following which the Master gave reasons in writing dated 1 November 2011. There was ample opportunity for the defendant to take this point, or to seek the opportunity to render fresh bills. He chose not to do so, relying instead on his argument that the Master's decision on the substantive issue was wrong. He has failed on that issue.

Third Issue: Were There Special Circumstances Justifying Assessment Out of Time?

60. The third and final issue is whether the Master was entitled to find that there were special circumstances justifying detailed assessment of the final bill, incorporating the whole series of bills, notwithstanding that the application was made outside the one-month time limit. In fact the application was made only two days before the expiry of the absolute time limit of twelve months from payment of the final bill.

61. At para 73 of his judgment the Master said that he had no doubt that special circumstances existed, for the reasons he went on to give. He noted that the claimant paid the final bill in January 2010 only under protest in order to obtain his papers and conclude negotiations with MRP's solicitors. It was the examination of those papers which led to the advice that the costs he had paid to the defendant in relation to the MRP claim were not justified. The Master noted that the final bill of 22 January 2010 was expressed on its face to cover only work on the MRP claim, but also included profit costs of £12,900, in excess of the £10,000 "cap" agreed at the outset of the retainer.

62. The Master was less impressed by the suggestion on behalf of the claimant that a detailed assessment as between solicitor and client would be of direct assistance to the plaintiff in recovering his costs

against MRP following settlement of that claim. The Master acknowledged that he was in no position to draw any conclusion about the quality of the service the defendant had provided, but the claimant's perception that he had been substantially overcharged was "not irrelevant".

63. What weighed particularly heavily with the Master was the fact that from the outset the defendant's charging arrangements with the claimant were linked to the recovery of costs from MRP. That was treated by both parties as a yardstick by reference to which the reasonableness of the defendant's bills could ultimately be gauged. Now that the claimant found himself apparently unable to recover his outlay on the MRP claim, owing to lack of information to support the costs charged, this pointed to the existence of special circumstances justifying an order for assessment despite the delay. Even after receipt of the files the claimant still had no clear idea exactly how much he had paid his solicitor for work on each of the different matters covered by the retainer.

64. The Master acknowledged that the application could have been made much sooner within the twelve month period following payment of the final invoice, for example after settlement of the MRP claim in May 2010. However, the claimant had demonstrated that special circumstances existed to justify an application out of time. Those circumstances did not become less significant as time went by, nor did there appear to be any prejudice to the defendant by reason of the delay.

65. Dr Friston submitted that there were four separate errors in the Master's approach to special circumstances. First the Master failed to give sufficient weight to the fact that there was virtually no evidence to support the application. This complaint is misconceived. The Master had ample evidence in two witness statements from Miss Wootton and in the exhibits to those statements. Secondly it is said that the Master failed to take into account that no good explanation had been given for the long delay. The Master clearly did consider the delay, and it was [up to] him to weigh its significance. Thirdly, Dr Friston submits that the Master attached undue weight to the claimant's concern that he had been overcharged. In fact the Master was careful to make no finding against the defendant, but there was more than sufficient evidence to justify the claimant's apprehension. Indeed, it has been borne out by events in that the bill of costs recently served confirms

that there has had to be a great deal of estimation in the absence of proper records. Fourthly, Dr Friston complains that the Master misunderstood the agreement between the parties over capping the costs of the MRP claim. The Master explained this conclusion further in the reasons he gave in refusing permission to appeal.

66. Overall, and as the Master rightly identified at para 12 of his reasons for refusing permission, Dr Friston's complaints overlook the most significant of the circumstances identified by the Master in his judgment, namely that the claimant would not receive his papers unless he paid the defendant's final bill; that he needed the release of those papers to conclude his litigation and to substantiate his claim for costs; that there was a mutual understanding that the reasonableness of the defendant's costs could be measured by reference to the amount recovered against MRP; and that in fact, on the release of the papers, the claimant was advised that he was unable to justify recovery of a sum even close to the amount charged by the defendant.

67. In my judgment the criticisms advanced by Dr Friston come nowhere near the threshold required to demonstrate that the Master's exercise of discretion was plainly wrong and outside the generous ambit of reasonableness. As it was put by Lewison J (as he then was) in *Falmouth House Freehold Company Ltd* v *Morgan Walker LLP* [2010] EWHC 3092 (Ch), at para 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 a particular case is justified despite the restrictions contained in s 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."

Not only was the Master entitled to find special circumstances in the present case, he was plainly right to do so.

Conclusion

68. It follows that on all three issues the appeal fails, and must be dismissed. Having seen this judgment in draft, counsel have made brief written submissions in relation to costs and consequential matters.

Costs must follow the event. The defendant will pay the costs of the appeal. I note that the Master directed that the costs of the application before him should be assessed at the detailed assessment hearing of the bills themselves. That is the most convenient course to adopt in respect of the costs of the appeal as well, as the parties agree. Technically it cannot be a summary assessment and must be a detailed assessment, but it is agreed that it can be carried out on the basis simply of a costs schedule rather than a full bill of costs. It is agreed in principle that there should be an order for an interim payment on account of costs. The claimant has suggested £12,000. That figure has not been disputed. I therefore order that the defendant shall pay £12,000 on account of costs within 14 days, that is to say by 4.00 pm on 12 July 2012.

69. I am indebted to my assessors for their very considerable assistance. The decision was mine and mine alone but I am reassured to learn that it is a decision with which they fully agree.

James Holmes-Milner (instructed by Sarah Wootton Solicitors) appeared for the claimant/respondent (Bari).

Dr Mark Friston (instructed by RA Rosen and Co) appeared for the defendant/appellant (Rosen).