Neutral Citation Number [2023] EWHC 181 (SCCO)
Case No: SC-2022-APP-000292

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Date: 1 February 2023

Before:

COSTS JUDGE BROWN

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Between:

DANIEL KENIG	**Claimant**
- and –	
THOMSON SNELL & PASSMORE LLP	**Defendant**

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- -

Mr. Gold, costs draftsman, instructed by SCS Law solicitors, for the Claimant
Ms. Tew, counsel, instructed by and for the Defendant

Hearing dates: 3 October and 17 November 2022
Further submissions received on 12 January 2023[1]
Draft circulated on 23 January 2023

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.

....

Costs Judge Brown:

1. The Claimant, who is a beneficiary of a will, seeks an assessment of bills delivered by the Defendant solicitors to the executor of the will. I have to decide whether the bills should be

[1] as to the effect of decisions not referred to at the earlier hearings including two decisions handed down following the last hearing (*Brealey v Shepherd* [2022] EWHC 3229 (KB) and *Menzies v Oakwood* [2022] EWHC 3199 (KB)).

assessed and, if I were to take the view that the bills should be assessed, the terms of any assessment having regard in particular to the decision of the Court of Appeal in *Tim Martin Interiors Ltd v Akin Gump LLP [2011] EWCA Civ 1574*.

2. The will, dated 13 February 2019, is that of Philippa Cunnick, the Claimant's mother, who died on 28 July 2019. The Claimant and his sister, Laura Peggs, were the sole beneficiaries of Mrs Cunnick's estate (each entitled to one half of the residuary estate). The Defendant solicitors were retained by Saul Biber, the sole executor of the will and Mrs Cunnick's brother, to administer the estate by formal engagement letter dated 31 July 2019 the terms of which were agreed to in an email on or about 2 August 2019.

3. A letter confirming the Defendant's appointment was sent to both of the beneficiaries on 6 August 2019. Probate was granted to Mr Biber on 22 January 2020.

4. The invoices were sent by the Defendant, by email, to the Claimant on 3 September 2021. They were accompanied by breakdowns in the form of time sheets. There were six invoices, the first interim invoice is dated 17 October 2019; and the last, the final invoice, dated 2 August 2021. It appears that sums were transferred by the Defendant from the estate to meet the claims for costs in the bills immediately after delivery or on delivery of the bills in the course of their retainer.

5. The Defendant's original costs estimate for their fees was between £10,000 and £15,000 plus VAT and expenses. The total of their charges in the bills was £54,410.99 plus VAT and expenses. The estate had a gross value of some £2,881,000. The Claimant says however that the administration of the estate was not complicated and the costs were, as he has put it, grossly excessive.

6. The Claimant seeks an assessment of the Defendant's invoices under the Solicitors Act 1974, by way of a Claim Form issued on 25 April 2022, issued as I understand some 8 months after the last invoice was delivered. The Claim Form asserted that the Claimant was relying on section 70 of Solicitors Act 1974. This section deals with applications for assessment by those chargeable with a bill. However it was clear, and ultimately agreed, that the Claimant is, for the purposes of section 71(3) of the 1974 Act a "*person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay, the bill*" and not a person chargeable with the bill . The invoices are payable out of the estate of which Mr. Biber is executor; accordingly, Section 71 (3) applies and the Claimant is entitled to seek an assessment under this section.

Issues

7. It was accepted at the hearing in October that by the terms of the retainer with the executor the solicitors are in principle entitled to issue what are called interim statute bills; that is to say, bills which are final for the period that they cover and capable of assessment under the 1974 Act. However there remained an issue as to whether the bills in respect of which Claimant seeks assessment were (interim) statute bills and further whether, and to the extent it necessary for me to find, there are special circumstances justifying assessment of the bills and/or any discretion to allow an assessment should be exercised in the Claimant's favour. The Defendant says the invoices were interim statute bills, they have been paid and there are no special circumstances; and that in any event (even if there are special circumstances) they contend in the exercise of my discretion I should refuse the relief sought.

8. Ms Tew raised what strikes me may be a novel point in the context of assessments under section 71 of the 1974 Act. The point arises out of what she said was the privilege or

confidentiality in respect of documents which might be relevant to any issue arising on this application (and which might otherwise be deployed to justify the costs claimed and resist this order). She says that the privilege lies with the executor and the Defendant solicitors have a duty to keep the content of such documents confidential and no proper consideration of the bills is possible in these circumstances. Relying on the principles that apply in the context of the wasted costs jurisdiction she says that I am required to give the benefit of doubt to the Defendant solicitor on this application and in any assessment; so that I should, for instance, make an assumption that the costs claimed are reasonable and that there were good reasons for the discrepancy between the estimate and the costs in fact charged. For this reason alone an assessment was a worthless remedy and in the exercise of my discretion I should refuse the application.

9. There is also an issue as to whether and to what extent certain restrictions set out in *Tim Martin* (including those at paragraph 95 of the judgment) apply to any assessment that I may order, and, if so, what the effect of those restrictions may be. The Defendant says, in essence, that there is no point in the Claimant being permitted an assessment of costs under the 1974 Act as the restrictions which apply under *Tim Martin* mean that no meaningful or useful determination of the costs payable by the estate can be undertaken. That could only be achieved if the executor had made an application for an assessment, and he has chosen not to do so. In the exercise of my discretion, I should dismiss the application for an assessment because nothing may be gained from it. In *Tim Martin* the Court of Appeal suggested that a challenge by a beneficiary might be by way of an account against executor. Ms. Tew, for the Defendant solicitors, however appears to accept that in view of the decision by the Senior Master Marsh in *Chopping v Cowan* (unreported, 17 April 2013) and another decision to which I will refer, no effective alternative remedy is available to the beneficiary. However, as I understand her case, this is the necessary effect of the decision in *Tim Martin* and that, save in very limited respects, only an executor can challenge the bills payable by an estate. This was so notwithstanding the express terms of section 71 (3), set out below. If Ms. Tew is right then there are important consequence for beneficiaries and those involved in the administration of an estate.

Evidence

10. I have received a number of witness statements from both sides: two from the Claimant and three from the Defendant. It emerged at the hearing in October that there were issues of fact arising which had not been addressed in the evidence and various attempts were made, as I saw it, to assert factual matters which were not evidenced in the witness statements- in effect, to give evidence by submission. In the event the hearing ran over the allotted 2.5 hours and it was necessary to re-list the hearing, at which point I gave directions for both parties an opportunity to submit further evidence. I made it clear that if the parties wished me to take into account some of what had been said in submissions this should be addressed in evidence. Mr. Gold, who represents the Claimant, is not a lawyer and although, as I understand it, is an experienced costs draftsman it was not clear to me that he appreciated the need to address matters of evidence in witness statements. It was, I think, Ms. Tew who sought to put in further evidence, and I think suggested that Mr. Gold may wish to consider whether he should do so, in respect of the assertions he had made.

The position of Ms Peggs and Mr. Biber

11. Ms. Peggs has indicated that she does not wish to be a party at this stage. It appears that she may be waiting the outcome of this application before deciding whether she might participate in any assessment. The Defendant wrote to her on 24 October 2022 informing her

of the proceedings, suggesting that she should have been joined to the application (a point not I think pursued before me). In the letter the solicitor also expressed some criticism of the Claimant in particular as to what is said to be a "*lack of commerciality*" given what was said to be the high level of the solicitor's own costs in opposing the application; they stated *inter alia* that if she were a party and the application was unsuccessful they would seek an order for costs against her and the Claimant. I do not think that it can be inferred from her response following that letter, namely that she did not want to be made a party yet, that she would not be interested in an assessment if this application were successful.

12. Mr. Biber's views are not in evidence. He has taken no part at all in these proceedings. No reason has been provided for this by the Defendant. There is no evidence that the solicitors have even approached the executor to ask for his views. Mr. Gold says that Mr. Biber and the Claimant are essentially estranged. I have however not received direct evidence about this, albeit Mr. Gold says that the failure of Mr. Biber to challenge items of the bills supports what he told me about the relationship. Indeed, Ms Tew told me that there were some disputes between Mr Biber and the beneficiaries (or, at least, a dispute) in the course of the administration of the estate.

The relevant provision of the Solicitors Act 1974 and guidance

13. Sections 70 and 71 of the 1974 Act provide:

70.— Assessment on application of party chargeable or solicitor.

(1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.

(2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order—

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

(3) Where an application under subsection (2) is made by the party chargeable with the bill—
(a) after the expiration of 12 months from the delivery of the bill, or
(b) after a judgment has been obtained for the recovery of the costs covered by the bill, or
(c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill,
no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the [assessment]6 as the court may think fit.

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

…..

71.— Assessment on application of third parties.

(1) Where a person other than the party chargeable with the bill for the purposes of section 70 has paid, or is or was liable to pay, a bill either to the solicitor or to the party chargeable with the bill, that person, or his executors, administrators or assignees may apply to the High Court for an order for the [assessment]2 of the bill as if he were the party chargeable with it, and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill.

(2) Where the court has no power to make an order by virtue of subsection (1) except in special circumstances it may, in considering whether there are special circumstances sufficient to justify the making of an order, take into account circumstances which affect the applicant but do not affect the party chargeable with the bill.

(3) Where a trustee, executor or administrator has become liable to pay a bill of a solicitor, then, on the application of any person interested in any property out of which the trustee, executor or administrator has paid, or is entitled to pay, the bill, the court may order—

(a) that the bill be [assessed]3 on such terms, if any, as it thinks fit; and

(b) that such payments, in respect of the amount found to be due to or by the solicitor and in respect of the costs of the [assessment]4 , be made to or by the applicant, to or by the solicitor, or to or by the executor, administrator or trustee, as it thinks fit.

(4) In considering any application under subsection (3) the court shall have regard—

(a) to the provisions of section 70 as to applications by the party chargeable for the [assessment]5 of a solicitor's bill so far as they are capable of being applied to an application made under that subsection;

(b) to the extent and nature of the interest of the applicant.

(5) If an applicant under subsection (3) pays any money to the solicitor, he shall have the same right to be paid that money by the trustee, executor or administrator chargeable with the bill as the solicitor had.

(6) Except in special circumstances, no order shall be made on an application under this section for the assessment of a bill which has already been assessed.

(7) If the court on an application under this section orders a bill to be assessed, it may order the solicitor to deliver to the applicant a copy of the bill on payment of the costs of that copy.

14. It is clear that, save where the bill has been paid, on delivery of a statute bill (being a bill complying with the requirements of the Act) the "*party chargeable with the bill*" (normally the direct client of the solicitor) has one month to apply as of right for an assessment of the bill. Thereafter, the ordering of an assessment is discretionary albeit it is only when an application is made after 12 months that the person chargeable with the bill has to demonstrate special circumstances. In practice the discretion to allow assessment of a bill where the application is made within 12 months is generally exercised in favour of the applicant, albeit in appropriate cases an assessment may be subject to terms as to the making of payments against the bill.

15. In *Ralph Hume Garry v Gwillim [2002] EWCA Civ 1500* Ward LJ provided guidance as to the circumstances in which an invoice is to regarded as a statute bill, that is to say a bill capable of being assessed and therefore of triggering the time limits under the section 70 of

the 1974). He held that a bill should provide sufficient narrative to identify what it is "*the client*" ([70]), the person chargeable with the bill, is being charged for. However, even if the narrative is insufficient the court is required to consider whether the person chargeable with the bill has sufficient knowledge from other documents in their possession or from what they have been told, reasonably to take advice whether or not to apply for that bill to be assessed. Ward LJ held that *"[the] sufficiency of the narrative and the sufficiency of his knowledge will vary from case to case, and the more he* [the client] *knows, the less the bill may need to spell it out for him"*. He suggested that at the very least a client would be entitled to expect to see a time sheet "*with a description of the fee-earner, the rate of charging and some description of the work done"* and that a copy of the print-out, adjusted as may be necessary to remove items recorded for administrative purposes but not chargeable to the client, could so easily be rendered. Further, in *Haskell Elias v Wallace LLP* [2022] EWHC 2574 Senior Costs Judge Gordon-Saker gave further persuasive guidance at [17] indicating invoices which were accompanied by time records, showing the work done, time spent, fee earner involved and hourly rate applied were sufficient to count as statute bills.

16. I should say that often a key issue to be addressed by a person chargeable with a bill in deciding whether to apply for a detailed assessment of a solicitor's bill is the, so called, '1/5th rule'. By this rule, absent special circumstances, the amount of any disallowance determines who pays the costs of the assessment: if the disallowance is less than 1/5th, the client will pay the costs, see section 70 (9)of the 1974 Act; if 1/5th or more, the solicitor.

17. There is no gloss on the statutory phrase 'special circumstances' which appears in subsections 70 (3) and (10) of 1974 Act. The circumstances need not be exceptional, *Wilsons Solicitors LLP v Serena Bentine* [2015] EWCA Civ 1168, at [69], per Sales LJ (as he then was) (albeit in the context of a consideration of s 70(10)). The question of whether special circumstances exist is "*essentially a value judgment*" which "*depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified, despite the restrictions contained in Section 70(3)"*: in *Falmouth House Freehold Co Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch) per Lewison J (as he then was); see also *Bentine* [2015] EWCA Civ 1168 at [63].

18. In considering whether special circumstances are or are not shown in any particular case what is relevant is an assessment of the aggregate of the relevant circumstances rather than an item by item assessment of each circumstance: see *Kundrath v Harry Kwatia & Gooding* [2005] 2 Costs LR 279 at [8] per Beatson J (as he then was).

19. Should the court find that special circumstances exist, it has a discretion to make an order for assessment of the bill. In exercising that judicial discretion, questions of delay may be relevant where that has given rise to significant prejudice: see *Patel v Mowlam* [2020] EWHC 1079 (QB), J at [9] [10] per Eady (citing *Kundrath*), (see too *Friston on Costs* [[1180]).

20. Where the bill has been paid the party chargeable with the bill has 12 months to make an application from the time when a bill has been paid but has to demonstrate special circumstances. Retainer by a solicitor of his costs out of money in his hands belonging to the client can amount to a "*payment*", but only if there has been a settlement of account between the parties: see *Menzies v Oakwood* [2022] EWHC 3199 (KB) per Bourne J at ([25] (ii) and

(iii)[2]]. There is a difference between an agreement to the bill and an agreement to payment being made (or a settlement of account): see *Menzies*, [39] and [40]. Further a bill can only be 'paid' where a bill had been delivered; where a bill is delivered after payment then the payment is effected when the bill is delivered: see *Re Thompson* [1894] 1 QB 462, recently confirmed in *Menzies* at [25 (v) and vi)] .

21. By section 71 (4) when considering whether to order assessment of a bill on an application by a beneficiary the court is required to "have regard" to the provisions of section 70 "*so far as they are capable of being applied to an application made under that subsection*" (my underlining), In *McIlwraith v McIlwraith*, [2004] 4 Costs L.R. 533 (2002) a bill had been paid twelve months prior to the issue of an application. HH Judge Rich, sitting as a High Court judge, held, relying on the express terms of subsection 71 (4), that there was nevertheless a discretion in respect of an application made by a beneficiary under section 71 (3) to allow an assessment. It appears that the issue as to whether there was any discretion to allow an assessment was treated as a preliminary issue in the appeal and the report of the judgment only refers to this element of the decision. Nevertheless it is relevant to note the terms on which the learned judge held that the discretion was to be exercised. He said as follows:

> "*Finally, I would add this. I have decided that there is a discretion. It is, however, a discretion to be exercised in circumstances where the court is required to have regard to the fact that there would be no power to order a taxation on the application of the chargeable party. It will, therefore, in my judgment, be for the applicant, who is interested in the chargeable property, to persuade the court that it should nonetheless order a taxation at his request, and that the considerations of finality which justify the rule in respect of the chargeable party should not prevail upon the present application. In my judgment, some special circumstances precluding a more timely application would have to be shown to invoke the court's discretion*."

22. Ms Tew accepted in the light of this decision that the limit in section 70(4) on ordering the assessment of bills that had been paid more than 12 months before an application is made is not determinative in this application and that I have a discretion to allow an assessment in such circumstances.

23. It also appears to be clear that the fact a third party does not have control over the litigation is not of itself sufficient to amount to special circumstances (since the absence of such control is normally the case in circumstances where an application is made under section 71) : see *Friston* at 36.35, citing *Barclays plc v Villers* [2000] 1 All ER (Comm) 357 at 369 per Langley J.

The presumptions under CPR 46.9 applicable in a solicitor/client assessment

24. The effect of presumptions which apply on an assessment between a solicitor and client. CPR 46.9 has some relevance to issues arising in respect of *Tim Martin*. They are:

> *(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –*
>
> > *(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client.*
> > *(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client.*

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[2] Following *Re Foss, Bilborough & Co* [1912] 2 Ch 161 at 164 per Neville J, applying what was then section 41 of the Solicitors Act 1843

(c) to have been unreasonably incurred if –
(i) they are of an unusual nature or amount; and
(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.

25. It is plain that in order to benefit from the presumptions in their favour (at (a) and (b)) it is necessary for solicitors to establish informed consent (approval) to the incurring of the costs: *McDougall v Boote Edgar Esterkin (a Firm*) [2001] 1 Costs L.R. 118, *Herbert v HH Law Ltd* [2019] EWCA Civ 527 [37] and [38] ad *Belsner v Cam Legal Services* Ltd [2022] EWCA Civ 1387 [67].

26. In *McDougall*, in the context of an argument about the reasonableness of hourly rates in a solicitor-client dispute, Holland J said this:

> "*To rely on the Applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the Applicants, lay persons as they are, can reasonably be bound by it.* "

27. Further, in *Herbert* the Court of Appeal made clear that the overall burden of showing informed consent, as a pre-condition to the presumptions of reasonableness applying, is on the solicitor (see [38]).

28. The term '*unusual nature or amount'* in respect of the presumption of unreasonableness at (c) is not expressly defined. In *ST v ZY* [2022] EWHC Senior Costs Judge Gordon-Saker rejected the submission that the term "*unusual*" should be read as being 'unusual' between solicitor and client. He held that this would be to ignore the purpose of the rule and went on to say:

> "*To avoid the presumption the solicitor is required to explain to the client that the costs may not be recovered because they were unusual. "Unusual" must therefore be read in the context of a between the parties assessment. Of course we are not here concerned with costs which are merely "unreasonable*". *A solicitor is not required to inform the client that particular costs may not be recovered because a court may conclude that they were not reasonably incurred or reasonable in amount*."

29. It is perhaps relevant to note in the context of the argument in this case (insofar as it concerns an estimate provided by a solicitor to an executor) that in *ST v ZY* a claim was made by solicitors against the client (a protected party with a litigation friend) for sums which had not been recovered against the defendant to a claim which were substantially in excess of the *inter partes* costs budgets. Such costs were held to be 'unusual'.

30. Further, I should add that it is clear from the judgment in *Tim Martin* itself (at [22]) that the presumption in para (c) of unreasonableness can prevail over the presumptions in paras (a) and (b).

31. Although at one stage Ms. Tew intimated an argument to the effect that the presumptions were irrebuttable this was not pursued (or developed). If it were to have been pursued, I would in any event have rejected it. As Holland J said (obiter) in *McDougall*, the fuller the explanation the more likely it is that the court would hold the client to an agreement. However, as Lloyd LJ confirmed in *Tim Martin* itself the presumptions are rebuttable; see [22]. Also, in *Murray*

v Richard Slade [2022] Costs LR 43 (at [63]) Sir Andrew Nichol, sitting as a High Court judge, rejected the argument that the presumptions were not rebuttable (albeit obiter) holding that the argument was contrary to the language of CPR 46.9(3).

32. Further, a consideration of the common law background to these provisions, to my mind, confirms why the presumptions set out in CPR 46.9 are to be given their ordinary and natural meaning and why it is that they are merely presumptions A solicitors' cause of action for remuneration is ordinarily on their bill[3] and is not a cause of action on an agreement (save and to the extent there is an enforceable business agreement compliant with the relevant provisions of Section III of the 1974 Act[4]). An agreement as between solicitor and client as to fees has generally been viewed with suspicion: see *Clare v Joseph* [1907] 2 KB 369) in which Fletcher–Moulton LJ explained that "*the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense*" [see page 376] (see too Friston [1.82] and [1.83][5]). A bill is, of course, subject to an assessment of reasonableness of the costs claimed in it[6]. Against this background it seems to me to be clear why 'approval' (or agreement) by a client merely creates a presumption, why such approval must be 'informed' and indeed why generally the presumptions in CPR r46.9 are rebuttable in an assessment of the reasonableness of a bill.

33. I should perhaps add that I do not think, as Ms. Tew suggested, that the decision in *Belsner,* in which the Court of Appeal explained that solicitors do not owe fiduciary duties to clients when entering into retainers (see [83]), alters the approach to be taken even if the explanation for these provisions (if any were required) were to lie in more general concerns than those expressed in *Clare*.

A. **Interim statute (statutory) bills or interim on account bills**?

34. If the bills in this case are on account invoices and are merely requests for payment, they are not capable of assessment and compliant bills would need to be served (in the absence of any agreement to the effect that the bills are to be treated as statute bills).

35. The narratives on some of the invoices are short, and simply refer the reader to the breakdown or time sheets which accompanied the bills. At the hearing in October, I raised a concern as to whether the bills were all accompanied by breakdowns in legible form (the copies in my bundle were difficult to read). Subsequent evidence has clarified that in the form served the breakdowns were more legible than had appeared in my bundle (albeit the breakdown which accompanied the bill of 23 March 2021 remained somewhat difficult to interpret).

36. The breakdowns (time sheets) provided contain little explanation as the nature of the work that was being undertaken: it is recorded that emails and letters were sent and received and there were discussions between fee earners but it is difficult, in large part, to see what was

[3] *Walton v Egan* [1982] Q.B. 1232. at pages 1237G - 1238 A.

[4] See too, *Re Stuart,ex parte Cathcart* [1893] 2 QB 201 as to the meaning of 'fair and reasonable'.

[5] See also, *EVH v Smith* [2022] EWHC 1607 (SCCO) [33] –[46]).

[6] See the judgment of Erle CJ in *Philby v Hazle* (1860) 8 CB (NS) 647 (cited in *Friston inter alia* at [1.83]).

going on. As the examples I have set out below indicate there are claims for lengthy periods of attendance by the senior fee earner with only a cursory description of what was happening ("Telephone", "Perusal", Attendance"), and it is difficult to see how much of the work might have been progressive of the administration of the estate. Applying the guidance of Ward LJ, I would not, I think, be satisfied that there was sufficient information provided to the executor from looking at the bills and time sheets alone to know what the estate was being charged for. Indeed would expect a fee earner to record in somewhat greater detail than is provided in the breakdowns the nature of the work undertaken and the extent to which it was progressive.

37. Mr. Biber is however the executor, and the bills were addressed to him (albeit payable from the estate) and he is the party chargeable with the bill. It seems to me that it is the extent of his knowledge I should consider. Looking at things in the round, I would accept, on balance, that he probably did have sufficient information available to him to know in broad terms what he was being charged for. If I read the time sheets correctly it would seem that he probably was kept abreast of what was going on by emails and in discussions. On this basis, and notwithstanding some concerns, I think that the invoices are to be regarded as statute bills. Indeed, I understood that Mr. Gold did accept, in the course of the second hearing, that they could be regarded as compliant bills.

B. Discretion/special circumstances

B.1. Do the sums claimed in the bills call for an explanation and do they amount to special circumstances?

38. As it is put in *Friston on Costs* [36.36], if there is something about the bill which calls for an explanation that can amount to special circumstances. For reasons which are perhaps obvious it is generally not enough for the client (or indeed a third party) simply to complain that the costs claimed are too high: if it were otherwise, the requirement to show special circumstances would be of little effect.

39. It seems to me clear however that where there is a substantial discrepancy between an estimate provided to a client by a solicitor and the costs billed that discrepancy generally calls for an explanation, and if no adequate explanation is provided the costs over and above the estimate may be disallowed in whole or in part: see *inter alia Mastercigars v Withers* [2007] EWHC 2733(Ch) [2009] 1 WLR 881. An estimate may indeed provide a 'yardstick' for what is reasonable whether or not it is relied upon by the client (in the sense of creating some form of estoppel). As Morgan J said at [102] (cited in *Belsner* at [96]):

> *"Even if the solicitor has spent a reasonable time on reasonable items of work and the charging rate is reasonable, the resulting figure may exceed what it is reasonable in all the circumstances to expect the client to pay and, to the extent that the figure does exceed what is reasonable to expect the client to pay, the excess is not recoverable*."

40. A discrepancy of the sort identified in this case in my view is plainly capable of amounting to a special circumstance: see *Friston* [1178-1180].

41. It was, as the Defendant pointed out, made clear at the outset that the estimate the solicitors had provided may need to be revised and, indeed, that it was provided on the basis of certain assumptions; should such assumptions change the figures given in the estimate were liable to change. On 25 October 2019 Ms Lane (one of the fee earners in the case) wrote to the Claimant to warn him that the invoice to date was higher than anticipated due to

"*additional liaising with you as the beneficiaries… and with other third parties*". A higher estimate of £15,000 to £20,000 plus VAT and disbursements was provided, such estimate being based on the assumption that the only additional work required *"is the completion of the transfer/closure forms for the assets in your mother's estate and preparing the Estate Accounts for approval".* Ms Lane expressly warned the Claimant that "*any additional liaising with you or third parties in order to conclude matters in the estate will increase the costs involved and will be dealt with on a time spent basis.. ..* "

42. It appears too that periodic costs updates were provided to the beneficiaries (including, but not limited to, a letter sent to the beneficiaries on 25 October 2019 and an email dated 15 November 2019; and in an email dated 15 November 2019, Ms Lane highlights concerns over increasing costs). I have been referred to further correspondence to similar effect in August 2020 from which it appears there had been substantial exchanges between the beneficiaries and the solicitors: a further revised estimate of £2,000-£2,500 was provided for future work but on the basis that this excluded any further work liaising with beneficiaries' solicitors which was to be dealt with "*on a time spent basis*" (the relevant correspondence is said to have been provided by way of further example only).

43. Such correspondence as has been provided suggests to me that there may well have been significant time liaising with the beneficiaries or their solicitors. I am conscious too that when looked at closely it may well then appear that the Claimant himself caused or contributed substantially to the costs exceeding the estimate. I would add that although I was told that there was a dispute or disputes with the beneficiaries, who instructed separate solicitors, the nature and extent of the dispute or disputes and the reasons why solicitors were instructed are currently unclear.

44. Whilst some communications have been disclosed it is not clear whether and or when the executor was informed that the estimate was going to be exceeded to the extent that it was. It is, of course, not generally sufficient in the face of a large discrepancy between what had been charged and any estimate given that the solicitors simply tell the client that the estimate had been exceeded: if that were the case it would deprive the provision of estimates of their intended effect. Moreover, the retainer in this case provides:

> "*If it becomes likely that our estimate will be exceeded, we will inform you promptly and will discuss the impact on the overall level of our charges. We will however use our best efforts to complete the matter within the estimated charges.*"

That provision might be said to contemplate a discussion as to whether an estimate is likely to be exceeded and, perhaps, why and how, substantially in advance of an estimate being exceeded.

45. I have considered all the matters which I have been put to me by the Defendant. I do not think however it would be appropriate to dismiss the concerns that have been raised by the Claimant. As the Claimant has asserted in correspondence the extent of the discrepancy between the initial estimate and the costs claimed is very substantial indeed- a multiple of some 4 to 5. Indeed, it is notable how quickly after instruction the estimate was exceeded. Whilst I have some concerns that the Claimant may himself have contributed to the costs being above the initial estimate, I am not satisfied that such information which is currently available does justify the discrepancy, or indeed come close to doing so. Indeed, I am left with the impression that on this basis alone there is potential for a very significant reduction in the bill. This would

seem to be the case whether or not Mr. Biber relied upon the estimate (and indeed approved the bills retrospectively) particularly if the estimate could be taken as a 'yardstick' indicating the level of costs that might reasonably be expected in an administration of an estate of this nature.

46. Further, and independent of the estimate, there appears to be some force in the contention that administration of the estate looks relatively uncomplicated, notwithstanding the value. The Claimant says that the estate consisted of some stocks and shares, cash in various accounts, personal effects to the sum of about £250, a freehold property and two timeshares. I note that the schedule to the estate accounts lists only seven holdings of securities (none of which suggest much complication). I must however be wary about any assertions of this nature; the administration of the estate may well have been more complicated than a preliminary consideration of the documentation produced to me might suggest. But to my mind there appears substance in the suggestion that notwithstanding the substantial value of the estate the amount of the bills simply look globally and in aggregate high against the work that might reasonably be anticipated.

47. Indeed, a more detailed consideration of the breakdowns appears to lead to the same conclusion. There appears to be particular force in a concern that rates at the level that have been agreed are commensurate with substantial expertise and experience; the rate for the senior fee earner and partner is £385 per hour , and for the other principal fee earner £255 per hour (cf the guideline rates and noting that solicitors are in Tunbridge Wells, Kent). Without going into this in too much detail, I have some concerns about the extent of the involvement of these two fee earners at what might be regarded as senior fee earner rates in the work that was undertaken. I am also concerned that there may have been a significant amount of work which may have called for little legal input and was administrative in nature- but which has been charged at substantial hourly rates and for lengthy periods. Further, as I have indicated above there is little information in the time sheets about much of the work or explanation as to why so long was being taken on certain activities.

48. I give the following by way of example only of matters that give rise to possible concern:

<u>Invoice dated 17 October 2019</u>

- Charges for funding work 'file opening and quoting for work' and for work possibly before the retainer was agreed (cf the term of retainer letter, fourth paragraph)
- A charge for 3 hours work by the senior fee earner described only as 'Attendance'

<u>Invoice dated 31 January 2020</u>

- Extensive involvement by a senior fee earner checking stock transfer forms and related correspondence when the lower grade fee earner spent a lengthy period of time doing so
- Some 4 hours spent by a junior fee earner telephoning various registrars to determine whether dividends were paid after the testator's death, in addition to which time was spent drafting and perusing letters to registrars.

<u>Invoice dated 24 April 2020</u>

-1.4 hours for obtaining and preparing forms to transfer share holdings (noting work already done)

- Some one hour of attendance claimed by the senior fee earner simply described as ‘Attendance’

-1.4 hours claimed in various entries by the senior fee earner for work which is simply described as ‘Perusal’

-2 hours claimed in respect of the senior fee earenr simply described as ‘Telephone’

Invoice dated 25 August 2020

- 2.5/3? hours claimed in respect of the senior fee earner in various entries simply described as ‘Telephone’

-2 hours claimed in various entries in respect of the senior fee earner simply described as ‘Perusal’

-Internal liaison involving the senior fee earner in various entries, 1.6 hours

-2 hours spent by a senior fee earner simply described as ‘General’

Invoice dated 3 December 2020

-0.5 hours claimed in respect of these senior fee simply described as ‘Email’

-1.8 hours claimed in respect of the senior fee earner described simply as ‘Telephone’

49. I should perhaps add that there may also be concerns in this case about the charging of incoming emails (ie received correspondence) at separate units of 6 minutes. It is usual in *inter partes* claims for costs to be awarded on the basis of units of routine correspondence; one unit is generally to be allowed for a letter or e-mail in and a letter or email out and correspondence of a routine nature which are incoming are not normally allowed separately (see PD47). Thus, whether or not the retainer might support such a claim, there seems to be some basis for thinking that the separate charging for incoming emails at least at a unit of 6 minutes is unusual and might be presumed unreasonable[7].

50. Inevitably, any view at this stage is highly preliminary, particularly when the time sheets provide insufficient information as to why the matter would have required so much more time than had been anticipated. However all three approaches I have set out above, whether looked at in aggregate or individually, appear to provide a sound basis for thinking that there might be a substantial reduction in the sums in bills and by a margin which might well substantially exceed 1/5th.

51. In my view it is plain that the sums claimed in the bills call for an explanation and amount in themselves to special circumstances. Indeed it strikes me that this was rather obviously the position on the information available. I understood that the Defendant’s argument in response was not so much that there was no basis for thinking that on the information available there could not be a substantial deduction (if an assessment were to take place) but that it was not in a position to respond to these points because the material which she would seek to rely upon was privileged or confidential. I deal with that point next.

[7] See *Breyer Group v Prospect* (unreported)

B2. Privilege/confidentiality– no point in having an assessment?

52. Ms. Tew relied on *Medcalf v Mardell* [2003] 1 AC 120; [2002] UKHL 27 as authority for the proposition that I should, in effect, assume that there was good explanation for the costs claimed and for the discrepancy between the estimate and the costs billed. I should assume whatever concerns I might now have about the level of costs that there were good arguments that the Defendant solicitors could advance in defence of their own charges. Their inability to refer to communications or documents over which their client hold privilege prevented them from advancing such a case. The Defendant, it was said, was required by the SRA Code of Conduct for both solicitors (6.3 – 6.5) and firms (6.3-6.5) not to disclose any information which is confidential to its client, save where permitted by law. Further, it is said that the court should be mindful of the need to avoid any "*own interest*" conflicts between the Defendant and its client. Taking such an approach an assessment could not provide the Claimant with any worthwhile remedy.

53. Plainly communication between the clients and their lawyers for the purposes of obtaining legal advice of course privileged and that privilege is absolute: see *Re v Derby Magistrates Court ex parte B* [1996] 1 ACR 487 *Three Rivers DC v Governor and Company of the Bank of England* [2004] UKHL 48[8]; see also [65] in the judgment of Aikens J *Winterthur Swiss Insurance Co v AG (Manchester) Ltd* [2006] EWHC 839 (Comm).

54. However, when the arguments were raised in the course of the hearing it was not obvious to me that privilege of an executor could be asserted as between himself and the beneficiary; and I needed some further assistance on this point. Ms. Tew subsequently referred me to the decision in *Schmidt v Rosewood Trust Ltd, [2003]* 2 A.C. 709 (2003), a decision of the Privy Council. In that case the court was concerned with a beneficiary's right to seek disclosure of trust documents. The Court held such a right was sometimes "*not inappropriately described as a proprietary right"* but that the matter was best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trust. The judgment of their Lordships continued:

> *However, the recent cases also confirm (as had been stated as long ago as In re Cowin 33 Ch D 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief."*

55. Applying this guidance it is difficult to see that there was any relevant privilege or confidentiality arising as between the executor and the beneficiaries in the ordinary course of the administration of the trust that would prevent disclosure of the documents to the court for

[8] Noting the difference between the legal professional privilege and litigation privilege at p761.

the purposes of an assessment of costs, save only perhaps to the extent that there was a dispute between the trustee and the beneficiary.

56. Mr. Biber who was, of course, the direct client of the solicitor is a trustee and owes fiduciary duties to the Claimant and Ms. Peggs. It is difficult to see why he would not co-operate in this assessment and give permission as required for the Defendant to provide the court with the documents justifying the costs claimed by the Defendant. Moreover it is difficult to see on whatbasis he could resist, if asked, to give his permission for the documents to be released (so long as such they did not relate to the dispute himself and the beneficiaries); the estate, and thus the beneficiaries, are after all the parties paying the bill, and the executor will simply have passed on the relevant costs to the estate. Indeed there would seem to be every reason why an executor would want to take part and give permission for relevant documents to be disclosure, as costs which are not incurred for the purposes of administering the estate may, at least in principle, may be chargeable to the executor in their personal capacity and not recoverable from the estate.

57. There is no evidence that Mr. Biber has even been approached about this, let alone asked if he would be prepared to release the papers for the purposes of an assessment. I cannot accept that it would be inappropriate, as Ms. Tew suggested, for the Defendant not to make such a request. If the executor refused it may be that he could, if necessary, be made a party and any refusal in breach of the terms of the trust could, I suppose, merit his replacement (under the provision of the Administration of Justice 1985) - albeit it strikes me that that would be a truly surprising course of events.

58. Ms. Tew did not, as I understand it, shirk from the proposition that if she were right in her objection it could be raised by other solicitors and might effectively prevent third-party assessments generally. I was not provided with authority to support her concerns in the context of section 71 and its predecessors; if it had been a good objection, one might have thought that it would have been raised before now.

59. In any event it seems to me to be plain that the Defendant and the executor should both be taken to have understood that if any bill were challenged by the beneficiaries, it would be possible for the solicitors to produce their papers to the court to justify their charges[9]. That is the nature of the process provided for by statute. As is well known costs judges (taxing masters) consider privileged and confidential material as an ordinary part of an assessment. Special rules apply and an application to a court proceeds on the understanding that the privilege and confidential nature of documents will be respected. Only in rare and defined circumstances is a person holding the privilege even put to their election as to whether or not to disclose or rely upon other material[10]. It seems to me, applying ordinary principles, such an understanding must of necessity be implied into the terms on which the executor instructed solicitors: that is to say, an understanding that if their charges were objected to by way of an application they could produce the relevant documentation to the court.

60. *Medcalf* concerned allegations of serious misconduct against counsel. The allegations, as the Court of Appeal emphasised, were being considered in a jurisdiction which was penal in nature. Counsel was not able to respond to by reason of the privilege in relevant documents. There was no prospect, it seems, of counsel realistically seeking the client's permission to

[9] Indeed I note that some of the papers generated in the course of instruction have been deployed by the Defendant in response to the application.
[10] Under the *Pamplin* procedure.

waive privilege and there were no procedures to enable the court to consider privileged material.

61. I do not think that the approach of the Court in *Medcalf* can apply here. I would accept that there may be documents which are privileged to the extent that they relate to a dispute between claimant and the executor and that it may not be appropriate for the Claimant to see these. But I do not accept that this is a hurdle to the carrying out an assessment. The consideration of privileged material is, as I say, a normal feature in an assessment- indeed it is in the nature of a costs assessment that a costs judge may see privileged and confidential material and is not clear how a detailed assessment can otherwise be carried out[11]. Privilege can be maintained whilst ensuring that the parties have the necessary information to understand why costs have been incurred (in order to make any challenge) and to understand the reasons for any determinations made in the assessment.

62. In circumstances where there is no evidence Mr. Biber has even been approached to ask for his views, these contentions struck me as tactical and without substance. In any event even if the Defendant's concerns might justify the further steps that I have indicated above (and an order which sanctioned the released of such papers to the court) I do not see them as a barrier to an effective assessment.

B.3 In the light of the decision in *Tim Martin*, would an assessment would serve any useful purpose?

B.3.1 The restrictions in *Tim Martin*

63. At paragraph [95] of his judgment in *Tim Martin* Lloyd LJ (with whose judgment the other judges in Court of Appeal agreed) held as follows:

> *"The effect of my conclusions as regards both quantification and payment is that a third party assessment under s 71 is of limited use to a third party. As regards quantification it only allows the costs judge to follow what might be called a blue pencil approach. He can eliminate (a) items which ought not to be laid at the door of the third party at all because they are outwith the scope of his liability, here as mortgagor, and (b) items which are only allowable as between client and solicitor on a special arrangement basis, within the terms of CPR r 48.8(2)(c). He cannot either eliminate any other item or reduce the quantum of any item which is properly included in itself, but for which he considers that the charge made is excessive, unless he could have done so as between client and solicitor on an assessment under s 70."*

64. The facts of the case are important. A bank had taken steps to enforce a mortgage against a borrower, using solicitors in the process. The bank claimed to be entitled to recover all of its costs from the borrower pursuant to a contract which required the borrower to pay "*all legal and other costs, charges and expenses incurred by the bank .... in relation to the Mortgagor or Mortgaged property… on a full indemnity basis*". The borrower applied for and obtained an order for assessment of the solicitors' bills.

65. At first instance, Costs Judge Campbell assessed the costs at some £31,000 (against a sum claimed in the bill/s of some £114,000). The bank had instructed solicitors based in City

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[11] In *Medcalf* Lord Bingham's citation of *Ridelagh v Horsefield* [2003] 1 AC 120 indicated that source of prejudice to counsel might be mitigated by reference to a taxing master (page 134, 135B).

of London who, it appears, charged rates which reflected their location. The costs judge considered the rates unreasonable (reflecting an unreasonable choice of solicitors) and substituted rates appropriate to a firm local to the mortgaged property. His disallowance of costs was however decided on the express basis that the bank might well have been liable to the solicitors for the relevant costs in the full amount charged.

66. Lewison J (as he then was) held in the first appeal ([2010] EWHC 2951 (Ch)) that the borrower was only entitled to challenge the costs to the extent that he could have done so as between client and solicitor on an assessment under s 70 and it was not open to the court to disallow the cost claimed on bills to the extent that the Costs Judge had done under section 71. The bank had decided to instruct City of London solicitors in respect of a matter which proceeded in the county court; as between the bank and borrower there was a real issue as to the reasonableness of the choice of solicitors but which the borrower could not raise against the solicitor under section 71 unless the bank could itself have done so. The procedure by which the borrower could take the objections it sought to make was a determination under CPR 48.3 (an assessment of costs payable under contract) or a claim for an account between itself and the bank which could take place simultaneously with an application under section 71: see [42]).

67. The Court of Appeal upheld the decision of Lewison J allowing the appeal from the costs judge.

68. Ms. Tew argues that I am bound by *Tim Martin* and contends that 'the blue pencil' test set out in paragraph 95 above precludes any meaningful challenge to the reasonableness of the fees. Although *Tim Martin* concerned an application under subsection 71 (1) ('ss (1) application') and not, as here, an application under subsection 71 (3) ('ss (3) application')) she relies upon various passages in the judgment which she says showed that the Court had in mind that the rules that apply under section 71 (1) also applied in respect of this application under section 71 (3). If the restrictions set out above applied, it would substantially limit the benefits available when a beneficiary applies for an assessment. The remedy of third party mortgagor was, following the decision of the Court of Appeal, to bring proceedings by way an account of what was due under the mortgage. At [102] Lloyd LJ said that "[a] *claim for an account may be the right approach for several situations which can throw up this sort of problem, for example in the case of a trust or the administration of an estate*".

69. Mr. Gold says *Tim Martin* should be distinguished; further, even if the restrictions set out in *Tim Martin* did apply, they did not prevent a meaningful challenge to the costs claimed in the bills and did not prevent him taking the objection that he intimated as to the effect of the estimate in this case.

70. In *Brealey v Shepherd* [2021] 6 WLUK 732 Costs Judge Rowley decided that the blue pencil test extended only to the challenges referred in the first sentence of para. 95 ([12]). It seems to me however to be clear from the whole of paragraph 95 (see above [71]) and the reasoning in the judgment of the Court of Appeal generally in *Tim Martin* (see inter alia para. [83]) when read against the background of the judgment of Lewison J[12], that the blue pencil test should be read as permitting at least any objection that a client <u>could have taken.</u> That this is the correct approach is, to my mind further confirmed by the judgment of Cavanagh J in

[12] See in particular paragraph [34] cited at [83] by Lloyd LJ and [39]-[41] noting that Lloyd LJ said he agreed in all respects with his judgment [105]).

Brealey v Shepherd [2022] EWHC 3299 at [59]. I understand from her final submissions (at [4] and [5]) that such an approach is not disputed by Ms. Tew.

71. I had understood Ms. Tew to have argued that the Claimant is limited to taking any point which the person chargeable with the bill can now take. Her point was that it is not now open to the executor to take any point as to the sums claimed in the bill because they have been agreed and approved for payment. She relied on what is said in the final sentence of the following passage at [82] in the judgment of Lloyd LJ of *Tim Martin* :

> *Neither on the basis of precedent, therefore, nor as a matter of principle does it seem to me that it is open to the court on an assessment under s 71 to substitute a lower amount for a higher one, on the basis that something is allowable but that the rate claimed is unreasonably high, unless that substitution could have been made on an assessment under s 70 as well. Where the client has agreed the bill and paid it, such a substitution is not possible under s 70.* [82] (my underlining)

72. I would reject this argument.

73. Firstly, I would not read the passage relied upon by Ms. Tew (at [82]) as overriding or qualifying what the learned judge said in his conclusion. Moreover, the last sentence of this passage is to be read in the context of what is said immediately before (where the permissible objections as said to extend to anything that could have been raised). On a plain reading the test to be applied as set out in the conclusion of the judgment of Lloyd LJ is not whether the executor can now take the objection (a point that might require some considerable investigation and which is ill-suited to an assessment) but whether the executor could have taken it in the sense that it was the type of point open to the executor to take. This is not only because those are the words stated in the conclusion and would appear to carry more weight because of this, but it is more consistent with the reasoning of the court, in particular when seen against the judgment of Lewison J.

74. Secondly, there is to my mind no support for this approach in the wording of the relevant subsections. Indeed the fact that a beneficiary may apply for an assessment even if an assessment has already taken place (presumably) at the institution of the executor (under section 70 (6)) (albeit subject to showing special circumstance) would appear to confirm that the court is not bound by the stance taken by the executor (which strikes me as the corollary of Ms. Tew's argument).

75. Thirdly, it seems to me that if Ms Tew were right, it would largely defeat the purposes of the provision. The fact that the executor has not challenged a bill and indeed agreed it cannot it seems to be a basis for barring a beneficiary from a remedy. If it were otherwise it would, inter alia, allow collusion to defeat the claim by the beneficiary.

76. In short, it seems to me that the question is not whether the objection is still open to the person chargeable with the bill but whether the objection is of a type that is open to the person chargeable with the bill to take.

77. I should perhaps add that I am not sure how much that this point would have assisted the Defendant in any event. As is clear from the above, the costs claimed in a bill may be challenged by a person chargeable with the bill after the bill has been paid (see section 70 (4)). In order to effect payment, save in the case of direct payment by client to the solicitors, a payment by way of deduction from sums held by them is only effective for these purposes

once there has been a settlement of the account, in effect an agreement to the deduction. But agreement to a deduction is not agreement to the sums claimed in the bill. I note that the solicitors say in a letter dated 20 August 2021 that the final bill has been agreed with the executor. Taken on its face that might well indicate agreement to the final bill but it is not clear whether all the other bills have been agreed in the amounts claimed (noting the distinction between approval for payment and agreement to the bill, see *Menzies,* inter alia at [39]).

78. As indicated above one of the objections the Claimant has indicated he wishes to make is that the sums claimed in the bills exceed the estimate of costs by a substantial margin and should be reduced in accordance with the approach set out in *Mastercigars*. The point is commonly taken in an assessment as between the solicitors and client and plainly could have been taken by the person chargeable with the bill. Thus if, as I think it must, the blue pencil test is to be read subject to the qualification that the beneficiary can also take any point that the executor could have taken then the restrictions imposed by the test are, at the very least much less limited than Ms. Tew's argument might suggest.

B.3.2 Do the restrictions in *Tim Martin* apply to an application under section 71 (3) ('a ss(3) application')?

Is a ss (3) application materially distinct from a ss (1) application?

79. The two different applications provided for by section 71 originate from separate sections of the Solicitors Act 1843, sections 38 and section 39. Subsections 71 (1)-(2) in their current form are not materially different from section 38 (see [68] and [69] of *Tim Martin*) and the provisions of section 70 (3)- (5) follow section 39.

80. It is notable that section 38 of the 1834 Act is headed '*Bills may be taxed upon the Application of Third Parties'* whereas section 39 is headed '*Lord Chancellor may direct Taxation of Bills chargeable on Executors* &c'. This difference in title seems to me to be at least consistent with the idea that an applicant under section 39, as a person interested in property out of which the costs were payable, might not be in quite the same position as a 'third party' in an application under section 38.

81. In any event Section 71(1) expressly provides that the third party may apply to the court *"as if he were the party chargeable with it…. and the court may make the same order (if any) as it might have made if the application had been made by the party chargeable with the bill."* (my underlining). The same restrictions do not appear in section 71 (3) (see too *McIlwraith* at [10] where it is noted that the time limits applicable to the two applications differ).

82. Moreover when a ss (3) application is made by the executor or the beneficiary for an assessment it is the estate's liability for costs with which court is ultimately concerned. When retaining solicitors and incurring costs, the executor is assumed to be acting on behalf of the estate and able to pass all the costs in the bill on to the estate: a beneficiary is, a *"person interested in any property out of which the trustee, executor or administrator has paid has paid, or is entitled to pay, the bill"* (my underlining). Thus the ultimate paying party for the purposes of the assessment is the estate, in effect the beneficiaries.

83. With the exception it seems to me of *re Brown* (1867) lR 4 Eq 464, the cases referred to in *Tim Martin* at [35] –[55], are cases under section 38 in which the legal relations between

the person chargeable with the bill and the third parties are ones of contract[13]. In the case of an ss (3) application the executor owes fiduciary duties to the beneficiaries. This seems to me to be a distinction of substance.

84. In re *Brown* (1867) lR 4 Eq 464 a beneficiary ('cestui que trust') had obtained an order for the taxation of a bill. Following a substantial disallowance by the taxing master the solicitor applied for a review, submitting (in terms anticipating the argument in *Tim Martin*) , that "*if it was improper in the trustee to require the solicitor to write so many letters, or to attend on him so often, the remedy of the cestui que trust is to object to the allowance of the items in the account between the trustee and himself*". Lord Romilly MR refused the application. He accepted that the taxation was as between solicitor and client and that the bill be must be taxed "*exactly as if* [the beneficiary] *stood in the place of the trustee*" but he added a qualification in the following passages:

> *"If a person, being a trustee, chooses to employ a solicitor for the purpose of conducting the affairs of the trust, which, of course, the solicitor is well aware of, there is a distinction between his employing that same solicitor for exactly similar purposes with regard to which he is not a trustee. Suppose, for instance, that he is not a trustee, but simply a client, and that he says to the solicitor, 'I wish you would make me, or procure for me, copies of such and such deeds, and I want to have them fully explained to me, and I come to you for that purpose.' The solicitor tells him, 'You can have them if you wish, but they are not at all wanted, they are of no species of use.' The client says, 'Never mind, I require it to be done.' The solicitor says, 'If you wish it, you shall have it.' When the bill is taxed, and that fact is stated, the client cannot complain. He would be told, 'You ordered it to be done, you were told it was useless, and you must pay for it.' But take the case where he is a trustee. He makes the same request, the solicitor makes him the same answer, on which the client says, 'Never mind, I still insist upon that being done.'*
>
> *Then it is the duty of the solicitor to tell him: 'Very well, if you insist on its being done, it shall be done; but you must understand that as this is not required for the purposes of the administration of the trust, you cannot charge these costs against your cestui que trust, and I cannot put them into the bill of costs which will have to be paid out of the trust estate; therefore, if you require it to be done, you must pay for it personally, and you will understand that it is a personal matter between you and me.' And Mr Little very properly admitted, if the circumstances amounted to something like collusion between them, there could be no question upon the subject.*
>
> *I think, therefore, that it is the duty of the solicitor to tell the trustee, 'This is not wanted for the administration of the trust, and if you insist upon its being done, it is for your private convenience, and, therefore, cannot be charged against the trust estate.'*
>
> *So regarding it, I have looked at this bill, and I have no doubt that the client did order it all, but then the application of the rule I have mentioned appears to me to be necessary, and then comes this question, which is properly a question for the*

[13] See inter alia *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171

Taxing Master to determine, is it proper, or necessary, or fit, for the administration of the trust that certain things should be done?

Now, on a question of quantum the court always allows the opinion of the Taxing Master to be paramount and follows it, and neutral really applies not merely to the question of quantum, but, if I may go on with the same sort of illustration comment to a question of quoties whether you should allow 10 or 12 interviews. on those matters detecting master is best capable to form a judgement, and he always goes through these matters very carefully. I am over opinion that I cannot alter any of the taxation of the Taxing Master." [my underlining]

85. Although there is reference in the argument recorded in the court report to the application having been under section 38 of the 1834 Act, it appears to be acknowledged in *Re Longbotham & Sons* [1904] 2 CH 152 (again in argument, see page 156) that the Court in *re Brown* were dealing with a taxation following an application under section 39 of the 1834 Act.

86. It seems to me to be clear in any event that on an application under ss (1) the third party steps into the shoes of the client: as *Tim Martin* makes clear the third party borrower may in many cases be best served by making a claim for an account against the person chargeable with the bill and a section 71 application. There are, as explained in *Tim Martin*, in such situations two measures of costs: one as between the third party borrower and the bank and the other as between the third party borrower and the solicitor. However, applying the test in *re Brown* in the case of a ss (3) application, it seems to me, there is no distinction in the approach of the court, whether it is the executor or the beneficiary who applies.

87. That is perhaps not surprising as the costs which are to be payable by the estate, whoever applies, and the executor is assumed to be acting on behalf of the estate (and hence the beneficiaries). Further, it seems to me, the interests of the estate (and thus the beneficiaries) are, as the judgment of Lord Romilly MR makes clear, central to the consideration of the reasonableness of the costs when an executor instructs a solicitor to administer an estate is doing so on behalf of the estate.

88. As *Brealey v Shepherd* [2022] EWHC 3229 (KB)) illustrates, an executor may be a solicitor (for which role they may be remunerated) and that solicitor may instruct their own firm in the administration on an estate. The potential for collusion in the circumstances of a ss (3) application appears substantial. As Lord Romilly MR commented in *re Brown*, it went without saying that any costs which were the product of collusion could not be recoverable against the estate. That seems to me to me must be the case whether it is the executor who applies for an assessment or a beneficiary.

89. The Court of Appeal in *Tim Martin* was not, it seems, addressed on the possible distinctions between a ss(3) application and a ss(1) application, nor, it seems to me did the Court need to consider such distinctions. In any event it is not clear to me that the Court considered that the approach of Lord Romilly MR to the measure of what is reasonable in the context of a trust was wrong.

90. Lloyd LJ commented in *Tim Martin* at [40-42], when considering *re Brown* , that "*nothing seems to turn on whether it was section 38 or section 39 that was relevant*". But the Court in *Tim Martin* was considering the approach to be taken on an application under section 71(1), the successor provisions to section 38. As Lloyd LJ expressly acknowledged (at [42])

the approach taken by the Master of the Rolls in *re Brown* assisted the appellant borrower in *Tim Martin*. An acknowledgement that *re Brown* was a decision which concerned a different type of application (ie one under ss (3)), it seems to me, would seem only strengthen the Court of Appeal's conclusion in *Tim Martin*.

91. To my mind, the argument that *Tim Martin* should be distinguished is strengthened when considering the particular issues which concerned the Court of Appeal in *Tim Martin*, quantification and payment. At [99] Lloyd LJ said this in explaining his conclusions:

> *"I realise that, on this basis, what Sir John Romilly said was the purpose of the provision for third party assessment, namely, to shorten the remedy, will have been achieved in only a small minority of cases, probably rather unusual ones. I see no alternative to that, given the nature of the issues that tend to arise on quantification in relation to costs bills drawn in modern circumstances, and also given the issue about re payment, which seems to have arisen only rarely if at all in the older cases*

92. As to quantification, the issue identified by Lloyd LJ was whether an assessment under section 71 proceeds as if the third party were the client and whether it open to the third party to challenge the costs on the basis that, for, instance it was reasonable to instruct solicitors of a certain location (see [82] cited above). Lloyd LJ went to say this:

> *"……. I do not accept that either the cases or the statute allow the court to alter the amount of an item in the bill in respect of which something is properly chargeable, but where the court considers that the amount claimed is excessive and unreasonable, so that a lower amount should be allowed, unless that could be done on an assessment under s 70, as between the solicitor and the client directly. I therefore agree with Lewison J who said at para 34 "On an assessment under s 71 the court is entitled to interfere with the hourly rate agreed between the solicitor and the client; but only to the extent that it could have interfered with it at the behest of the client." He went on to point out that in a case where the client had agreed the rate there was very little scope for such interference, because of the presumption under CPR r 48.8(2)(b).* [83]

93. It is these concerns which led the court to indicate that a ss (1) application may not be of much use to someone in the position of the borrower (at least on its own). It seems to me however, for reasons that are set out in *re Brown* and which I have set out above, such a difference in the approach to quantification does not arise in a ss(3) application.

94. The bank in *Tim Martin* could hardly complain that the solicitors had charged City of London rates having chosen to instruct a firm in this area (in circumstances where the bank might be assumed to be aware that they would not recover those rates in county court litigation against the borrower). But, as appears from *Re Brown*, a trustee who, for their own personal convenience, instructs City of London solicitors at high rates would appear to have difficulty charging the additional sums associated with such an instruction to the estate; and, importantly, it seems to me that that is the case whether it is the trustee who applies for an assessment or a beneficiary.

95. A similar point can be made in respect of the issue of payment/repayment. It appears that the Court of Appeal in *Tim Martin* was concerned with difficulties and consequential unfairness if solicitors had already been paid by the borrower the difference between what the bank had already paid and what was due on the assessment. Referring to the decision of the costs judge (reducing the costs on the bill on the basis that solicitors would appear to have

had good claim for a higher level of cost than had been awarded in that assessment), Lloyd LJ said this:

> *"On that footing it seems surprising that the result of the Appellant's success before Master Campbell should have been that the Respondent solicitors were required to pay to the Appellant part of the amount which the Appellant had paid to the Bank. That is a major part of the Respondent's criticism of the procedure adopted by the Appellant. However, the Bank was not a party to the assessment proceedings, so there was no basis on which an order for repayment could be made against the Bank.*

96. Against this background Lloyd LJ said, at [96] –[98], that in the future if the third party has not yet paid anything in respect of the bill (or only sums on account which are less than the amount properly allowable) then a s 71 assessment may be useful to the third party. But if the client has paid the solicitor, and the third party has paid the client, then third party's remedy must lie against the client, not against the solicitor, because, he said *"it cannot be right to require the solicitor to pay to the third party money which he received from his client and which his client was bound to pay to him, merely because the third party was not liable to pay the same amount to the client"*.

97. However, again, it seems to me that there are no such difficulties in a ss (3) application. The reckoning that is required after such an assessment is, as the section contemplates, between the estate (and, ultimately, the beneficiaries) and the solicitors, whether it is the executor who applies for an assessment or a beneficiary.

98. It seems to me in any event that the provisions relating to a ss (3) application proceed on that basis any orders that may be required to give effect to an assessment between the estate and the solicitors can be made.

99. In *Tim Martin*, Lloyd LJ said of *re Brown*,

> "*The report does not disclose what order had been made, but since the trustee was not a party to the taxation, there cannot have been an order against him. Presumably, therefore, the order was that the solicitor should refund money to the trust fund, or to the beneficiaries directly*."

100. Later the learned judge said this:

> *"In Re Brown the bill had been paid by the client, a trustee, and a beneficiary obtained an order to tax under s 38 and succeeded in getting items disallowed on the taxation. The solicitor's appeal failed, but the report does not record what happened as regards payment or repayment. As mentioned at para 42 above, it may be that the solicitor had to refund the money to the trust fund or to the beneficiaries directly. That seems to be the only case which might be a precedent for the order sought in the present case. Given that the report is silent as to what happened, it is a slender support at best.* "

101. Although the absence of a fuller report in *Re Brown* was a factor in the Court's determination in *Tim Martin*, the prospect that a repayment should be made to the trust fund or the beneficiaries does not appear to be intrinsically problematic.

102. It strikes me in any event that the absence of the executor cannot have been an objection to an application under section 39: it is in the very nature of the relief provided in the section

that the executor need not be joined in the application. An executor, in contrast to the position of the client bank *vis a vis* the third party in a ss (1) application, is understood and assumed, to have been instructing the solicitors on behalf of the estate.

103. I would add that the possibility that sums may be payable by the executor (should any such order be required) on an application for an assessment by a beneficiaries appears to be contemplated by the subsection 71 (5) of the 1974 and expressly provides that "[if]*an applicant under subsection 71 (3) pays any money to the solicitor, he shall have the same right to be paid that money by the trustee,..... chargeable with the bill as the solicitor*"[14].

104. I should also add that if it were necessary for an executor to be made a party in order to effect any payment required it seems to me that there would not be any particular difficulty in that happening (in contrast to the position under ss (1) where the challenge involved a different cause of action and a wholly different procedure is required). As I have indicated above however it is difficult to see that an executor would not co-operate in an assessment.

Would there be any meaningful relief available to a beneficiary alleging that solicitors had overcharged if *Tim Martin* does apply and has the limiting effect which Ms. Tew relies upon?

105. Although Lloyd LJ did not address the provisions of ss (3) separately, he did say, as I have noted above, that a claim for an account "<u>may</u>" be the right approach.

106. It is not clear whether the court in *Tim Martin* were addressed in any detail on the issue as to whether an account might be available to a beneficiary in the same way that an account is available to mortgagor. In any event in *Chopping*, against the background of the Court of Appeal's decision in *Tim Martin*, Senior Chancery Master Marsh rejected a claim by a beneficiary for an account where the beneficiary alleged the cost charged by solicitors administering an estate were too high. He said this:

> *"In this case, the claimant has not obtained an order for an account. She has no absolute right to such an order and does not, in any event, need one because full estate accounts have been provided to her. There is, therefore, no process of reviewing the expenses incurred by the defendants currently being undertaken by the court. The claimant has to justify the making of an order for an account. There must be a basis for such an order and, as Lewin explains, where full accounts have been provided, an order for an account must be based upon there being breaches of trust which have been established, or at least a case made out for further factual inquiry, before expenditure incurred will be investigated in detail. It is not enough, as here, for the claimant to ask for moderation of the professional fees the defendants have incurred and paid because they are entitled to the protection of section 15 of the 1925 Act. The claimant must show at least some basis for suggesting a breach of trust has occurred, or that the charges were improperly incurred, before an account or an inquiry will be ordered."*

[14] It notable in the context that the court has power under section 73 of the 1974 Act to make charging orders in favour of a solicitor even without the appear the need for any originating process, presumably of the general jurisdiction of the court over solicitors as officers of the court.

107. The Senior Master was not satisfied that the Claimant could establish any breach of trust. It is correct that he was not satisfied that costs which the claims sought to challenge were "*on their face*" untoward or excessive. However, in his conclusion he said this:

> "*I do not consider that the claimant has real prospects of obtaining the order she is seeking in this claim. In my judgment, she is not entitled, relying on Johnson and/or Allen, to an order seeking moderation of the professional fees paid by the defendants. Those cases were decided long before the protections contained in section 15 Trustee Act 1925 and section 31 Trustee Act 2000 were available. An entitlement to moderation is inconsistent with the statutory right to pay debts of the estate and to an indemnity without recourse save where there has been a breach of trust. The defendants are not obliged to show that they obtained best value when employing lawyers and accountants to act for them and they do not have to justify every element of the charges they incurred. They are entitled to an indemnity for expenses not improperly incurred. It is, of course, possible to envisage circumstances in which the executors have been substantially over-charged, and they have fallen below the standard of care that is expected of them in paying such excessive charges. However, in my judgment, the claimant's evidence (both hers and Mr Bacon's) falls well short of showing that the charges were improperly incurred or that there was a possible breach of trust*."

108. It seems to me to follow from this decision that an account would only rarely be of any use to a beneficiary who is complaining that the charges of the professional instructed to the administer an estate are unreasonably high. The extent of any challenge in a claim an account would therefore be far more limited than is provided for under section 70 of the Act and which, on a literal reading of section 71, might be understood to be available under this provision.

109. Further, that an account would not provide any meaningful relief appears to be confirmed by the decision of HH Judge Matthews, sitting as a High Court judge, in *Mussell v Patience* [2018] 4 WLR 57. The learned judge was concerned with the sufficiency of documents produced for the purposes of an account and said this at [16]:

> *In particular, the executor is not required at the outset to prove by his or her voucher(s) that the charge made is reasonably incurred or reasonable in amount. These are matters which may arise in the assessment of solicitors' costs, but they are not matters which arise—at least initially—in considering whether the executor may put the sum into the accounts. It is not necessary or the executor to defend the charges made by solicitors against the beneficiaries. That is what the system of assessment of solicitors' costs is for. As is well known, it is not only the direct client (here the executor) who may seek assessment of costs. In addition, third parties who in substance pay such costs may do so too. It would plainly be wasteful if, in every case, for their own protection, executors were to be obliged to engage the costs' assessment system down to the last penny before being able to enter the sum concerned in their accounts to their beneficiaries.*[15]

110. Ms Tew did not seek to persuade me that the decision in *Chopping* was wrong or that an account did provide an effective remedy to a beneficiary who considers the estate overcharged. Thus it seems to me that absent any breach of trust (to which a high bar applied)

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[15] See too, *Henchley v Thompson* [2017] EWHC 225 at [62]

if she were right about *Tim Martin*, there was little a beneficiary could do to challenge the costs of solicitors administering an estate. Her case is, as I have indicated above and as I have understood it, that that was the natural consequence of the decision in *Tim Martin*.

Conclusion on the issue as to whether the restrictions set out in paragraph 95 in *Tim Martin* apply

111. I accept Ms. Tew's point that the Court of Appeal did assume that the principle which it decided should apply to a ss(1) application should also apply to ss(3) application and thus that the restrictions that I have set out above should apply in an application, as here, for an assessment made by a beneficiary (as appears from passages at [2] and [71]). I also acknowledge, importantly for Ms. Tew's argument, Lloyd LJ's remark in respect of *re Brown* that "*nothing seems to turn on whether it was section 38 or section 39 that was relevant*."

112. It is clear however that I am not bound by these comments if they are not necessary to the decision (see *Halsbury's Laws* Volume 11 (2020) at 25 and 26, if citation were necessary). It also seems me to be clear for the reasons which I have set out above that such remarks were not necessary for the decision. I therefore take a different view from Cost Judge Rowley who considered that he was unable to distinguish the facts of *Tim Martin* (see *Brealey v Shepherd* [2021] 6 WLUK 732) and whose decision Ms. Tew urged me to follow. I consider that there is a proper basis for distinguishing *Tim Martin* and doing so without doubting the reasoning that led to the decision in that case.

113. Even if not binding, the remarks of the Court of Appeal require the greatest respect and are to be treated as highly persuasive. It is, accordingly, with some considerable hesitancy that I take the view that *Tim Martin* does not apply to this application.

114. The decision in *Tim Martin* concerned a different type of application governed by different wording from the one with which I am concerned. As I have said above it is not clear that the Court in *Tim Martin* was addressed on the differences between the two applications nor indeed was it necessary for this to occur. It seems to me however that there is force in the argument of Ms. Tew that some of the difference in the wording as between the two different applications is or may be explained as relating to provisions concerning the 'gateway' to an assessment and not relating the nature of the assessment. But there are other differences in such applications as is apparent from *re Brown*. Moreover it seems to me that *re Brown*, unlike *Tim Martin*, is a decision on the same facts as here.

115. I do not think it is open to me to say that because the Court in *Tim Martin* may be understood to have rejected the approach in *re Brown* when considering a ss (1) application that it follows such an approach cannot apply when considering a ss (3) application and that *Re Brown* was wrongly decided. It seems to me that *Re Brown* remains authority for the correct approach to be taken on a ss(3) application and is thus binding on me.

116. A different approach is to be taken in assessment under ss (3) from that which applies following ss (1) application; the concern of the court in carrying out an assessment under subsection (3) is to consider whether the costs are, to use the words of Lord Romilly MR, "*proper or necessary, or fit, for the administration of the estate*". To my mind Lord Romilly MR in *re Brown* to my, makes clear the approach is not the same where the person chargeable with the bill is not in a fiduciary relationship with an applicant. Thus, whilst the executor is the "*direct*" client of the solicitor (as HH Judge Matthew put it in *Mussell*) it is the reasonableness of the costs having regard to the interests of the estate (and ultimately the

beneficiaries) with which the court is concerned whoever applies. In short, and for the reasons further set out above, the justification for the restrictions that the Court held should apply in the context of ss (1) application do not, in my view, apply here.

117. Further and in any event, there seems to be good reason why I should conclude that the restrictions in *Tim Martin* do not apply, certainly if they are to have the limiting effect that has been attributed to them. I would not read the decision Court of Appeal in *Tim Martin* as indicating that there should be no relief available to a beneficiary who considers that the estate has been overcharged. To my mind a beneficiary should be entitled to seek an assessment of costs and the concerns which seem to underpin section 39 of 1834 Act remain. As I understand it, there can be no objection to a solicitor acting as an executor (whether in a professional capacity or otherwise) and any firm in which they are a partner or member being instructed on the administration of the estate. It would, I think be an odd thing if there could not, in these circumstances, be a proper scrutiny of the costs of the solicitors administering the estate. Indeed the mischief to which, it seems to me, the section is directed remains even where the executor is not a solicitor and where there is no evidence any collusion. The executor is assumed to pass on their liability for costs to the estate and the beneficiaries are, in effect, the paying parties. Although I have no specific evidence as to why the executor in this case has not challenged the bills (I should emphasise, for the avoidance of doubt, that no allegation of collusion has been made) there might be good or bad reasons for this, indeed just straightforward indifference in circumstances where the executor is not paying the costs.

118. Mr Gold did, I should say, indicate some substantial criticism of the executor's failure (as he saw it) to challenge the bills. He described it, in terms, as a dereliction of his duty. Ms. Tew denied that there had been any such failing; she said, relying on discounts offered in the bills (from the sums that might have been claimed on the basis of time sheets) that Mr. Biber had in fact challenged the bills. It was unclear to me that the discounts provided were in fact at his request (such discounts are not infrequently offered -not necessarily at the express request of the client) and I am not prepared to make any such finding on the limited basis of the evidence provided. But in any event these matters miss the point. In the normal case the beneficiary will not be able to put their case so high (ie as a dereliction of duty) and I do not see why a beneficiary should have to put their case so high in order to obtain an assessment of a bill.

119. There appears to me to be no good reason why the beneficiary should not be entitled to the same procedure for challenging a bill as the executor. The purpose of the section s 38 and 39 was to extend a quick and effective method of determining what it is due on a bill to a beneficiary: see *re Abbott* (1861) 4LT 576. The need, which section 71 of the 1974 Act sought to address, remains. Although there is from time to time perhaps a surprising amount of argument about whether an applicant is entitled to an assessment, the process of assessment itself remains, in general, quick and efficient. There are generally no written statements and the ordinary rules of disclosure do not generally apply. A formal Breakdown of the costs claimed in a bill is sometimes required; these are followed by Points of Dispute which set out the objections and thereafter there may be Replies (they are optional). It is intended to be and should be a relatively low cost exercise. A client who makes insubstantial challenges is liable to have to meet the solicitor's costs under the 1/5th rule; this is a powerful disincentive against frivolous challenges and a heavy incentive to consider carefully whether there is any proper basis to make a challenge. If a hearing is required then in the case of relatively low level bills, such as this, representation can be provided by costs draftsman or costs lawyers at

proportionate expense[16]. These procedures are far more geared to the nature of the dispute than CPR Part 7.

120. Further, it is seems to me that there is good reason why I should give effect to what seems to me the ordinary and natural meaning of section 71 (3). This latter point being to me of some significance in respect of a provision which, more obviously than most, falls to considered by lay people and not lawyers, when in a position of conflict with a lawyer.

B.3.3 If *Tim Martin* does apply, how does it apply?

121. Even if I were wrong in my conclusion as to the application for *Tim Martin* to a ss(3) application I am not satisfied that the restrictions set out in that case would deprive the Claimant of any meaningful or useful relief.

122. The first of the objections that may be taken under the blue pencil test, is in respect of those costs which are "*out with the scope of* [the] *liability"* of the beneficiary (such objections were considered by the Court of Appeal to be outside a normal assessment following *In re a Solicitor* [1936] 1 KB 523, see [62][17]). In the context of this application such an objection might be said to include the objection that the bill includes costs which were incurred by the executor in his personal capacity. There are other costs which are sometimes claimed in bills but which might be said to be outwith a beneficiary's liability for costs, such as work done by the solicitors dealing with their own charges or costs which are not covered by the terms of the retainer (and which might include costs for work done before a retainer is entered into). I have above identified some costs that may possibly be caught by this objection but I cannot exclude the possibility that there may be more. It may not be possible to see whether costs are outwith the liability for the executor or beneficiary until a reasonable breakdown is provided (or indeed until inspection of the papers).

123. Further, the blue pencil test does expressly permit a client to take an objection to "*items which are only allowable as between client and solicitor on a special arrangement basis"* (see [57] and [83] of *Tim Martin*). Whether costs are allowable under such an arrangement requires a consideration of the presumption of unreasonableness in r 46.9 (3) (b). If costs are of an unusual nature or amount then unless the solicitors tells the client that as a result the costs might not be recovered from "*the other party*" they are presumed unreasonable. Only if the client then agrees to the costs, providing a "*special authority*" (see [74]) would the costs be recoverable.

124. Lloyd LJ appears to indicate (at [83]) that a third party borrower could be the 'other party' for these purposes and on this basis it would seem to follow that a beneficiary (or the estate) could also be treated as the 'other party'. The objection permitted under this test is against any item which is "allowable" by way of the special arrangement and thus applies whether or not there was any such arrangement. Since the objection appears to apply to items which are 'unusual' in amount or nature whether there was in fact a special arrangement or not, it might follow from the apparent breadth of the term 'unusual' that this element of the blue pencil test could also permit significant challenge.

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[16] If there are substantial arising they are identified and addressed by tailored directions at the direction hearing normally within a matter of weeks of issue.

[17] I note in passing that Court of Appeal subsequently found *In re a Solicitor* to per *incuriam*, see *Bentine* (see [21])

125. Whether hourly rates might in principle be objected to if they are 'unusual', the objection which appeared at the forefront of Mr. Gold's concern is the discrepancy of the costs claimed with the estimate and that is, at least arguably, encompassed by the '*special arrangement'* objection: it might be said the reasoning of the Senior Costs Judge in *ST v YZ* in respect of costs claimed in excess of *inter partes* budgets, should also apply to an estimate given to a client thereby rendering cost claimed in excess of an estimate 'unusual' for the purposes of the presumption at 46.9 (3) (c).

126. Moreover if, as I understand to be accepted, the Claimant can take any point that could have been taken by the executor it is not easy to see that the limitation would have any substantial effect upon an assessment. Applying *re Brown*, if I am right, the same approach applies to quantification whether it is the executor or beneficiary who applies. Indeed whether *Re Brown* is correct on this point or indeed whether or not I have interpreted it correctly, it seems to me there are quite a range of possible objections that could have been taken by the executor. The concern in this case may not be so much the hourly rate; it is at least in part the extent of the involvement of the higher grade fee earners at substantial rates in the administration of the estate and the amount of time spent by those charging at senior fee earner rates, indeed at the lesser rates, which may be the concern. It is not clear to me, without being addressed on this matter specifically that the rates are themselves necessarily objectionable in respect of an estate of this value. But at the risk of stating the obvious, the hourly rate is only one component of a claim for costs (whether *inter partes* or between solicitor and client). In general the higher the hourly rate more experience and efficiency might be expected of the fee earner, indeed in many instances the more the role of the senior fee earner is expected to supervisory only and the less the senior fee earner can reasonable be involved in day to day work. Whether or not the hourly rates are themselves challenged, these sorts of objection are plainly open to a client in a solicitor/client assessment and these are the type of points which could have been taken by the executor.

127. It is not necessary for me to deal on a granular level with the terms on which an assessment would take place on the assumption *Tim Marti*n applied. However, at the risk of oversimplifying matters, it is not at all clear that any full and fair explanation that may be required for the purposes of the presumption or reasonableness (at r 46.9 (3) (a) and (b)) would differ that much from the explanation that is required to avoid a presumption of unreasonableness under r 46.9 (3) (c)[18]). Indeed it is not clear to me that the application of any of these tests in a conventional solicitor/client assessment would lead to a different result from the application of the approach in *re Brown* in determining the reasonableness of the costs.

128. In short, whilst I have no doubt that the restrictions in *Tim Martin* can in many cases severely limit the challenges that may made, as Cavanagh J observed in *Brealey* at [59] (albeit strictly obiter) and as illustrated in *Tim Martin*, I am not satisfied that even if they applied in this case they would prevent a meaningful assessment of the costs with the potential for significant benefit to the Claimant.

B.4. How should the discretion under Section 71(4) be exercised?

B.4.1 When were the bills 'paid'?

129. It appears from the schedule attached to the first witness statement of Mr. Steggles,

[18] Or any explanation required having regard to the SRA obligations referred to in *Belsner* ([14] and [80])

partner of Defendant, dated 7 July 2022, and as have noted above, that money in satisfaction of the bills was transferred to the solicitors from the estate immediately after delivery or on delivery of the bills. What is not so clear is whether and/or when the payments out of the estate in respect of interim bills were authorised or approved. Mr. Steggles says in his witness statement:

> "*On most occasions when interim accounts were raised, we confirmed with Mr Bieber that he was happy for the fees to be settled from the Estate funds we held on account*." (my underlining)

130. It is asserted in evidence that the final Estate Accounts were approved by Mr Biber on 9 March 2021 and by Ms Peggs on 10 May 2022 (such accounts referring to the payments made to the solicitors). The final Estate Accounts are also exhibited to the witness statement of Mr Steggles. They were prepared to 23 March 2021, so it is not at all clear that they could, as asserted, have been approved by Mr Biber on 9 March 2021. It appears that the final Estate Accounts were sent out in early April 2021 and it appears there was extensive discussion and correspondence with Mr Biber in the course of that month, although precisely when Mr. Biber approved the final accounts or indeed earlier accounts (and thus authorised payments in accordance with the decision in *Menzies*) is somewhat unclear to me. Notwithstanding these concerns, for these purposes I have assumed that 'payment' in the sense required did take place in respect of all but the last bill (of August 2021) over 12 months prior to the issuing of the application so that the executor would not have been able to challenge them even if there had been special circumstances.

B.4.2 The test to be applied

131. Per *McIlwraith*, I have a discretion to allow an assessment even assuming the bills were all 'paid' in the sense required over 12 months prior to application. Ms Tew's case was, at least initially, that it was necessary for the Claimant to establish some special circumstances precluding a more timely application. She relied in particular on the final sentence of the passage in *McIlwraith* to which I have referred (at [21]). If it were possible, she argued, for the Claimant to have issued an application before he did (and following delivery of the bills) that was effectively a bar to assessment. The bills in this case were emailed to the beneficiary on 3 September 2021 and there was, she said, an opportunity to make the application before the date when one was in fact made. On this basis I should refuse the application.

132. As I have noted above it seems to me clear that any issue as to how the discretion under section 71 (4) was to be exercised did not need to be addressed in the reported decision of *McIlwraith* (the only question in the preliminary issue was whether there was a discretion) and hence, it seems, should be treated as obiter in this judgment (I was not provided with any decision as to how the discretion may have been exercised).

133. I agree that that it must be right that the discretion is to be exercised having regard to the need for finality, as Mr. Tew rightly in my view stressed and is apparent from the decision in *Patel* above. Nevertheless I do not think that the passage in *McIlwraith* on which she relies can have the effect for which she contends.

134. There seems to be an inherent difficulty in requiring a beneficiary literally to establish circumstances precluding a more timely application since it will almost always be possible,

save in the event of an application made immediately after delivery of bills, to have made an application earlier. And almost always it could be said that it would have been possible to have made the application earlier than it was made. If this were an effective response to an application, it seems to me it would render the assessment procedure ineffective at least in many cases. Thus, it seems to me, it cannot follow that in every case where an application could have been made sooner, the remedy is precluded because almost every application would in consequence be refused.

135. Further, I would not read the passage in *McIlwraith* which she relies upon the same way as Ms Tew. Not only must the learned judge have had in mind the first point I have made above, but I think the final sentence (which Ms. Tew relied upon) if read in context, does not bear the meaning she attributed to it. The learned judge emphasised that the test was discretionary in nature; it involves a balancing exercise as the court is required to consider whether "*the considerations of finality which justify the rule in respect of the chargeable party should not prevail"*. That seems to be inconsistent with a test that requires the beneficiary to establish that they could not have made an earlier application. Further, the reference to the need for "special circumstances" and the meaning of this term in the context of a section 70 application indicates to me that he did not in fact have in mind such a high bar as Ms Tew has contended for.

136. I would, accordingly, reject the formulation as initially advanced by Ms Tew whilst accepting, of course, that delay is an important matter for me to consider in the exercise of discretion. In the event in her final written submissions Ms. Tew accepted that a finding under section 70 requires a value judgment which requires the court to weigh all the relevant factors in aggregate: per *Kundrath* and *Patel*, see above. She also accepted, properly in my view, that in accordance with these decisions and the decision in *Menzies* whilst the court is bound to consider whether or not there were special circumstances precluding a timelier application it would not prohibit a court from ever exercising its discretion if there were no such special circumstances.

B.4.3 The allegation of delay and whether there are special circumstances explaining any delay and/or justifying an assessment

137. The Claimant says the invoice and breakdowns on 3 September 2021 supplied to him after several requests for copies of the defendant's invoices. When they were provided, he says, this was the first opportunity he had to properly consider the Defendants' charges.

138. Thereafter and before engaging solicitors to issue proceedings the Claimant says he tried several times to engage with the Defendant regarding their fees. On 1 October 2021, he emailed the senior fee earner at the Defendant solicitors. He said this:

> " *I can only express my surprise at the extent of your firm's fees given not your original fee estimate, but also the fact that you and I know that this was* ***not*** *a complex matter***.**"

139. He went on to ask how the Defendant could, as he put it, "*begin to justify*" what he said was a "*vast difference*" between the original fee estimate and the figure the defendants were now seeking to charge, a factor he put at almost five times. He said that he had "*taken the opportunity of seeking the initial opinion and advice of a very experienced law costs draftsman, who shares my view that your purported charges appear to be grossly excessive*." He asked whether the solicitors could "*significantly*" reduce their fees to "*what I would deem to be a fair and reasonable sum*", failing which "*you would leave me with no alternative other than to*

seek a Remuneration Certificate and/or to seek a detailed assessment". It was suggested by the Claimant that this was part of an attempt to initiate discussion about the sums claimed on the bills.

140. The Defendant was, it would appear, not willing to enter into any discussion about their bills and having initially told the Claimant that his next step would be to make a complaint under the Defendant's complaints procedure (which, it seemed to have been later may have accepted may not have been appropriate) on 19 October 2021, Mr Walker, the senior fee earner, told the Claimant that his remedy would be to apply for an assessment.

141. The attempt, it seems to me, on the part of the Claimant to engage the Defendant in some discussion with a view to resolving any issue before issuing an application does not seem to me to me a matter that should necessarily be wholly deprecated. The Defendant's initial criticism appeared to me that the Claimant should have sent a formal pre-action protocol letter: although somewhat forthright in his criticisms of the charges in correspondence, it is not entirely clear to me what more might have been said by way of detail by him in the absence of adequate information in the bills or otherwise explaining why the estimates had been exceeded.

142. The Claimant and Mr. Gold, who now represents the Claimant as costs draftsman, are business partners. I understand that they run a commercial debt recovery business. In his witness statement of 3 November 2022 the Claimant explained that Mr. Gold has been unwell. Although the nature of the illness is not specified nor have I been provided with a medical report nevertheless I understand that he was in pain and unable to focus on work. As a result, the Claimant says that he was obliged to manage single-handedly the business. Further the Claimant says he also got married on 10 September 2021 and for the most part was out of the country relocating to the USA where his wife lives and works. All these matters were said to be very consuming of his time and that this explained the delay. He accepts he could have instructed another costs specialist, but he wanted to instruct Mr. Gold as he says he had first hand experience of his ability.

143. Mr Gold's health improved, it appears from the Claimants witness statement, sufficiently for him to engage in work related matters in the spring of 2022, when he was able to deal with this matter. The Claimant then instructed solicitors SCS law who in turn engaged Mr Gold: an application was drafted and sent to the SCCO for issue on 13 April 2022. It appears that the Part 8 application was returned by the court, possibly for the application to be uploaded on to CE-file. It was in any event application issued, as I say, on 25 April 2022.

144. Faced with the decision in *Tim Martin* it might perhaps be understandable that some time was taken in considering the merits of an application and indeed what sort of application might be made. But as the claim was initially advanced under section 70 it is not clear that this particular matter in itself presented any difficulties, nor is this said have been the cause of any problem. Nevertheless it seems to me that it was reasonable to instruct solicitors and to take advice of a cost specialist, indeed Ms Tew did not appear to take issue with the instruction of a cost specialist. Ms Tew says that having had the benefit of some input from a costs specialist in September 2021 the Claimant could have approached another costs specialist and that effectively the Claimant took no adequate action to protect his own interests by issuing the application; he knew that Mr Gold was unable to act due to his illness, he had received advice on the bills following receipt and could and should have taken steps to issue the application more promptly.

145. Further, Ms Tew stated that there was some substantial background to the delivery of the bills prior to the service of the bills and that he had all the information he required on receipt of the bills. Ms Tew took me through the matter in some detail. It appears that the Claimant was provided with interim accounts and draft Final Estate accounts which set out the sums claimed in the bills by way of costs by the Defendant. Final accounts were provided on 8 April 2021 with a request for him to confirm his approval; a request with was reiterated on 25 June 2021 with a notification that "*failing which we will assume that the accounts are approved and will remit your final distribution to the account to which we sent previous distributions*" (and complaint was made of his failure properly to respond to this).

146. I take into account these matters and that the Claimant had seen the Estate accounts; he knew the amount of costs that the solicitors had claimed; there had also been some substantial interaction between him and the Defendant about costs. It seems to me however that the breakdowns which accompanied the bills would not have conveyed as much to the Claimant as it would to be the executor, who will have had a much greater understanding of the charges.

147. I have already set out my reasons for rejecting the formulation of the test which underlay Ms. Tew's initial submissions. If I am required to find not merely special circumstances in the sense which they are commonly understood but also special circumstances relating to the delay I would so find. I am satisfied that there were such special circumstances present in this case. It was not a complete obstacle to applying that Mr. Gold was unwell but I can see that it would have presented difficulties, not perhaps least of which would be the time and expense of instructing other costs specialist. I would accept that ultimately another costs specialist might have been instructed but the circumstances relied upon by the Claimant are, in any event, to my mind sufficient explanation to justify my conclusion that there are individually (in respect of the delay) and in aggregate special circumstances which justify allowing an assessment of the bills.

148. Both parties would have anticipated the likelihood of an application for assessment some years prior to the sending of the bills. It appears that as early as November 2019, the Claimant asked for justification of the sum claimed and asserted that "*ultimately, a detailed assessment may be necessary"*.

149. In Ms. Tew's written submissions of 12 January 2023 the Defendant asserted for the first time there was prejudice caused by the delay. It seems to me too late to do so and, indeed unfair if I were here to allow the Defendant to do so. I had invited submissions on 9 January 2013 only on the correct legal approach to the issues arising in the light of four authorities which had not previously referred to (including *Patel* and *Kundrath*): no application was made by the Defendant to go beyond this (nor any explanation for the lateness of the assertions).

150. In any event I would reject the assertion that that there has been any serious or significant prejudice.

151. It is now alleged that the Defendant fee earners are required "*to piece together the events throughout the retainer where possible*", the suggestion being, as I understand it, that delay will have impaired recollection of the fee earners (albeit this is not said in terms). Further, it is said that the challenge had been made to earlier interim bills during the course of retainer the Defendant would have had security by way of funds in the client account but, as I understand it, because the estate has now been distributed it no longer has such security.

152. It seems to me, that if there are any difficulties faced by the fee earners of the sort alleged it is likely to be because of a failure to make an adequate record on time sheets, or in contemporaneous attendance notes, of the work being done. Plainly an assessment of costs, rarely, turns on any ex post facto witness evidence as to what occurred.

153. I am not satisfied that there is any real or realistic basis for criticism of the decision not to issue proceedings prior to the delivery of the bills on the Claimant and in my judgment there is no force in the second point either. The Defendant's criticism on the issue of delay had focused on the period after they had sent the bills to the Claimant (following, it would appear, a number of requests for the bills by the Claimant); by the time the bills had been provided the final distribution had already taken place. Moreover even accepting that a beneficiary could apply for an assessment of a bill before they have been provided with a bill, it does not strike me as realistic to criticise the Claimant for not doing so (not least because of the function that a bill is intended to perform). Further, the evidence suggests it would have been anticipated that the Claimant may well wish to seek an assessment in August 2021 when it appear the final distributions took place (and it is not clear why the issue was not addressed then by the Defendant). Indeed given that the issue of security could have been (as it commonly is) raised at the hearings to decide whether and on what terms an assessment is to be ordered (in this case the hearings in October and November), I do not accept that that security was a real or proper concern. Nor, it seems to me, is it appropriate for me to take into account at this stage in this determination: if it had been raised as an issue and the point had any substance to it, it could have been responded to by the Claimant, who might, I suppose, have offered it. I would add that I would expect the costs to be involved on an assessment of costs of bills of this size and nature to be modest.

C. Conclusion

154. The Claimant has, of course, a substantial interest in the sums payable by the estate by way of costs. I have found that there are special circumstances justifying an assessment. I accept, of course, that the Defendant is entitled to finality and certainty as regards the payment of its bills. I have had regard to the need for finality generally and the apparently very limited nature of any challenge that the executor could now make and the time limits in section 70 (4). Nevertheless to refuse the relief sought on the basis of the delay alleged would in my judgment be a disproportionate response.

155. Whether or not it is necessary for me to consider whether any delay has caused prejudice in order for the delay to weigh against a finding of special circumstances (Ms. Tew says it is not necessary) it seems to me, that the discretion should be exercised in the Claimant's favour. Indeed even if there were prejudice of the sort asserted it seems to me that weighing such factors with all other matters I would nevertheless still conclude that there are in aggregate special circumstances justifying an assessment and that I should exercise my discretion in the Claimant's favour.

156. I should add, for the avoidance of doubt, that I reach this conclusion on the basis that the triggering event for the purpose of time running is the service of the bills on the <u>executor</u>. It seems to be that rather obviously difficult to expect a beneficiary to challenge a bill which they had not seen, but my decision is not based on service of the bills on the Claimant as being the triggering event.

157. Accordingly, in the exercise of my discretion and bearing in mind all the circumstances which include serious concerns as to substantial overcharging, I will order an assessment of all the bills.

158. I am grateful to both advocates for their assistance.