Case No: F5QZ77FA
SCCO Reference: SC-2020-APP-000788

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE
FROM THE COUNTY COURT AT LUTON

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

Date: 30/07/2021

Before:

COSTS JUDGE LEONARD

- -

Between:

Raydens Ltd	**Claimant**
- and -	
Ms Julie Cole	**Defendant**

- -
- -

Martyn Griffiths (instructed by **Keidan Harrison**) for the **Claimant**
Simon Teasdale (instructed by **Railton Law**) for the **Defendant**

Hearing date: 28 May 2021

- -

Approved Judgment

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

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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. The Claimant solicitors acted for the Defendant in matrimonial proceedings between November 2013 and September 2018. The conducting solicitor was Mr Julian Bremner, a partner, assisted by solicitor Che Meakins.

2. The substantive proceedings included a divorce suit, ancillary relief and Family Law Act non-molestation and occupation order applications (the FLA proceedings were themselves listed for a two-day hearing). The proceedings concluded, in the course of an ancillary relief hearing listed for four days, with an order of District Judge Gibson dated 25 May 2017, which incorporated agreed terms of settlement.

3. The order provided, among other things, for the Defendant's ex-husband ("the Respondent") to pay to the Defendant a lump sum of £800,000. Of that sum £290,000 was to be paid by 19 July 2017, to be applied in the first instance to clearing the Defendant's incurred costs, defined so as to include loan liabilities to litigation funder Novitas and to meet the Claimant's fees and disbursements insofar as not already paid through that loan. Payment was not however made until 28 September 2018.

4. Over the period between November 2013 and September 2018 the Claimant rendered bills totalling (inclusive of VAT) £263,426.11, of which £44,298.02, excluding any claim to interest, is outstanding. Had the payment ordered on 27 May 2017 been made in time, I understand that it would have discharged all liabilities with a surplus payable to the Defendant, but the need to pay additional interest accruing on the Novitas loan during the period of delay resulted in a shortfall.

Costs Disputes and Recovery Proceedings

5. The communications to which I am about to refer followed a long history of protracted, difficult litigation, mounting costs and funding difficulties. I am focusing upon them because they incorporate the Defendant's complaints to the Claimant about costs, and they offer some insight into the Defendant's state of mind at the time.

6. On 25 April 2018, during the long wait for the Respondent to meet his payment obligations under the order of 25 May 2017, the Defendant sent an email to the Claimant:

> "As previously mentioned to you, I feel like I have had the worst divorce in history and felt very let down after the final hearing back in May last year. I felt that the court case just went ahead so that a settlement could be reached and everyone could get paid.
>
> The failure to finalise the agreement when I was going to buy the house in Lytton Avenue, has cost me so much. I had come to you for professional advice, and felt every confidence that you would give it to me.
>
> The best divorce settlement, was probably the offer on the table for the purchase of Lytton Ave at £800,000 and monthly payments of £2,300 per month and my fees at that point stood at £39,000.
>
> Unfortunately the deal collapsed, and 3 years later I settled for monthly payments

> of £3,250 and a balance of £500,000 when Nick can afford to pay me, which probably won't even buy me a small house, let alone 4 bedrooms so that I can offer my children a home.
>
> The net result is that I am out of pocket £290,000 plus the inflation on house prices. The fact that Novitas wouldn't lend me any more money to pay your fees forced me I feel to settle with unfavourable terms.
>
> My divorce should not have cost this much and your fees are nearly half of my divorce settlement. I always knew that getting divorced would be difficult and I feel that the law has not protected me and has been merely a vehicle for your company to earn huge fees.
>
> I am still suffering from depression and I can't hold a job down. I have no money and I am stuck in a house which isn't mine and I can't afford to run and quite frankly I don't think there is anything good about my life at present.
>
> My friends are very concerned about me and think I am heading for a breakdown. It is 5 years since I first asked for a divorce and I can't help feeling that things would have been very different if the Lytton Avenue deal had gone through.
>
> My main concern as you know, is that Nick has to give me the money to pay my fees and feels that I was given bad advice and not happy about me taking out the loan agreement with Novitas. He says my depression meant that I wasn't able to think clearly and make rational decisions. I am beginning to think he is not all together wrong, though I hate to admit it, as I recently started a new job and they let me go after two weeks because they didn't have any confidence in me.
>
> My divorce has gone on for so long and I can no longer function and I need to rebuild my life. The only way I will can even start to do this is if my debts are settled and not playing constantly on my mind. The only possible way that I can do this is to get a reduction in the fees to placate Nick and then he will pay them as soon as possible I am therefore asking if you would cap your fees at £170,000. I will pay the disbursements, Counsel and expert fees, plus the VAT. I realise that this is a huge fee write off, but it will still have cost me nearly £200,000 plus the interest, to get divorced…."

7. Mr Bremner, having consulted Novitas and reviewed his files, replied on 8 May 2018. His response was detailed and I will not reproduce it in full. In essence his key points were that the case had been one of the most problematic he had dealt with in many years of practice; that costs had been increased by a seeming desire on the part of the Respondent and his solicitors to make things as difficult as possible, probably in the early stages exacerbated by a desire on the Respondent's part to force the Defendant to return to him; that the available assets had been adversely affected by attempts on the Respondent's part to depress the value of Benchmark Fabrications Ltd (the business at the heart of the family finances) which had triggered a real crisis; that the proposed "Lytton Avenue" settlement had failed due to the Respondent's refusal either to enter into binding heads of agreement or to make necessary commitments

without court orders, and unrealistic expectations on the part of his solicitors as to when that could be achieved; that the settlement finally reached provided the Defendant with spousal maintenance on a joint lifetime basis, in respect of which the Defendant could apply for an increase and which had not been a feature of the "Lytton Avenue" proposal, which incorporated no spousal maintenance and minimum child support; and that the litigation difficulties, and the Defendant's own depressed state of mind, had been exacerbated by her refusal to enforce orders such as an occupation order preventing the Respondent visiting the Defendant's home without her agreement.

8. Whilst accepting that one of the problems was the refusal of Novitas to provide further funding at a crucial juncture, Mr Bremner also said that the Claimant had departed from its normal policy in continuing to act for the Defendant without payment, the Defendant being only the second client for whom he had ever done that; that the settlement achieved on 27 May 2018 had been freely entered into by the Defendant without undue pressure, her advisers being ready to proceed to the conclusion of the hearing; that the aims of that settlement had been undermined by the Respondent's failure to pay £290,000 within the agreed time; and that the Defendant had already advised the Claimant to the effect that she could take steps against the Respondent to require him to make up the losses caused by his delay.

9. Mr Bremner advised the Defendant that if he were to render a bill at that time, there would be an outstanding balance of £28,307.49, of which all but just over £10,000 could be recovered from the Respondent, should the Defendant choose to act. He concluded:

> "Julie, it troubles me greatly that you find yourself writing to me in the manner in which you do. For my part, I strongly believe that you have received the best possible advice you could have as each and every incident has arisen over the long running course of this matter.
>
> I also think you have been fully supported by this firm at a time when it did not need to (and perhaps should not have) in continuing to work for you on the transparent fee estimates provided to you throughout these proceedings. You could have, upon receipt of these monthly advices (or interim month when needed) or other key letters setting out your costs asked this firm to stop work at any time. Knowing the costs that we were asking you to pay, you continued to instruct us. This was in the knowledge of the financial landscape at the time and in the context of the cost benefit analysis to you being explored in correspondence and in conference with Counsel.
>
> I have spoken to Katherine Rayden, who as managing partner in charge of the firms finances, is not prepared to offer a discount on the firms fees; this is on the basis that we offered to work for you without payment until your received funds. The firm adhered to its agreement with you. However, the firm will not charge interest on late payments of existing debts.
>
> If you would like to meet with me and, perhaps, Nadia Biles-Davis, who is the firms' client complaint handling partner, then I would be more than

> happy to organise this. I also attach this firm's complaints policy so you have it to hand."

10. Evidently this invitation was not accepted. A formal complaint was not made until 2 December 2019, by which stage the Claimant had (on 18 September) sent to the Defendant a letter of claim for its outstanding fees, as represented by bills dated 20 July 2018 (partly paid) and 17 October 2018 (wholly unpaid) and issued proceedings for their recovery. The Defendant, at the time acting in person, had on about 11 November 2019 filed a defence disputing the claimed amount which read, simply:

> "I have requested to Rayden Solicitors that I would like a full assessment of my costs to be carried out. I am awaiting confirmation from them that the process has been started."

11. The Defendant's formal letter of complaint (insofar as it referred specifically to costs, as opposed to case management) said:

> "I also want to complain about the fees, Julian's hourly rate started at £245 per hour in November 2013, by May 2017 it was £384 per hour. If his fees had increased inline with inflation they would be £268 per hour in May 2017. That's a 57% increase in $3^{1/2}$ years!
>
> …In my view, you should stop the court proceeding, cancel the invoice and accept that the matter was handled badly and apologise for the unnecessary stress that this additional delay in my divorce has caused.
>
> Please review the hourly rate increases and advise why you believe it acceptable increase so much when a client is in the middle of a divorce and has no real choice but to accept the increases."

12. At a CCMC on 26 October 2020, District Judge Ayers made an order recording his finding that the Defendant was out of time to apply for detailed assessment pursuant to section 70(3) of the Solicitors Act 1974, unless she could establish special circumstances.

13. To put this finding in context, I will briefly summarise the pertinent provisions of section 70 of the of the 1974 Act. Under section 70(1), a solicitor's client has an unqualified right to an order for detailed assessment of a bill delivered to the client if an application is made before the expiration of one month from delivery. If the client makes an application after that point, it will be made under section 70(2), which gives the court the discretion to make an order. Section 70(3)(a) limits that discretion by providing that if an application is made for the assessment of an unpaid bill after the expiration of 12 months from delivery, no order shall be made except in special circumstances.

14. DJ Ayers ordered a stay of the County Court proceedings and transfer to the SCCO with a view to determining that as a preliminary issue. The Claimant was given permission to file and serve a witness statement in response to a witness statement from the Defendant dated 28 July 2020, and the Defendant given permission to respond by 4pm on 14 December 2020.

15. In fact I have only two witness statements: that of the Defendant dated 28 July 2020, and a witness statement in response from Mr Bremner dated 26 November 2020, to which the Defendant did not respond.

The Principles

16. Before I consider the parties' evidence and submissions, I will set out the principles applicable to a finding of special circumstances.

17. The Defendant puts the position in this way. There is no hard and fast rule as to what can amount to "special circumstances". Per Lewison J (as he then was) in *Falmouth House Freehold Co Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch) at paragraph 13:

> "Whether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified, and despite the restrictions contained in Section 70(3)."

18. Special circumstances do not have to be exceptional circumstances. They can be established by something out of the ordinary course, sufficient to justify a departure from the general position under section 70 of the 1974 Act (Sales LJ in *Stone Rowe Brewer LLP v Just Costs Ltd* [2015] EWCA Civ 1168, at paragraphs 66 and 69, and Costs Judge Rowley in *Masters v Charles Fussell & Co LLP* [2021] EWHC B1 (Costs) at paragraph 60).

19. The existence circumstances sufficient to justify an order for assessment is a matter of degree and discretion to be exercised in the circumstances of the particular case (*In re Hirst & Capes* [1908] 1 KB 982).

20. In many ways, a helpful test is to consider whether there is something in the fees claimed by the invoices, or the circumstances in which they were charged, which "calls for an explanation". If they do call for an explanation or further scrutiny, that is a strong indication that there should be an assessment. This is not the time for the explanation to be given and evaluated in detail. That is the purpose of the assessment procedure and the scrutiny it provides.

21. The Claimant agrees with this analysis, with one significant difference of emphasis. By reference to the judgment of Costs Judge Rowley in *Eurasian Natural Resources Corporation Limited v Dechert LLP* [2017] EWHC B4 (Costs) at paragraphs 15 and 56, the Claimant submits that the test of special circumstances is a three-stage test, as follows. Was there a special feature or circumstance in the case? If so, did that feature or circumstance call for an explanation? If so, the court will make a value judgment in respect of whether an assessment is required.

22. I am unable to accept this analysis. First, I need to point out that the three-stage test was formulated in a submission put to Master Rowley. He did not adopt it in reaching his conclusions. In my view, it imposes an unnecessary gloss which would serve to narrow what is of necessity a wide discretion. In particular, it puts the focus on matters that call for an explanation, effectively making that an essential component of a finding of special circumstances. To my mind that cannot be right. It is clear from the authorities to which both parties have referred that the real test is whether there is something out of the ordinary course, sufficient to justify a departure from the time limit otherwise imposed by section 70(3).

The Defendant's Evidence

23. The key points of the Defendant's case as set out in her witness statement of 28 July 2020 are that despite being told, on instructing the Claimant, that costs would run to an estimated maximum £30,000, by the end of the proceedings all of her £290,000 lump sum payment went to the Claimant, which is now seeking further payment; that her mental health has suffered significantly with the stress of the proceedings, leading to a diagnosis of depression and the prescription of anti-depressants; that the settlement achieved was worse than that on offer when costs were only £39,000; that seeking advice on the Claimant's fees, given her lack of funds, was effectively impossible; that the Claimant did not advise her about the time limits applicable to seeking assessment of a solicitor's fees; and that although she did challenge those fees in April 2018 and December 2019, her poor mental health, her lack of funds and a degree of opacity in the information given by the Claimant prevented her from taking effective steps towards attaining a detailed assessment.

24. On 2 February 2021 the Claimant filed an application for an order to the effect that Mr Bremner's evidence stand unchallenged, and debarring the Defendant from relying upon any further evidence. On 17 March 2021 I made an order providing for the "special circumstances" issue to be addressed in a hearing with a time estimate of 2.5 hours, the hearing to proceed on the basis of the witness statements dated 28 July 2020 and 26 November 2020. The order provided that the parties could not, without further order, rely on any other evidence or call witnesses to give oral evidence.

The Defendant's Case as Put on 28 May 2021

25. The Defendant's case as put to me by Mr Teasdale (as summarised in a thorough 11-page skeleton argument prepared two days before the hearing) expanded significantly upon anything offered by the Defendant up to that point.

26. Mr Teasdale argued that one could justify a finding of special circumstances in this particular case in view of three factors. The first was the adequacy of estimates and provision of costs information throughout the lifetime of the retainer. The second was a history of what he described as very significant unilateral increases to hourly rates. The third is described as an irregularity in billing, as represented by the two invoices that are the subject of these proceedings.

27. A fourth factor, said to be a degree of uncertainty about what had been applied towards payment of the Claimant's fees and what was outstanding, was disposed of by agreement and not pursued.

28. Of the three factors that remain, Mr Teasdale submitted that they are to be considered in the context of costs incurred far in excess of anything that the Defendant had been led to expect, so a great part of the assets that might otherwise have been available to her following settlement of the matrimonial proceedings instead were instead swallowed up in costs; and that, in considering the Defendant's relatively short delay in seeking an assessment (just over a year after the October bill was delivered), one must take account of the toll those proceedings, and the attendant costs, took on her mental health.

29. One must also, bearing in mind *Rippon Patel and French LLP v Mowlam* [2020] EWHC 1079 (QB), avoid imposing a double penalty by penalising delay: the statute already provides for that by imposing the "special circumstances" test.

Estimates

30. The Claimant's letter of engagement, signed by Mr Bremner, was dated 18 November 2013 and contained the following information:

> "I will act for you in relation to the breakdown of your marriage and financial application.
>
> In addition I will advise in relation to matters connected with or incidental to the above where you request me to do so and I will also liaise as necessary with other advisers…
>
> I will be your point of contact at Rayden Solicitors. I will be responsible for the day to day running of your matter and for supervising and coordinating the work of other individuals here who may become involved. Whenever necessary, I will involve other members of this firm to assist in the preparation of your case, provide specialist advice or to provide cover for me in the event of absence or unavailability. As discussed I will be asking a junior assistant to help me with your file so as to keep the costs down…
>
> Fees will be charged in accordance with the attached general terms of engagement. My charge-out rate is £245.00 per hour plus VAT. Che's charge out rate is £100.00 per hour plus VAT…"

31. Mr Bremner then supplied the current charge out rates of the other members of the Claimant firm, adding:

> "… The charge out rates of this firm will be reviewed on 1 April each year. You will be informed of any change to our rates in writing shortly after that date. The rates shown above have been reviewed for this year; the next review date will be April 2014….
>
> At this very early stage it is difficult to provide any clear estimate of what may be the total cost of my acting for you. This will. of course, depend on the work required to collate further information, the extent of the issues between you and your spouse and the level of my involvement. From the information you have provided I suspect that as long as I am able to conclude matters fairly easily, the work necessary to achieve overall

agreement on your behalf will be in the region of £3,000 to £5,000; however, this figure may increase depending on how smoothly negotiations progress.

In general terms, you will not be surprised to learn that the more contentious the proceedings, the higher the necessary time commitment and the higher the costs.

If Court procedures are invoked in relation to financial issues, there are three specific Court hearings. As a general guide, costs up to the first hearing ("the First Appointment") will be in the region of £3,000 to £9000 plus VAT; costs to the second hearing will be in the region of a further £6,000 to £10,000 plus VAT (depending on what is required) and if there is a trial, then I will need to provide you an estimate at that time. As a general rule of thumb, the costs to FDR are doubled to final hearing. These estimates may be more or less depending on the complexity of your case. Kindly note, that these costs are additional to any period of negotiation without proceedings being implemented

The costs in children's matters are much harder to predict. While the basic court structure suggests that there will be three potential hearings — the courts also like to review how any agreement reached in the first (or subsequent) hearings progresses. Therefore, it is not uncommon to have 3 or more short conciliation/directions hearings rather than a final hearing. While I will provide you with an estimate tailored to your specific matter, 1 estimate that costs will be in the region of £3000-£5000 plus VAT for each stage of the process. I note that it is unlikely that children's matters will need to be dealt with.

To the extent that l have to instruct Counsel, or any other expert on your behalf, their fees will be in addition to this firm's fees…

… I will also invoice you for other expenses, such as court fees, photocopying and travel which we incur on your behalf. Disbursements are not included on the bill of costs unless they are actually incurred, and are therefore our responsibility. For this reason, they must be settled by return.

The estimate above is provided in order to assist you with budgeting but whether it will accord with the actual figure billed will depend on a number of assumptions relating to the work involved. I emphasise that our fees are time-based and will be charged as such whether or not the eventual total falls within our estimate.

I aim to bill monthly so that you will be kept informed of the level of your costs on a regular basis. That information and other discussions that l have about the progress of your case should be regarded as a revision of the above estimate where necessary….

A simple divorce will take between three to six months to conclude but any divorce is typically not concluded until the financial claims are resolved.

> Financial claims can be resolved by agreement and negotiation very quickly if there is a broad agreement between the parties and it is sometimes possible to conclude all matters within six months. If matters are fully contested. then- subject to the courts lists - this matter could take some 18 months.
>
> As indicated above, the more contentious a matter is, the longer it will take to conclude.
>
> If it seems that you are in broad agreement about the division of finances (and also matters concerning the children) then contested applications to court will not be necessary, If it is not possible to reach an agreement, then applications. to the Court may be required…."

32. Mr Bremner then offered some advice upon the likely timing and length of any court applications. He continued:

> "… I hope that everything will be settled by consent but, if contested litigation does ensue, you should be aware that you will still be responsible for our fees in the first instance and will need to settle them upon presentation of an invoice. This is the case even if the firm obtains a costs order against a party to the litigation, albeit that you may be entitled to reimbursement of a proportion of those costs by virtue of the order.
>
> In children's matters — costs orders are extremely rare and you should expect that you will need to settle your own costs absolutely. In financial matters, the courts starting position is "no order as to costs'; meaning that each party is responsible for their own legal fees. The criteria that a court needs to apply when making a costs order is both narrow and extremely discretionary. ln practice, costs orders are rarely made.
>
> The Courts have wide discretionary powers in relation to costs so you should not expect that your costs will be paid even if you are successful. Indeed, if your application to court is unsuccessful there is a risk that you may be ordered to pay towards the other party's costs.
>
> In divorce proceedings, costs, if claimed by the petitioner, are normally awarded irrespective of your circumstances. These costs vary depending on the Legal Firms involved. The range is from £1000 to £3,000 plus vat inclusive of court fees. Divorce costs can be subject to negotiation between the parties.
>
> I will provide you further advice as to litigation costs, more tailored to your specific application, throughout the course of your matter…"

33. As promised in the engagement letter, the Claimant rendered regular interim bills to the Defendant, generally on a monthly basis (with some exceptions where accrued costs and disbursements were low, and for the month of December). A schedule appended to Mr Teasdale's submissions lists, not counting the two that are the subject of these proceedings, some 39 interim bills. (An appendix to Mr Bremner's statement

seems to offer a slightly different count, but nothing turns on that for present purposes). Each was accompanied by an estimate for the period to the next bill.

34. Mr Teasdale is highly critical of the costs information provided by the Claimant on a monthly basis. He argues that the volume and frequency of the updates were more apt to obscure than shed any light upon the long-term ballooning of costs in the matrimonial proceedings. The emphasis was on quantity of information, rather than quality, so that for example the monthly information did not adequately identify or address the points at which previous overall estimates were exceeded. Estimates were piecemeal and over-complex, and varied in their presentation so as to be inconsistent in their inclusion and exclusion of VAT and disbursements.

35. Overall, he submits, the Defendant was not given adequate information of the kind she needed to make informed decisions about the conduct of the litigation. It was, he says, that incremental "mission creep" which ultimately left the Defendant with the shortfall now pursued in this claim, even after applying the full amount of her £290,000 to her litigation loan and costs liabilities.

36. This has to be considered in the context of fees and disbursements initially estimated in the tens of thousands, but ultimately incurred in the hundreds of thousands. That is a very significant figure, which can be taken into account when considering special circumstances.

Increases in Hourly Rates

37. The Claimant's engagement letter provided for hourly rates to be reviewed at the beginning of April each year. Mr Bremner has helpfully set out in table form the annual increases in his hourly rate, all of which were notified to the client in accordance with the Claimant's contractual obligations. I am reproducing it here:

Date of increase	Date letter/email sent	Increase
1 April 2014	28 March 2014	Old rate - £245 New Rate - £260
1 April 2015	30 March 2015	Old rate - £260 New rate - £265
1 April 2016	23 March 2016	Old rate - £265 New rate - £295
1 April 2017	29 March 2017	Old rate - £295 New rate - £320

38. There were no increases in 2018 or 2019.

39. Mr Teasdale points out that the increase in Mr Bremner's hourly rate between 2013 and 2017 exceeded 30% (it would seem that, in her formal complaint of 2 December 2019, the Defendant overstated the increase). Mr Meakins' hourly rate also increased, from £100 to £165, an increase of some 65%. The Defendant, however, signed up to the hourly rates set out in the engagement letter. A standard annual review provision

did not give the Claimant carte blanche to impose unilateral hourly rate increases on this scale. They are properly subject to scrutiny and challenge: the Defendant could not be taken, by reference to CPR 46.9(3), to have approved those rates. There is a real case for the Claimant to answer here: the increases call for an explanation.

Irregularity of Invoices

40. As I have mentioned, the two bills that are the subject of these proceedings were dated 20 July 2018 and 17 October 2018. The bill dated 20 July 2018 is for professional charges up to 5 July 2018. From the accompanying breakdown, it is clear that the period covered is 3 April 2017 to 5 July 2018, the period since the last bill. The bill includes a number of disbursements including experts' fees from McNeill, Lowe and Palmer, chartered surveyors.

41. The bill of the 17 October 2018 is not attributed to any particular period. It comprises one disbursement, described as experts' fees, of £5000 plus VAT. A short accompanying narrative indicates that it represents work undertaken by the expert culminating in a report dated 18 April 2017. The relevant work would have been done before the financial disputes were resolved with the court's order of 25 May 2017.

42. Referring to *Rezvi v Brown Cooper (a firm)* [1997] Costs L. R. 109 Mr Teasdale argues that having rendered a statute bill for the period between 3 April 2017 and 20 July 2018 (and this must be a statute bill, or the Claimant would not been able to sue on it) the Claimant is, in accordance with established principle, bound by that bill. It is not open to the Claimant to attempt to remedy any omission in its July 2018 bill by delivering another.

43. Again, says Mr Teasdale, this irregularity in billing and calls for an explanation and further scrutiny at a detailed assessment hearing.

Conclusions: Estimates and Related Matters

44. My first conclusion is that it would be wrong for me to make any finding of special circumstances based upon the proposition that the Claimant did not provide the Defendant with adequate estimates and costs information. I say that for these reasons.

45. I accept the submission of Mr Griffiths for the Claimant that the purpose of the order made by DJ Ayers 26 October 2020 was to allow the parties to set out their case on special circumstances through the medium of witness evidence, as they would do on a standard Part 8 application under the 1974 Act. The Defendant was not obliged to file any evidence in response to that of Mr Bremner, but given the weaknesses in her witness statement of 28 July 2020 (to which I shall come) it is understandable that the Claimant feared that she would attempt to do so out of time, and made an application to prevent her doing so. That led to the provisions in my order of 17 March 2021 limiting the evidence upon which the issue was to be determined, absent the permission of the court, to that already served.

46. In the event the Defendant did not attempt to expand her case on estimates through the medium of any additional evidence, but through submissions made by Mr Teasdale, many of which were not foreshadowed by anything from the Defendant's side until two days before the hearing.

47. I can understand that Mr Teasdale thought it necessary, in the proper interests of his client, to do that. The Defendant's witness statement does little to assist her case, being too short on detail and too one-sided to be particularly helpful.

48. It is, for example, simply wrong to say that the Claimant ever indicated to the Defendant that her maximum costs exposure would be £30,000. That is entirely inconsistent with what the engagement letter said.

49. It is also, in my view, misleading to suggest that the entire sum of £290,000, when finally received from the Respondent, went to the Claimant. Mr Bremner explains that it discharged the Novitas loan, outstanding disbursements to third party experts engaged in the proceedings and some of the Claimant's outstanding costs. Nor was that the entire lump sum payable to the Defendant by the Respondent, as the Defendant's witness statement implies.

50. The suggestion that the Claimant is in some way responsible for the Defendant, after substantial costs and disbursements had been incurred, having to accept an offer from the Respondent less favourable than an offer that could have been implemented when costs were only £39,000, is of dubious relevance, but I should observe that it is, at best, an oversimplification. It does not seem to me to reflect what really happened.

51. The Defendant's evidence does not begin to make a case on estimates because it is limited to an inaccurate comparison of a very early, necessarily general and broad estimate (which seems to me, on the basis of the limited information available at the time, to have been fairly reasonable and comprehensive) with the actual cost attendant on a bitterly contested and very difficult piece of litigation, seemingly compounded by wilfully obstructive conduct on the Respondent's part, which lasted for some four years and which might well have required six days in court.

52. I would add that I cannot base a finding of special circumstances upon the proposition that the Claimant should have given specific advice on the time limits imposed by the 1974 Act. The Claimant was under no such obligation.

53. Mr Teasdale, evidently, attempted to compensate for the shortcomings in the Defendant's stated case by applying himself to the available evidence and undertaking an admirably thorough forensic analysis of the information on estimates provided by Mr Bremner, in order to make a case to the effect of costs information provided to the Defendant was inadequate. This, however, led to several problems.

54. The first arises from the fact that it is for the Defendant to make out some sort of prima facie case on estimates sufficient to support a finding of special circumstances, which she plainly had not done in her evidence. Mr Bremner in his evidence was, appropriately, doing no more than respond to the Defendant's stated case. For that reason the information supplied by him on estimates in his witness statement of November 2020 was far from complete.

55. The inevitable consequence was that having seen Mr Teasdale's skeleton argument, the Claimant hastily assembled a supplementary bundle of documents containing additional information overall on estimates, for example incorporating (in addition to an overall estimate given in August 2015) estimates of future costs and comparisons with available funding from February 2016, descending into some detail and

obviously put together with some care. Whilst (for obvious reasons) this was not objected to by the Defendant, it entirely defeated the purpose of my order of 17 March 2021.

56. Much of the hearing was then taken up with by Mr Teasdale's forensic analysis of the documentary evidence, presented with a view to establishing that the extensive information provided by the Claimant on a monthly and occasionally more comprehensive basis was unclear and inadequate to keep the Claimant properly informed about accruing and likely future costs, so as to give her the chance to make informed decisions (exactly what, in the absence of any evidence from the Defendant, those decisions might have been, remains unclear).

57. Because that had not been the Defendant's stated case, Mr Teasdale was obliged to rush through his detailed submissions to the extent that I found it hard to keep up with him. Even then, as Mr Griffiths pointed out, the submissions took too much time out of a hearing that had not been set with such submissions in mind.

58. In all the circumstances I would not consider it appropriate to make any finding on Mr Teasdale's submissions on costs information and estimates.

59. I say that primarily because, although Mr Griffiths for the Claimant very properly did his best to address the new case, it seems clear to me that the Claimant has not had a proper opportunity to do so. Faced with a timely and properly particularised case on estimates, the Claimant would have had the opportunity to give witness evidence putting its monthly and overall estimates in context and, to the extent that they varied from the final figures, to explain that (for example by reference to the Family Law Act applications, which were not a feature of the original estimate). However no timely and properly particularised case has been advanced by the Defendant, and it would be unfair to the Claimant for me to proceed as if it had.

60. There are also questions of principle. Mr Teasdale, quite rightly, pointed out that in *Mastercigars Direct Ltd v Withers LLP* [2009] EWHC 651 (Ch) ("Mastercigars No 2") Morgan J concluded that in a case where a client satisfies the court that an inaccurate estimate deprived the client of an opportunity of acting differently, that is a relevant matter which can be assessed by the court when determining the regard which should be had to the estimate when assessing costs.

61. That is right as far as it goes. It does not however follow, for example, that the loss of such an opportunity will necessarily lead to the conclusion that the amount which it is reasonable for a client to pay the solicitor stands to be reduced.

62. In fact Morgan J made it clear in *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch) that where a solicitor does give his client an estimate but the costs subsequently claimed exceed the estimate, it will not follow in every case that the solicitor will be restricted to recovering the sum in the estimate. It seems to me that Mr Teasdale has asked me to assume that it would. As Mr Griffiths points out, that would be to treat estimates as fixed quotations.

63. There may be all kinds of reasons for costs to depart from estimates. Everything depends upon the context, and one would normally have witness evidence to address

that. I do not, because the Defendant has not made out a case to which the Claimant has a proper opportunity to respond.

64. I have, as a result, no basis upon which to come to a firm conclusion as to the likelihood that on assessment the Claimant's costs might be reduced by reference to estimates. They might be, but I do not know, and the mere possibility cannot justify a finding of special circumstances.

65. I should add that I cannot accept that there was any connection between the shortfall in the Defendant's ability to beat the Claimant's costs and the costs information provided, from time to time, by the Defendant. The shortfall came about first because the Respondent did not make the payment ordered by the court on 25 May 2017 until 28 September 2018, and second because the Defendant refused to accept the Claimant's advice that she should take steps to enforce the court's order and to recover from the Respondent the losses she had incurred as a result of his delay.

Conclusions: Irregular Billing

66. Whilst, for reasons I shall give, I would not regard it as right to express a concluded view on the point for the purposes of this decision, in principle I would tend to agree with Mr Teasdale that if the October 2018 bill was indeed an attempt to compensate for an omission from the July 2018 bill, then it would be unlikely to be a valid statute bill.

67. Mr Griffiths submits that the Claimant can rely upon *Boodia and another v Richard Slade and Co Solicitors* [2018] EWCA Civ 2667.

68. The point of *Boodia*, as I understand it, is that it is acceptable and consistent with modern practice for a solicitor to render separate bills for costs and disbursements, even if the bills cover the same period, as long as the client is properly informed in line with *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500 principles.

69. It is quite another matter to attempt to remedy an omission in a statute bill by subsequently delivering another. A client must have sufficient understanding of what is being billed to take advice on exercising the right to challenge. That will not be so if bills are delivered in fragments and without explanation.

70. This is however another new point, made for the first time in Mr Teasdale's submissions. It raises the question of whether the October 2018 bill was a valid and enforceable statute bill and as such would have been an obvious point to raise by way of defence to the claim. It was not.

71. I appreciate that the Defendant was unrepresented when she filed her defence, but she has had two opportunities, after receiving advice, to raise it as part of her case: in her statement of 28 July 2020 and in the further statement she had permission to serve by 14 December 2020.

72. Again, if it had been raised in good time I could have considered the merits of the point against the background of whatever evidence the parties chose to offer, for example as to the context in which the October 2018 bill was delivered and the Defendant's knowledge and understanding of what was being billed from time to

time. Again, I have no evidence from the Defendant and the Claimant has not been given a proper opportunity to address the point.

73. For those reasons I would not regard it as right to base a finding of special circumstances on possible irregular billing by the Claimant.

Conclusions: Hourly Rates

74. I am exercised by what seems to me to be a quite exceptional increase in the Claimant's hourly rates between 2014 and 2017.

75. Whilst I have already come to the view that it would be inappropriate for present purposes to make any finding on estimates, it is pertinent that these increases took place against a background of exceptionally high accruing costs, originally anticipated in tens of thousands but ultimately exceeding £260,000, the sheer scale of which inevitably had a significant impact of the assets that were to become available to the Defendant following her divorce.

76. Mr Griffiths submits that, as with estimates, Mr Teasdale's submissions on hourly rates represent an entirely new case. I do not agree. These hourly rate rises inevitably must have contributed significantly to the overall scale of costs of which the Defendant complains, and her specific complaint about hourly rate increases is included in the body of the evidence. The fact that the Claimant recognises that this is a significant part of the Defendant's case is reflected in the detailed evidence given by Mr Bremner in response.

77. The Defendant's litigation was managed by a partner and junior assistant team. At the time she signed the engagement letter she agreed to specified hourly rates payable over a period estimated at up to 18 months. In those circumstances she might reasonably have anticipated one annual hourly rate review before the litigation concluded. I do not believe that anyone in her position could reasonably have anticipated that before it was over, she would be paying the senior fee earner and his assistant hourly rates that had increased by over 30% and 65% respectively.

78. Mr Bremner says that the Claimant, on reviewing hourly rates, took into account the rates charged in the local legal services market as well as rates charged by similar specialist matrimonial firms in London, so that their hourly rates tracked those in London (albeit at a lower figure) and would generally have been higher than the rates charged by local non-specialist competitors.

79. That offers a broad context for the rises, but not an explanation. I do not know why Mr Bremner's and Mr Meakins' hourly rates increased to such an extent over four years, or whether any consideration was given to the extent to which those very substantial increases were going to exacerbate the difficulties that the Defendant experienced from the outset with funding very difficult and expensive litigation.

80. I appreciate that the rise in Mr Meakins' hourly rate may have had something to do with increasing seniority and experience, although the Claimant's evidence does not address that. If however that were the basis for such a substantial increase in his hourly rate, it would give rise to the question whether Mr Meakins should have been

replaced by someone whose hourly rate would have been closer to that originally agreed.

81. It does not seem to me to be an answer to any of these concerns to say, as Mr Griffiths submits, that the Defendant had the choice of discussing these increasing rates with the Claimant or just ceasing to instruct the Claimant.

82. With regard to discussion, if there is an explanation to justify such exceptional hourly rate increases it does not seem to have been offered to the Defendant, who was presented with a fait accompli.

83. It is common ground that the Defendant's experience of the matrimonial litigation has, over the years, taken a severe toll on her mental health, for which she has needed treatment. The Defendant herself has said that she felt at the time that she had no choice but to accept the increases, and I find that quite credible. It seems clear from the evidence that she was unable to stand up to the Respondent, even to the extent of enforcing occupation and ancillary relief orders that the Claimant had obtained for her benefit. I can accept that in her distress, she did not have the will to pick a quarrel with her solicitors as well.

84. To suggest that the Defendant could just have parted company with her solicitors in the midst of such difficult and stressful litigation, whilst struggling with funding difficulties, does not seem to me to be realistic, especially given her state of mental health.

85. These increases, in my view, do call for explanation, and there has to be an issue about informed (or any) approval by the Defendant of the hourly rate rises imposed by the Claimant.

Conclusions: Timing

86. I appreciate that the Defendant, other than by complaining, has done little to advance her case, but again one must take into account her state of mind. I can accept that she did not feel able to enter into a battle with her solicitors until forced to do so by finding herself, yet again, in court.

87. It seems to me in any event that the principle to be derived from *Rippon Patel and French LLP v Mowlam* is that, if special circumstances are found, the court has a discretion to order detailed assessment. Delay on the client's part in applying may weigh against the exercise of the court's discretion in the client's favour if that delay has given rise to significant prejudice. That is not a real factor in this case.

Summary of Conclusions

88. It seems to me that a finding of special circumstances is justified in this case by exceptionally large increases in the Claimant's hourly rates, charged to a client who was already struggling to fund her matrimonial litigation, against a background of quite exceptionally high overall litigation costs.

89. Having made a finding of special circumstances I shall, as anticipated by DJ Ayers' order of 26 October 2020, give directions for an assessment. I should make it clear, to

that end, that this judgment addresses only the question of special circumstances, based on the evidence I have before me at present. It is not intended to limit the case that either party may choose to advance on assessment.