



Neutral Citation Number [2026] EWHC 703 (SCCO)
Case No: SC-2024-APP-001104

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 24/03/2026

Before :

COSTS JUDGE LEONARD

Between :

Alberto Joseph Safra

Claimant

- and -

Wilmer Cutler Pickering Hale and Dorr LLP

Defendant

Nicolas Bacon KC and Simon Teasdale (instructed by **Quillon Law LLP**) for the **Claimant**

Roger Mallalieu KC (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for the **Defendant**

Hearing dates: 20, 21 and 22 October 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE LEONARD

Costs Judge Leonard:

1. On 17 December 2024 the Claimant filed an application for the assessment of a series of invoices rendered to the Claimant by the Defendant between 10 December 2022 and 17 September 2024. The invoices were rendered in US dollars and, inclusive of disbursements, came to US \$35,343,213.96. They represent work undertaken by the Defendant for the Claimant pursuant to a contract of retainer (“the Engagement Letter”) entered into by the parties on 2 September 2022 and subsequently amended. The claimed, unpaid balance of the invoices is US \$18,923,316.10.

The Issues to be Addressed in this Judgment

2. The parties have identified a number of preliminary issues to be determined for the purposes of the Claimant’s application, and a consent order dated 5 March 2025 provided for the hearing of those issues.
3. Under the heading “The Nature of the Retainer” they are:
 - (a) Does the Engagement Letter dated 2 September 2022 constitute a contentious business agreement within the meaning of section 59 of the Solicitors Act 1974?
 - (b) If it does, was it fair and reasonable (and should it therefore be enforced or set aside)?
4. Under the heading “The Status of the Invoices” they are:
 - (c) Was the Defendant entitled to deliver interim statutory bills to the Claimant under the terms of the Engagement Letter?
 - (d) Did the Invoices, as delivered, amount to interim statutory bills (compliant with the express and implicit requirements of such bills)?
 - (e) In light of the answers to the above questions, when were the invoices (individually or collectively) delivered to the Claimant as a statutory bill or bills for the purposes of the Solicitors Act 1974?
5. Under the heading “Entitlement to Assessment” they are:
 - (f) When and to what extent have any statutory bills been paid for the purposes of s.70(4) of the Solicitors Act 1974 (if at all)?
 - (g) To the extent required, are there special circumstances to justify an order for assessment of the Invoices pursuant to s.70(3) of the Solicitors Act 1974?
 - (h) In light of the answers to all the questions above, should the court make an order for assessment of all or any of the

Invoices, pursuant to the applicable provisions within Part III of the Solicitors Act 1974?

- (i) If an order for assessment is to be made, should it be made subject to any conditions?
6. The parties' positions on each of the above issues have been set out in Statements of Case, served under the terms of the consent order of 5 March 2025, as expanded upon by the detailed submissions of Mr Bacon KC and Mr Teasdale for the Claimant, and of Mr Mallalieu KC for the Defendant. For simplicity's sake I will refer to their submissions as those of the Claimant and the Defendant.
 7. Those submissions have been of great assistance to me and I am (as ever) grateful to counsel for that assistance. In conjunction with the statements of case they do, on necessity, cover a lot of ground. I have attempted to reproduce both the Statements of Case and the submissions as comprehensively as is necessary to understand each party's case, but I believe that I have taken account of everything that has been said on behalf of each party (including case law), whether I specifically refer to it or not.

The Statutory Provisions

8. The statutory provisions referred to in the above list of issues are all provisions of the Solicitors Act 1974, and all references in this judgment to a section or sections refer to sections of the 1974 Act.
9. Section 87(1) defines "contentious business" as business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator. "Non-contentious business" means any business done as a solicitor which is not contentious business, as so defined.
10. Section 69 provides that no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements of the section, in particular as to signature and delivery. A solicitor's bill that complies with the requirements of section 69 and which meets additional criteria established by case law is referred to as a "statute bill" or "statutory bill".
11. The delivery of a statutory bill, in accordance with the requirements of section 69, has two important consequences. The first is that, after the expiry of a month (or sooner, if certain criteria are met) the solicitor can sue for the outstanding fees. The second is that the client can apply for assessment of those fees under section 70.
12. Section 70 empowers the court to order the assessment of a solicitor's bill on application either by the solicitor or by "the party chargeable with the bill" (usually the solicitor's client). It also imposes time limits upon any application by a client.
13. The pertinent provisions for present purposes are subsections (1) to (4):

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

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

(a) that the bill be assessed; and

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

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

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

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

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

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

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

14. Sections 59, 60 and 61 provide for a solicitor and a client to enter into an arrangement which is subject to a different statutory costs regime. Such an agreement is referred to as a contentious business agreement (“CBA”), and I will refer to the statutory regime in relation to such agreements as “the CBA regime”.

15. Subsection (1) of section 59, under the heading “Contentious Business Agreements”, reads:

“... a solicitor may make an agreement in writing with his client as to his remuneration in respect of any contentious business done, or to be done, by him (in this Act referred to as a “*contentious business agreement*”) providing that he shall be remunerated by a gross sum

or by reference to an hourly rate, or by a salary, or otherwise, and whether at a higher or lower rate than that at which he would otherwise have been entitled to be remunerated...”

16. The provision for a CBA to allow for remuneration by reference to an hourly rate (such agreements being referred to in this judgment as “hourly rate CBAs”) was added to section 59(1) by section 98 of the Courts and Legal Services Act 1990, as were the references to hourly rate CBAs in sections 60 and 61, referred to below.

17. There are similar provisions, at section 57, for Non-Contentious Business Agreements (“NCBAs”).

18. Section 60 sets out the effects of a CBA. As between solicitor and client, they are to be found in subsections (1) and (4):

“(1) Subject to the provisions of this section and to sections 61 to 63, the costs of a solicitor in any case where a contentious business agreement has been made shall not be subject to assessment or (except in the case of an agreement which provides for the solicitor to be remunerated by reference to an hourly rate) to the provisions of section 69...”

(4) A contentious business agreement shall be deemed to exclude any claim by the solicitor in respect of the business to which it relates other than—

(a) a claim for the agreed costs; or

(b) a claim for such costs as are expressly excepted from the agreement...”

19. Section 60 is expressly subject to the provisions of sections 61-63. Sections 62 and 63 has no bearing upon the issues I have to decide. Section 61 does.

20. Section 61 is headed “Enforcement of contentious business agreements” and it reads:

“(1) No action shall be brought on any contentious business agreement, but on the application of any person who—

(a) is a party to the agreement or the representative of such a party; or

(b) is or is alleged to be liable to pay, or is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates,

the court may enforce or set aside the agreement and determine every question as to its validity or effect.

(2) On any application under subsection (1), the court—

(a) if it is of the opinion that the agreement is in all respects fair and reasonable, may enforce it;

(b) if it is of the opinion that the agreement is in any respect unfair or unreasonable, may set it aside and order the costs covered by it to be assessed as if it had never been made;

(c) in any case, may make such order as to the costs of the application as it thinks fit.

(3) If the business covered by a contentious business agreement (not being an agreement to which section 62 applies) is business done, or to be done, in any action, a client who is a party to the agreement may make application to a costs officer of the court for the agreement to be examined.

(4) A costs officer before whom an agreement is laid under subsection (3) shall examine it and may either allow it, or, if he is of the opinion that the agreement is unfair or unreasonable, require the opinion of the court to be taken on it, and the court may allow the agreement or reduce the amount payable under it, or set it aside and order the costs covered by it to be assessed as if it had never been made.

(4A) Subsection (4B) applies where a contentious business agreement provides for the remuneration of the solicitor to be by reference to an hourly rate.

(4B) If on the assessment of any costs the agreement is relied on by the solicitor and the client objects to the amount of the costs (but is not alleging that the agreement is unfair or unreasonable), the costs officer may enquire into—

(a) the number of hours worked by the solicitor; and

(b) whether the number of hours worked by him was excessive.

(5) Where the amount agreed under any contentious business agreement is paid by or on behalf of the client or by any person entitled to do so, the person making the payment may at any time within twelve months from the date of payment, or within such further time as appears to the court to be reasonable, apply to the court, and, if it appears to the court that the special circumstances of the case require it to be re-opened, the court may, on such terms as may be just, re-open it and order the costs covered by the agreement to be assessed and the whole or any part of the amount received by the solicitor to be repaid by him...”

The CBA Regime

21. The Defendant, referring to the fact that there appears to be little detailed jurisprudence on the workings of section 61(4B), offers an analysis which I will endeavour to summarise as follows.
22. Section 60(4B) only applies “on the assessment of any costs”, and section 60(1) (subject to sections 61 to 63) provides that costs incurred under a CBA shall not be subject to assessment.
23. A solicitor who has acted under a CBA may rely upon section 60(1) to resist an order for assessment. If however the client persuades the court that the CBA is unfair or unreasonable then the CBA will be irrelevant and the assessment will proceed.
24. If the client does not allege that the CBA is unfair or unreasonable and the solicitor does not resist an order for assessment, then the costs will be assessed by reference to the CBA. If for example it is a fixed fee CBA, then the costs will be assessed accordingly. If it is an hourly rate CBA, the solicitor may rely upon the CBA to limit the court’s enquiry, in accordance with section 61(4B), to the number of hours worked, and whether they were excessive.
25. If however the client attempts to but fails to persuade the court that the CBA is unfair or reasonable, section 61(4B) has no application. That is because it expressly applies only where the client is not making such an allegation. It does not apply where the client has attempted to but failed in establishing that the CBA is unfair and unreasonable, because the wording of section 61(4B) does not extend to that.
26. In consequence, where the client alleges that the CBA is unfair or unreasonable but the court concludes otherwise, then the CBA stands and, in accordance with section 60(1), there can be no assessment.
27. I mention that analysis not because it is necessary for me to say whether I agree with it, but because it has some bearing upon some of my conclusions. I would only observe that I do not think that it can be right, as the Defendant contends, to say that if a client has at any point taken issue with the fairness or reasonableness of a CBA, then the limited enquiry provided for by section 61(4B) cannot take place. Section 61(4B) provides for such an enquiry where the client is not alleging that the agreement is unfair or unreasonable. One can see the sense in that. There would be no point in proceeding with such an enquiry until that issue, if raised, has been determined. Section 61(4B) does not however provide for such an enquiry only where the client has never alleged that the agreement is unfair or unreasonable.

Witness Evidence

28. Two witnesses have given evidence for the Claimant. The first is Mr Anderson de Brito Coltro (“Mr Coltro”), an Executive Superintendent at ASA, a financial institution founded by the Claimant, with 18 offices in Brazil and the United States. Mr Coltro’s first language is Portuguese and his command of

English is, I understand, limited. He has given his evidence through an interpreter.

29. The second witness for the Claimant is Mr Mark Hastings, a solicitor and partner in Quillon Law LLP, the Claimant's solicitors. Mr Hastings is not in a position to give factual evidence on any of the issues considered in this judgment, as he was not himself involved at the relevant time. His witness statements refer to and comment upon the documentary evidence and the Defendant's witness evidence. In effect they comprise a series of submissions on undisputed documentary evidence, rather than offering evidence.
30. The Defendant's witness is Mr John Trenor, a registered foreign lawyer and a partner in the Defendant firm who, together with his fellow partner Gary Born, led the team that represented the Claimant throughout the period of the Defendant's retainer.

The Background

31. The Claimant is the son of Mr Joseph Safra, now deceased, who in his lifetime had been the wealthiest person in Brazil and one of the wealthiest people in the world. Mr Joseph Safra had founded Banco Safra, now one of the largest private banks in Brazil, and the Safra family owned many financial institutions and other companies in Brazil and around the world.
32. I understand it to be common ground that the Claimant is a sophisticated, well-educated businessman. He has acted in senior management roles at large banks, including Banco Safra, and as mentioned above is the founder of ASA. The Claimant, as well as his various advisors and representatives, is highly experienced in managing financial and commercial matters, including the instruction of and dealings with lawyers.
33. Mr Joseph Safra's death in December 2020 resulted in what has been described in international media as a "bitter multibillion-dollar estate feud" between members of the Safra family and "one of the largest-ever inheritance battles that played out in courts from New York to Geneva".
34. The disputes within the Safra family concerned Mr Joseph Safra's US \$23 billion estate. They arose between the Claimant, on the one hand, and members of his family and family-owned companies, on the other.
35. These disputes, which involved billions of US dollars' worth of assets, formed the subject matter of the contract of retainer between the Claimant and the Defendant which lasted from September 2022 until July 2024, when the Safra family disputes were settled.
36. The Safra family disputes were the subject of five arbitrations ("the Arbitrations"). The Claimant pursued four of the Arbitrations in the London Court of International Arbitration (LCIA) against members of the Claimant's family, family-owned companies, and officers and directors of those companies (LCIA Arbitration Nos. 225494, 225623, 225630, and 236017). The fifth arbitration was initiated by Banco Safra against the Claimant as

respondent (LCIA Arbitration No. 225552). The Arbitrations were consolidated before a single Tribunal with separate procedural timetables.

37. The Safra family disputes also gave rise to various litigation and other proceedings between the Claimant and other family members, family-owned companies, and corporate officers and directors in Brazil, the Bahamas, the United States, Switzerland, and Gibraltar.
38. Prior to and during the Claimant's engagement of the Defendant, the Claimant had the benefit of representation by other prominent law firms, including E. Munhoz Advogados ("Munhoz Advogados") as Brazilian co-counsel and Quinn Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel") in New York, Geneva and London, as well as other firms in local jurisdictions.

The Parties' Initial Discussions

39. The Defendant enjoys a reputation as one of the world's leading international arbitration practices. On 25 August 2022 Mr Gary Born, a partner in the Defendant firm, received an email on behalf of the Claimant from Mr Eduardo Munhoz of Munhoz Advogados. Mr Munhoz enquired as to whether the Defendant could represent the Claimant as lead counsel in relation to the Arbitrations, with Quinn Emanuel and Munhoz Advogados to play supporting roles.
40. According to the Legal 500, Munhoz Advogados practices in litigation (court disputes and arbitration), corporate restructuring and corporate law. Mr Munhoz is the founding partner of Munhoz Advogados and is a professor of the Law School of the University of Sao Paulo.
41. Following confirmation on 27 August 2022 that the Defendant was in a position to act for the Claimant the parties entered negotiations which culminated in the Engagement Letter. The Claimant was represented in those discussions by Mr Munhoz and by Mr Eduardo Sosa Filho ("Mr Sosa"), who worked with the Claimant in ASA Investments.
42. Mr Born's colleague, Mr Claudio Salas, sent to Mr Munhoz a draft form of Engagement Letter which provided for hourly rates to be specified, but (as they were still under discussion) left the figures blank. Mr Munhoz confirmed that the Claimant accepted the terms of the letter and asked for a copy "completed with the value of the fees".
43. Mr Salas invited Mr Munhoz to let him know approximately what Quinn Emanuel had been charging for the case, "as we think we should be in the same ballpark. Of course, if you have different guidance on the rates let us know."
44. Mr Munhoz advised Mr Salas that Quinn Emanuel's "most expensive" hourly rates were US \$2,030 (New York City) and US \$1,775 (London). Mr Salas then sent to Mr Munhoz a revised draft complete with hourly rates:

“Our current rates for matters such as this range from \$1600 to \$2100 for partners, \$1200 to \$1400 for most counsel, \$800 to \$1150 for associates, and \$350 to \$650 for visiting foreign lawyers and paralegals...”

45. Mr Sosa responded:

“A consideration regarding the proposal. As we are putting together a team of lawyers from different offices, we will often have a duplication of fees for this reason, I would like to request a review of the proposed fees for US\$1360 to US\$ 1780 for partners, US\$1020 to US\$1190 for most counsel, US\$700 to US\$1035 for associates, and US\$350 to US\$520 for visiting foreign lawyers and paralegals...”

46. Mr Born responded proposing hourly rates which were ultimately incorporated in the finalised Engagement Letter (and set out below). Mr Sosa confirmed agreement on 1 September 2022.

The Contract of Retainer

47. The finalised Engagement Letter was dated 2 September 2022 and signed by both parties on that date. It was addressed to the Claimant by Mr Born and included these provisions:

“We are pleased that you have asked Wilmer Cutler Pickering Hale and Dorr LLP (“WilmerHale” or “the Firm”) to serve as your legal advisers, and we look forward to the opportunity to act for you. This letter will confirm our discussion with you regarding the engagement and describe the basis on which our Firm will provide legal services to you. If you have any questions about any of these provisions, do not hesitate to call, and if any of these terms are not acceptable to you, please notify us immediately...”

Our client in this matter will be Alberto J. Safra (“you”). We will be engaged to advise you in connection with one or more arbitrations seated in London regarding shareholder disputes related to businesses owned by you and your family, subject to particular conflicts clearance in the usual course (the “Matter”)...

Our acceptance of this engagement does not involve an undertaking to represent you in any other matter. If you seek our advice in any future matters and if we agree to undertake such representations, the terms and conditions set forth in this letter shall apply to all future matters unless otherwise agreed to in writing...

I will be the partner primarily responsible for carrying out work on this Matter and will be assisted by the lawyers listed below. As the Matter progresses, I may seek assistance from other staff, as appropriate. I will have overall supervisory responsibility for the legal team and will be responsible to you for ensuring that a

proper service is provided and for any queries concerning fees. Do not hesitate to call me for any reason at any time. If I am unavailable, please leave a message with my secretary, Katrin Frach...

Our fees are ordinarily based on hourly rates for lawyers and, where applicable, other professionals and paralegals and the time they spend on client matters. We review and may revise our billing rates periodically, and changes in billing rates for personnel working on a matter may occur during the course of the representation. We will notify you of any changes in billing rates as and when they occur. Our current rates for matters such as this range from \$1400 to \$1830 for partners, \$1075 to \$1270 for most counsel, \$715 to \$1055 for associates, and \$350 to \$520 for visiting foreign lawyers and paralegals...

The current hourly rates of the senior lawyers who will work on this Matter initially are:

Gary Born (partner) \$1830

John Trenor (partner) \$1625

Sarah Ganz (special counsel) \$1270

Claudio Salas (special counsel) \$1215

In addition to legal fees, we will also invoice you for any disbursements and other out of pocket expenses which typically include courier, photocopy charges, travel expenses (which will include business class air fares), counsel's fees, overseas lawyers' fees and required secretarial overtime...

We will ordinarily send you monthly statements for work performed and expenses recorded on our books during the previous month. If you have any requests with respect to information you want to have included in our statements, please advise us promptly. Please review our statements when you receive them so that any questions you may have are raised in a timely fashion. All such statements are due and payable upon receipt of our statement, and we reserve the right to discontinue providing legal services, after notice, if our statements are not paid promptly. If you do not pay the bill within 30 days, we may charge interest on any sums outstanding at the rate of 8% per year, calculated on a daily basis, from the date on which payment was due...

We are confident that we will provide you with a high quality service. However, if you have any queries or concerns about our work for you, please take them up first with Stephen Pollard, the Firm's Complaints' Partner for the London Office. If that does not resolve the problem to your satisfaction, then please speak to Franz

Schwarz or a member of the Firm's Management Committee.

Our Firm has a written complaints handling procedure, a copy of which is available upon request. You may also have the right to refer an unresolved complaint to the Legal Ombudsman within a period of six months from the date of our final complaint response letter. The Legal Ombudsman can be contacted by telephone on 0300 5550333, by email on enquiries@legalombudsman.org.uk or by writing to the Legal Ombudsman at PO Box 6806, Wolverhampton WV1 9WJ. Further information can be found at their website www.legalombudsman.org.uk. On our side, if we perceive a problem with the representation, we will discuss it with you. In addition, you have a right to object to our bill, and to apply for an assessment of it under Part III of the Solicitors Act 1974...

Unless we agree to the contrary, we will communicate with you on the Matter by whatever means we consider appropriate, including by email or other electronic communications over the internet and with such persons we reasonably believe are authorised by you..."

48. There has been some discussion about the use of the word "ordinarily" in the Engagement Letter, which I will address now. The Engagement letter was, on the evidence I have heard, based on a template. In relation to the hourly rate basis of charging, the word "ordinarily" has the appearance of standard wording, superseded by the Engagement Letter's specific provisions for hourly rate charging. It has no real significance. If it were removed, the meaning of the Engagement Letter would be unchanged.
49. In relation to "monthly statements for work performed and expenses recorded", the provision that these will "ordinarily" be sent falls short of a firm commitment to provide such statements monthly, but indicates at least that the Claimant will be kept advised, normally on a monthly basis, of accruing costs and disbursements. The exact status of the monthly statements is addressed below.
50. Mr Trenor says that, after the Engagement Letter was signed, the scope of the work that the Claimant required the Defendant to perform expanded rapidly. In addition to the Arbitrations, the Claimant was involved in other proceedings against his family, family-owned companies and directors in Brazil, The Bahamas, the United States, Switzerland, and Gibraltar. The Defendant was instructed to work with the Claimant's counsel in those litigations and other matters to ensure that his overall objectives were being properly pursued.
51. On 25 September 2023 Mr Born addressed a letter to the Claimant recording amendments to the terms of the retainer between the parties to cover the expanded scope of the work:

"As we have discussed, our engagement agreement dated September 2, 2022, is hereby amended as follows and is effective as of that date.

We are engaged to advise you in connection with one or more arbitrations seated in London regarding shareholder and other disputes related to businesses and assets owned by you and your family, as well as in connection with court litigations related to the disputes in Switzerland, the United States, Brazil and elsewhere, subject to particular conflicts clearance in the usual course (the ‘Matter’)...”

Continuing Instructions

52. During the course of the retainer, the Defendant communicated with the Claimant directly or through representatives such as Mr Munhoz and his colleague Mr João Vicente Lapa de Carvalho, another partner at Munhoz Advogados.
53. The Claimant was also represented, in particular in matters relating to fees and billing, by senior executives at ASA including Mr Sosa, Mr Jose Roberto de Cunha Junior (“Mr Junior”), and Mr Coltro. These executives, says Mr Trenor, were experienced in managing financial and commercial matters, including in dealing with lawyers.

Invoicing

54. On 6 September 2022 Mr Junior sent an email to Mr Salas explaining that he worked with the Claimant and Mr Coltro, that he was responsible for the payment of invoices, and that he would be the contact for receiving future invoices. Between December 2022 and March 2023 the Defendant sent to Mr Junior five invoices for work performed in September, October, November and December 2022 and January 2023. They came to a total of US \$8,068,881.53.
55. For work performed from February 2023 onwards, the Defendant began providing draft invoices. Each was for a given month and marked as a draft. The drafts were provided in three groups. Draft invoices for February, March and April 2023 were sent to Mr Sosa on 17 May 2023; drafts for February to July 2023 (with updates for February, March and April) were sent to Mr Coltro on 27 September 2023; and drafts for August to November 2023 were sent to Mr Coltro on 21 December 2023. The circumstances in which they were sent are addressed below, but on each occasion they were sent in response to a request from ASA on behalf of the Claimant.
56. Other than disbursements-only invoices for experts’ fees, no further invoices were delivered until 17 September 2024, after the retainer had been terminated by the Claimant. The Defendant then delivered a comprehensive set of finalised invoices for each month of the retainer, including copies of those already delivered, and replacing all drafts.
57. Both the draft and the finalised monthly invoices were accompanied by a detailed narrative breakdown of work performed in the matter each day by each fee earner, including the hours worked, the applicable hourly rates, the names of the fee earners and a summary of the work done by each fee earner

over the month at the relevant hourly rate. Disbursements (other than large experts' fees in disbursements-only bills) were also itemised.

58. Each invoice, whether draft or finalised, incorporated the following wording:

“Includes only Services and disbursements posted to date.
Disbursements all paid unless indicated unpaid. Total Amount Due does not reflect past due amounts.”

59. Mr Trenor says that the draft invoices were provided with the intention of ensuring that any disagreement regarding the contents could be resolved prior to issuing a final version, which would be payable upon receipt in accordance with the terms of the Engagement Letter.

60. The following schedule, provided by the Defendant, shows the dates of delivery of finalised invoices by the Defendant to the Claimant. Invoices No. 5081782 and 5081788 are described in the original schedule as “revised” on 16 September, but as any revision appears to have preceded delivery, I attach no significance to that.

Fees and Disbursements incurred							
Invoice Number	Invoice Date	Invoice Period	Date Invoice Delivered	Invoice Total	Fees (USD)	Disbursements (USD)	
5080681	30/11/2022	01/09/22 - 30/09/22	10/12/22	875,314.97	873,084.00	2,230.97	
5080682	30/11/2022	01/10/22 - 31/10/22	10/12/22	1,510,847.62	1,497,306.00	13,541.62	
5080720	13/12/2022	01/11/22 - 30/11/22	13/12/22	1,990,989.82	1,980,137.50	10,852.32	
5080848	21/02/2023	01/12/22 - 31/12/22	23/02/23	2,098,229.58	2,069,221.50	29,008.08	
5080910	14/03/2023	01/01/23 - 31/01/23	14/03/23	1,593,499.54	1,561,249.00	32,250.54	
5081018	25/04/2023	To 24/02/23 (Expense Only)	25/04/23	253,370.45	--	253,370.45	
5081476	13/10/2023	01/02/23 – 28/02/23	17/09/24	1,219,217.86	1,211,950.00	7,267.86	
5081478	16/10/2023	To 16/08/23 (Expense Only)	17/10/23	156,750.00	--	156,750.00	
5081790	28/02/2024	01/03/23 – 31/03/23	17/09/24	1,022,010.21	1,017,435.00	4,575.21	
5081784	28/02/2024	01/04/23 – 30/04/23	17/09/24	840,776.25	836,992.00	3,784.25	
5081789	28/02/2024	01/05/23 – 31/05/23	17/09/24	1,900,992.08	1,875,033.00	25,959.08	
5081782	28/02/2024 ¹	01/06/23 – 30/06/23	17/09/24	3,136,253.22	3,089,633.00	46,620.22	
5081788	28/02/2024 ²	01/07/23 – 31/07/23	17/09/24	615,831.56	573,690.00	42,141.56	
5081787	28/02/2024	01/08/23 - 31/08/23	17/09/24	1,108,543.71	1,106,805.00	1,738.71	
5081783	28/02/2024	01/09/23 – 30/09/23	17/09/24	979,007.94	968,376.50	10,631.44	
5081786	28/02/2024	01/10/23 – 31/10/23	17/09/24	858,013.89	856,998.50	1,015.39	
5081785	28/02/2024	01/11/23 – 30/11/23	17/09/24	911,856.93	910,175.00	1,681.93	
5082068	23/05/2024	01/12/23 – 31/12/23	17/09/24	1,702,322.85	1,698,377.50	3,945.35	
5082381	13/09/2024	01/01/24 – 31/01/24	17/09/24	3,052,332.79	2,848,360.00	203,972.79	

5082382	13/09/2024	01/02/24 – 29/02/24	17/09/24	3,939,323.51	3,694,350.00	244,973.51
5082366	12/09/2024	01/03/24 – 31/03/24	17/09/24	411,429.50	399,364.00	12,065.50
5082365	12/09/2024	01/04/24 – 30/04/24	17/09/24	104,895.24	98,373.00	6,522.24
5082021	10/05/2024	To 26/04/24 (Expense only)	18/05/24	32,625.00	--	32,625.00
5082367	12/09/2024	01/05/24 – 31/05/24	17/09/24	637,299.15	636,903.00	396.15
5082388	13/09/2024	01/06/24 – 30/06/24	17/09/24	2,523,715.40	2,508,624.00	15,091.40
5082389	13/09/2024	01/07/24 – 31/07/24	17/09/24	1,867,764.89	1,854,079.00	13,685.89
Total Fees and Disbursements Incurred				35,343,213.96	34,166,516.50	1,176,697.46

Discussions on Fees and Retainer

61. On 13 December 2022, Mr Junior raised two queries in relation to the Defendant’s final invoices for the month of September, October and November 2022, which had been delivered over the previous few days. Mr Junior asked for the full name and attribution of one of the Defendant’s fee earners, Ms Sarah Ganz, and queried the fact that Mr Trenor and Ms Ganz appeared to have worked more than 12 hours per day in October 2022, with Mr Trenor working for more than 17 hours per day in November 2022 and another fee earner, Mr Teixeira, more than 11 hours per day.
62. Mr Junior asked Mr Trenor to check the position. Mr Trenor replied confirming that the invoiced hours were accurate, explaining the position of Ms Ganz, summarising the work that had been done, emphasising how busy the previous few months had been and correcting what appears to have been a miscalculation on Mr Junior’s part:
- “Sarah and I averaged around 8.3 hours a day in October. Gabriel averaged around 8.3 hours, and I averaged 12.5 hours, in November. Those are indeed long hours, but the work required has demanded that level of commitment.
- Please do not hesitate to call if you would like to discuss further. We want to ensure that Alberto is 100% satisfied with the work that we are providing on these arbitrations.”
63. Mr Junior replied the following day thanking Mr Trenor for his email and confirming that if he had any further questions, they would speak again. On 15 December 2022, he confirmed that the Claimant would pay the September, October and November 2022 invoices over the course of the following week. Payment was duly made, but no further payments were received by the Defendant until August 2023, in the circumstances described below.
64. On 28 December 2022, Mr Born and Mr Trenor received an email from Mr Munhoz:

“... Alberto came with an important issue related to the fees. And that’s why I am sending this email. He is telling me that, if the fees will be kept at the same level observed in the last two months during the whole arbitration, he will not be able to afford it.

So, in order to reduce the costs, he probably will decide to have only you guys in the arbitration, not Quinn anymore. I don’t like the idea. My preference is to reduce substantially their role, but this solution might be not enough.

With respect to WH’s fees, Alberto is wondering if it would be possible to manage the case and the bills in a way that the fees are not higher than USD 400K per month. I imagine that the fees will be much higher in more busy months. But hopefully there will be months when they will be lower.

Alberto’s calculation is that , if the arbitration will take 30 months for example, the fees will be around USD 12 millions. Around this number he is perfectly able to go ahead.

This is a very important point to him, and as I realized , one of the reasons why he was thinking that it would be better to suspend the arbitration.

I don’t know if it would be possible to manage the case in a way that the fees would be around these amounts.

Could you analyze this matter and get back to me?”

65. Mr Born replied on the same day:

“We’ll find a way to make that or something else he wants work”.

66. Mr Trenor gives the following account of telephone discussions with Mr Lapa de Carvalho in March 2023.

67. The day after the delivery (on about 13 March 2023) of the Defendant’s finalised invoice for January 2023, Mr Trenor received a call from Mr Lapa de Carvalho. Mr Lapa de Carvalho acknowledged to Mr Trenor that Mr Munhoz’s email of 28 December 2022 was not clear. He also accepted that, if it would not be workable for the Defendant to manage the case in a way as to limit its fees to US \$400,000 a month, the Defendant could propose something else for discussion.

68. During the call, Mr Trenor discussed a number of different fee options with Mr Lapa de Carvalho, ranging from significantly reducing the Defendant’s work on the case (which Munhoz Advogados thought not to be in the Claimant’s interests), to fixed or capped monthly fees, to some sort of contingency arrangement.

69. On 24 March 2023, Mr Trenor spoke again to Mr Lapa de Carvalho in relation to fees. Given that the Defendant’s monthly fees were likely to fluctuate

significantly, based on the amount of work the Defendant was instructed to perform for the Claimant to obtain his objectives, Mr Trenor proposed an annual cap, payable in monthly or quarterly pro rata instalments, with any capped amount lower than US \$12 million per year to be agreed in conjunction with a success fee to compensate for the risk assumed by the Defendant. Specifically, Mr Trenor suggested an annual cap of US \$8.5-9 million, with a success fee of double the difference between the annual cap and the actual fees incurred each year.

70. Mr Lapa de Carvalho agreed that some kind of annual cap structure was likely to work and was similar to what the Claimant had in mind, but that the Claimant would likely propose a lower annual cap. Mr Lapa de Carvalho said that the Claimant had not expected a success fee.
71. Mr Trenor says that he found this surprising, because the Defendant had previously been informed by Mr Lapa de Carvalho that the Claimant had agreed to a success fee arrangement with Munhoz Advogados, and Mr Lapa de Carvalho had previously informed Mr Trenor that he understood that the Claimant would be open to such an arrangement with the Defendant. Mr Trenor explained, in response, that the alternative of capped fees without a success fee would require the Defendant to significantly reduce the work that the Defendant performed, which Mr Munhoz stated (then and subsequently) was not in the Claimant's interests. During this call, Mr Lapa de Carvalho also confirmed that the Claimant intended to end his engagement with Quinn Emanuel with respect to the Arbitrations.
72. On 31 March 2023, Mr Sosa emailed Mr Trenor in relation to the Defendant's invoices for December 2022 and January 2023:

“It was agreed in December with Gary Bon, through Eduardo Munhoz, that the monthly bills would not exceed R\$400K. Munhoz spoke with Gary last week, reinforcing this point. We are ready to pay immediately two invoices of US\$ 400K, referring to the months of December and January. Can you please provide us with two new invoices?”
73. Mr Trenor replied to the effect that the Defendant would discuss the position with Mr Munhoz. He says that on 11 April 2023 he received a call from Mr Lapa de Carvalho and they discussed the Defendant's fees. According to Mr Trenor, Mr Lapa de Carvalho informed Mr Trenor that Mr Munhoz considered the Defendant's annual cap proposal “of around US \$8 million” to be very reasonable and that he believed the Claimant would accept it, and that the Claimant recognised that, if agreed, the annual cap would mean that the Defendant would need to change its scope of work and the size of its team.
74. Mr Lapa de Carvalho explained that the Defendant's contingency fee proposal would likely be more difficult for the Claimant to approve, but confirmed that if it was part of the Defendant's proposal, the Defendant should present that to him.

75. On 12 April 2023, Mr Trenor sent an email to Mr Munhoz and Mr Lapa de Carvalho:

“We would propose the following fee arrangement to Alberto.

As for our work in calendar years 2023 (including January) and 2024, our bills will be subject to a monthly cap of \$700k (with any excess added to the next month(s), subject to the cap), with a total cap through the end of 2024 of \$16.8 million (24 x \$700k), together with a success fee of 2 times any fees we could not bill due to the cap, if there is an award or settlement in excess of an agreed amount (or other comparable resolution).

Please let us know if you would like to discuss further. Thanks.”

76. On 3 May 2023, Mr Trenor emailed Mr Munhoz and Mr Lapa de Carvalho suggesting a telephone call to help move the discussions forward.

77. On 8 May 2023, Mr Sosa emailed Mr Born:

“... Today I spoke with Alberto regarding our invoices, and I would like to resolve the issue.

I want to ask you to separate the subjects: a) the past (December to April); b) the future (May onwards). Regarding the past, I would like to ask the office to send us all open invoices, so that we can analyze and discuss this amount. Regarding the future, Munhoz was with us today and commented on his proposal, which we do not agree with. Anyway, before we negotiate the future we'd like to discuss the past, so I ask for the invoices.”

78. It was in response to that email that Mr Trenor sent to Mr Sosa, on 16 May 2023, draft invoices for the Defendant's fees for the months February, March and April 2023. According to the copies in the hearing bundle, the three draft invoices totalled \$2,788,529.05.

79. On 24 May 2023 Mr Sosa emailed Mr Born:

“To remember the situation, last December, we asked Munhoz to talk to you about the high cost of fees.

We asked him to explain to you that it was not possible to maintain a monthly value at the October and December levels. The position we received is that you agreed to keep the average monthly amount at \$400,000. At the time we were very pleased with the return, and even ended our contract with Quinn Emanuel in London.

For these reasons, I want to ask you to reconsider the amount of these invoices..”

80. Mr Born replied:

“Many thanks; apologies, and let us clarify”.

81. Mr Trenor says that on or around 25 May 2023, he was informed by Mr Born that he had just spoken to Mr Munhoz and that Mr Munhoz had explained that the Claimant intended to make a further proposal whereby the Claimant would: (i) pay all of the Defendant’s fees to May 2023, capped at a monthly amount of US \$800,000-900,000, with the excess applied to future months; (ii) agree to some sort of payment plan for the full remaining balance to be paid over a set period of time; and (iii) agree to the possibility of an additional 10 to 15% payment at the end of the matter. No such proposal was, however, received.

82. On 10 July 2023, Mr Trenor emailed Mr Sosa:

“We wanted to follow up on the status of payment of the outstanding invoices. We also have additional invoices to bill since sending you the last ones and wanted to know whether to send those now. We are under pressure from management on our end to address this. We understand from Eduardo Munhoz that you were going to propose a fee arrangement for discussion, but we have not received that proposal. We would be happy to discuss at your convenience and remain open to finding a mutually agreeable way to resolve.”

83. The same day, Mr Trenor received a reply from Mr Sosa repeating his account of his dealings with Mr Munhoz the previous December:

“As a reminder, in December we asked Munhoz to speak with you and Gary about the high cost of invoices

We asked Munhoz to explain to Gary that it was not possible to maintain a monthly value at October and November levels. The position we received is that Gary has agreed to keep the average monthly amount at \$400,000. At the time we were very pleased with the return, we ended our contract with Quinn Emanuel in London.

For this reason, we insist that the correct thing is to adjust the invoices from December to April to US\$ 400,000.00. From May onwards we are open to discuss a new value that is reasonable for everyone.”

84. Mr Trenor says that this email was both surprising and concerning, as it did not reflect the discussions that had taken place over the preceding months, let alone the proposal that Mr Munhoz had just presented to Mr Born.

85. On 8 August 2023, Mr Coltro emailed Mr Trenor:

“I write to send you proof of bank transfers referring to invoices for services provided in the months of December 2022 and January, February, March, April, May and June 2023, in the amount of US\$

400,000.00 per month, as negotiated previously between Dr. Munhoz and Dr Gary...”

86. Mr Trenor emailed Mr Munhoz on the same date:

“As noted below, we just received payment from Alberto in the amount of \$2.8 million, which appears to constitute payment of \$400,000 per month from December 2022 through June 2023, purportedly pursuant to some “agreement” reached between you and Gary. While receipt of some payment is a welcome step forward, obviously there was never any agreement to cap our fees at \$400,000 per month, and we do not understand where this misunderstanding comes from. Our monthly fees greatly exceed that in most months, due to all of the tasks we’ve been asked to perform, and the scope and complexity of the arbitrations has expanded considerably since we began our work, as you are aware. We have willingly taken on the greater responsibilities that you have asked us to perform for Alberto, but the understanding has always been that we will be paid in full. We have done our best to handle these cases as efficiently as possible, but cases of this scope and complexity require considerable work given the multitude of issues and constant developments.

The last time that Gary and I spoke with you about fees (in New York in June), we understood that you thought it would be possible to reach agreement with Alberto that he would pay all of our bills, capped at a monthly amount (to be negotiated, but significantly higher than \$400,000), with any excess rolled over to future months, with some sort of payment plan for the full balance to be paid over a set period of time, plus the possibility of a 10 or 15% additional payment at the end. We have emailed Sosa on multiple occasions to try to discuss terms of an agreement on fees, but he has said he cannot participate in a call in English. We have therefore reached out to you for assistance, but we’ve been unable to reach you.

Our management is putting significant pressure on us to resolve the fee issue as quickly as possible, with a reasonable monthly payment and a definitive plan for full payment on a set schedule.

Could you please let us know when you would be available to speak about fees?”

87. The following day, Mr Trenor wrote to Mr Coltro:

“Thank you for payment of the \$2.8 million, which we have received and will apply as partial payment to our unpaid invoices.

As to the amount of payment, there appears to be an ongoing misunderstanding in relation to our fees. We believe that a joint call with you/Sosa, Munhoz, and us would be the most productive way to address this important issue of our outstanding fees, but we have

been unable to arrange such a call with Munhoz. If you are able to organize a call with him, we would appreciate it...”

88. The call took place on 28 August 2023, attended by Mr Trenor, Mr Coltro and Mr Salas. Mr Trenor says that Mr Coltro acknowledged, during that call, that no agreement had been reached to limit the Defendant’s fees and that in order to assist discussions Mr Trenor put forth the same proposal that Mr Munhoz had put to the Defendant in June 2023 (I think that he means to refer to the discussion between Mr Munhoz and Mr Born in May 2023).
89. In response, Mr Coltro requested that the Defendant propose a monthly cap on fees (for both past and future fees) with any excess in fees rolling over between months. In the meantime, he requested draft invoices for the months of May, June and July 2023, which the Defendant provided on 27 September:
- “Our Finance team has prepared updated draft invoices for the months of February through July 2023, as you requested. Please see attached. Note that these drafts have been updated to reflect all fees and disbursements for those months and may therefore differ from the preliminary drafts for the months of February, March, and April sent to Sosa in May. They also reflect the updated 2023 billing rates that went into effect in January (as reflected in the January 2023 invoice sent in final earlier this year).
- Also attached, as requested, are narrative summaries of the work we performed each month from December 2022 through July 2023 on the (now 5) arbitrations. As the summaries explain, the scope of our work was extensive and all performed pursuant to instructions from Alberto and the EM team. Please let us know if you have any questions.”
90. Mr Coltro gives a different account of the telephone discussion of 28 August 2023, and of the parties’ dealings up to that point. He does not accept that draft invoices were sent to the Claimant, as Mr Trenor says, in order to avoid disagreement: at least, he says, that was not the Claimant’s intention.
91. Mr Coltro says that after the first few invoices, the Defendant stopped sending invoices on a regular basis. That made it more difficult for Mr Coltro to review and raise queries on the invoices that were received, because he and his colleagues could not always recall exactly what had been happening back in the relevant month. It made it much harder to understand and discuss the Defendant’s charges. The Claimant’s team also had no idea how much was being charged.
92. Because of that, on 28 August 2023, Mr Coltro spoke to Mr Salas and Mr Trenor about the fact that the Claimant was not receiving regular invoices. Whilst he does not claim to remember the precise details of each discussion, his recollection is that he continued to raise his concerns in subsequent conversations with the Defendant, but the Defendant did not resume sending regular invoices to the Claimant.

93. Mr Coltro also says that Mr Trenor suggested that the Defendant could provide draft versions of the invoices as a way to get them to the Claimant more quickly. Mr Trenor explained that he could not provide final versions of the monthly invoices as he did not have a full picture of how many hours his team had worked but he could provide initial draft versions so that Mr Coltro and his colleagues could review them before they were updated later.
94. In oral evidence Mr Coltro said that this was said by Mr Trenor in the meeting of 28 August 2023, and that this lack of complete information accounted for the fact that he did not actually receive draft invoices until 27 September 2023.
95. Mr Coltro says in his written evidence that he had initially understood that Mr Born's email of 28 December 2022 was an agreement to a monthly cap on fees of US \$400,000. The invoices received after December 2022 had however been much higher than US \$400,000 per month. During the telephone discussion of 28 August 2023, Mr Trenor told Mr Coltro that the Defendant did not think that this was what Mr Born's email of 28 December 2022 had meant. Mr Trenor explained that the Defendant's position was that Mr Born was simply saying that the Defendant would think about whether a maximum of US \$400,000 a month was possible, and the Defendant had decided it was not. That is why, from that point on, the parties began to have meetings and in order to reach an agreement.
96. From February 2024, says Mr Coltro, payments increased to US \$600,000 per month. On 8 December 2023, during a videocall, Mr Sosa and Mr Coltro discussed with the Defendant a revised amount of US \$600,000 per month and they understood from that call that US \$600,000 per month was agreed or was likely to be acceptable to the Defendant. In the emails and calls which followed, it became clear again that the Defendant did not agree, but the Claimant continued to pay the increased amount.
97. Mr Trenor disputes much of this. He says that as the Claimant's agents and representatives were well aware, the Defendant had access to the daily hours and detailed descriptions of work performed by each timekeeper and were able to, and did, send this information to the Claimant (through his agents and representatives) in draft or final form upon request at any time. Mr. Coltro, he suggests, may be misremembering an explanation from Mr Trenor that such detailed invoices would need to be reviewed carefully before being finalized.
98. Mr Trenor says that draft invoices were provided to the Claimant on request in May, August and December 2023 because discussions were ongoing between the Claimant and the Defendant as to the Defendant's fees. The draft invoices were provided to facilitate that process and to inform the Claimant of accruing fees.
99. Mr Trenor also says that repeated offers by the Defendant to send draft or final invoices to the Claimant were ignored. He refers to his email to Mr Sosa of 10 July 2023, in which he offered to send more invoices but was met with a reprise of the claim that there was an agreement to cap the Defendant's fees at US \$400,000 per month; to an email he sent to Mr Sosa on 30 November 2023 with a suggested fee structure, confirming that if it was acceptable the

Defendant would immediately send final invoices reflecting that arrangement; and an email of 17 May 2024 (referred to below) sent by him to Mr Sosa with a summary of outstanding fees, to be met with the response that the Claimant did not recognise the figures as due.

100. I should add that in oral evidence, Mr Coltro was insistent that there had been an agreement, in December 2022, to limit the Defendant's fees to US \$400,000 per month, and subsequently another agreement in December 2023 to limit fees to US \$600,000 per month, but that that the Defendant had reneged on both agreements.
101. It is not, in fact, the Claimant's case for present purposes that there was any effective agreement to cap the Defendant's fees at either figure.
102. I will say now that I find that unsurprising. Mr Born, in December 2022, did no more than indicate a willingness to enter into an arrangement that worked for both parties. A conditional fee arrangement would have been one obvious example.
103. Such arrangements were, subsequently, discussed, but never agreed. Over the following months, discussions between the Defendant and the Claimant (through his agents and representatives) continued to take place about an alternative fee structure. It seems evident from the correspondence that both parties were attempting to maintain a working relationship, hopefully over the longer term, and find a mutually acceptable solution. However, no such solution was ever found. There was an increase in payments to US \$600,000 per month from February 2024, but again, there is no evidence to support Mr Coltro's assertion (which is not entirely consistent with his written evidence) that the Defendant agreed to limit its monthly fees to that amount.
104. The tone and content of the correspondence over the post-August 2023 period is illustrated by the following emails.
105. Mr Trenor, in an email of 10 December 2023, emphasised the amount of work being undertaken by the Defendant in the Claimant's interests:

“... Litigating any one of the five arbitrations on its own would be a significant undertaking, but pursuing all five together is a truly massive endeavor, reflective of the significant monetary value at stake. We do not believe that artificially capping our legal fees, thereby restricting the amount of work we can ultimately undertake on Alberto's behalf, is in his interests, given what is at stake. We believe that Eduardo Munhoz and his team can attest to the significant amount of work that we are being asked to perform for Alberto and the unparalleled quality of that work...”

106. The Claimant's position was set out in this email of 18 December 2023 from Mr Sosa to Mr Trenor:

“Regarding the conversations we have had in the last weeks and after analyzing the proposals you formalized to us, unfortunately

none of them are available to us at the moment. I would like to record once again the conditions to support our relationship. Firstly, I insist on emphasizing the email of December 28, 2022 sent by Munhoz, where we made it clear that our monthly fees could not exceed the full amount of US\$400K. In this regard, you responded to us that you would find a way to make it work.

Based on this response, we have chosen to maintain the contract with Wilme Hale and to terminate the services with our previous UK office. At that time, if that answer had been negative, we would look for some kind of solution and if you had refused our request, our partnership would not have started and we would not start to work together.

For all the foregoing, we affirm that our monthly payments from December 2022 until today, in the amount of US\$ 400K is what is possible for us.

Notwithstanding this fact, we agree with the office's requests to review the service provision fees. As previously formalized, we are available to adjust the monthly amount from June, 2023 to US\$600K...

For the year 2024 we will work with monthly amounts of US\$600K until March, with the commitment that in April, if an agreement has not been reached, we will return to discuss again the conditions of our contract.

Once again, I insist that this is the condition that we are able to fulfill now, but I reinforce our commitment to review the situation in April.

Therefore, we will be crediting the remaining amount of US\$1.8 million for the year 2023 until the 24th, within the conditions that we can currently meet.”

107. On 20 May 2024, in response to an email from Mr Trenor on 17 May containing a summary of, and seeking to discuss, outstanding and accruing fees, and in which Mr Trenor offered to send final monthly invoices for December 2023 to April 2024, Mr Sosa emailed Mr Trenor:

“Unfortunately we are facing the same situation as last year. At the time, we ended the relationship with the other UK legal advisor and migrated all work exclusively to you, under the condition of a monthly fee cap of US\$ 400,000.

As mentioned in January 2024, when we agreed to change the base monthly invoice on December 23rd to US\$ 600,000 it meant that this was the maximum amount you could work on each month based on the hourly rate charged. We cannot be surprised months later, in April, with the information that you have exceeded the hours

worked without any other prior notice. The correct procedure in this case would be to notify us in advance and request prior authorization.

Therefore, we do not recognize the amounts reported as due. However, at the conclusion of the process, Alberto intends to pay a discretionary amount as a success reward.”

108. Mr Trenor sent this email to Mr Sosa on 8 June 2024:

“I understand from Eduardo Munhoz that he spoke to you and Alberto again this week about our unpaid fees, which I believe are now over \$15 million. I held off responding to your email below while you engaged in negotiations on a resolution of the dispute with the family. I hope those talks went well.

However, we need to reach some resolution of our fees in order to proceed with our work on the next steps in the arbitration, which will be extensive, as outlined below.

Unfortunately, we cannot agree with your characterizations of our prior discussions and agreements set forth in your email below. We never reached agreement at the outset of the matter to cap our fees at \$400,00 per month, nor did we agree in January to cap our fees at \$600,000 per month. Rather, our engagement letter states that Alberto will pay our fees on a monthly basis as incurred, and we have not reached any alternative agreement.

Moreover, we have continued to make very clear in emails and calls with you that the amount of work we are being asked to do for Alberto continues to grow and grow and that our fees for many months would far exceed the capped amounts you have proposed, which is why we could not agree to such caps. Indeed, we specifically explained in emails and on our calls, for example, that our fees for the months of December, January, and February would each be multimillion given how much work we were being asked to perform for Alberto to prepare his massive Statement of Case and to litigate the document disclosure and privilege issues that he asked us to fight for him.

Although the work levels for March through May were much lower, the work levels moving forward will be significant again over the next 6 months. For example, just over the past week, we have been asked by Alberto to urgently prepare a new application for interim relief and a partial final award relating to document disclosure. That is on top of the significant work that will be required to prepare Alberto's defense in Arbitration 2 due in July, prepare extensive document disclosure requests in all five arbitrations due in July and which will be briefed in detail over the months of August and September, and prepare his Statement of Reply in the arbitrations due late this year, which must respond to the 1000-page-plus

memorials we just received from the Respondents as well as the 1000-plus pages of witness statements and expert reports they rely on.

We have shown great loyalty and commitment to Alberto as we continue to serve his extensive legal needs, but we must come to a solution on the unpaid fees and on fees going forward in order to continue. We have new Management in our firm this year, and we are under significant pressure to resolve this. We can revisit a contractually binding success fee arrangement if that would be useful.

Please let us know when we can discuss. This is urgent. Thanks.”

109. On 19 July 2024 Mr Born and Mr Trenor received this email from Mr Munhoz:

“Good news in this case !
Finally we got the settlement!
Thanks for all your great work and patience
And count on me to help to make all the pending fees dully paid.
It was a great pleasure to work with you in this case. And I really hope to have a new opportunity soon ! I will miss working together !”

110. There has been some discussion as to whether the phrase “dully paid”, which evidently incorporates a typographical error, should be read as “fully paid” or “duly paid”. It seems to me that “duly paid” is more likely, although the phrase still implies an acceptance on the part of Mr Munhoz that the Defendant’s fees should be paid without qualification.

111. Mr Trenor subsequently received this email from Mr Coltro:

“Considering the agreement by Alberto and his family, we request the suspension of any and all activities that impact the consumption of base hours today, July 22.”

112. That, in effect, terminated the Defendant’s retainer.

113. Subsequent attempts to reach agreement on the Defendant’s claimed outstanding fees did not bear fruit. In oral evidence Mr Trenor emphasised that Mr Munhoz had assured the Defendant that the Claimant would, as a matter of honour, meet his payment obligations: but that Mr Munhoz subsequently admitted that he had been wrong, and that following the settlement of the Safra family disputes the Claimant had left Munhoz Advogados and other advisers unpaid.

114. On 16 September 2024 Mr Born and Mr Trenor wrote to the Claimant:

“We are writing directly to you in an effort to resolve the issue of our substantial unpaid legal fees and disbursements that we incurred on your behalf in pursuing the claims against your family

and the Safra group companies in the five arbitrations and related matters. We are hopeful that we can resolve this issue amicably in the near future without the need to pursue our legal rights in court.

At the outset, we want to extend our congratulations to you in reaching the settlement with your family of the claims that we pursued on your behalf. We understand that this settlement gives you the financial independence that you sought, and we sincerely hope that it also serves as a basis for restoring harmony in your relationships with your family members over time. It has been an honor to represent you, all the more so in helping you achieve success. We greatly enjoyed working with you and are thankful for you having chosen us to serve as your legal counsel to pursue and ultimately achieve your objectives.

Now that the settlement has addressed the cash flow problems you faced during the dispute with your family, we turn back to the issue of payment of our unpaid legal fees and disbursements. As you are aware, we held off issuing final invoices for several months as a courtesy while we discussed the issue of our unpaid fees and disbursements and while we sought to resolve this issue. However, now that the settlement has been reached, we are writing under separate cover to formally document the total fees and disbursements incurred on your behalf over the course of the representation, as well as a precise calculation of the amounts that are still unpaid following the receipt of partial payments from you...”

115. Following delivery of the Defendant’s finalised invoices on 17 September 2024, the Defendant on 18 November 2024 sent to the Claimant a formal Letter of Claim under the Pre-Action Protocol for Debt Claims. The letter required a response by 18 December 2024. The day before that period expired, the Claimant made his application for assessment.

The Allocation of Payments to Bills

116. Between 16 December 2022 and 16 August 2024, the Claimant made payments to the Defendant totalling US \$16,419,897.86.
117. According to a schedule of payments prepared by the Defendant, excluding the Defendant’s first three invoices and three disbursements-only invoices (No. 5081018, 5081478 and 5082021), all of which were paid in full, the Claimant paid US \$11,600,000 against the Defendant’s invoices, as follows:

Date	Amount
07/08/2023	\$2,800,000.00
15/09/2023	\$800,000.00
13/10/2023	\$400,000.00

07/12/2023	\$800,000.00
26/02/2024	\$3,200,000.00
11/03/2024	\$600,000.00
08/04/2024	\$600,000.00
07/05/2024	\$600,000.00
01/07/2024	\$600,000.00
16/08/2024	\$600,000.00
16/08/2024	\$600,000.00
	\$11,600,000.00

118. There is a dispute as to how those payments are to be allocated against the Defendant's invoices, from invoice No. 5080848 (for December 2022) onwards.
119. The Defendant's position is that, as Mr Trenor explained to Mr. Coltro in August 2023, the payments received from the Claimant were taken "as partial payment to our unpaid invoices." That means that payments were allocated so that the oldest outstanding invoice (starting with invoice No. 5080848) was paid first. Further, Mr Trenor, on 13 October 2023, sent this email to Mr Coltro and his colleague Ms Emiliana Cassamassimo:
- "Thank you for the payment on account in the amount of \$400,000, which we received yesterday. Because we have not yet reached resolution of our ongoing discussions on fees issues, we will continue to apply payments on account that we receive from you to the oldest unpaid invoices that we have issued in final form until such invoices have been fully paid off. We applied the prior payments on account of \$400,000 received from you in past months to our invoices for services performed in December 2022 and January 2023. Given that the invoice for services performed in January 2023 is now almost fully paid off, we will apply the payment on account of \$400,000 received from you yesterday to finish payment on the January 2023 invoice and as partial payment of the new invoice attached, which we are issuing in final form for services performed in February 2023 (and which we previously sent to you in draft). Please let us know if you have any questions..."
120. In his oral evidence Mr Coltro said that he spoke to Mr Trenor again by telephone making it clear that the Claimant did not agree to this arrangement

and insisted that and payments should be applied to the relevant month. There is however no reference to that in Mr Coltro's witness statement. He says only that, in a video conference on 27 October 2023, he queried the rises in the Defendant's hourly rates. Nor, it would seem, is there any documentary record of any such objection. Mr Trenor, in oral evidence, denied that any such conversation had taken place (and stated that the discussion on increased hourly rates actually took place on 26 October).

121. In fact, earlier in his oral evidence Mr Coltro seemed to confirm that he had given no specific instructions as to how the Claimant's payments were to be allocated, though he may in that respect to have been referring only to the meeting of 28 August 2023.
122. Mr Coltro did accept that a payment of US \$2 million made on 26 February 2024 was not intended to be allocated against any specific bill: it was paid (according to his witness statement) toward a comprehensive fee proposal that was never finally agreed.
123. In any event, the Defendant says that the outcome of its applying the Claimant's monthly and lump sum payments first to the oldest outstanding invoice balances is that all invoices up to and including disbursements-only invoice No. 5081018, dated 25 April 2023, as well as disbursements-only invoice No. 5081478, dated 16 October 2023, were paid in full by 17 December 2023, one year prior to the Claimant's application for assessment.
124. Invoice No. 5081476 dated 13 October 2023, invoice No. 5081790 dated 28 February 2024, invoice No. 5081784 dated 28 February 2024, invoice No. 5081789 dated 28 February 2024, and invoice No. 5082021 dated 10 May 2024 were, says the Defendant, also ultimately paid in full, but after 17 December 2023. All remaining invoices remain unpaid.
125. The Claimant says that the payments made from August 2023 (with the exception I have mentioned) were referable to the Defendant's charges for each individual month. Those payments were made in those amounts to reflect the Defendant's assurance to Mr Munhoz that it would be possible to ensure that the Defendant's charges amounted to no more than about US\$ 400,000 per month, or similar. In February 2024, those payments increased to US \$600,000 for each month.
126. It was therefore express, or at least implicit, that the payments were being made against each month's fees. The Claimant did not agree to those sums being used to pay earlier invoices, so it was not open to the Defendant to apply the Claimant's payments in that way. That was not the basis on which the payments were being made.
127. The Claimant points to references by Mr Trenor, in correspondence, to "monthly" payments of US \$400,000 received and possible alternative agreed "monthly" caps on fees, and to a table provided by Mr Trenor to Mr Coltro, on 21 December 2023, in this email:

“I understand from Claudio that you wanted the figures for fees incurred, fees paid, and the unpaid difference. Here are the numbers I have from our Finance department. They show that there is currently more than \$10 million in unpaid fees from December 2022 through November 2023, not including December 2023 (which is still pending). Please let us know if you have any questions.

I will separately send draft invoices for August through November, as you requested in your call with Claudio.”

128. The table that followed showed payments of US \$400,000 received against fees incurred over each individual month between December 2022 and November 2023.
129. Similarly, on 10 December 2023, Mr Trenor made proposals for payment which included settlement of the Defendant’s December 2022 invoice “minus the \$400,000 already paid to date.”
130. Mr Trenor says that this correspondence merely reflected the Claimant’s position to the effect that he was paying a given amount per month, and does not reflect the way in which the Defendant actually allocated the payments, which minimised the Claimant’s contractual liability for interest on unpaid fees at 8% per annum.

The Claimant’s Cashflow Issues

131. On 29 December 2022, the day after Mr Munhoz sent his email to the Defendant asking whether it would be possible to limit fees to an average monthly figure of US \$400,000, Mr Lapa de Carvalho emailed Mr Trenor quoting a message from the Claimant. The message was in Portuguese, but the essence of it was that it would be desirable to expedite the Arbitrations, because his opponents’ strategy was to take advantage of their superior financial resources to stifle his efforts to maintain the litigation:

“... a estratégia da família é me estrangular financeiramente...”

132. As Mr Lapa de Carvalho put it:

“We think there is a way to make the point that the passage of time harms Alberto much more than the Respondents. We can frame it as an additional reason for the expedited timetable. Basically, the Respondents have unlimited resources to litigate, he has not. The shares he received from his father are tied to the existing agreements. After 2 years, VS has not even delivered an inventory of the assets of the estate in the Swiss proceeding. And during such 2 years Alberto received a very low amount of dividends... The Respondents also control the information and what happens in the various companies. The longer it takes for a decision, the better for them, as Alberto may not be able to wait until the end, or at least will suffer extraordinary harm until then. The harm is imminent, reparation is a possibility in the future. So everything they do is to

pressure Alberto to settle and exit the family entities. Therefore, if the tribunal does not expedite the timetable, the Respondents will already be in a position of advantage.”

133. The subsequent discussions between the parties as to invoicing and funding arrangements necessarily took account of this issue, described by the Defendant in correspondence as a cash flow problem.
134. The information received by the Defendant in that respect was, however, not always consistent. Hence this email from Mr Trenor to the Claimant’s representatives in November 2023:

“We had a very helpful call with Anderson last month. He noted that there was never any agreement to cap our fees, and that the client has been paying us \$400,000/month until we resolve the dispute (so far, I believe we have received \$400,000 initial payments for the months of December 2022 through September 2023). We suggested the proposal that Eduardo Munhoz had discussed with us in NYC in May to address what we understood was a cashflow problem: the client would pay us \$800,000 or \$900,000/month until the case is resolved, at which time we would be paid the remaining unpaid fees plus an uplift of 10-15% to account for the time value of money that continues to be our preferred resolution. However, Anderson explained that there was never a cashflow problem but a desire to cap our monthly fees. Anderson asked us to propose a monthly cap (both backward-looking and forward-looking) with excess spilling over to the next months. Given the magnitude of work involved in the arbitrations, and the expanding nature of the cases, this isn’t easy for us to do...”
135. In oral evidence Mr Coltro firmly denied that the Claimant had ever had a cash flow problem. He emphasised that the Claimant could at all times pay his suppliers.
136. Mr Coltro’s evidence went beyond that, in that he asserted that the entire cash flow issue was an invention of Mr Trenor, advanced by the Defendant as a strategy for the purposes of the Arbitrations, and extending (against all logic, bearing in mind that it could only reduce the amount that the Defendant could ask to be paid pending resolution of the Arbitrations) to the parties’ discussions on alternative payment arrangements. He was so insistent on the point that Mr Bacon, in behalf of the Claimant, subsequently made it clear that it was not the Claimant’s case that the Defendant had, as Mr Coltro insisted, invented such a strategy.
137. That was, of course, proper and appropriate. It is obvious from the documentary evidence (to which Mr Coltro was referred in the course of his evidence) that the Defendant was given to understand that the Claimant’s opponents were attempting to exploit their superior financial resources to gain an advantage in the Arbitrations; that part of that strategy was to limit the financial resources immediately available to the Claimant; that the problem would not be resolved until the family disputes had themselves been resolved;

and that the Claimant's references to what he could afford were to be understood in that context.

138. Mr Coltro's flat denial, in December 2023, of any cash flow problem clearly caused the Defendant some confusion. It was symptomatic of a tendency on the part of different representatives of the Claimant, recorded in the correspondence between the parties, to disagree with or contradict each other.

Hourly Rate Rises

139. The Defendant's hourly rates were increased twice during the currency of the retainer: in January 2023, and January 2024. This was largely, Mr Trenor says, by reference to inflation, with some possible increases on fee earner promotion. The Engagement Letter, as set out above, provided for the Claimant to notify the Defendant of any changes in hourly rates as and when they occurred.
140. That is not really what happened. Mr Trenor mentioned the January 2023 rises to the Claimant for the first time in his email of 27 September 2023, enclosing draft invoices for February to July 2023. Up to that point, the Defendant had left it to the Claimant to identify the rate increases from the draft invoices that had been delivered between December 2022 and May 2023.
141. There was no mention of the Defendant's January 2024 hourly rate rises at any time before the termination of the retainer, nor did the Defendant have the opportunity to identify those rate rises until the delivery of a set of finalised invoices on 17 September 2024.
142. I turn to the issues identified in the consent order of 5 March 2025.

Does the Engagement Letter dated 2 September 2022 Constitute a Contentious Business Agreement?

143. It is common ground that the work undertaken by the Defendant for the Claimant was contentious business for the purposes of the 1974 Act.
144. As to whether the Engagement Letter was a CBA, it may help put matters in context if I preface my summary of the parties' submissions with a reference to some of the key authorities.
145. In *Street v Mountford* [1985] A.C. 809 Lord Templeman considered parties had entered into a lease or a licence. That had to be determined by reference to the nature and effect of the agreement:

“Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The

manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.”

146. In *Wilson v The Specter Partnership* [2007] EWHC (Ch), [2007] 6 Costs LR 802 Mr Justice Mann considered whether an agreement between solicitor and client was a CBA. He rejected (at paragraph 14 of his judgment) the proposition that a CBA has to describe itself as such:

“I turn therefore to the question of the district judge’s decision as to whether the relevant agreement was indeed a CBA... His main reason is that it was not referred to anywhere as being a CBA. With respect, I do not think that that is necessarily relevant, and it is certainly not determinative. What matters is substance, not form. If the agreement fulfilled the criteria for a CBA then it would be one whether or not the parties labelled it as such...”

147. He went on however (at paragraphs 15 and 16) to find that the agreement in question was not a CBA, because it lacked the requisite requirement of certainty:

“The essence of a CBA is certainty. The parties to the CBA define how the client will be charged. The benefit to both parties is certainty. The disadvantage for the client (or one of them) is that he no longer has a right to taxation, though he has protections under s 61. One disadvantage for the solicitor is the limits on enforcement under s 61. But both have the benefits of certainty. Since the client is disadvantaged, the agreement has to be in writing, and it has to be sufficiently certain:

“It seems to me that an agreement in writing can be contained in letters. But the letters ought at least to be signed by the client if he is to be deprived by the agreement of his right to tax. Further the agreement must be sufficiently specific, so as to tell the client what he is letting himself in for by way of costs. It seems to me that the letters in this case do not give the client the least idea of what he is letting himself in for. As counsel for Mr Chamberlain said to us, there is broad band of uncertainties. Take, for instance, the rate. It certainly seems high enough to me. It is £60 to £80 an hour. What rate is to be charged? And for what partner? Of what standard? Then £30 to £45 an hour for associates who may be involved. Which legal executives? Of what standard? Which associates? Does it include the typists? That is one of the broad bands which is left completely uncertain by this agreement ...” (per Lord Denning MR in *Chamberlain v Boodle & King* [1982] 3 All ER 188 at 191c–e)

That demonstrates the degree of certainty as to the charging that must appear in a CBA.”

148. Among the reasons for Mann J's finding that the agreement in *Wilson v The Specter Partnership* was not a CBA was insufficient certainty as to charging:

“The terms as to charging are not sufficiently fixed. The purpose of a CBA is to fix the fees, or provide a fixing mechanism, so that the parties (and in particular the client) know where they stand. Under the terms of this document there is still an element of uncertainty. While it is more certain in its charging consequences than the agreement in *Chamberlain*, it still leaves open the possibility of charging at a higher rate than the specified rates. The agreement specifies fixed hourly charging rates, but at two points refers to the possibility of increase... That being the case, the agreement is not one which fixes the costs by reference to a fixed hourly rate, and since it is not one for an overall sum then it falls outside s 59.”

149. In *Holcroft v Thorneycroft Solicitors Ltd* Mr Justice Eyre had to determine whether an agreement between solicitor and client, as to the total amount to be paid to the solicitor in personal injury proceedings, was an NCBA or (as he found) an agreement which precluded the operation of both section 57 and section 70.

150. He observed (at paragraphs 34, 35 and 36):

“... It is necessary to consider the terms of the agreement to see which is the correct analysis...

There is a strong public interest in a solicitor's client being able to seek assessment of the solicitor's bill by the court. The jurisdiction originally arose as an aspect of the court's supervision of solicitors. It is now entirely statutory but the public interest remains. The public interest is shown by the fact that even where there is a non-contentious business agreement between the solicitor and the client s 57 of the Act retains scope for a limited degree of control by the court. This public interest means that an agreement which is said to preclude the court's intervention is to be scrutinised with care...

At one point Mr Benson submitted that clear words were needed before a client could be held to have foregone his or her right to assessment. I do not accept that proposition. It is contrary to the modern approach to the interpretation of contracts in which the court is to determine the parties' intention objectively having regard to the language used read in context and without requiring express words for any particular outcome... The point does, however, have force to this extent namely that such agreements are to be scrutinised with care and that it is of note that here there was no express reference to the appellant's potential right to assessment and still less to its removal...”

151. As to whether the agreement was an NCBA, he said (my emphasis):

“Section 57 defines such an agreement in wide terms and provides that it can be made after the relevant non-contentious business has concluded. In light of that, the August 2020 agreement could be seen as meeting the definition **but that is not the most apt reading of it...**”

CBA Submissions: the Claimant

152. The Claimant argues that the burden is on the Defendant to establish that the Engagement Letter constitutes a CBA, and points to the following matters in support of the proposition that it does not.
153. The Engagement Letter does not contain any express wording to the effect that it is to be a CBA. The Defendant did not advise the Claimant that the Engagement Letter was to be a CBA. The Defendant’s apparent intention to treat the Engagement Letter as a CBA has only become known as a consequence of the Claimant’s challenges to the Defendant’s invoices.
154. The Claimant argues that the Solicitors Regulation Authority (“SRA”) Code of Conduct, at paragraphs 8.6-8.11, imposed an obligation upon the Defendant to make it clear to the Claimant if he was entering into a CBA.
155. The Engagement Letter expressly states that the Claimant will have rights of assessment in relation to any bill delivered. If solicitors intend to restrict the usual statutory rights to an assessment under section 70 of the 1974 Act, clear wording is required and any doubt should be resolved against the solicitors that drafted the agreement.
156. The Engagement Letter contains no such wording. On the contrary, the Engagement Letter expressly states that the Claimant will “have a right to object to our bill, and to apply for an assessment of it under Part III of the Solicitors Act 1974”. That is a clear reference to the section 70 assessment regime. The statutory CBA regime is premised on the enforcement of agreements, not the assessment of bills. The effect of section 60(1) is to remove the client’s usual statutory rights of assessment under section 70.
157. Where a retainer amounts to a CBA which provides for the remuneration of the solicitor to be by reference to an hourly rate, the client is limited to an “enquiry” into the number of hours worked by the solicitor and whether the hours worked were excessive. It follows that the rights of the client are more limited to those of a client pursuing an assessment under s.70. The limitation applies unless the client establishes that the agreement is unfair or unreasonable.
158. It is against that background that it must be remembered that nowhere in the Engagement Letter does it suggest that it is a CBA, nor is it suggested that the Claimant was ever told that the Defendant intended it to be a CBA. It is accepted by the Claimant that labels (or their absence) are not determinative if the substance of the agreement was otherwise plainly that of a CBA, but it is obviously a relevant factor in circumstances where the substance of the agreement is not clearly that of a CBA. If an agreement does

not appear to be a CBA in either substance or form, there is no safe basis on which to deprive a client of their rights under section 70. Here, all material terms of the Engagement Letter point to the conclusion that it was not a CBA.

159. Further, the terms of the Defendant's remuneration were insufficiently certain for the Engagement Letter to be a CBA. A necessary ingredient of a CBA is that it contains certainty as to the fees and expenses payable. And the reason for that is that if the right to challenge a solicitor's costs by assessment is to be withdrawn, it is because the law is respecting the fact that there is in no need for assessment in circumstances where the remuneration is agreed.
160. For most of the fee earners that ultimately came to be charged for in the Defendant's invoices, the Engagement Letter did no more than indicate the "current rates for matters such as this" by reference to broad ranges for each level of fee earner. Specific rates for those fee earners were not stipulated.
161. Even where specific rates were stipulated for the four "senior lawyers" involved in working on the Matters "initially" they were stated to be only the "current" rates, and remained subject to the Defendant's ability to unilaterally alter hourly rates "periodically". A unilateral right on the part of the Defendant to increase hourly rates to a level of its own choosing is irreconcilable with the CBA regime. Otherwise, under the terms of a CBA, a solicitor could alter hourly rates in any way they chose, and the client would have no right to challenge them on assessment.
162. This is not just a hypothetical point: in this case, the Defendant did apply rate increases twice within the period of their retainer with the Claimant, without notification to the Claimant.
163. In any event, the Engagement Letter did not even guarantee that the Defendant's charges would always be based on hourly rates. It said only that the Defendant's fees were "ordinarily" based on hourly rates.
164. That degree of uncertainty is incompatible with the Engagement Letter being an hourly rate CBA, under which hours worked by each fee earner are to be multiplied by a fixed hourly rate and there can be no right to an assessment of those hourly rates.

CBA Submissions: the Defendant

165. The Defendant's case, in essence, is that because the Engagement Letter meets the criteria set out at section 59, it is a CBA.
166. The Defendant does not accept that there is a 'burden' on the Defendant to establish that the Retainer Agreement is a CBA. It is a matter of fact and law whether any particular solicitor's retainer is, or is not, a CBA. It either is a CBA or it is not. It is an issue to be determined, not one which requires proof on the balance of probabilities.
167. The Defendant emphasises that the terms of the Engagement Letter were negotiated with the Claimant, on behalf of an experienced and commercially

sophisticated client, by very experienced lawyers, and rejects any suggestion that a CBA is inherently disadvantageous to a client. In fact, the Defendant argues, most of the reported cases on whether or not a retainer is a CBA appear to be cases where the client is arguing for the CBA and the solicitor is arguing against it, rather than vice versa.

168. The effect of a CBA is that costs which are subject to a CBA shall not be made subject to assessment. The counterbalances to this are that any attempt to enforce the CBA is subject to the Court's ability to enforce or set aside the agreement and to determine its validity or effect. In exercising that power, both the fairness and the reasonableness of the agreement may be put in issue, and the solicitor cannot bring an action on the CBA unless and until such matters have been determined.
169. It follows that whilst the client's "rights" to a statutory assessment under section 70 are removed, a different set of rights and protections is created. Notably, the section 70 rights (for a client) are subject to time limits, so that there may be a requirement for special circumstances under section 70(3), or the right to assess may be lost completely under section 70(4). In contrast, the ability for a client to seek scrutiny of the fairness and reasonableness of a CBA under section 61(1) is subject to no such qualification.
170. There is, accordingly, no requirement for "clear wording". Nor can the *contra proferentem* principle have any application where, as here, terms of the agreement are clear and are not in dispute.
171. There is no requirement for a solicitor to advise a client as to whether an agreement is a CBA, any more than there is one for the solicitor to advise a client that an agreement is not a CBA. At that stage, the solicitor is not a fiduciary for the client but is negotiating the solicitor's own terms of business with a counterparty (*Belsner v Cam Legal Services Ltd* [2022] EWCA Civ 1387, [2023] 1 WLR 1043).
172. Neither is there any obligation on a solicitor to advise a client to seek independent legal advice in relation to the same (*Bolt Burdon v Tariq* [2016] EWHC 811 (QB), [2016] 2 Costs LR 359). In the context of an NCBA (and there is no material difference for present purposes), the absence of the client having independent advice on the effect of the NCBA was held not even to be material to any question of 'fairness'. It cannot have any relevance at all to the prior question of whether the agreement is or is not a CBA as a matter of fact and law.
173. The fact that (as Mann J found in *Wilson v The Specter Partnership*) a CBA does not describe itself as such is not conclusive or determinative to its status as such, and is probably not even relevant. So, in *Hollins v Russell* [2003] EWCA Civ 718, [2003] 1 WLR 2487 (Brooke LJ, at paragraph 93) the Court of Appeal reached the conclusion that Conditional Fee Agreements ("CFAs") generally (and specifically the then Law Society models that they were considering) were CBAs.

174. The Defendant accepts that for the Engagement Letter to be a CBA, there must be a sufficient degree of certainty in the fees fixed by the CBA or the charging mechanism that is to be used to fix the fees. What is required, however, is sufficient certainty, not absolute certainty. For example it is not a requirement that the client must know, at the time the CBA is entered into, the precise sum that he will be charged. Such a requirement would be wholly contrary to the express provision in s.69(1) that a CBA may permit remuneration “by a salary”, “by reference to an hourly rate” or “otherwise”. By use of the term “or otherwise” it is clear that section 59 is not intended to be restrictive as to the permissible basis of charging in a CBA.
175. Furthermore, where the statute not merely uses such wide words, but expressly permits remuneration by a salary or by an hourly rate, it is inconsistent with such express provision to contend that an agreement cannot be a CBA if it provides for reasonable increases to such salary or hourly rate over time. What is required is sufficient certainty as to the basis of charging.
176. Provided the provision for increase is spelt out and there is provision for such rates to apply on notification (so that, in practice, the new rates operate as a variation to the terms of the agreement), this is wholly consistent with the 1990 amendment to section 59 (and with the Court of Appeal’s findings in *Hollins*).
177. Given that litigation can take many years, the idea that section 59 cannot apply in any situation where a purported CBA contains provision for annual increases to hourly rates would unnecessarily neuter the purpose of section 59. Such an agreement would continue to be an agreement providing for remuneration “by reference to an hourly rate.”
178. The Defendant refers to *Acupay System LLC v Stephenson Harwood LLP* [2021] EWHC B11 (Costs), in which this Court concluded that similar terms in a CFA involving payment by way of hourly rates and time spent, including (i) rates which were expressed to cover a “range” (depending on seniority); and (ii) provision for the solicitor to review and amend those rates, were entirely consistent with the CFA being a CBA. The only distinguishing factor in *Acupay* which precluded the agreement from being a CBA was the express agreement between the parties that it was not a CBA, which is not a feature of this case.
179. Similarly, *Addleshaw Goddard LLP v Wood & Anor* [2015] EWHC B12 (Costs), involved a discounted, hourly rate-based CFA in which the hourly rates again appear to have been expressed to cover a range. Master Campbell, the Costs Judge deciding that case, accepted that provisions for increases in hourly charging rates, for example in line with inflation, are ubiquitous in solicitors’ engagement letters. He noted that in that particular case, the review provision added the caveat that any changes would be discussed with the client before implementation. He did not accept that such a clause created a degree of uncertainty inconsistent with the CFA’s status as a CBA.
180. In this case, the Engagement Letter provided for the specific rates for the key senior lawyers who were to work on the matter and it identified the specific

range of rates for the other categories of fee earners who would work on the matter. Where such work was undertaken, the specific rate would be shown in the bills provided to the client for each month.

181. Those rates were all the subject of specific agreement. The only scope for variation was by way of a periodic increase (of the type that is entirely standard for example in a Law Society model CFA), such rates to apply on notification to the client. The client would be able, on notification of any such periodic increase (a) to see the increase in rates; and (b) to take issue with such increase should they wish to do so, either by negotiation, complaint or (ultimately) termination of the retainer if such increased rate was objected to and the objection was not satisfactorily resolved.
182. Once notified and not disputed, or if disputed resolved, the increased rate would then be the new specified rate replacing the previously agreed rate, expressly in accordance with the terms of the Engagement Letter and maintaining the necessary degree of certainty.
183. There was no other right on the part of the firm to alter the basis of charging. The reference to The Defendant's fees "ordinarily" being based on hourly rates cannot properly be construed as being a contractual term permitting the Defendant to charge the Claimant on a different basis. It was plainly a reference to the fact that the Defendant ordinarily charges that way. The Engagement Letter then goes on to provide for that ordinary basis of charging to apply.
184. The Engagement Letter invited the Claimant to discuss with the Defendant any questions, comments, requests or queries concerning fees, and contained express provision for the raising of any queries or concerns by the Claimant, including a full complaints procedure.
185. The reference to the Engagement Letter to rights of assessment is neither material nor determinative. The question remains whether the agreement fulfils the criteria for a CBA. If it does, it is a CBA and the effect is as set out in section 60.
186. In any event, it is the Claimant's own case that even if the Engagement Letter is a CBA, then the Defendant was required nevertheless to produce a statutory bill or bills in respect of its costs and that some form of assessment may take place in relation to those costs. The Defendant's position is that under a CBA, a solicitor is entitled to deliver a bill or bills of costs to their client as a statement of the sums due pursuant to the CBA.
187. Part III of the 1974 Act provides for the right to apply for an assessment in respect of a CBA, under section 61(2) (subject to establishing that the agreement was unfair or unreasonable and should be set aside); and if the agreement is not a CBA, under section 70 (subject to specified limitations noted above).
188. The Claimant has applied for an assessment. He would be entitled to such an assessment if he is able to set aside the CBA. That issue is being tested at the

first stage of his application for an assessment. A statement (as in the Engagement Letter) of general remedies which might be available to a client, subject to detailed consideration of the relevant regime, is immaterial to the characterisation of the retainer itself. Notably the Claimant advances no evidence to the effect that the relevant wording was considered, let alone relied on, by the Claimant at any stage.

Whether the Engagement Letter is a CBA: Conclusions

189. I agree with the Claimant that the Engagement Letter, if a CBA, would have been manifestly disadvantageous to the Claimant compared with a non-CBA retainer, in adding to the time limits that would apply to any application under section 70, the further limitations imposed by sections 60 and 61.
190. I appreciate that an unqualified right to assessment could still be established in the event that the Claimant were subsequently to persuade a court that the Engagement Letter had been unfair or unreasonable, but the hope of demonstrating that one has been treated unfairly or unreasonably from the outset can scarcely be described as an advantage.
191. That said, whether a CBA would have been disadvantageous to the Claimant, compared to a non-CBA retainer, does not really assist in determining whether the Engagement Letter is a CBA. Nor (as Eyre J made clear in *Holcroft v Thorneycroft Solicitors Ltd*) is there a requirement for “clear words” in such circumstances.
192. I cannot attach much weight to the fact that the Defendant did not advise the Claimant that the Engagement Letter was a CBA, because the Defendant was under no such obligation, nor to suggest that the Claimant seek independent legal advice on the intricacies of costs law. The Defendant’s references to *Belsner v Cam Legal Services Ltd* and *Bolt Burdon v Tariq* are precisely on point: the Defendant did not, at the time the terms of the Engagement Letter were negotiated, have any fiduciary duty to the Claimant.
193. I am unable to accept that the SRA code of conduct adds anything. Paragraphs 8.6-8.11 provide for the client to be given certain information. Paragraphs 8.6 and 8.7 in particular require that clients receive the best possible information about pricing and the likely overall cost of the matter, and that solicitors should give clients information in a way they can understand, and ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available.
194. That has a bearing, for example, where the client complains that estimates of overall cost have not been given or adhered to. Further, in *Belsner v Cam* Sir Geoffrey Vos MR found that solicitors had been in breach of the requirements of the code in failing to ensure that a client understood that she would, under the terms of a CFA, be liable to pay her solicitors five times the costs she would be getting back from the defendant.

195. None of those provisions seem to me however to impose upon a solicitor any duty to advise a client as to whether the solicitor's retainer might or might not be a CBA.
196. The Claimant also argues that if compliance with the requirements of section 59 is alone sufficient to render all written contentious retainers CBAs, then in practice almost all retainers for contentious business would be CBAs. That, the Claimant argues, is plainly not what Parliament intended, nor how the courts have applied Part III of the 1974 Act in any of the many decades since its enactment. If the Defendant is correct in its interpretation of the requirements of a CBA, then the vast majority of cases pursued under s.70 of the Solicitors Act 1974 in the intervening period, including those pursued to the Court of Appeal, House of Lords and the Supreme Court, have proceeded and been determined on an entirely false premise.
197. I can see the force of that, although the answer might simply be that, in the great majority of cases, the point has not been taken because neither party chose to take it. In any event, the question before me is only whether, in this particular case, the Defendant is right in saying that the Engagement Letter is a CBA.
198. As to that, the Claimant has a point in arguing that, where the Defendant resists the Claimant's application for an assessment under section 70 on the basis that the Engagement Letter is in fact a CBA, then it is incumbent upon the Defendant to establish at least a *prima facie* case to that effect. My decision, however, does not turn on that, as the position seems to me to be tolerably clear.
199. The Claimant refers to *Finnan v Candey Ltd* [2024] Costs LR 1261, in which HHJ Cadwallader, sitting as a High Court Judge, said of the provisions at section 59 for a CBA:
- “This is a permissive, rather than a prescriptive, provision, and is apt to cover almost any agreement for remuneration for contentious business, subject to exceptions which do not apply here...”
200. The choice of the word “permissive”, rather than “prescriptive”, as approved by HHJ Cadwallader, was the foundation of this court's rejection in *Acupay* of the proposition that any retainer agreement that meets the description of a CBA in section 59 must be a CBA, even where the parties to the agreement have expressly contracted to the contrary.
201. The underlying point is that (even absent any issue as to certainty) one must avoid misinterpreting the authorities so as to conclude that any written retainer agreement that falls within the categories of CBA permitted by section 59 must necessarily be a CBA, just as one should not conclude that any animal that has a tail and four legs must be a cat. As in *Holcroft v Thorneycroft*, one must determine the nature of the relevant agreement on established contractual principles.

202. It follows that, just as an express provision in a contract to the effect that it is not a CBA supports the conclusion that it is indeed not a CBA, the existence within a CBA of other provisions that are inconsistent with its being a CBA may support the same conclusion.
203. That takes me to the Claimant's argument that the reference in the Engagement Letter to a right to challenge the Defendant's bill is inconsistent with the proposition that the Engagement Letter is a CBA.
204. On the Defendant's interpretation of the effect of sections 59-61, I would entirely agree. The Engagement Letter confirmed the Claimant's right to apply for assessment of "our bill" under part III of the Solicitors Act 1974. It is not a viable reading of that provision to say that it refers only to the right to apply for an assessment that could, at the Defendant's option, be denied unless the entire agreement were set aside as unreasonable or unfair.
205. In my view the Defendant's interpretation of the Engagement Letter's assurance to the Claimant of his right to apply for assessment would have rendered it downright misleading. The reference in the Engagement Letter to a right to apply for assessment is not consistent with its being a CBA.
206. The decisive factor seems to me however to be that the Engagement Letter embodies precisely the uncertainty identified by Mann J in *Wilson v The Specter Partnership*. The following extract from this judgment applies to the Engagement Letter just as it did to the retainer he was considering:
- "The purpose of a CBA is to fix the fees, or provide a fixing mechanism, so that the parties (and in particular the client) know where they stand. Under the terms of this document there is still an element of uncertainty."
207. I tend to agree with the Defendant's submission that one must take care, with a post-1990 hourly rate CBA, about applying too literally the words used by Lord Denning MR in *Chamberlain v Boodle & King* by reference to a CBA regime that did not then allow for such agreements. The provisions of the Engagement Letter for the payment of hourly rates by reference to "bands" of fee earners is not necessarily inconsistent with its being a CBA.
208. Nor is a provision within a retainer agreement for increases to hourly rates in itself necessarily inconsistent with that retainer being a CBA. The difficulty for the Defendant (as with the solicitor in *Wilson v The Specter Partnership*) is that the Engagement Letter's provision for hourly rate increases is not governed by any "fixing mechanism": it is entirely open-ended.
209. In *Acupay* the contract of retainer provided for an annual increase to hourly rates, on 1 May every year, at a fixed rate of 3%. I do not know precisely the provisions considered by the Court of Appeal in *Hollins v Russell*, but I do agree with the Claimant that that part of Brooke LJ's judgment was obiter in any event and I do know that in this case the provisions of the Engagement Letter for hourly rate reviews were, both as to timing and amount, entirely at the discretion of the Defendant.

210. The consultation and complaint provisions in the Engagement Letter do not alter its straightforward provision for the Defendant to increase its hourly rates by any amount and at any time it saw fit. The Defendant's only obligation to liaise with the Claimant in that respect was to notify the Claimant of the increases when they took effect. The Defendant's right to increase its hourly rates was not contingent upon such notification, much less agreement by the Claimant.
211. I appreciate that in practice the Defendant's hourly rate rises might well have taken place once a year and might (as Mr Trenor has said) have been purely inflation (or possibly promotion) based. The question is, however, what the Engagement Letter actually said, and it contained no such provisions.
212. It is not an answer to any of that to say that the Claimant could complain, or attempt to negotiate, or terminate the retainer, nor to point to the prospective certainty of some future hourly rate arrangement that was unknown when the Engagement Letter was signed. Termination of the retainer would not change its nature or its terms, including the Claimant's contractual obligation to pay the Defendant's revised rates up to the point of termination.
213. Nor can I accept that the Engagement Letter's hourly rate review provisions can be construed as an agreement to the future amendment of the Engagement Letter. Increases to hourly rates were provided for in the Engagement Letter from the outset, and would not in themselves vary its terms. Even if the Engagement Letter's hourly rate review provisions could be construed in that way, the element of uncertainty would not be removed because it was not known, at the time that the Engagement Letter was signed, what those variations were going to be.
214. There was, accordingly, a significant element of uncertainty within the Engagement Letter as to the hourly rates the Defendant would be paying from time to time. That is wholly inconsistent with the proposition that the Engagement Letter was a CBA. My conclusion is that it was not.

Whether the Engagement Letter was Unfair or unreasonable

215. As I have found that the Engagement Letter was not a CBA, it is not strictly necessary for me to address this point. In case I am wrong as to the status of the Engagement Letter, I should however do so.
216. The test (as applied in *Bolt Burdon Solicitors v Tariq*) was set out by Lord Esher MR in *Re Stuart ex p Cathcart* [1893] 2 QB 201, at 204-205:

“With regard to the fairness of such an agreement, it appears to me that this refers to the mode of obtaining the agreement, and that if a solicitor makes an agreement with a client who fully understands and appreciates that agreement that satisfies the requirement as to fairness. But the agreement must also be reasonable, and in determining whether it is so the matters covered by the expression "fair" cannot be re-introduced. As to this part of the requirements of the statute, I am of opinion that the meaning is that when an

agreement is challenged the solicitor must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the Court that the terms of that agreement are reasonable. If in the opinion of the Court they are not reasonable, having regard to the kind of work which the solicitor has to do under the agreement, the Court are bound to say that the solicitor, as an officer of the Court, has no right to an unreasonable payment for the work which he has done, and ought not to have made an agreement for remuneration in such a manner.”

217. The Claimant says that the Engagement Letter, if a CBA, was unfair and unreasonable because no advice or information was given to him in respect of the limitations imposed by the CBA upon his right to seek assessment of the Defendant’s bills and because the status of the Engagement Letter as a CBA was prejudicial to the Claimant and advantageous to the Defendant, in particular in removing his right, on an assessment under section 61(4B), to challenge hourly rates which could be increased at any time entirely.
218. The Defendant points to the fact that the terms of the Engagement Letter, in particular as to the hourly rates to be applied, were individually negotiated with Mr Munhoz and Mr Sosa, and set by reference to the rates charged by advisers offering comparable services.
219. I appreciate that even a seasoned practitioner such as Mr Munhoz, based as he was in Brazil, could scarcely have been expected to appreciate the distinction between a CBA and a non-CBA retainer. Nor, of course, could the Claimant or his financial advisers. On the evidence, however, precisely the same could have been said of Mr Born and Mr Trenor, both of whom were registered foreign lawyers, not solicitors.
220. Where (as I have found) the Defendant was under no obligation to explain that distinction, it cannot be said that the arms-length commercial negotiation that led to the signature of the Engagement Letter by between the Defendant and the Claimant, as an experienced businessman with access to multi-jurisdictional legal support, was unfair.
221. Reasonableness is another matter. For the reasons I have given, I have concluded that a retainer which incorporates the Engagement Letter’s entirely open-ended provisions for hourly rate increases cannot be a CBA.
222. If I had concluded that the Engagement Letter were, nonetheless, a CBA, I would have found it to be unreasonable in providing for the Defendant’s hourly charging rates to be increased at times and by amounts dictated entirely by the Defendant, whilst simultaneously removing the Claimant’s rights, under section 70, to challenge those hourly rates.
223. I would, accordingly, have concluded that the Engagement Letter (had it been a CBA) should be set aside as unreasonable, and that the Defendant’s billed costs should be assessed in their entirety.

Was the Defendant Entitled to Deliver Interim Statutory Bills to the Claimant under the terms of the Engagement Letter?

224. It is common ground that the default position for a contract between a solicitor and the client who retains that solicitor is that it is an “entire contract” under which the solicitor is entitled to render a statutory bill only at the end of the retainer, as on the completion of a transaction or the conclusion of litigation.
225. Some contracts of retainer, such as for the management of complex, multi-party litigation, may not lend themselves readily to the “entire contract” model. In such cases, the solicitor may be able to rely upon *In Re Romer & Haslam* [1893] 2 QB 286 and other authorities which establish that a solicitor may have the right to render a statutory bill at a “natural break”.
226. The “entire contract” principle is subject to agreement to the contrary. The solicitor and client may agree that the solicitor may, during the currency of the contract of retainer, render interim bills. To qualify as interim statutory bills, they must however be complete and final for the work performed over the period that they cover. As Spencer J put it in *Bari v Rosen* [2012] 5 Costs LR 851:
- “... a solicitor may contract with his client for the right to issue statute bills from time to time during the currency of the retainer. Such bills are known as “interim statute bills”. They are nevertheless final bills in respect of the work they cover... They are complete self-contained bills of costs to date.”
227. The necessity of completeness and finality as characteristics of a statutory bill was considered by the Court of Appeal in *Slade (t/a Richard Slade And Company) v Boodia and another* [2018] EWCA Civ 2667, in which the court found that there was nothing to prevent a solicitor rendering separate statutory bills, at different times, for profit costs and disbursements, but did not otherwise depart from the principles described by Spencer J.
228. The delivery of interim statutory bills has the same consequences, in law, as does the delivery of a final statutory bill. Once the month’s wait imposed by section 69 has expired, the solicitor can sue for the recovery of the amount due under an interim statutory bill. The time limits for applying for detailed assessment of interim statutory bills under section 70 will run from the date of delivery of each of them.
229. Interim bills that are not interim statutory bills are often referred to as “mere requests for payment on account” and have none of those consequences, even if (as in this case) the solicitor reserves the right to cease acting and to charge interest if they remain unpaid.
230. In *Ivanishvili v Signature Litigation LLP* [2024] 1 W.L.R. 4636 the Court of Appeal noted in that interim billing has gone from being rare to being commonplace today. The court also observed that the delivery of interim statutory bills during the currency of a retainer could have adverse consequences for the client (Coulson LJ at paragraph 27):

“The time periods in which the client can challenge a statutory bill under section 70 are very tight, a situation exacerbated when the client has an ongoing relationship with the solicitor. In *Harrod’s Ltd v Harrod’s (Buenos Aires) Ltd* [2014] 6 Costs LR 975 , Jacob J said at para 20 that the timetable laid out in sections (3) and (4) put the client “in an impossible position. Either he challenges his solicitors’ bill—the very solicitor who is now acting for him—and continues using that solicitor at the same time; or he has to change solicitor, all in the middle of litigation when he is facing another enemy”. In *Vlamaki v Sookias & Sookias* [2015] 6 Costs LO 827 , Walker J referred at para 16 to the observations of the costs judge in *Bari v Rosen...* and “the impracticality and unfairness to a client if a retainer has the effect that interim bills are final in relation to the period that they cover, with resultant drastic limitations on the ability of the client to make use of statutory provisions for assessment”.

231. It is not, however, suggested by either party (nor, bearing in mind *Richard Slade and Company plc v Erlam* [2022] EWHC 325 (QB) could it be successfully argued) that the Defendant was under any obligation to warn the Claimant of the consequences of the delivery of interim statutory bills, nor that the absence of any such warning could have any bearing upon the Defendant’s right, under the terms of retainer, to deliver interim statutory bills. The question is whether the Engagement Letter conferred such a right upon the Defendant.

The Defendant’s Right to Deliver Interim Statutory Bills: the Claimant’s Submissions

232. The Claimant says that the Defendant had no contractual entitlement to deliver interim statutory bills. In order to displace the default position of an ‘entire agreement’, clarity will always be required on ordinary principles of contractual construction. It is for the solicitor to demonstrate that an interim invoice is, in law, an interim statutory bill: *In Re Romer & Haslam*. As the drafter of the relevant terms, any ambiguity will be construed against the Defendant (*Vlamaki v Sookias and Sookias*, at 15-16, as cited in *Boodia v Slade* [2024] 1 W.L.R. 2084 at 40 and 57).
233. The prejudice to a client caused by the service of interim statutory bills over the currency of a retainer, as considered by the Court of Appeal in *Ivanishvili*, justifies a cautious approach to finding the existence of any agreement to deliver interim statutory bills.
234. The Engagement Letter does not contain any wording (let alone clear wording) to the effect that ‘interim statute bills’ may be delivered. To the contrary, the Engagement Letter merely suggests that the Defendant will ordinarily send the Claimant “monthly statements” showing work performed and expenses recorded during the previous month.
235. There is no indication that those monthly statements will have any particular status beyond an interim request for payment. It is not clear that they will be

complete and/or final (as contrasted with “recorded on our books”) for the work done in the previous month. The Claimant is told only that they should be reviewed upon receipt so that any ‘questions’ he may have can be raised in a timely fashion. The relevant paragraph is prefaced with the word “ordinarily” and this lack of certainty alone weighs heavily against any agreement for the delivery of interim statute bills, as opposed to requests for payments on account.

236. Similarly, the Engagement Letter refers to the Claimant having a right to apply for an assessment in relation to “our bill” (singular). That is consistent with the conventional position where a final statutory bill is delivered at the conclusion of the matter, in respect of which the client then has the right to seek assessment under section 70.

The Defendant’s Right to Deliver Interim Statutory Bills: the Defendant’s Submissions

237. The Defendant says that properly construed, the Engagement Letter provided for the delivery of interim statutory bills. It provided for the periodic delivery of monthly statements of work performed and expenses recorded for the previous month: a full and self-contained account of the work for the previous month and the expenses recorded in that period. The client was told to raise any dispute in relation to the same in a timely fashion.
238. The client was further informed that such statements were “due and payable” upon receipt and that interest would be charged on the bills if payment was not made within 30 days, such interest running from the date payment was due (namely the date of receipt, as specified). The statements, in that context, were specifically described as ‘bills’.
239. There is no requirement to use the words “statute bill” or “statutory bill” when providing for delivery of a statutory bill in an engagement letter. Such language is unlikely to be of much assistance to any client. What is material is that the engagement letter provides, by agreement, for the delivery on a periodic basis of bills which are complete for the period they cover, and in respect of which any dispute should be raised following delivery and not at the conclusion of the matter. That is exactly what the Engagement Letter provided for.
240. As a matter of practice, the Court may also look to see how bills are delivered and treated to see if that is consistent with such an agreement being in place, whether expressly or by implication (Roskill LJ in *Davidsons v Jones-Fenleigh* (1980) 124 Sol Jo 204 (following *Romer & Haslam* [1893] 2 QB 286), as approved by the Court of Appeal in *Abedi v Penningtons* [2000] 2 Costs LR 205 at 207.
241. The Defendant argues that the general form of the Defendant’s finalised invoices, in particular in relation to the detailed information given with each of them, was consistent with their being statutory bills and that the requirement in the Engagement Letter that any queries should be raised in a timely fashion, together with Claimant’s arrangements for reviewing the contents of the

invoices and raising queries upon them promptly (as in December 2022) indicate that both parties treated them as final for the period they represented. The Defendant points to the lack of any evidence from the Claimant to the effect that the Defendant's invoices were not final, and to the Defendant's practice of delivering draft monthly bills to the Claimant, which says the Defendant supports the proposition that the subsequent finalised versions were indeed interim statutory bills.

The Defendant's Contractual Right to Deliver Interim Statutory Bills: Conclusions

242. I am not convinced that all of the authorities referred to by the Claimant and the Defendant are of assistance in construing the terms of the Engagement Letter. The burden on the solicitor identified in *In Re Romer & Haslam* seems to me to arise where it is appropriate to consider whether the parties agreed to treat interim bills as statutory bills, in the absence of any established right on the part of the solicitor to render such bills (Bowen LJ at 298). It does not extend to the interpretation of a written agreement.
243. Similarly, the passages referred to by the Defendant in *Abedi v Penningtons* and *Davidsons v Jones-Fenleigh* address the question of whether it is right to conclude that the parties agreed that a particular bill was to be treated as a self-contained bill of costs to date.
244. They do not create an exception to the established contractual principle that the meaning of a contract is to be ascertained at the time when it is concluded, having regard to its background and the surrounding circumstances within the parties' knowledge at that time. Subsequent statements or conduct, including the mode of performance, are inadmissible for the purpose of interpretation.
245. As Walker LJ put it in *Vlamaki v Sookias & Sookia* (at paragraph 15):
- “In accordance with established principles, I interpret the terms of the contractual retainer by reference to the agreement as a whole and by reference to the factual matrix at the time of the agreement.”
246. Bearing that in mind, my conclusion is that the provisions of the Engagement Letter for the provision of “monthly statements” are consistent with those “monthly statements” being interim statutory bills.
247. I agree that any ambiguity in the Engagement Letter would stand to be interpreted against the Defendant, but I do not find any such ambiguity.
248. The reference to “our bill”, to my mind, has no significance. It is just loose phrasing and cannot bear the weight of meaning imposed upon it by the Claimant. In fact the words “bill” and “statements” appear to be interchangeable in the Engagement Letter.
249. I gave careful consideration to the sentence “We will ordinarily send you monthly statements for work performed and expenses recorded on our books during the previous month”. The word “ordinarily” refers to the timing of the

Defendant's monthly statements, rather than their status, but the sentence offers a clear indication that a given monthly statement might miss out something not yet recorded, which would have to be incorporated in some future monthly statement.

250. The sentence however indicates that the monthly statements will cover all work performed during the previous month. Expenses not yet recorded in the Defendant's books might be included in a later monthly statement. Bearing in mind *Slade (t/a Richard Slade And Company) v Boodia and another*, that is not in itself inconsistent with the status of each monthly statement as an interim statutory bill.

Did the Defendant's Finalised Invoices, as Delivered, Amount to "Interim Statutory Bills"?

251. Section 69, at subsection (2E), provides that, where a bill is shown to have been delivered in accordance with the requirements of section 69 it is to be presumed, until the contrary is shown, to be a statutory bill.
252. A client can rebut that presumption by showing that the bill lacks certain essential characteristics established by case law.
253. One is finality. As is clear from the judgment of Spencer J in *Bari v Rosen*, the fact that a solicitor and client have entered into an agreement to the effect that the solicitor can render interim statutory bills is not in itself determinative of the status of any interim bills subsequently delivered. They must still meet the essential criterion of being complete and final for the work that they cover.
254. The Court of Appeal, in *Ivanishvili v Signature Litigation LLP* [2024] 1 W.L.R. 4636 (Coulson LJ at paragraph 48) restated the requirement for statutory bills to be complete and final:

"To be an interim statutory bill, it must be final and complete in respect of the work or period that it covers. There can be no subsequent adjustment for any reason, whether that be 'the outcome of the business' or something else: an interim statutory bill must be a complete self-contained bill of costs."

255. Another essential criterion is whether the bill contains sufficient information. The test was explained by Ward LJ in *Ralph Hume Gary (a Firm) v Gwillim* [2002] EWCA Civ 1500 at paragraphs 70 and 73:

"70... the burden on the client... is satisfied if the client shows: (i) that there is no sufficient narrative in the bill to identify what it is he is being charged for, and (ii) that he does not have sufficient knowledge from other documents in his possession or from what he has been told reasonably to take advice whether or not to apply for that bill to be taxed. The sufficiency of the narrative and the sufficiency of his knowledge will vary from case to case, and the more he knows, the less the bill may need to spell it out for him. The interests of justice require that the balance be struck between

protection of the client's right to seek taxation and of the solicitor's right to recover not being defeated by opportunistic resort to technicality....

73. I add this postscript for the profession's consideration so that an unseemly dispute of this kind does not happen again. Surely in 2002 every second of time spent, certainly on contentious business, is recorded on the account department's computer with a description of the fee-earner, the rate of charging and some description of the work done. A copy of the printout, adjusted as may be necessary to remove items recorded for administrative purposes but not chargeable to the client, could so easily be rendered and all the problems that have arisen here would be avoided. In these days where there seems to be a need for transparency in all things, is a printout not the least a client is entitled to expect?"

Whether the Finalised Invoices were Interim Statutory Bills: the Claimant's Submissions

256. I have already summarised, under the previous heading, the Defendant's arguments in favour of the conclusion that the finalised invoices delivered by the Defendant to the Claimant were statutory bills. I will summarise here the Claimant's submissions, insofar as pertinent given the conclusions I have already reached.
257. The Defendant's finalised invoices, as delivered, were no more than the "monthly statements" envisaged by the Engagement Letter. They are formal requests for payment and contain detail of the costs included, as would be expected given the extraordinary sums involved. But that does not mean that they amount to interim statutory bills in law.
258. Each of the invoices contained a caveat to the effect that it "Includes only Services and disbursements posted to date". That allowed the Defendant scope to charge for work done and expenses incurred in an earlier month, but which had not yet been recorded at the time of the earlier invoice.
259. The context for providing "draft" versions in advance of "final" versions of the invoices was not, as the Defendant seeks to suggest, to establish, once and for all, the final sum that would be payable for the relevant work. Instead, it was a function of the Claimant and his agents being concerned at the delays in the Defendant's supply of "monthly statements".
260. The Engagement Letter requested queries about monthly statements in a "timely fashion", but that was undermined when the statements themselves were not supplied in a timely fashion. The supply of "draft" versions of those monthly statements was adopted as a way to facilitate them being provided for review more promptly. It was not intended to elevate the status of the "final" version ultimately provided thereafter. Those "final" versions (being the invoices) were only ever the "monthly statements" envisaged by the Engagement Letter, and did not amount to interim statutory bills.

261. That the Defendant's finalised invoices were not treated by the parties as final bills for the sums which were due and payable is further demonstrated by the fact that the Claimant was continuing to dispute them, and to make payments only to the extent of a monthly "cap".

Whether the Finalised Invoices were Interim Statutory bills: Conclusions

262. I will start with what seems to me to be clear and decisive evidence supporting the conclusion that Defendant's finalised invoices are not statutory bills.
263. I can accept that each of the Defendant's invoices meets the standard of particularity necessary to meet the *Ralph Hume Gary (a Firm) v Gwillim* test. The Claimant takes issue with some of the detail provided, but that strikes me as a quibble: the degree of detail is all that one could reasonably expect from a solicitor's computerised record.
264. There is however a discrepancy between the description of the "monthly statements" described in the Engagement Letter and the finalised invoices subsequently delivered by the Defendant.
265. For the reasons I have given, an interim statutory bill does not have to incorporate all disbursements incurred during the period that it covers. For that reason, I saw no difficulty in the fact that the Engagement Letter provided for monthly statements that would only incorporate expenses "recorded on our books" during the previous month.
266. The standard wording on the Defendant's finalised (and draft) invoices is, however, materially different in that, as the Claimant points out, each monthly invoice "Includes only Services and disbursements posted to date."
267. The clear meaning of that phrase is that some of the work performed by the Defendant during the period covered by each invoice might not have been "posted", in other words recorded upon the Defendant's systems, at the time of delivery and accordingly might have to be included in a subsequent invoice. In other words, none of the finalised invoices are stated to be final for the period they cover: quite the contrary.
268. The Defendant attempts to interpret this phrase only as an indication that further charges may be rendered for work undertaken in the subsequent month. That does not seem to me to be a viable interpretation. There is no reason why an invoice covering work undertaken during a specified period should incorporate a redundant warning to the effect that that the solicitor will charge for further work undertaken during a subsequent period.
269. Given that all of the Defendant's finalised invoices, whether disbursements-only or for legal fees and disbursements, reserved the right to render further charges for work undertaken in the period they covered, the correct conclusion would seem to be that none of them were statutory bills.
270. Turning to the way in which the Defendant's invoices were treated, very clear evidence would be needed to establish that an invoice which, on its face, is

expressly not final has nonetheless been agreed to be final. There is nothing of that kind here.

271. On the evidence, the Claimant continued, throughout the retainer, to examine the Defendant's invoices, whether draft or finalised, in detail. That in itself does not say anything about whether any of them were treated as final for the period they covered. It is equally consistent with a readiness on the Claimant's part to give careful consideration to any charges for the same month included in a subsequent invoice.
272. As it has some bearing on the issue of finality, I will say now that the only area in which I tend to prefer the evidence of Mr Coltro over that of Mr Trenor is where the Defendant's reasons for rendering draft invoices, and the timing of those draft invoices, is concerned.
273. Mr Coltro's oral evidence, on the whole, was hopelessly partisan. I do not mean that he ever gave deliberately misleading evidence, but he very evidently focused on vindicating the Claimant rather than simply stating the facts as he understood them. Hence, for example, his reluctance on cross-examination to give clear answers to the questions put to him, where he appeared to think that a clear answer might not suit the Claimant's case; and his absolute insistence, notwithstanding a wealth of documentary evidence to the contrary, that Mr Trenor had invented the Claimant's cashflow problems.
274. Mr Coltro also insisted that the Defendant had twice broken an agreement with the Claimant to cap its fees. Here his evidence went beyond the Claimant's stated case. I find it (given the level of fees being incurred each month) to be inherently incredible that the Defendant would have agreed to cap its fees without either the balance being paid later, possibly on a conditional basis, or drastically reducing the amount of work being undertaken for the Claimant.
275. I do not accept that this can be explained away either by reference to linguistic differences or by a layman's understanding, on Mr Coltro's part, of a binding agreement. Mr Coltro stated clearly, and he clearly meant, that the Defendant had twice come to an agreement with the Claimant to cap its fees, and reneged upon the agreement both times. Even if that were the Claimant's case, I could not accept it.
276. Mr Trenor's evidence, on the whole, appeared to me to be frank, forthright and convincing, except where it came to billing and hourly rate increases. There, a rather defensive note crept into his oral evidence. So, for example, his reluctance to accept that the Defendant did not give proper notice of its hourly rate increases in January 2023, and his suggestion that the Defendant had complied with its obligations under the Engagement Letter by dividing its invoices, when finally delivered, into monthly periods rather than "ordinarily" delivering them monthly. That is not a viable interpretation of the clear terms of the Engagement Letter.
277. I do not find Mr Trenor's evidence on the reason for the Claimant's rendering draft invoices entirely convincing. He says in his written evidence that this was done with the intention of ensuring that any disagreement regarding its

contents could be resolved prior to issuing a final invoice. There is however no documentary evidence to support that proposition and it is not consistent with the Defendant's practice of sending draft invoices in batches, after months of delay and only (with the exception of a few offers to do so, not followed up) on request.

278. Nor is there any obvious reason why the Defendant should have delayed in sending invoices merely because the parties were discussing an alternative payment structure: if anything, such discussions should have been informed at all times by the best available information on what the Defendant's services, under the current terms of engagement, were costing.
279. Mr Trenor also says that the Defendant had access to the daily hours and detailed descriptions of work performed by each timekeeper and could (and did) send this information to the Claimant, through his agents and representatives, in draft or final form, upon request at any time. However on 27 September 2023, when he sent to Mr Coltro revised draft invoices for February, March and April 2023, he warned Mr Coltro that they had been updated to reflect "all fees and disbursements" for those months and might therefore differ from the drafts sent four months earlier.
280. In fact the figure shown for legal fees in the Defendant's invoices for the month of March 2023 changed three times. In the version sent in May 2023, the figure was US \$967,337. In the draft sent in September 2023 it was US \$1,011,675. In the final version, sent in September 2024, it was US \$1,017,435.
281. I do not mean that differences between the Defendant's draft invoices and finalised invoices has in itself any direct bearing upon whether the finalised versions were statutory bills. The point is that it could, evidently, take months for the Defendant's legal fees for a given month to be finalised.
282. That is consistent with the warning, on the Defendant's finalised invoices, that they still might not comprise all of the Defendant's legal fees for the period covered. It supports my interpretation of the words "Includes only Services and disbursements posted to date" and my conclusion that the Defendant's finalised monthly invoices were not statutory bills.

When were the Defendant's Invoices Delivered?

283. To explain my conclusions in this respect I need to refer to the concept of a "Chamberlain bill". A Chamberlain bill is a series of non-statutory bills which together become a statute bill upon delivery of the last bill (*Chamberlain v Boodle & King*). A series of bills which, individually, do not qualify as statutory bills can nonetheless collectively comprise a Chamberlain bill (*Bari v Rosen*, Spencer J, at paragraph 52-59).
284. The Defendant's case is that all of its finalised invoices, being statutory bills, were delivered on the dates shown in the schedule reproduced at paragraph 60 above.

285. The Defendant however accepts that if the Defendant's finalised invoices were not, individually, statutory bills, then as the Claimant says, the complete series of non-statutory bills delivered by the Defendant to the Claimant together comprised a statutory "Chamberlain bill", delivered on 17 September 2024, consistently with the terms of the letter of 16 September 2024 sent to the Claimant by Mr Born and Mr Trenor.
286. Given the conclusions I have already reached, that is the only conclusion open to me. The effective date of delivery of a statutory bill to the Claimant by the Defendant was 17 September 2024.

When And to What Extent Have Any Statutory Bills Been Paid For the Purposes of Section 70(4)?

287. The dates and amounts of the payments made by the Claimant against the Defendant's invoices, from August 2023, are set out in the schedule reproduced at paragraph 117 above.
288. As I have mentioned, there is a dispute between the Claimant and the Defendant as to the way in which the payments made by the Claimant against the Defendant's invoices should be allocated. The Defendant's position is that the payments received from the Claimant fell to be allocated against the balance of the oldest outstanding bills. The Claimant's position is that from August 2023, and with the exception of one payment of US \$2 million made on 26 February 2024, it made payments of either US \$400,000 or US \$600,000 bill for the relevant month.
289. Had I concluded that the Defendant's finalised invoices were statutory bills, then depending upon my conclusions as to the appropriate allocation of payments some of them would have been treated as fully paid and others as partly paid.
290. Partly paid statutory bills, for the purposes of section 70, are treated as unpaid. Of the fully paid statutory bills, some would have been paid more than 12 months before the application for assessment was made, so that, under section 70(4), the court would have had no jurisdiction to make an order for assessment. Others would have been paid within 12 months of the application for assessment, so that an order could only have been made for their assessment under special circumstances.
291. The parties have come most helpfully, prepared a schedule, which (on the assumption that the Defendant's finalised invoices were indeed statutory bills) summarises each party's position with regard to payment and the consequent application to each statutory bill of section 70(3) and (4). It is appended to this judgment as Appendix 1.
292. The following summary, also helpfully supplied by the parties, shows the significance of the point:

	The Defendant's Case	The Claimant's Case
Amounts subject to s.70(4)	US\$ 8,479,001.98	US\$ 4,787,272.86
Amounts subject to s.70(3)	US\$ 5,015,621.40	US\$ 6,097,195.87
Amounts subject to s.70(2)	US\$ 21,848,590.58	US\$ 24,458,745.23

293. Given that the Defendant's finalised invoices were not statutory bills, the Chamberlain bill delivered by the Defendant on 17 September 2024 is part paid. The court has a discretion under section 70(2) to order assessment of the whole of that bill, incorporating as it does all of the Defendant's finalised monthly invoices, without the need first to establish special circumstances.
294. Again, however, in case I am wrong on that point, I will state my conclusions on the appropriate allocation of payments made by the Claimant.
295. Before doing so I need to mention the authorities to which I have been referred in relation to this point.
296. First I should mention the rule in *Devaynes v Noble, Clayton's case* (1816) 1 Mer 529, to the effect that monies paid into an overdrawn account are set against, and extinguish, the earliest debts first. My understanding is that this is, usually, how a creditor is expected to apply payments (so minimising a debtor's liability for interest on unpaid debt).
297. In *Simson v Ingham* (1823) 2 B&C 70 (at 310) Bayley J described a different general rule in relation to the allocation of payments to debt:
- “The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money.”
298. In *Menzies v Oakwood* [2024] UKSC 34, solicitors had deducted the amount of their final bill from damages upon rendering that bill, passing the balance of damages on to the client. The question before the court was whether that constituted payment for the purposes of section 70. The court found that it did not. Although what the solicitors had done was consistent with their terms of their retainer, the deduction from damages was a *fait accompli* and could not establish agreement by the client to the sum taken in payment.

299. At paragraph 71 of his judgment in *Menzies v Oakwood* Lord Hamblen summarised the principles:

“In summary, the authorities show a long established understanding as to what payment by deduction or retention requires in this context both generally and with specific reference to section 70 and its statutory predecessors. The need for a settlement of account has been consistently stated in cases from *In re Bignold* in 1845 to *Harrison v Tew* in 1987. This requires an agreement to the sum taken or to be taken by way of payment of the bill of costs. Such an agreement may in an appropriate case be inferred from the parties’ conduct and in particular from the client’s acceptance of the balance claimed in the delivered bill. The authorities therefore provide strong support for the Client’s case of the need for an agreement as to the amount to be paid in respect of the bill of costs and that mere delivery of the bill does not suffice.”

The Claimant’s Case on the Allocation of Payments

300. The Claimant refers to the general rule in *Simson v Ingham*.
301. The Claimant says that his lump sum payments of US \$400,000 and US \$600,000 were, expressly, referable to the Defendant’s charges for each individual month. The payments of US \$400,000 reflected the Defendant’s assurance to Mr Munhoz that it would be possible to ensure that the Defendant’s charges amounted to no more than about US \$400,000 per month. In February 2024, those payments increased to US \$600,000 for each month, to reflect the proposal made in December 2023 to increase the monthly sum.
302. It was express, or at least implicit, that the payments were being made on that basis. The Claimant did not agree to those sums being used to pay other invoices. As a result, it was not open to the Defendant to apply those payments to invoices related to other months. It was clear that that was not the basis on which those payments were being made.
303. As a result, most of the Defendant’s invoices were only part-paid. The only exceptions are the first three invoices and the three disbursements-only invoices which were paid in full, and invoices No. 5082365, 5082366, which relate to March 2024 and April 2024, which were each for less than US \$600,000 and so were discharged in full by the payments of US \$600,000 made in respect of each of those months.
304. The Defendant does not dispute that the Claimant made the relevant payments, expressly or implicitly, on the basis that US \$400,000, and later US \$600,000, was attributable to each individual month. The Defendant merely denies that the payments were applied that way.
305. The question however is not how the Defendant allocated the payments. The question is whether the Defendant was entitled to allocate them in that way, at least for the purposes of identifying the date of payment for the purposes of section 70.

306. In that regard it is the Claimant's intentions, and his expressions of those intentions which are relevant. Mr Trenor appears to accept that it was the Claimant's intention that his payments be attributed to individual months. He must do so, not least because it is an intention which he himself noted in contemporaneous emails (as in his email of 30 November 2023) even if he did not accept that the Defendant was obliged to apply the payments that way.
307. That, says the Claimant, is conclusive. The Defendant cannot simply decide of its own volition to apply those payments differently. As held by the Supreme Court in *Menzies* at paragraph 45:

“...As to the specific purpose of section 70(4), the obvious reason for the stricter regime that applies where the bill has been paid is that payment by a client of a particular bill is taken to represent acceptance and agreement by the client to the sums claimed in that particular bill. Where there is such acceptance and agreement it is understandable that the client's right to an assessment should be restricted...”

The Defendant's Case on the Allocation of Payments

308. The Defendant points out that the Claimant relies on his having made monthly payments (albeit sporadically, in addition to other lump sum payments), but also accepts that there was no agreement limiting his liability to a specific amount per month. What the Claimant does not identify (other than in Mr Coltro's new evidence under cross-examination) is any instruction or agreement to the effect that payments received could only be used against a specific month's invoice.
309. The Claimant's case is, rather, that it must be taken to have been known or agreed (essentially amounting to the creation of a special purpose trust) the payments for a given month could only be used to pay that particular month's invoice, and that that was the Claimant's intention and right to do so. This is a flawed case, and the payments allegedly made against the March 2024 and April 2024 invoices illustrate that flaw.
310. That is because, on any basis, the payments allegedly made against the March 2024 and April 2024 invoices cannot have been payments only against those invoices, which were, respectively, for US \$411,429.50 and US \$104,895.24. If the Claimant's monthly payments were to be utilised only for that specific month's invoice, he overpaid over US\$ 683,675.26 across those two months.
311. On any basis, therefore, any such unexpressed, but purportedly implied term that the sums paid monthly were only to be applied to that month's invoice, must either be qualified by some other implied term. For example, if the charges for a given month were less than the payment for that month, the balance was to be repaid (which would be the effect if there was some kind of trust or specific limitation on the use of the monies) or, pursuant to some further implied term, it could be used to clear other invoices, in some unspecified order.

312. It is for the Claimant to establish that there was some such binding term or limitation and what its terms were. He has not, and what he has said does not make sense even on his own case. Nowhere does the Claimant identify anything to support his argument that he intended, instructed, or that the Defendant must be taken to have agreed or understood, that the monies paid by him were to be used in anything other than the conventional manner to clear the Claimant's outstanding debt by payment of the oldest part of the debt first.
313. It is not in issue that the only applicable engagement letter and terms of retainer here are the 2 September 2022 Engagement Letter, as amended on 25 September 2023. The fact that the Claimant chose to make payments of a sum chosen by him against his debt on what was intended to be a sporadic monthly basis, and that when he made payments he stipulated which month's payment that was, does not alter what those sums were being paid towards.
314. The sums were all payable toward the Defendant's unpaid fees and disbursements. That debt continued to accrue. Each invoice delivered by the Defendant added to the debt because the Claimant was not paying the invoices in full. Each payment he made reduced the debt.
315. As Mr Trenor put it in his email of 9 August 2023, the payments were applied by the Defendant "as partial payment to our unpaid invoices". On 13 October 2023, Mr Trenor expressly explained that the Defendant would continue to apply the payments on account to the oldest unpaid invoice first until the debts were paid off. On neither occasion did the Claimant or any agent or representative respond to dispute this or to say that this was contrary to an express direction, instruction or agreement.
316. The Defendant accepts that it is open to a client to provide monies to a solicitor on express terms that those monies shall only be used to pay a specific cost. However, this was not such a case. The monies were provided to pay the accruing debt. The position is no different in principle (even if different in quantum) to payment of a gas bill or a car loan. A client may agree a payment plan of a given amount next per month. The client will then make monthly payments, and can talk of their January, February payments etc. However, those payments are payments of the debt and can (and usually will) be applied to clear the oldest part of the debt first.
317. This standard approach is in the debtor's interest, in that applying the payment to pay down the oldest part of the debt first will reduce the liability for interest on the outstanding debt. In the solicitor-client context, it does not prevent the client seeking an assessment in accordance with the time limits in section 70.
318. As a very astute financial businessman, the Defendant's obligation to minimise the interest due on its invoices under the terms of the Engagement Letter is a point the Claimant would no doubt be keen to emphasise in other circumstances, and the Defendant would be open to criticism in such circumstances if they had not applied the Claimant's monthly payments to clear the oldest part of the debt first. It does not suit the Claimant to emphasise that point now, but that does not change the fact that the

Defendant's application of the payments received, as specifically notified to the Claimant, is the correct one.

Conclusions on the Allocation of Payments

319. This is not, as in *Menzies v Oakwood*, a case in which a client's money was appropriated, without prior consultation, toward payment of a solicitor's bill. Both parties accept that all of the payments made by the Claimant to the Defendant were made against the Defendant's invoices.
320. How such payments should be allocated, when there is more than one outstanding invoice, was not the issue before the court in *Menzies v Oakwood*. In accordance with *Simson v Ingham* it was incumbent upon the Claimant, if he wished particular payments to be allocated to particular invoices, to say so. Failing that, allocation would be a matter for the Defendant, which could, as Mr Trenor said at the time (and in accordance with established principles) apply them to the oldest outstanding bills first.
321. The only evidence I have to the effect that such instructions were ever given is the evidence of Mr Coltro, given under cross-examination. I am unable to accept his evidence in that respect. That is first because it does not appear in his written evidence; second, because it goes hand in hand with his insistence that the Defendant agreed to accept capped monthly payments, which (as the Claimant accepts) the Defendant did not; and third because, for the reasons I have given, I do not find his evidence in this and some other respects to be entirely credible.
322. The Defendant is right to point out that the proposition that there was an understanding that the Claimant making monthly payments against monthly invoices is not consistent with the fact that two of the payments made would, on that basis, have been overpayments. It begs the question of what understanding there might have been as to how the surplus should be applied. I appreciate that (as recorded in Mr Trenor's email of 24 November 2023) Mr Trenor and Mr Coltro appear, in November 2023 and previously on 28 August 2023, to have discussed a potential
- “ monthly cap (both backward-looking and forward-looking) with excess spilling over to the next months”.
323. These were, however, proposals for some future arrangement, not an agreement as to the treatment of payments that were already being received. When asked directly, on cross-examination, about the use of any surplus of payment over a monthly invoice, Mr Coltro indicated that such payments were simply made monthly, not against any particular invoice.
324. Nor is the Claimant's case in this respect consistent with the repeated insistence upon the part of the Claimant's representatives that the Defendant had agreed to accept a monthly cap on its fees, with the necessary implication that most of the Defendant's invoices were not valid at all. I refer, for

example, to Mr Sosa's request, on 31 March 2023, for two invoices of US \$400,000 to replace the drafts for December 2022 in January 2023; his request, on 24 May 2023, that the Defendant "reconsider" the amount of its invoices for February, March and April 2023; his demand, on 10 May 2023, that the Defendant "adjust" its invoices for December 2022 to April 2023 to US \$400,000 each; and his refusal, on 20 May 2024, to recognise the amounts reported by Mr Trenor as outstanding, on the pretext that the Defendant had agreed, in January 2024, to cap its fees at US \$600,000 per month.

325. I accept Mr Trenor's explanation of such communications as he sent which appeared to match the Claimant's monthly payments against the Defendant's monthly invoices. Whether presented as summaries or as a part of proposals for payment, they do not furnish evidence of any particular understanding upon Mr Trenor's part about the way in which the Claimant might want payments to be allocated. Mr Trenor would have had no reason to suppose that the Claimant would, at the time, would have wished payments for a given month to be allocated against the invoice for that month, rather than applying them in a way that would minimise the interest element payable on the full balance of the Defendant's claimed outstanding costs.
326. Nor did any of Mr Trenor's communications countermand his very clear explanation to the Claimant's representatives of the way in which he was actually applying the payments received by the Defendant.
327. As the Defendant says, the Claimant did not make payments of US \$400,000 or US \$600,000 against specific monthly invoices. The Claimant made single or cumulative monthly payments against a claimed accumulating debt on the premise that the Claimant's exposure to costs would, at least for the time being, be limited to such sums. That is not the same thing.
328. For those reasons, I prefer the Defendant's analysis of the basis upon which the Claimant's monthly payments of US \$400,000 and US \$600,000 were made, and the way in which they stood to be allocated. Had I concluded that the Defendant's finalised invoices were statutory bills, I would have accepted the Defendant's case to the effect that it was appropriate for the Defendant to apply the Claimant's payments, as it did, to the oldest outstanding invoices.

To the extent required, are there "special circumstances" to justify an order for assessment of the Defendant's invoices?

329. Because I have concluded that the Defendant's invoices together represented a part-paid Chamberlain bill delivered on 17 September 2024, and because the Claimant applied for the assessment of that bill on 17 December 2024, section 70(2) applies and special circumstances are not required before an order for the assessment of that bill can be made. Again however I will explain what my conclusions would have been, had I found that the Defendant's invoices were interim statute bills.

Special Circumstances: the Claimant's Submissions

330. It is common ground that the burden of demonstrating special circumstances, sufficient to justify an order for assessment of any invoices subject to section 70(3), is on the Claimant. The Claimant argues that there are clearly such circumstances.
331. The Claimant refers to *Falmouth House Freehold Co. Ltd. v Morgan Walker LLP* [2011] 2 Costs L.R. 292 in which Lewison J (as he was then), having reviewed the case law relevant to special circumstances, stated (at paragraph 13):
- “Whether special circumstances exist is essentially a value judgement. It depends on comparing the particular case with the run of the mill case in order to decide whether a detailed assessment in the particular case is justified, and despite the restrictions contained in section 70(2).”
332. Special circumstances do not have to be exceptional circumstances (*Wilson's Solicitors LLP v Bentine* [2016] 2 W.L.R. 1035, at paragraph 69).
333. In *Raydens Ltd v Cole* [2021] EWHC B14 (Costs), in applying the guidance of Lewison in *Falmouth*, this court observed (at paragraph 20):
- “In many ways, a helpful test is to consider whether there is something in the fees claimed by the invoices, or in the circumstances in which they were charged, which “call for an explanation”. If they do call for an explanation or further scrutiny, that is a strong indication where there should be an assessment. This is not the time for the explanation to be given and evaluated in detail. That is the purpose of the assessment procedure and the scrutiny it provides.”
334. Here, the Claimant says, there are a number of circumstances which call for an explanation and further scrutiny, starting with the assurances provided by the Defendant as to the level of fees to be charged.
335. It is not disputed by the Defendant that they did not provide any estimate of total fees for the work at the outset of the engagement.
336. The Claimant refers to Mr Munhoz’s email of 28 December 2022, sent after the Defendant had delivered its first three monthly invoices, totalling some US \$4,377,152.41. Mr Munhoz, on behalf of the Claimant, expressed concern as to the level of fees which the Defendant had incurred and told the Defendant that the Claimant was unwilling and unable to continue incurring fees at the same level as had been incurred in the previous two months. He said, in plain terms, that the Claimant could not afford it. He also clearly explained that the Claimant could manage to fund the arbitrations over a period of 30 months at a cost of US \$12 million.
337. That was the basis upon which Mr Munhoz asked the Defendant whether it would be possible to manage matters so as to ensure that the Defendant’s charges amounted to no more than about US \$400,000 per month. Mr

Munhoz could not have been clearer as to the importance of the issue for the Claimant, and the need for the Defendant to confirm whether managing the costs in this way would be possible.

338. Mr Born responded promptly to the effect that the Defendant would find a way to make that, or something else that the Claimant wanted, work. That was a straightforward assurance, on behalf of the Defendant, that they would be able to maintain their fees at the level indicated or make something similar work to address the Claimant's concerns.
339. This was not done. Many of the "monthly statements" subsequently delivered by the Defendant ran into the millions. Rather than averaging around US \$400,000 per month, the Defendant's fees averaged about US \$1,500,000 per month. The Defendant's retainer lasted only about 22 months, but the Defendant billed almost triple the US \$12 million that the Claimant had indicated he could afford over 30 months.
340. The Claimant accepts that no strict cap on fees was ever formally agreed in a way that bound the Defendant. At the very minimum however, the Defendant's clear assurance in response to the serious concerns raised on behalf of the Defendant (and on which the Claimant plainly relied) is relevant to an assessment of the reasonableness of the Defendant's charges, in much the way as a conventional estimate would be.
341. Morgan J in *Mastercigars Direct Ltd v Withers LLP* [2009] 1 W.L.R. 881, at paragraphs 99 and 102, explained the significance of estimates for the purposes of assessing a solicitor's reasonable costs:

"The estimate is a useful yardstick by which the reasonableness of the costs may be measured. If there is a modest difference between the estimate and the final bill, because an estimate is not a fixed price for the work, one may be very little surprised by the modest difference. The greater the difference, the more it calls for an explanation"...

... it is relevant as a matter of law to ask: "what in all the circumstances is it reasonable for the client to be expected to pay?" Thus, 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".

342. In his subsequent judgment in *Mastercigars Direct Ltd v Withers LLP* [2009] 3 Costs L.R. 393 Morgan J further noted, at paragraph 47, that:

"In a case where the client satisfies the court that the inaccurate estimate deprived the client of an opportunity of acting differently, that is a relevant matter which can be assessed by the court when determining the regard which should be had to the estimate when

assessing costs. Of course, if a client does prove the fact of detriment, and in particular substantial detriment, that will weigh more heavily with the court as compared with the case where the client contends that the inaccurate estimate deprived the client of an opportunity to act differently and where the matter is wholly speculative as to how the client might have acted”.

343. A major issue in any assessment of the invoices will, accordingly, be the lack of adequate costs information supplied by the Defendant and the effect of the reassurances given to the Claimant in relation to the likely scale of the Defendant’s charges.
344. The Defendant seeks to downplay the Claimant’s concerns as being related merely to “cashflow”, which suggests that the Defendant felt free to incur any level of cost it saw fit, but only expected the Defendant to pay the full sum at the conclusion of the case.
345. In this case, the difference between the total level of fees “estimated” and the total level of fees actually incurred is measured in the tens of millions of US dollars. In light of the correspondence between the parties in December 2022 alone, there are circumstances which call for an explanation and further scrutiny upon assessment.
346. Continued concerns were expressed as to fees during the retainer (and on the delivery of the Defendant’s invoices). Assuming that the Defendant’s finalised invoices were interim statute bills, the very fact of such bills having been delivered, in circumstances where it was unrealistic to expect a client to commence assessment mid-proceedings, may amount to special circumstances in itself.
347. The Defendant refers in this respect the concerns expressed by Jacob J in *Harrod’s Ltd v Harrod’s (Buenos Aires)*, as cited with approval by the Court of Appeal in *Ivanishvili*.
348. Given the intensity of the work on the Arbitrations, which the Defendant itself relies on, it would obviously have been unrealistic to expect the Claimant to issue proceedings for an assessment against the firm which was representing him in ongoing, fast-paced, hard-fought and high-value arbitration proceedings.
349. In any event, it is not as if the Claimant or his agents remained silent in relation to their concerns as to the Defendant’s fees. The correspondence in the bundle demonstrates the extent of the concerns which were repeatedly raised with the Defendant, particularly once it became clear, in mid-late 2023, that the Defendant was not making good on Mr Born’s assurance of December 2022, but was instead delivering very large invoices far in excess of the expected limit.

350. During late 2023 and into 2024, the parties were engaged in ongoing negotiations to agree an alternative arrangement for the Defendant's remuneration. If those negotiations had succeeded, they would have superseded any dispute in relation to the invoices. This is not a case in which the delay in seeking an assessment was culpable, or where the solicitors can express any surprise as to the concerns now ventilated in these proceedings.
351. Assessment proceedings were not a realistic option until the Arbitrations had concluded. It was only on 17 September 2024 that the Defendant delivered the full run of their invoices. These proceedings were issued only 3 months later. In the circumstances of this case, that is the most prompt action that could reasonably have been expected.
352. The Claimant also relies upon allegedly unusually high time charges and other expenses. The Defendant's invoices are, says the Claimant, for extraordinary sums. US \$35 million is an unusually large sum to incur over less than two years in even the heaviest of litigation.
353. Throughout all of the invoices, there are charges which are so high as to raise concern as to the costs incurred across the board. The Claimant refers, for example, to Mr Trenor's charges for November 2022, which come to 376.6 hours (including 18.6 hours in one day); a total cost for one fee earner in one month of US \$611,975. Mr Trenor charged for 370.7 hours in January 2024, a total cost for one fee earner in one month of US \$691,355.50 and for 318.3 hours in February 2024 totalling US\$593,629.50. It is not suggested that the work was not done, but the amount of time and level of fees is, says the Claimant, remarkable.
354. Although Mr Trenor's time costs are perhaps the most obviously high, many other fee earners regularly charged for well over 200 hours per month and more than 12 hours (and often more than 14 or 15) in a single day.
355. Cumulatively this resulted in very high fees. So, on 18 June 2023 alone, Mr Trenor charged 19.3 hours of his time. At his then hourly rate of US \$1,920, that amounted to a total charge for one fee earner on one day of US \$27,648. The nine fee earners working on the Arbitrations on 18 June 2023 charged a combined 130.3 hours, a total charge of US \$162,312.00 for that one day of work. This says the Claimant illustrates a broad approach on the part of the Defendant in which time is routinely very high, exacerbated by extremely high hourly rates.
356. Nor were those rates all agreed. The rates agreed in the Engagement Letter were in place for only three months, at which point the Defendant unilaterally increased them. There were two rate increases (in January 2023 and January 2024) during the 22-month currency of the retainer, so that by January 2024 each of the hourly rates charged by Mr Born, Mr Trenor, Ms Ganz and Mr Salas had increased by more than 14%.
357. Rate increases may be commonplace, but in circumstances where the agreed rates were already so high, the need to raise them further (so quickly, and by so much) calls for an explanation. By January 2024, the highest partner rate

had reached US \$2,095 per hour, US \$265 per hour more than had been agreed only 15 months earlier.

358. Moreover, the Defendant did not give notice to the client of those rate increases, in accordance with the terms of the Engagement Letter.
359. Many of the expenses and disbursements are of a surprising nature and amount, especially bearing in mind the hourly rates charged. For example, the Defendant charged the Claimant for subscriptions to Westlaw. In the first month alone (September 2022) this amounted to US \$2,114.07, and the practice continued over most months of the retainer period. In January 2024, the charge to the Claimant for the Defendant's Westlaw subscriptions was US \$30,354.48. In February 2024, it was US \$20,302.20.
360. The Claimant also appears to have been charged for meals consumed by the Defendant's fee earners when working outside normal office hours, amounting to US \$1,532.78 in June 2023. That US \$1,532.78 appears to relate to office takeaways and is not to be confused with a separate and additional US\$1,595.90 charged for "Dinner" and "Lunch" charges accompanying late and weekend work over the same month, or numerous other breakfasts/meals/snacks charged for separately (apparently in connection with a stay in New York). Similarly, "after hours" support from legal secretaries has been charged to the Claimant, as in June 2023, totalling US \$1,819.48 for one person.
361. Many of the invoices also contain extremely high travel and accommodation expenses, for example US \$11,367.54 for Mr Trenor's airfare and other travel expenses from New York to London in December 2022 (including US \$41.76 of laundry); US \$6,037.55 for Mr Born's accommodation for meetings with the Defendant in October/November 2022, in addition to an airfare of US \$8,592.11 (billed in November 2022); and US \$10,659.75 for Mr Salas' airfare to London in June 2023, in addition to US \$5,118.82 for accommodation.
362. The Claimant contends that these examples illustrate the extraordinary time charges, rate increases and expenses found throughout the Defendant's invoices and submits that they are more than sufficient, individually or together, to demonstrate special circumstances meriting an assessment, to the extent that that threshold needs to be met.
363. Overall, the Defendant's invoices amount to over US \$34 million for less than two years of work. By 2024, the highest partner rate reached US \$2,095 per hour (following the two unilateral increases to the contractual rates). The Defendant's charges are extremely high, and well outside any "run of the mill" case. Even a small percentage overcharge would easily amount to a seven-figure sum – and for the reasons above, it is reasonable to expect that reductions on assessment would be far higher.

Special Circumstances: the Defendant's Submissions

364. The Defendant points out that the phrase “special circumstances” is not one on which the court should place any gloss and is not confined to any rigid categories (*Arrowfield Services v BP Collins (A Firm)* [2003] EWHC 830 (Ch), at paragraph 9). The court must consider the aggregate of the relevant circumstances.
365. The general proposition that the size of bills may be a material factor is not disputed. However if any court case which differs from the most routine type is one where special circumstances are made out, then it would mean that in every case of size, complexity or substantial value (and in every commercial case of any real size) special circumstances would be made out. That would be to undermine the effect of section 70(3).
366. It would also mean that in every case where, due to the size and complexity of the case, substantial costs were likely to be reasonable and explicable, those very circumstances would be said to justify a detailed investigation of those costs that would otherwise not be permissible. That would be perverse.
367. Any consideration of special circumstances must therefore take into account the specific type of case before the court. Complexity and scale, even if relevant, are factors to be considered as part of an overall evaluation of the circumstances.
368. Again it is not disputed that the delivery of interim statutory bills during ongoing litigation may be a factor relevant to special circumstances, particularly if the Court reaches the conclusion that it inhibited the client’s ability to challenge or dispute the bills due to a risk of creating a conflict. It cannot however in itself establish special circumstances. Otherwise such circumstances would be established in every case where interim statute bills have been delivered over the course of any contentious retainer of any length. That, again, would undermine the purpose of section 70(3).
369. Undisputedly, the Arbitrations and related matters upon which the Defendant was instructed were of extremely high value (involving billions of dollars), extremely complex (involving five arbitrations with multiple claims and 20 parties, in addition to the other related proceedings) and extremely important (involving efforts by the Claimant’s family to financially asphyxiate him). That of itself makes the level of fees charged more, not less, explicable.
370. The Claimant, an astute and experienced businessman, already had a team of lawyers across a range of firms, at rates which (insofar as disclosed by the Claimant) exceeded those of the Defendant. He was provided with very detailed records of time by the Defendant and where there were any issues with the detail or the work done, he raised queries and they were promptly answered. Furthermore, the Claimant and his representatives, more than once, confirmed both their satisfaction with the work done and that it was instrumental in obtaining the substantial success he achieved by way of settlement. These are factors which point towards the costs being prima facie explicable and reasonable, not towards the existence of any special circumstances warranting an assessment.

371. During the currency of the Defendant's retainer the Claimant never lacked the resources, the support nor the willingness needed to challenge the Defendant's costs. He had teams of advisers to assist him, including the Munhoz Advogados and his own staff at ASA. He was well aware of both the scale of work involved and the scale of work the Defendant was undertaking at his instruction. The evidence clearly shows the Claimant had no issue with the agreed hourly rates, the detail of the work being done (work that he continued to instruct and details of which his team reviewed when invoices or draft invoices were received), or the work product itself, which he and his agents and representatives praised.
372. The evidence also clearly shows that the Claimant knew what costs were being incurred and he knew that if he did not want those to continue to be incurred he either had to (a) reduce the scope of work he instructed the Defendant to perform; (b) instruct the Defendant to suspend or cease work; (c) instruct another firm to do the work; or (d) properly engage in the proposals for an alternative basis of engagement, rather than spasmodically make plainly unworkable proposals whilst at the same time not paying properly for the work that he continued to instruct the Defendant to do and the Defendant did.
373. The Defendant has proffered evidence on all of these points, and the Claimant has not contested it. The issue here was not with the Claimant's understanding of the work being done and its attendant costs to him, but with his unwillingness to pay for it (at least on the terms he had expressly agreed). This point is further evidenced by the Claimant's offers to pay for the work, but on a deferred or contingent basis.
374. The attempt to negotiate an alternative fee arrangement of some kind was something the Defendant was willing to engage in, but was always a work in progress and a matter of incomplete negotiation, during which the Claimant knew that fees under the terms of the Engagement Letter continued to accrue. The Claimant was well aware of quantum of those fees, not least from the monthly bills and draft bills provided to him and his knowledge of the huge amounts of work he was instructing the Defendant to perform and that they were doing.
375. In short, the circumstances here are not akin to those considered by the Court of Appeal in *Ivanishvili*, nor within the range of special circumstances identified in *Falmouth*. It is the case before this court that must be considered. It is plain that the Claimant wanted the best lawyers to do everything they could to help him succeed in his hugely important dispute, but to try to limit, avoid or delay paying them their fees in circumstances where he closely reviewed and analysed the work being done without raising any material dispute. He just did not want to pay the bills that were the inevitable consequence of his instructions, at least until an award or settlement when his cash flow problems would hopefully be resolved. Even after the settlement he did not pay.
376. With regard to estimates, as Mr Trenor explains in his witness evidence the Arbitrations were extremely complex and their likely course and duration extremely unpredictable at the time of the Engagement Letter. Even the

number of arbitrations was not then known. The full scope of the Defendant's work and was not known to the Defendant at the outset of the engagement. It was dictated by the Claimant, through his agents and representatives, as matters proceeded. It was not possible to provide a reliable estimate of the likely costs. The Claimant never requested any estimate at the outset of the engagement, and he advances no sensible argument that this is a case where a costs estimate could realistically have been given.

377. The concerns raised by Mr Munhoz on 28 December 2022 related to the cash flow problems that the Claimant faced due to the efforts of his family and the family-owned companies to asphyxiate him financially (as argued in the Arbitrations and related matters) and was directed at the totality of fees he was incurring in respect of all his advisors and not specifically at the level of the Defendant's fees.
378. Mr Born indicated in response that the Defendant was willing to consider ways in which these concerns could be met, but the Claimant did not pursue the matter, notwithstanding attempts by the Defendant, over the following months, to follow this up.
379. As to the examples of charging given by the Claimant, the Defendant has offered a detailed response, the essence of which is that the Claimant accepts that Mr Trenor did the work he billed for, at the individually negotiated hourly rates provided for in the Engagement Letter. The additional charges referred to were charged as appropriate to the needs to the particular case (including the cost of obtaining specialised content from Westlaw). They were charged in accordance with the agreed terms of the Engagement Letter. The (quite commonplace) hourly rate rises were also charged in accordance with the agreed terms of the Engagement Letter.
380. It is, says the Defendant, remarkable that the Claimant attempts to rely, for the purposes of establishing special circumstances, upon the amount of work undertaken by the Defendant, particularly Mr Trenor. The Claimant, Mr Munhoz and others (all of whom have declined to give evidence) were acutely well aware of the huge demands being placed on Mr Trenor and the Defendant team and the very high level of time and effort he and others were committing to the Claimant's case.
381. A clear example can be shown from the 13 December 2022 query in relation to Mr Trenor's time, where he was recorded on occasions working 17 hours a day. The response to that query by Mr Trenor was clear in explaining that the Claimant's demands were extensive and required that level of work to perform, no further query as to hours worked by Mr Trenor or any other fee earner was raised and the invoice was paid. No such subsequent queries as to hours performed were ever raised.
382. Mr Trenor explained on multiple occasions to the Claimant and his agents and representatives the significant commitment, loyalty, and sacrifice involved in the Defendant's work on his behalf.

Conclusions on Special Circumstances

383. I agree with the Defendant that the fact that a given contentious retainer might involve very substantial amounts of money, or feature unusual complexity, or might in some other respect be an unusual case, does not in itself establish special circumstances. The same applies to the delivery of interim statute bills.
384. Any such features may be relevant factors to take into account, but in “comparing the particular case with the run of the mill case” (as Lewison J put it) one must focus, in considering the aggregate of the relevant circumstances, on matters which have some bearing upon the merits of making an order for assessment.
385. I do not attach much weight, for present purposes, to the billing details relied upon by the Claimant. On the evidence Mr Trenor and his team worked extremely hard, under substantial pressure, to help the Claimant achieve his goals. The very long hours referred to are explained by Mr Trenor’s clear evidence about the amount of work that the Claimant wanted the Defendant to do for him. They are commensurate with the scale of work the Defendant was required to undertake and with the value, weight and complexity of the litigation. Mr Trenor’s willingness to put in long hours on behalf of his client is now being used against him.
386. The Defendant’s hourly rates were individually negotiated and comparable with other advisers instructed by the Claimant at the time of the engagement letter. Whilst the Engagement Letter left hourly rate reviews entirely at the discretion of the Defendant, in fact they were reviewed at the beginning of each calendar year and they do appear (as Mr Trenor explained) largely to be inflation-based, and not in themselves remarkable.
387. As for the expenses highlighted by the Claimant, they generally seem to me to be in line with the provisions of the Engagement Letter. I would expect normal overheads to be covered by the Defendant’s hourly rates, but out of hours secretarial support, for example, is not a normal overhead, and it is expressly provided for in the Engagement Letter.
388. The travel and hotel expenses billed seem to me to be commensurate with the nature of the case and of the work being undertaken (business class airfares are for example, expressly provided for in the Engagement Letter). There might be some room for argument over matters such as out of hours meals or subsistence, but again, such charges seem to me to be commensurate with general terms of the Engagement Letter and the nature and scale of the work being undertaken.
389. My real concern is with the provision to the Claimant of financial information. I am unable to accept the Defendant’s protestations to the effect that the Claimant was kept fully informed on costs.
390. In this respect, I need to revisit the Claimant’s reference to the SRA code of conduct and in particular paragraph 8.7:
- “You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement

and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.”

391. That provision imposes a positive duty upon a solicitor, at the outset of a retainer and on a continuing basis, to give their client the best possible information, not only of the potential cost of their acting, but of accruing costs. It is a duty to volunteer such information, not to provide it as and when the client actually asks for it, and it extends well beyond telling the client, from time to time, how much they owe.
392. In this case, such information as was given by the Defendant to the Claimant about accruing cost was given, in 2023, at widely spaced intervals. The Defendant’s invoices for September 2022 to January 2023 were delivered reasonably promptly. I can accept that the draft invoices sent thereafter approximated to the final figures eventually billed, and they provided much detailed information, but (disbursements-only bills aside) they were delivered quite sporadically.
393. So, for the period February to April 2023, for which the final (non-disbursements only) bills totalled US \$3,082,004.32, no costs information was given until 17 May 2023. For the period May to July 2023, for which the final bills totalled US \$5,653,076.86, no costs information was given until 27 September 2023. For the period August to November 2023, for which the final bills totalled US \$3,857,422.47, no costs information was given until 21 December 2023.
394. For the period between December 2023 and July 2024, for which the final (non-disbursements-only) bills totalled US \$14,239,083.33, no detailed costs information was given until after the termination of the retainer, on 17 September.
395. What appears to have happened from December 2023 is that discussions began in earnest on an alternative costs arrangement, and in the course of those discussions Mr Trenor referred more than once to the balance of outstanding fees, for example at over US \$10 million in December 2023 and US \$15 million in June 2024. Mr Trenor said, in his oral evidence, that the record is littered with costs updates given to the Claimant by the Defendant: the record I have seen is not. It gives the impression that the updates given were rather sporadic.
396. I fully appreciate that Mr Trenor offered, on three occasions, to provide further costs information, and that his offers were not, at the time, taken up. The Defendant should not however just have offered the information, nor waited until it was asked for. It was incumbent upon the Defendant to ensure that information on accruing costs was provided reasonably promptly and regularly. Ideally, as indicated by the Engagement Letter, it should have been provided on at least a monthly basis.
397. I also appreciate that Mr Trenor received some mixed messages about the reasons for the limits on what the Claimant could afford, and as to what the Claimant might be prepared to agree as an alternative to the terms of the

Engagement Letter. There is evidence of open disagreement between Mr Munhoz and the Claimant's representatives at ASA, with Mr Munhoz being much more supportive of the Defendant and more appreciative of the value of the Defendant's work. This however would have been an additional reason to the Defendant to pay attention to potential costs problems: the Claimant, not Mr Munhoz, was the client.

398. As for the exchange of emails with Mr Munhoz on 28 December 2022, even in the absence of any direct evidence from the Claimant as to reliance, there is much force in his comparison between an estimate of costs and the Defendant's assurance that the case could be managed at a level of cost that the Claimant said he could afford.
399. Mr Trenor says, and I do not doubt, that the Claimant was well aware of the amount of work he was insisting that the Defendant perform and that (presumably through Mr Munhoz) he was able to monitor what was being done on his behalf.
400. The Claimant, through Mr Munhoz, had nonetheless given very clear indication at an early stage of what he thought he could afford to spend upon the Arbitrations, at least until they were resolved. Mr Born gave an equally clear indication that this could be achieved.
401. I appreciate that, for months on end, rather than really working with the Defendant to achieve some such arrangement, the Claimant through his representatives either fell back on a non-existent fee-capping agreement or offered proposals that the Defendant could not accept. It may well have suited him, as the Defendant suggests, to string along discussions about alternative retainer arrangements while paying as little as he could until his goals had been achieved.
402. This does not however absolve the Defendant from an evident failure to give adequate costs information, as costs accrued to a level far beyond what the Claimant had said he could afford. Whether the limit of what he could pay was dictated by cash flow difficulties does not seem to me to furnish an answer to that. As far as I can see, there was no guarantee in any event that the Arbitrations would achieve an outcome which would leave the Claimant in a better financial position.
403. Mr Trenor says that it was not possible to provide an estimate of costs at the outset of the retainer, and I accept that. He does not say however that it would never have been possible to provide an estimate once the scale of the work to be undertaken became clear. No consideration seems to have been give to that.
404. I have not previously encountered a case in which such levels of costs accrued with such limited information being provided to the client. The Defendant's failure to notify the Claimant of its hourly rate increases seems symptomatic of a lack of awareness of the importance of keeping the client fully informed of the costs position. However much he would have known about what was being done for him, and however pleased he may have been at the level of service provided, the Claimant was not regularly being kept aware of what it

was costing him. That would have been unsatisfactory even if the fees finally billed had not been so far in excess of what he had clearly indicated that he could afford.

405. I do not accept that the Defendant can say that the Claimant did not, at the time, take issue with its costs. The Defendant's costs were very much a live issue, and for quite lengthy periods – including over the last eight months of the retainer, where costs accrued to a value of over US \$14 million – the Claimant was given no costs information other than an occasional update on how much he was said to owe.
406. I fully appreciate that the Defendant (at least, after settlement of the Arbitrations) received assurances of payment, and that Mr Trenor feels keenly the disappointment of finding such promises unfulfilled. Such promises, however, appeared to come from Mr Munhoz rather than the Claimant. The Claimant's representatives at ASA were, throughout the retainer, sending a very different message.
407. I also take account fully that the Claimant himself has to date produced no witness evidence, nor Mr Munhoz, nor others who might have shed more light on what, exactly, was happening in the Claimant's camp from time to time. None of that seems to me however to undermine the weight of the evidence upon which I have based my conclusions.
408. For those reasons, had it been appropriate, I would have certified that there were, in this case, special circumstances that would have justified an order for the assessment of such statutory bills as fell within section 70(3).

If an Order for Assessment is to be Made, Should it be Subject to any

Conditions?

409. The Claimant accepts that this court has the power to make any order for assessment pursuant to section 70(2) or (3) subject to conditions (most commonly, the making of a payment on account). However, where the Claimant has already made payments on account of over US \$16m (almost 50% of the full sum claimed in the invoices), and in light of the concerns raised in relation to the invoices above, it would not, argues the Claimant, be reasonable to require any further payments on account to be made.
410. The Defendant's position is that the Claimant should be ordered, as a condition of any assessment, to pay the full balance of any outstanding invoices which are, by virtue of section 70(4), excluded from an order for assessment, and to pay 80% of such invoices as are subject to assessment, with the balance to be paid into court or into an agreed escrow account.
411. The Defendant points out that the Claimant is based out of this jurisdiction. He is understood to be an extremely wealthy man (not least as a result of the successful settlement of the Arbitrations, which was achieved by virtue of the work undertaken by Defendant for which he has not paid). No prejudice will

be occasioned to the Claimant by being required to place the monies he owes into a secure account to abide the outcome of any assessment. The balance of prejudice, and in particular the risk of the Defendant having to engage in a very lengthy and costly assessment process only to face the risk of being unable to recover the sums ultimately allowed to it, strongly favours such conditions.

412. I would not normally attach conditions for an order for assessment on an application made, under section 70(2), within three months of delivery of the relevant bill. In this particular case, given the history and the sheer amounts involved, I would have considered making an order for a payment on account of about 50% of the Defendant's total bills, but that has already been paid.
413. I note that the Defendant does not suggest that enforcement of the court's certificate of the amounts due to the Defendant, following assessment, would be impossible. I also bear in mind that the Defendant was aware from the outset that the Claimant is based outside this jurisdiction. It was open to the Defendant to take such steps as seemed appropriate to protect its position with regard to any unpaid fees.
414. In this, as in other respects, and for the reasons I have given above, I consider that the current unfortunate situation is at least as much the responsibility of the Defendant as the Claimant. There are many features of this case which justify an order for assessment and none, in my view, that would justify a requirement, as a condition of assessment, that the Claimant should pay any more than he has already paid.
415. For those reasons, I will make an order for assessment of the Chamberlain bill delivered by the Defendant to the Claimant on 17 September, and I will not attach any conditions to that order.

Summary of Key Conclusions

416. The Engagement Letter between the Claimant and the Defendant, as signed on 2 September 2022 and amended on 25 September 2023, was not a Contentious Business Agreement (CBA). Its unilateral, open-ended provisions for hourly rate increases, the amounts and timing of which were entirely at the discretion of the Defendant, are inconsistent with the requisite characteristic of certainty.
417. If I had found that the Engagement Letter was a CBA, I would have set it aside as unreasonable because it incorporated those unilateral, open-ended review provisions whilst (as a CBA) preventing the Claimant, on any assessment, from challenging any increased hourly rates, whatever they might have been.
418. The Engagement Letter did allow for the Defendant to deliver interim statutory bills to the Claimant in the course of the Defendant's retainer.
419. The invoices actually delivered were not, however, interim statutory bills, because they lacked the requisite element of finality.

420. The invoices collectively, as a series, comprised a single Chamberlain bill delivered to the Claimant by the Defendant on 17 September.
421. The Claimant's application for detailed assessment having been made on 17 December 2024, this court has jurisdiction to order an assessment of the Chamberlain bill under section 70(2) of the Solicitors Act 1974.
422. Given that Defendant's invoices were not interim statute bills, it is not necessary for the Claimant to establish that special circumstances justify an order for assessment of such of them as would otherwise have fallen within section 70(3). If it had been necessary, I would have found that special circumstances do apply.
423. I find it to be appropriate to make an order for assessment, under section 70(2), of the Chamberlain bill delivered by the Defendant to the Claimant on 17 September. I do not find it to be appropriate to attach any conditions to that order.

APPENDIX 1

Invoice	Invoice Period	Delivery Date	Amount in US\$	WilmerHale's case	Mr Safra's case	Is the applicable subsection of s.70 agreed or not?
508068 1	01/09/2022 – 30/09/2022	10/12/2022	875,314.97	s.70(4) Paid in full for 12 mth+	s.70(4) Paid in full for 12 mth+	Y
508068 2	01/10/2022 – 31/10/2022	10/12/2022	1,510,847.62	s.70(4) Paid in full for 12 mth+	s.70(4) Paid in full for 12 mth+	Y
508072 0	01/11/2022 – 30/11/2022	13/12/2022	1,990,989.82	s.70(4) Paid in full for 12 mth+	s.70(4) Paid in full for 12 mth+	Y
508084 8	01/12/2022 – 31/12/2022	23/02/2023	2,098,229.58	s.70(4) Paid in full for 12 mth+	s.70(3) Delivered 12 mth+ prior to Claim Form, and also paid in full but within 12mth	N
508091 0	01/01/2023 – 31/01/2023	14/03/2023	1,593,499.54	s.70(4) Paid in full for 12 mth+	s.70(3) Part paid, but invoice delivered more than 12mth	N
508101 8	To 24/02/2023 (Disb only)	25/04/2023	253,370.45	s.70(4) Paid in full for 12 mth+	s.70(4) Paid in full for 12 mth+	Y
508147 6	01/02/2023 – 28/02/2023	13/10/2023	1,219,217.86	s.70(3) Paid less than 12 mth	s.70(3) Part paid, but invoice delivered more than 12 mth	Y (but for different reasons)
508147 8	To 16/08/23 (Disb only)	17/10/2023	156,750.00	s.70(4) Paid in full for 12 mth+	s.70(4) Paid in full for 12 mth+	Y
508202 1	To 26/04/2024 (Disb only)	18/05/2024	32,625.00	s.70(3) Paid in full for less than 12 mth	s.70(3) Paid in full for less than 12 mth	Y
508179 0	01/03/2023 – 31/03/2023	17/09/2024	1,022,010.21	s.70(3) Paid in full for less than	s.70(2) Part paid, delivered for less	N

Invoice	Invoice Period	Delivery Date	Amount in US\$	WilmerHale's case	Mr Safra's case	Is the applicable subsection of s.70 agreed or not?
				12 mth	than 12 mth	
508178 4	01/04/2023 – 30/04/2023	17/09/2024	840,776.25	s.70(3) Paid in full for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	N
508178 9	01/05/2023 – 31/05/2023	17/09/2024	1,900,992.08	s.70(3) Paid in full for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	N
508178 2	01/06/2023 – 30/06/2023	17/09/2024	3,136,253.22	s.70(2) Part paid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508178 8	01/07/2023 – 31/07/2023	17/09/2024	615,831.56	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508178 7	01/08/2023 – 31/08/2023	17/09/2024	1,108,543.71	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508178 3	01/09/2023 – 30/09/2023	17/09/2024	979,007.94	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508178 6	01/10/2023 – 31/10/2023	17/09/2024	858,013.89	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508178 5	01/11/2023 – 30/11/2023	17/09/2024	911,856.93	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508206	01/12/2023 –	17/09/2024	1,702,322.85	s.70(2)	s.70(2)	Y (but for different

Invoice	Invoice Period	Delivery Date	Amount in US\$	WilmerHale's case	Mr Safra's case	Is the applicable subsection of s.70 agreed or not?
8	31/12/2023			Unpaid, delivered for less than 12 mth	Part paid, delivered for less than 12 mth	reasons)
508238 1	01/01/2024 – 31/01/2024	17/09/2024	3,052,332.79	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508238 2	01/02/2024 – 29/02/2024	17/09/2024	3,939,323.51	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508236 6	01/03/2024 – 31/03/2024	17/09/2024	411,429.50	s.70(2) Unpaid, delivered for less than 12 mth	s.70(3) Paid in full for less than 12 mth	N
508236 5	01/04/2024 – 30/04/2024	17/09/2024	104,895.24	s.70(2) Unpaid, delivered for less than 12 mth	s.70(3) Paid in full for less than 12 mth	N
508236 7	01/05/2024 – 31/05/2024	17/09/2024	637,299.15	s.70(2) Unpaid, delivered for less than 12 mth	s.70(3) Paid in full for less than 12 mth	N
508238 8	01/06/2024 – 30/06/2024	17/09/2024	2,523,715.40	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Part paid, delivered for less than 12 mth	Y (but for different reasons)
508238 9	01/07/2024 – 31/07/2024	17/09/2024	1,867,764.89	s.70(2) Unpaid, delivered for less than 12 mth	s.70(2) Unpaid, delivered for less than 12 mth	Y
Total			35,343,213.96			