Neutral Citation Number: [2023] EWCA Civ 268

Case No: CA-2022-000808

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Mr Justice Linden
[2022] EWHC 1264 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2023

Before:

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
LORD JUSTICE NUGEE

- -

Between:

THE KING (on the application of JERRY ISAH)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Robin Dunne and Tiki Emezie (instructed by **Dylan Conrad Kreolle Solicitors**) for the **Appellant**
Paul Joseph (instructed by **Plexus Law**) for the **Respondent**

Hearing date: 1 March 2023

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Approved Judgment

This judgment was handed down remotely at 11.00 a.m. on 14 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal concerns the issue of whether a judge is permitted to order costs to be summarily assessed in a different court by a different judge or whether a summary assessment must be undertaken by the judge making the order for summary assessment, whether at the same time or at some point in the future. Snowden LJ gave permission to appeal in relation to this issue and, if such a power exists, in relation to the directions which were given for the hearing of the summary assessment by a Master in the Senior Courts Costs Office.

2. The issue arises out of a detailed assessment of the Appellant, Mr Isah's costs of his successful claim for damages for unlawful detention by the Respondent, the Secretary of State for the Home Department (the "SSHD"). Having conducted the detailed assessment, Master Brown, sitting as a costs judge, assessed Mr Isah's costs at £25,338.75 on a bill of costs of approximately £88,000; and made no order as to costs in respect of the assessment process itself. His order is dated 13 December 2019.

3. Mr Isah was granted permission to appeal both of those aspects of Master Brown's order by Stewart J on 5 March 2021. The SSHD then made a Part 36 offer in relation to part of the appeal and filed an application pursuant to CPR r 16(5) seeking the court's determination of the costs of the appeal.

4. The remainder of the appeal having been abandoned, the issues which came before Linden J were the costs of the appeal, directions to determine the quantum of those costs and the costs of the application which had been issued by the SSHD.

5. The judge made an order dated 7 April 2022 (the "Order") providing, amongst other things, that: the SSHD pay Mr Isah's costs of the detailed assessment before Master Brown in the sum of £2,972,13; Mr Isah pay the SSHD's costs of the appeal from 16th October 2021; the SSHD should pay Mr Isah's costs of the appeal prior to that date; and there be no order as to costs in relation to the SSHD's CPR r 16(5) application.

6. Paragraph 6 of the Order provided for summary assessment of those costs (if not agreed), with the assessment to be conducted by a Master of the Senior Courts Costs Office. By paragraphs 7 and 8 of the Order, each party was required to file costs schedules within 21 days and thereafter the summary assessment was to be listed before a Master in the Senior Courts Costs Office by video with a time estimate of 1½ hours. In order to facilitate the summary assessment by a Master, the judge also ordered that his oral judgment at the hearing should be transcribed at public expense: paragraph 11 of the Order. Snowden LJ granted permission to appeal in relation to paragraph 6 of the Order (the "summary assessment issue") and paragraphs 7 and 8 (the "directions issue").

7. Having heard submissions from Mr Dunne, on behalf of Mr Isah, and Mr Joseph, on behalf of the SSHD, we decided that the appeal in relation to the summary assessment issue must be allowed. I now set out the reasons for doing so.

The Summary Assessment issue

– The Judge's approach

8. Having decided upon the incidence of costs, the judge addressed quantum at [34]. He decided that it was not appropriate for him to assess the costs summarily at that stage not least because he did not have statements of costs which would have enabled him to do so. (Although the parties had filed schedules of costs in N260 form, they were not prepared in a way which matched the order which had been made.) The judge stated that it was with some reluctance that he directed steps for a summary assessment if the quantum of costs could not be agreed. He then directed that schedules of costs be served by 4 pm on 28 April 2022 [37]. He went on as follows:

> "38. As far as the question of whether the matter should be listed before Master Brown or not listed before him is concerned, I am not going to make any direction as to whether it should be Master Brown or anyone else. Both parties accept that they cannot pick or choose who determines the case. Obviously there may be cases in which there is a particular advantage to a particular judge or master considering the matter if, for example, they are very familiar with the detail of the case and the detail of the case will be relevant to the matters which they are called upon to decide at a forthcoming hearing. In this case it seems to me that the issues which wil1 be required to be determined are discrete issues and therefore no particular advantage is gained by reserving the matter to Master Brown but, on the other hand, should the position be that the matter is listed before Master Brown I can see no objection to that whatsoever. I am therefore going simply to direct that it be listed before a Master."

9. There is no indication in the judgment, or the parts of the transcript which Mr Joseph handed up, that submissions were made to the judge in relation to whether there was power to direct that the summary assessment be heard by another judge whether a Master in the Senior Courts Costs Office or otherwise or any consideration of that issue. As Mr Joseph, who also appeared below, helpfully explained, he had produced a draft order in which it was proposed that the summary assessment be conducted by a costs judge and the centre of the debate before the judge was whether the assessment should be conducted by Master Brown (who had carried out the original detailed assessment) or another Master.

10. It seems, therefore, that having put forward the proposal in order to save further delay and costs, neither advocates nor the judge addressed the question of whether there was power to make such an order. That is the central question on this appeal.

- *The Relevant Rules and provisions*

11. What are the relevant rules? CPR r 44.1(1) contains definitions which apply in Parts 44 - 47 of the Civil Procedure Rules, unless the context otherwise requires. The following are relevant to this issue: "detailed assessment" is defined as "the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47"; "summary assessment" is stated to mean "the procedure whereby costs are assessed by the judge who has heard the case or application"; "costs officer" means "(i) a costs judge; (ii) a District Judge; or (iii) an authorised court officer"; and "costs judge" means a taxing master of the Senior Courts.

12. There is no suggestion that a Master in the Senior Courts Costs Office is not a costs judge and therefore, a costs officer.

13. CPR r 44.6(1) provides as follows:

> "(1) Where the court orders a party to pay costs to another party (other than fixed costs) it may either –
>
> (a) make a summary assessment of the costs; or
>
> (b) order detailed assessment of the costs by a costs officer,
>
> unless any rule, practice direction or other enactment provides otherwise."

14. The notes at 44.6.3 of the White Book state that the court will make a summary assessment of costs unless it is not practicable to do so at the conclusion of a hearing which has lasted not more than one day and the exercise of the power should be considered in every case.

15. Practice Direction 44 provides, under heading "Procedure for assessing costs: rule 44.6" at paragraph 8.1, that "the amount of costs payable will be assessed by the court" and that "[R]ule 44.6 allows the court making an order about costs – either – (a) to make a summary assessment of the amount of the costs; or (b) to order the amount to be decided in accordance with Part 47 (a detailed assessment)". Under the heading, "Summary assessment: General provisions" the Practice Direction provides as follows (where relevant):

> "*Timing of summary assessment*
>
> 9.2 The general rule is that the court should make a summary assessment of the costs –
>
> (a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
>
> (b) at the conclusion of any other hearing, which has lasted not more than one day in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,
>
> unless there is a good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily.
>
> …
>
> *No summary assessment by a costs officer*

> 9.7 The court awarding costs cannot make an order for a summary assessment of costs by a costs officer. If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court may give directions as to a further hearing before the same judge."

16. Further, the Guide to the Summary Assessment of Costs (2021) under the heading, "Summary assessment by a costs officer" states the following:

> "6. The court awarding costs cannot make an order for the summary assessment to be carried out by a costs officer (i.e. a costs judge or district judge). If summary assessment of costs is appropriate but the court awarding costs is unable to carry out the assessment on the day it may give directions for a further hearing before the same judge or order detailed assessment. Rule 44.1 defines "summary assessment" as the procedure whereby costs are assessed by the judge who has heard the case or application. However, it has been held that there is no absolute bar on assessment by a different judge: *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 1687."

17. CPR r 1.2 provides that the court must seek to give effect to the overriding objective when it interprets any rule (save for irrelevant exceptions) and when it exercises any power given to it by the Rules. CPR r 1.1 places an emphasis upon proportionality. Where relevant it reads as follows:

> "1.1 The overriding objective
>
> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> . . .
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –
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> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly;

> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; . . ."

18. In addition, CPR r 3.1(2)(m) provides that except where the Rules provide otherwise, the court may "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective . . .".

Discussion and conclusions

19. Mr Dunne, who did not appear below, placed emphasis upon the definitions of summary assessment and detailed assessment in CPR r 44.1 and stressed that summary assessment is necessarily a rough and ready process carried out by the judge who heard the matter who, therefore, has the relevant knowledge to make the assessment. He has limited information before him in the form of costs schedules which should be filed at least 24 hours in advance, using Form N260. Mr Dunne submitted, therefore, that not only do the Rules require the judge who heard the matter to summarily assess the costs, it might lead to injustice if someone else who was less familiar with the case carried out that broad brush exercise. He also relied upon the binary choice provided in CPR r 44.6: either the court makes a summary assessment; or it orders a detailed assessment. He submitted, therefore, that a judge has three options: he can make a summary assessment there and then; he can adjourn the summary assessment and deal with it himself at a later date, whether in person, on paper or otherwise; or he can order a detailed assessment by a costs officer.

20. Mr Joseph on the other hand, submits that the court has a case management discretion and can decide that the summary assessment be conducted by another judge at a later date. He bases his argument upon the use of "may" in CPR r 44.6(1) and in PD44 paragraph 9.7, the effect of the overriding objective upon the Rules and CPR r 3.1(2)(m).

21. In my judgment, it is clear from the definition of "summary assessment" that it is, by its very nature, an assessment conducted by the judge who heard the case. That is its very essence. That is what the definition says. It is to be contrasted with a detailed assessment which is defined in a different way. It is a different type of procedure which is undertaken by a costs officer. The language used in the definitions is unambiguous.

22. Those terms are then used in CPR r 44.6(1) which provides that the court ". . . may either – (a) make a summary assessment; or (b) order detailed assessment by a costs officer in accordance with Part 47, unless any rule, practice direction or other enactment provides otherwise." I disagree with Mr Joseph, that the use of "may" before the two alternatives in CPR r 44.6(1) creates a case management discretion so that the court has power to order a summary assessment to be conducted by a costs officer. CPR r 44.6(1) is clear. The court is given two alternatives. It must either "make" a summary assessment or "order" a detailed assessment pursuant to Part 47. I agree with Mr Dunne that the use of "may" should be read together with "either" and is concerned solely with the choice open to the court. If it were otherwise, and the use of "may" imported a general discretion, it seems to me that "summary assessment" would have been defined differently in CPR r 44.1. To put the matter another way, if

the use of "may" imports a general discretion it would be contrary to the definition of "summary assessment".

23. This approach to CPR r 44.6(1) is reinforced by the terms of the rule as a whole. The use of "make" in relation to summary assessment in (a) is consistent with the definition of the term and the need for the court, if it adopts that alternative, to make the assessment. By contrast, the use of "order" in (b) is apposite in circumstances in which the court orders the assessment to be carried out by someone else.

24. Both Mr Dunne and Mr Joseph go on to rely upon the terms of Practice Direction 44. Although they place different interpretations upon it, there is no dispute between them about the role and status of Practice Directions.

25. Mr Dunne took us to *Leigh v Michelin Tyres plc* [2004] 1 WLR 846 in which the role of the Costs Practice Direction was considered in the context of CPR Pt 43. Dyson LJ, who delivered the judgment of the court, quoted the observations of Hale LJ in *In re C (Legal Aid: Preparation of Bill of Costs)* [2001] 1 FLR 602 at 608-9 para 21 and May LJ in *Godwin v Swindon Borough Council* [2002] 1 WLR 997 at 1001, para 11, in relation to the role of Practice Directions. Hale LJ had observed that practice directions are not made by statutory instrument, are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament but if approved by the Lord Chancellor, he will bear ministerial responsibility for them to Parliament. She went on to quote Professor Jolowicz that: "'It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate.'" May LJ had made the point that practice directions are subordinate to the rules and stated that in his view, they are "at best a weak aid to the interpretation of the rules themselves".

26. Dyson LJ considered that the relevant paragraphs of the practice direction in that case were made pursuant to the power in the court to regulate its own procedure within the limits set by the statutory rules and to fill in the gaps left by those rules: [21].

27. It seems to me, therefore, that Practice Direction 44 cannot be used to override CPR 44 itself. However, where it is consistent with the rules and provides guidance as to practice, it should be taken into account.

28. In this case Practice Direction 44 is consistent with CPR r 44.1(1) and with CPR r 44.6(1) and supplements them. Paragraph 9.2 provides that the general rule is that the court should make a summary assessment at the conclusion of the hearing. Further, the second sentence of paragraph 9.7 provides that if a summary assessment is appropriate and the court awarding costs is unable to deal with the matter on the day "the court may give directions as to a further hearing before the same judge".

29. Mr Dunne stresses the reference to a further hearing before the *same judge* (emphasis added). Mr Joseph, on the other hand, stresses the use of "*may*" in the phrase "may give directions" in support of his argument that there is a case management discretion to direct the manner in which the summary assessment should take place and that, accordingly, the assessment can be undertaken by another judge. He also relies, in this regard, upon the reasoning of Coulson J (as he then was) in *Transformers and Rectifiers Ltd v Needs Ltd* [2015] EWHC 1687 (TCC).

30. In that case, the question arose as to whether a judge who had not made the relevant costs orders could, nevertheless, summarily assess the costs which were the subject matter of those orders. Two sets of costs had been ordered by Edwards-Stuart J after consideration of the papers and the third set arose after the hearing of an application to set aside an adjournment made before Coulson J. Coulson J was asked to summarily assess all three sets of costs but the defendant's counsel objected on the basis that two of the three orders had been made by a different judge and, therefore, Coulson J had no jurisdiction to carry out a summary assessment.

31. Having set out CPR Part 44.6 and paragraph 9.7 of Practice Direction 44, Coulson J held as follows:

> "8. It seems to me that, not only is there nothing in the rules or the PD which prevents a different judge from summarily assessing the costs of a hearing conducted (or an order made) by a different judge, but such a blanket prohibition would make no practical sense. Obviously, in the majority of cases, it will be appropriate, even necessary, for the same judge to conduct the summary assessment. If, for example, there was a contested hearing, and the detail of any summary assessment exercise carried out thereafter depended on the views formed by the judge about the parties'submissions, or the witnesses, or their conduct generally, then it would be inappropriate for any other judge to attempt the exercise. But an inflexible rule that the same judge must, in every case, conduct the summary assessment, cannot be derived from the CPR.
>
> 9. The provision at paragraph 9.7 of the PD (paragraph 6 above) is permissive: if time does not permit the summary assessment then and there, it *may* be heard later by the same judge. Equally, therefore, it *may* be heard by another judge.
>
> 10. Nor would a blanket ban be in accordance with the overriding objective. It is often the case that a summary assessment is the only just and proportionate way to deal with costs. It would be absurd if such an exercise could not be undertaken because of, say, the death or indisposition of the judge who conducted the original hearing or made the original order, or because he or she is on circuit and is unable to deal with the matter when it arises. Some degree of flexibility must be permissible.
>
> 11. That is particularly so where, as here, the two orders made by Edwards-Stuart J (and therefore the focus of Mr Elkington QC's submissions) were made, not on the basis of and following a contested hearing, but as a result of a paper application supported by written evidence. In circumstances where there was no hearing, and the order was made on the basis of the papers, the summary assessment of costs can just as easily be undertaken by another judge, because precisely the

> same material is available to him or her as was available to the judge who made the original order.
>
> 12. Accordingly, in the absence of any binding authority to the contrary, I would conclude that I had the necessary jurisdiction summarily to assess the costs identified in the two orders of Edwards-Stuart J."

32. Coulson J went on to distinguish the case of *Mahmood & Anr v Penrose & Ors* [2002] EWCA Civ 457, in which this court held by reference to the previous version of the Practice Direction, that the judge erred in summarily assessing the costs of a hearing which had taken place before a recorder. He did so on the basis that: the previous Practice Direction had provided that if summary assessment was appropriate but the Court awarding costs was unable to do so on the day, it *must* (emphasis added) give directions for a further hearing before the same judge whereas the present Practice Direction is permissive; the case was decided under a previous version of the overriding objective and the new emphasis upon proportionality means that an absolute bar on another judge summarily assessing costs "would at least in certain circumstances, be disproportionate . . ."; *Mahmood* was concerned with the summary assessment of the cost of a hearing; and it was not clear that any argument had been addressed to the court on the issue and it was very doubtful that the Court of Appeal had intended to lay down a principle to be followed in all subsequent cases [13] – [15].

33. Coulson J concluded that:

> "19 . . . in appropriate circumstances, another judge may be able summarily to assess the costs arising out of a hearing conducted (or an order made) by another judge. I do not consider that there is any binding authority under the current version of the CPR to the contrary. In circumstances where, as here, the costs orders made by Edwards-Stuart J did not arise out of a hearing, but were made solely on a consideration of the relevant papers, it seems to me that there is no practical or sensible reason why I cannot summarily assess the costs in question."

34. What of Mr Joseph's reliance on the use of "may" in the second sentence of para 9.7 of the Practice Direction? In this regard, I agree with Mr Dunne. The sentence must be read as a whole. If a summary assessment is appropriate but the court awarding the costs is unable to assess those costs on the same day, the court may give directions for a further hearing to determine the issue before the same judge. The use of the permissive "may" does not go to whether the further hearing is before the same judge. It goes to whether directions are made or not.

35. If Mr Joseph's interpretation of the use of "may" were correct, it would turn the requirement that a summary assessment be undertaken by the same judge who conducted the hearing into a different and permissive provision. In effect, para 9.7 would need to be construed as if it read: "If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court may give directions as to a further hearing, which may be before the same judge." I do not

consider that that is the ordinary and natural meaning of the words used. Furthermore, if that were the case, it seems to me that the Practice Direction would be contrary to the Rules themselves and would have to be disregarded.

36. It is apparent, therefore, that although his approach to the costs of the matters which Edwards-Stuart J had dealt with on paper may well have made sense, I disagree with Coulson J's reasoning and conclusion in the *Transformers* case, both as to the Rules and the effect of paragraph 9.7 of the Practice Direction. I would add that it does not appear that Coulson J was referred to the definition of "summary assessment" in CPR r44.1.

37. In seeking to construe the Practice Direction as a whole, my approach is closer to that of Sir Swinton Thomas in the *Mahmood* case. That was a case in which a Recorder had ordered the claimants to pay certain costs but had referred the question of quantification and the manner of payment to the trial judge. Sir Swinton Thomas considered paragraph 13.8 of the Practice Direction as it then stood. It provided that if a summary assessment was appropriate but the court awarding costs was unable to do so on the day, "the court *must* give directions as to a further hearing before the same judge" (emphasis added). The overriding objective was also formulated differently at the time. Sir Swinton Thomas, with whom Mantell LJ agreed, considered that the important words were "a further hearing before the same judge" and that the reasoning behind the rule was clear. It was only the person who had actually heard the case and knew about it who was in a position to make a summary assessment of costs. See [12]. I agree. As my Lord, Lord Justice Bean suggested during the course of the hearing, it is possible that the change from "must" to "may" in the present version of the Practice Direction reflects the fact that it is now normal to deal with such matters on paper rather by way of a further hearing.

38. In any event, I reject the submission that a general case management discretion is created by the use of "may" in paragraph 9.7 of the Practice Direction.

39. I also consider that the terms of CPR r 44.6 are such that neither CPR r 1.2 nor r 3.1(2)(m) can assist Mr Joseph. Although CPR r 1.2 requires the court to give effect to the overriding objective when exercising the powers under the Rules and interpreting them (but for some irrelevant exceptions) the overriding objective cannot overrule the express terms of the Rules themselves. As drafted, a summary assessment by its very nature must be carried out by the judge who heard the matter, whether immediately at the end of the hearing or thereafter. Proportionality cannot assist.

40. Further, CPR r 3.1(2) provides by its express terms that it applies "[E]xcept where these Rules provide otherwise . . ". It is quite clear that CPR r 44.6 does so provide. Accordingly, it is not open to a judge to use the power in CPR r 3.1(2)(m) to order that a summary assessment be heard by another judge even if it would be proportionate to do so.

41. It seems to me, therefore, that the Rules as drafted leave the court in an inflexible position in which only the judge who heard the matter can make the summary assessment. There is no power to do otherwise. I accept, however, that there might be circumstances in which a judge who had not heard the original matter is in a position to carry out the broad-brush exercise which is the hallmark of summary assessment and it would be proportionate and just for him or her to do so. The circumstances in

which Coulson J found himself might be one such circumstance. Another might be where the judge who heard the matter is likely to be unavailable for a considerable time. In those circumstances, of course, the delay must be weighed against the additional cost involved in another judge considering the matter and the question of whether in the circumstances of the case, it would be just for someone who had not heard the matter to undertake the broad-brush exercise. In any event, the Rules as they stand do not allow for it. It seems to us that this is a matter which it might be appropriate for the Rules Committee to consider.

42. It follows, therefore, that I would allow the appeal on the summary assessment issue. In the circumstances, the directions issue does not arise.

43. Although Mr Dunne submitted that if the appeal were allowed we should order a detailed assessment, it seems to me that a summary assessment is appropriate. It was accepted, in principle, before Linden J, that a summary assessment was the correct course and the judge evidently agreed. Furthermore the hearing took less than one day and the costs should, prima facie, be subject to summary assessment unless there is a good reason otherwise. Lastly, it seems to me that in the circumstances, a detailed assessment would be disproportionate.

44. In the circumstances, therefore, I would direct that the summary assessment in this matter be remitted to the judge for him to carry it out at a convenient time, whether in person, by means of a Teams hearing, by telephone or on paper.

45. Lastly, having heard submissions, I would order that there be no order as to costs on this appeal, save as in respect of the order of Master Bancroft-Rimmer which provided that the Respondent do pay the appellant's costs of and occasioned by their application to extend time for service of the Respondent's notice. My reasons are as follows. The point in relation to summary assessment was not taken before Linden J and if it had been, an appeal might have been avoided altogether. Further, although the appeal is allowed, it is not clear that it will be of any significant benefit to Mr Isah and enough costs have already been expended arguing about costs already.

Lord Justice Nugee:

46. I agree.

Lord Justice Bean:

47. I also agree.