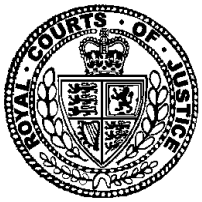

Neutral Citation Number: [2025] EWHC 125 (SCCO)
Case No: BL-2023-000660
SCCO Reference: SC-2024-BTP-000501

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 23/01/2025

Before :

COSTS JUDGE LEONARD

- -

Between :

(1) ST FRANCIS GROUP 1 LIMITED
(2) ST FRANCIS GROUP 2 LIMITED
(3) DSM SFG GROUP HOLDINGS LIMITED **Claimants**

- and -

(1) Mr JOHN THOMAS KELLY
(2) LANSDOWNE GROUP LIMITED **Defendants**

- -
- -

Simon Teasdale (instructed by **Pinsent Masons**) for the **Claimants**
Andrew Hogan (instructed by **Croft Solicitors**) for the **Defendants**

Hearing dates: 15 and 22 October 2024

- -

Approved Judgment

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

.....

COSTS JUDGE LEONARD

Costs Judge Leonard:

1. This is the detailed assessment of costs payable by the first Defendant to the Claimants in accordance with an order made by Master Pester on 8 August 2023. Before referring in detail to the terms of that order, I should refer briefly to the events that led to it.

2. According to a judgment of Mrs Justice Cockerill DBE of July 2022 (to which I will refer in more detail below) the Kelly family, of which the first Defendant is a member, built over two generations a number of successful businesses based in Birmingham. By a sale and purchase Agreement ("SPA") dated 17 March 2017 the family sold two of their companies, Demolition Services Midlands Group Holdings and St Francis Group. The transaction completed on 31 March 2017.

3. The nature of the sale was a management buy-out ("MBO") to a group of purchasers represented by the Claimants. That group was headed up by Mr Brian Baker and Mr Robert Braid, both of whom had worked for Kelly family companies and family members for years. The price was a little over £100m subject to a series of adjustments set out in the SPA. The Claimants were purchasers.

4. In the course of the transaction, the first Defendant personally executed a Claim Waiver (the "Claim Waiver") in which he irrevocably and unconditionally represented to the Claimants that neither he or any person connected with him had any claims against the Claimants "or their officers or employees", a term which included Mr Baker and Mr Braid.

5. In the Claim Waiver the first Defendant also waived in full any claim which he or any person connected with him had against the Claimants or their officers or employees and agreed to indemnify them against all losses incurred or suffered, directly or indirectly, in any way whatsoever in connection with any such claim.

6. "Losses" was defined to include "any losses, claims, judgments, costs (including all reasonable and properly incurred professional costs and expenses, and costs of enforcement), damages, awards, charges, demands, proceedings, penalties, fines, expenses or other liabilities".

7. In 2020, notwithstanding the terms of the Claim Waiver, the Defendants brought proceedings against Mr Baker and Mr Braid ("the fraud claim"). As is clear from the July 2022 judgment of Cockerill J, the Second Defendant was owned and controlled by the first Defendant, and was in effect a vehicle for the first Defendant's business interests: in essence the fraud claim was the first Defendant's.

8. The first Defendant claimed that he had not been told that the sale was an MBO and that Mr Baker and Mr Braid had breached fiduciary duties to him. He also claimed that Mr Baker and Mr Braid had told him, inaccurately and fraudulently, that they would achieve the best possible price for the Kelly family and that the value of the companies was reflected in the sale price.

9. The first Defendant's case was that but for the actions of Mr Baker and Mr Braid, the sale would not have gone ahead. Instead, a sale for £200 million would have been achieved, of which his share would have been twice the £37 million he received from the sale. Accordingly he claimed losses of £37 million against Mr Baker and Mr Braid.

Mr Baker and Mr Braid counterclaimed for an indemnity under the terms of the Claim Waiver.

10. The Claimants held documents, including emails, in their records which related to the MBO and to allegations made by the first Defendant, which I understand to have extended over a period of some ten years. In the course of the fraud claim, disclosure of documents was sought from the Claimants on one hand by the first Defendant, and on the other by Mr Baker and Mr Braid.

11. The Claimants, through their solicitors Pinsent Masons LLP, were able to agree the parameters of disclosure with Mr Baker and Mr Braid (as represented by their solicitors, Reynolds Porter Chamberlain LLP). The documents disclosed in accordance with that agreement were, in turn, disclosed to the Defendants by Mr Baker and Mr Braid in the fraud claim.

12. The Claimants were not able to agree the parameters of the disclosure exercise with the first Defendant, who issued a third party disclosure application against the third Claimant. The application came before Mr Justice Jacobs and was ultimately agreed save as to liability for costs. On 19 February 2022, Jacobs J made an order setting out the disclosure to be given and providing, at paragraph 7, that:

> "The Claimants do pay the Third Party's costs of complying with this order to be assessed if not agreed. The issue of the basis upon which such costs are to be assessed is generally reserved, and nothing in this order shall have the effect of preventing the Third Party from contending that such costs or any other costs incurred by it are recoverable on the indemnity basis pursuant to the Claim Waiver deed dated 31 March 2017."

13. Cockerill J handed down her judgment on the fraud claim on 19 July 2022. The claim was entirely unsuccessful, and the allegations of fraud were dismissed. Cockerill J found the first Defendant's understanding and recollection of events to be mistaken in numerous key respects; she rejected all allegations of breach of duty on the part of Mr Braid and Mr Baker; and she found that that there was no sale at an undervalue, but a sale, as she put it, " at the top end of the value of the businesses".

14. The counterclaim succeeded. Cockerill J observed, at paragraph 280 of her judgment:

> "I… conclude that the indemnity is apt to cover any losses (including legal costs) of the Defendants in circumstances where they have not breached any duty to the Claimants".

15. I understand that the Defendants paid a total of £93,185.20 against the costs claimed under paragraph 7 of Jacob J's order of 19 February 2022.

16. The process that led to the August 2023 order of Master Pester started with a letter dated 21 July 2022, addressed by Pinsent Masons to Weightmans LLP (then the first Defendant's solicitors) seeking payment of the Claimants' costs and expenses under the terms of the Claim Waiver. Correspondence followed with Weightmans and their successors as the Defendants' solicitors, Croft Solicitors Limited.

17. A witness statement dated 10 May 2023, filed in support of the application by Mr McNeill, the solicitor at Pinsent Masons with responsibility for managing the Claimants' case, explains that the reimbursement sought by the Claimants under the terms of the Claim Waiver falls, broadly, into two categories: costs incurred in providing disclosure, and the cost of management time spent responding to the fraud claim, the latter claim being limited to time spent by the claimants' in-house counsel, Mr Adrian Kennedy

18. In his statement, Mr McNeill describes a sequence of events in which the first Defendant consistently denied, in correspondence, that the Claimants had any entitlement to costs or expenses beyond that already provided for in the February 2022 order of Jacobs J and engaged only slowly, and with every sign of reluctance, with the Claimants' attempts to resolve matters, whether by agreement or court proceedings.

19. In fairness, I should mention that it seems to have taken the Claimants the best part of a year (between July 2022 and April 2023) to formulate fully their claim for reimbursement, in particular so as to include the cost of management time, though that does not in itself have any bearing either upon the validity of the claim, or upon the first Defendant's steadfast refusal to acknowledge the Claimants' right to any indemnity under the Claim Waiver beyond what had been paid pursuant to the order of Jacobs J.

20. That refusal led to the issue of the Claimants' CPR Part 8 application to Master Pester. The application was initially opposed by the first Defendant, who promised evidence in response but never filed it. In consequence, the Claimants applied for a date for the disposal of the application, which was set for 8 August 2023.

21. The Claimants, on 27 July 2023, sent to the first Defendant a draft joint statement of issues and reading list and proposed a timetable for exchanging skeleton arguments. The first Defendant did not respond, leaving it to the Claimants, on 2 August, to file a bundle for the hearing.

22. After 3 p.m. on 7 August 2023, the day before the hearing before Master Pester, the first Defendant sent to the Claimants a proposed consent order. This led to discussions in which most issues were agreed, the remainder being resolved before Master Pester on 8 August.

23. Master Pester's order of that date, which refers to the fraud claim as the "JK Fraud Claim", incorporates the following declarations:

> "1. The Claimants are entitled to an indemnity from the First Defendant in respect of all reasonable and properly incurred costs in relation to the JK Fraud Claim. If the costs were reasonably incurred and reasonable in amount (which is a matter for assessment and which this Order does not in any way prejudice) those costs are capable of including:
>
> a. both external legal costs and in-house legal costs, and expenses; and
>
> b. costs which were not incurred as a direct participant in the JK Fraud Claim (such as dealing with requests for disclosure for the purposes of the JK Fraud Claim and advising in relation to the same).

> 2. For the avoidance of doubt, 'in-house legal costs' are only capable of being recovered under this Order insofar as they are true 'legal costs' for work of a type which could be recovered for if otherwise performed by external solicitors, and nothing in this Order prevents arguments being raised on assessment as to whether any in-house costs claimed by the Claimants are of a recoverable type and/or recoverable in principle as 'legal costs'."

24. The order itself provided for the first Defendant to pay, on the indemnity basis and in accordance with CPR 44.5, the Claimants' costs of, incidental to and caused by the fraud claim; to pay interest upon the Claimants' costs from the date of payment to the date of the order, at 2% above base rate (the judgment rate to apply thereafter); and to pay on account of costs the sum of £175,000.

25. The Claimant says that the first Defendant's resistance to accepting his obligations under the indemnity has extended into this assessment, manifested by an approach calculated to put the Claimants to maximum cost and difficulty in responding to his Points of Dispute without having to go to any real effort himself to identify the actual issues in dispute against particular items, or his real position on the amount of time which tasks ought to have taken.

26. Having reviewed the Points of Dispute in some detail, for reasons I will explain, I find much force in that submission.

The Rules

27. CPR 44.5, which governs this assessment, reads as follows:

> "(1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –
>
> (a) have been reasonably incurred; and
>
> (b) are reasonable in amount,
>
> and the court will assess them accordingly.
>
> (2) The presumptions in paragraph (1) are rebuttable…"

28. For the purposes of this judgment, it is necessary also to bear in mind CPR 47.14(6), which provides that on an assessment between parties only items specified in the points of dispute may be raised at the hearing, unless the court gives permission; and paragraph 8.2 of Practice Direction 47, which governs the content of Points of Dispute in assessments between parties:

> "Points of dispute must be short and to the point. They must follow Precedent G in the Schedule of Costs Precedents annexed to this Practice Direction, so far as practicable. They must:

(a) identify any general points or matters of principle which require decision before the individual items in the bill are addressed; and

(b) identify specific points, stating concisely the nature and grounds of dispute."

The Bill, Points of Dispute and Preliminary Hearings

29. Notice of Commencement of the detailed assessment proceedings was served by the Claimants on 8 November 2023. The Claimants' bill of costs is in electronic spreadsheet form and, following some corrections made in response to a point taken by the first Defendant on the indemnity principle, comes to £468,687.15.

30. The bill detail comprises 1,103 items, of which 20 are disbursements. One of those disbursements is 270.6 hours of Mr Kennedy's time, charged at £69,003 and detailed separately in a schedule. The Defendants argue that Mr Kennedy's costs should have been shown in the Claimants' bill of costs as legal costs rather than as disbursements. That is an approach with which I tend to agree, although for practical purposes it does not seem to me to be of any significance, as the claim and the available information in support would have been the same.

31. The Points of Dispute fall into two parts. What are described as preliminary Points of Dispute are set out in standard Precedent G format. There are 12 preliminary points, a number of which cross-refer to what are described as item by item points, inserted into the column BB of table ("tab") 14 of the spreadsheet bill. Tab 14 contains the bill detail, and there is an objection in column BB to every one of its 1,103 items.

32. The first Defendant's starting point, as set out in the Points of Dispute, was that a detailed assessment should not proceed until preliminary points 1-4 had been addressed by the court. The Claimants' response, as set out in the Claimants' Replies, was that the Claimants would consent to a preliminary hearing in which points-1-4 could be addressed together with the Claimants' argument that the first Defendants' item by item points, by reference to *Ainsworth v Stewarts Law LLP* [2020] EWCA Civ 178 and *O'Sullivan v Holmes and Hills LLP* [2023] EWHC 508 (KB), are inadequately particularised and should be dismissed as such.

33. On filing a request for a detailed assessment hearing, the Claimants requested a two-hour hearing to deal with preliminary issues 1-4 and the *Ainsworth* point, followed by three days for a detailed assessment. The court listed a 2.5 hour hearing on 8 October 2024 for the determination of preliminary points 1-4 (insofar as possible without scrutiny of the bill detail) and the *Ainsworth* point. The remainder of the assessment was listed for three days between 12 and 15 November 2024.

34. The 2.5 hours allowed for the preliminary issues and the *Ainsworth* argument proved to be entirely inadequate. The 8 October hearing was adjourned part-heard to another 2.5 hour hearing on 22 October. Within that time frame, it was possible to dispose, as points of principle, with preliminary points 1-4, but having heard submissions on the *Ainsworth* argument I was left with insufficient time to deliver a judgment. Further, I was not in a position to deliver a reserved judgment before the three-day hearing listed for 12 November, which (given that, if I accepted the Claimants' arguments, most of the points of dispute would fall away) had to be adjourned to 18 March 2025.

35. I should say that none of that was the fault of counsel representing the parties (Mr Teasdale for the Claimants and Mr Hogan for the first Defendant), for whose careful, thorough and balanced submissions I am most grateful.

36. Preliminary point 1 needs to be revisited in the context of the *Ainsworth* point. I will come to that.

37. Preliminary points 2, 3 and 4 all concern the indemnity principle. It is sufficient for present purposes to say that I found that any indemnity principle issues had been fully resolved by the amendment of the bill, and that there was no real issue which would justify (as the Points of Dispute put it) requiring the Claimant to disclose retainer documentation, or (as Mr Hogan, effectively correcting the point of dispute, put it) putting the Claimants to the election provided for at Practice Direction 47, paragraph 13.13.

The *Ainsworth* Argument

38. As I have said there are 20 disbursements, and 1,083 timed items of work in the bill. The timed items are set out, in conventional spreadsheet bill fashion, to include a brief description of the work done, the identity of the person doing it, and the time spent. Three items (1101-1103, to which I will refer as "the bill preparation items") concern the preparation of the bill. They are addressed by preliminary point 12, which must await a full detailed assessment hearing.

39. Of the remaining 1,080 timed items, every one, without exception, is objected to, in column BB of tab 14, with the same words: "See PP1, 6, 7, 8, 9 & 11. Unreasonable time claimed, reduction sought as per Ds offer and grade."

40. Each of those timed items is then met at column BC by the first Defendant's suggested time allowance, every one of which appears to have been calculated at 22% of the claimed time. The resulting figure is rounded by the spreadsheet to the nearest tenth of an hour. The result is that for all 312 items in the Claimants' bill claimed at 6 or 12 minutes, totalling 50.2 hours, no offer is made at all in column BC. It might be more accurate to say that no visible offer is made: a subtotalling exercise shows a cumulative "offer" of 11.044 hours, 22% of the 50.2 hours claimed.

41. Entries in column BD specify the grade of fee earner who, according to the Defendant, should have done given items of work.

42. Before considering the actual content of preliminary points 1, 6, 7, 8, 9 and 11, I should set out to the principles by reference to which the Claimants argue that the 1,083 identical "item by item" objections raised by the first Defendant are inadequately particularised and should be dismissed or struck out.

43. *Ainsworth* concerned an assessment between solicitor and client under section 70 of the Solicitors Act 1974. The solicitors had, in the usual way, prepared a breakdown of their billed costs and the client's costs draftsman had inspected the solicitors' file before preparing Points of Dispute to that breakdown.

44. The breakdown included an itemised schedule of time spent on documents. The client, in his Points of Dispute, stated that all the entries in the schedule were disputed and set

out broad grounds of dispute such as duplication and excessive time, without identifying the entries in the schedule to which those objections were said to apply. The solicitor complained that the client had left them unable to prepare any meaningful reply, and absent itemised points of dispute invited the court to dismiss in their entirety the client's objections to the schedule.

45. The assessment hearing took place before Senior Costs Judge Gordon-Saker. At the hearing, the client's advocate, Mr Poole, explained that he proposed to identify some of the items in the schedule and to explain why he considered them to be unreasonable, with a view to persuading the court to reduce the overall time on a "broad brush" basis.

46. The Costs Judge explained his concerns about that approach (the client being the "claimant" and the solicitor the "defendant"):

> "… The difficulty with that, it seems to me, is that the claimant has not set out in his points of dispute which items he wishes to challenge and why and that does cause, as the defendant has indicated in its reply, a difficulty insofar as – in respect of items which have not yet been identified – they would need to look at the attendance notes to see what work was done and why and the context in which it was done in order to seek to explain why the time claimed is reasonable, if indeed that is the objection, or why a particular fee earner was engaged in doing it and why possibly more than one fee earner was engaged in doing it…
>
> The purpose of points of dispute is really to prevent that work being done on the hoof in the course of a hearing. The solicitors are entitled to know specifically which items are challenged and the reasons for the challenge. Insofar as the claimant states that all entries are disputed, it seems to me that it would be beholden on him to explain why each particular entry is challenged and whether he is asserting that no time should be allowed or reduced time should be allowed or whether the work should have been done by a different grade of fee earner. But, as pleaded, the points of dispute, it seems to me, do not raise a proper challenge to the documents items and certainly do not raise a challenge which can be properly answered by the defendant without a considerable amount of time being spent in looking at the papers to reply to that challenge and that, it seems to me, is a process, which if it is to be done, should be done in advance of the hearing rather than at the hearing. One can well understand why Mr Poole is seeking to adopt the approach that he is of encouraging the court to take a broad brush but the difficulty with that approach is that we are not going to be looking at every item, we will only be looking at particular items and presently, apart from Mr Poole, none of us knows which items those are going to be. It seems to me that that does put the defendant in a difficult position. It also puts the court in a difficult position. I read the papers in the light of the points of dispute as they are pleaded and I was not able to identify which particular items are challenged or why…
>
> In the circumstances, I think the only fair course is to dismiss that point of dispute… on the basis that it has not been properly pleaded."

47. The Court of Appeal found that Costs Judge Gordon-Saker had been right to dismiss the client's objection to the solicitor's schedule of document time.

48. Asplin LJ, at paragraphs 36 to 40 of her judgment, explained why the court thought it appropriate to apply to a solicitor/client assessment the provisions of Practice Direction 47, and why the court found that the client's Points of Dispute in relation to the solicitor's documents schedule were inadequate;

> "36. It seems to me quite clear, that… it is necessary to look to CPR Part 47 for assistance in relation to the form which points of dispute should take…
>
> 37. … General points and matters of principle which require consideration before individual items in the bill or bills are addressed, should be identified, and then specific points should be made "stating concisely the nature and grounds of dispute."…
>
> 38. Common sense dictates that the points of dispute must be drafted in a way which enables the parties and the court to determine precisely what is in dispute and why. That is the very purposes of such a document. It is necessary in order to enable the receiving party, the solicitor in this case, to be able to reply to the complaints. It is also necessary in order to enable the court to deal with the issues raised in a manner which is fair, just and proportionate.
>
> 39. As I have already mentioned, the complaint should be short, to the point and focussed. As para 8.2(b) of 47PD.8 indicates, that requires the draftsman not only to identify general points and matters of principle but to identify specific points stating concisely the "nature and grounds of the dispute". In the case of a solicitor and own client assessment, it seems to me, therefore, that in order to specify the nature and grounds of the dispute it is necessary to formulate specific points by reference to the presumptions contained CPR 46.9(3) which would otherwise apply, to specify the specific items in the bill to which they relate and to make clear in each case why the item is disputed…
>
> 40. It follows that in my judgment, the sample wording which appears in the hypothetical example at Precedent G is of no assistance... Para 8.2 itself provides that Precedent G should be followed "as far as practicable". It is only an example and is premised upon a party and party detailed assessment in which the paying party will not have had sight of the relevant documentation and the presumptions in CPR 46.9(3) do not apply."

49. In submissions, I understood Mr Hogan to suggest that *Ainsworth* concerned a case management decision and for that reason cannot be taken to have laid down principles of general application. I disagree. Asplin LJ's judgment addressed fundamental questions concerning the particularity to be required from Points of Dispute in order to ensure a fair, just and proportionate hearing. The question I have to consider is the way in which those principles are to be applied in an assessment between parties, rather than solicitor and client.

50. Before I come to that I should refer to *O'Sullivan*, which again concerned schedules of document time prepared for the purposes of a solicitor/client assessment. In the normal way, those schedules were summarised, in the body of the bill itself, under a single item

number setting out the total amount of time spent by each of the fee earners whose work is itemised in the schedule.

51. The client, referring to two such summaries of document time in the body of the bill, objected to the whole of each schedule on the basis that the time claimed was "either unnecessarily incurred and/or unreasonable an amount". An offer was made against the total time as summarised for each fee earner, but nothing more was said about the basis for the paying party's objections.

52. HHJ Gosnell, sitting as a Judge of the High Court, made it clear that, in applying the *Ainsworth* principles, the word "item" must be taken to apply to the individual entries in a documents schedule, not just the summary in the body of the bill.

53. At paragraphs 49 and 50 of his judgment HHJ Gosnell said this:

> "On the basis of my interpretation of the judgment in *Ainsworth* the Points of Dispute in the current case do not satisfy the requirements of CPR 47PD para 8.3 in that they do not identify specific points stating concisely the nature and grounds of dispute. The receiving party cannot identify which individual units of work are disputed and why. The assertion that the time was either unnecessarily incurred or unreasonable in amount is an assertion of two alternative allegations which are actually completely different. "Unnecessarily incurred" suggests work was done which did not reasonably need to have been done at all. "Unreasonable in amount" suggests work was reasonably done but it either is recorded incorrectly or took longer than was reasonably necessary. The receiving party is entitled to know which of these two allegations applies to any unit of work challenged so that it can meet the challenge with an explanation or evidence. To allow a generic alternative challenge to stand in relation to potentially any and all entries in the schedule is clearly unfair to the receiving party…
>
> … the length of the process is in the hands of the paying party. If there is a documents section as in this case where there is a schedule with 83 timed but identifiable items it is up to the paying party how many items it wishes to challenge. A sensible paying party may make a value judgment and decide to challenge only the highest and therefore more valuable entries. If the paying party chooses to challenge every single item in the schedule then he is the one adopting a disproportionate course of action which the receiving party has to be able to fairly respond to."

54. Mr Hogan points out that in both *Ainsworth* and *O'Sullivan* the client, as is usually the case in solicitor/client assessments, had had an opportunity to inspect the solicitor's files. Whilst the *Ainsworth* principles are derived from Practice Direction 47, which applies to assessments (as in this case) between parties, one must, accordingly, bear in mind that on an assessment between opposing parties, no such opportunity will have been available.

55. Mr Hogan also referred me to the judgment of Deputy Costs Judge Roy KC in *Wazen v Kahn* [2024] EWHC 1083 (SCCO), in which he concluded that the guidance in paragraph 38 of the judgment of Asplin LJ in *Ainsworth* must apply to assessments

between opposing parties, but that the requirement for particularity must be less demanding in an inter partes than a solicitor-client assessment.

56. Without repeating here in full the considered and thorough analysis of the relevant provisions undertaken by DCJ Roy in *Wazen v Kahn*, I should say that I respectfully agree with his conclusions. In particular, it seems to me that paragraph 38 of Asplin LJ's judgment in *Ainsworth* self-evidently applies to assessment between parties. So, in my view, do the first two sentences of paragraph 39, from which point Asplin LJ went on to set out the way in which the principles she had set out should be applied on solicitor/client assessments.

57. That there is nonetheless a real distinction to be drawn, when applying *Ainsworth*, between solicitor/client assessments and assessment between parties, is clear from paragraph 40 of Asplin LJ's judgment. One must not apply an artificial standard of particularity to which a paying party who has not had the opportunity to see the receiving party's files, cannot be expected to aspire.

58. It seems to me however clear from *Ainsworth* that certain fundamental underlying principles are common to solicitor/client assessments and assessments between opposing parties, which for present purposes I would summarise in this way.

59. First, the receiving party (or solicitor) must have an adequate opportunity to understand which of the items in their bill of costs (or breakdown) have been challenged and the grounds of that challenge, so as to be able adequately to prepare a response. Points of Dispute must be prepared in a way which achieves that.

60. Second, it is not acceptable, at a detailed assessment hearing, for the parties or the court to have to spend time identifying the items in the bill of costs that are objected to, or the nature or grounds of the objection. That should be clear from the outset. There must be no element of surprise or "ambush".

61. Third, Points of Dispute must be prepared in a way that ensures that a detailed assessment hearing can be managed in a fair, just and proportionate way. For example, it is not open to a paying party to insist that the court trawl through every item in a bill of costs to ensure that there is no objection to it. It is for the paying party to raise clear and pertinent points upon which the court can adjudicate.

Preliminary Points 1, +6, 7, 8, 9 and 11

62. Before considering them individually, I need to make some observations upon the effect of the first Defendant's raising the same six preliminary points against every timed item in the bill, other than the costs of its preparation.

63. Mr Hogan refers to the guidance of HHJ Gosnell, at paragraph 51 of his judgment in *O'Sullivan*, as to how Points of Dispute can achieve a satisfactory standard of particularity, and argues that the first Defendant has met that standard in this case. I disagree, for these reasons.

64. First, the insertion into the tab 14, column BB of the Claimants' spreadsheet bill of the first Defendant's purported item by item objections has evidently been a "cut and paste"

exercise rather than a considered exercise of determining which of preliminary points 1, 6, 7, 8, 9 and 11 might apply to which timed entry.

65. So much is obvious given that on the face of the items by item objections, for example, every single one of the Claimants' 1,080 timed items other than the bill preparation items, even including time spent in the disclosure exercise, are said both to be outside the scope of Master Pester's order and to represent work that is irrecoverable by its nature (against which the first Defendant has nonetheless offered over 166 hours); 41 items claimed at grade D are objected to on the basis that they should have been delegated to a grade D fee earner; the same objection is taken to 115 items offered by the Defendant at grade A; and the same pro forma objections of excessive time and inappropriate fee earner grade have taken against item 211, which is a disbursement.

66. In short, as no effort has been made to identify the items to which each of preliminary points 1, 6, 7, 8, 9 and 11 actually applies, the first Defendant's item by item objections at column BB of tab 14 of the bill add nothing to the preliminary points themselves. The Claimants and the court are left in the same position as if column BB of tab 14 had been left completely blank.

67. I turn to the content of preliminary points 1, 6, 7, 8, 9 and 11.

68. Preliminary point 1 argues that the Claimants' involvement in the fraud claim was limited to the provision of disclosure of documents and checking them for privilege. It goes on:

> "And yet, Cs Bill of Costs ("Bill") claims thousands of pounds for items such as (the below list is for illustrative purposes only, if and when the matter proceeds to a Detailed Assessment, the Court will proceed through the Bill on an item by item basis and note the hundreds of such items claimed):
>
> Item 1100, which claimed £69,003 claimed for Mr Kennedy (an in-house lawyer at Cs) for work such as:
>
> "Credibility assessment of John Kelly averments and inconsistencies with Messrs Braid and Baker leading to the preparation of a privileged report to RPC outlining JK's inconsistencies as an aid for cross examination – 16 hours
>
> In person attendance at trial of Baker and Braid proceedings – 64 hours"
>
> Quite clearly, there are thousands of pounds of costs claimed within Cs Bill, that extend significantly beyond the scope of the Authority for Assessment. As such, Cs solicitors conduct is called into question in preparing and signing such a Bill (at a cost of well over £15,000). The costs claimed are so beyond the scope of the costs Order that CPR 44.11 may be engaged as a result of Cs signing the Bill of Costs…"

69. In the hearing of 15 October 2024, I found that preliminary point 1 fails as a point of principle. I will revisit here in the context of the *Ainsworth* issue, my reasons for reaching that conclusion.

70. In his submissions in the hearing of 15 October, Mr Hogan developed two lines of argument that I myself cannot find in preliminary point 1. The first was that the indemnity available to the Claimants under the Claim Waiver could not extend to in-house costs of the magnitude claimed for Mr Kennedy's work, which was in any event undertaken on behalf of Mr Baker and Mr Braid, not the Claimants. On that basis he invited me to disallow in its entirety the £69,003 claimed for Mr Kennedy's work.

71. I can find no viable interpretation of the Claim Waiver which allows for the exclusion, under the indemnity given to the Claimants by the first Defendant, of any particular category of work or expense. Nor is there any scope for the imposition of any financial limit under the indemnity other than the mutually accepted principle, for present purposes, that they must be reasonably incurred and reasonable in amount. Even if the Claimants had spent too much on Mr Kennedy's work, it does not follow that they cannot recover anything at all.

72. Further, I am unable to accept that there is any proper ground for disallowing the work undertaken by Mr Kennedy on the basis that it was for the benefit of Mr Baker and Mr Braid, rather than the Claimants. I have accepted the May 2023 evidence of Mr McNeill to the effect that, as the fraud claim involved serious allegations of fraud against their past and present directors, the allegations had reputational consequences not only for Mr Baker and Mr Braid but also the Claimants' business and its stakeholders (Mr Braid being the serving CEO). There were also, he says, legitimate concerns that the first Defendant was on a "campaign" against the Claimants. Mr Kennedy, tasked by the Claimants with providing support and assistance, was required to follow all material developments in the fraud case.

73. The underlying point, as I accepted on 15 October, is the interests of Mr Baker and Mr Braid, in the context of the fraud claim, were for practical purposes indistinguishable from the interests of the Claimants, and that the Claimants' indemnity under the Claim Waiver plainly extends to any work undertaken, in that context, to protect the interests of the Claimants. This still leaves plenty of room for argument as to the reasonableness of Mr Kennedy's undertaking any particular task, but that is not the way in which the first Defendant has framed his objections.

74. Turning to preliminary point 1 as it is actually worded, I trust that I have already made it clear why the citation of that point, together with preliminary points 6,7,8,9 and 11, against every timed item in the bill other than the bill preparation items in itself illustrates rather than remedies their lack of particularity. It is in any event clear that from the wording of preliminary point 1 that the first Defendant does not advance the patently insupportable proposition that all 1,081 of those items falls outside the scope of Master Pester's order.

75. Otherwise, preliminary point 1 is less clear, but the premise behind it would seem to be that, under the Claim Waiver, the Claimant is not entitled to recover any costs other than those directly arising from the disclosure process. Hence for example the reference to the Claimants' allegedly limited involvement in the fraud claim.

76. If that is what is intended, then preliminary point 1 runs entirely contrary to the declarations already made by Master Pester. The first Defendant's reference to the Claimants' role in the fraud proceedings reads as an attempt to reopen his finding to

the effect that the Claimants right to indemnity extends to costs which were not incurred in that role.

77. As for "item by item" objections, the first Defendant purports to have identified thousands of pounds worth of items in the Claimants' bill that fall foul of preliminary point 1, but other than citing two examples of Mr Kennedy's work does not identify them, taking the line rather that they are to be identified in the course of a trawl by the court through the entire bill on a line by line basis.

78. All of this, very obviously, runs directly contrary to the guidance of the Court of Appeal in *Ainsworth*, given more than three years before Master Pester's order was made.

79. If preliminary point 1 is not intended to say that the Claimant is not entitled to recover any costs other than those directly arising from the disclosure process, then it fails entirely not only to identify which of the items of the bill said to fall outside the scope of Master Pester's August 2023 order, but why. If a given item of work is said to fall outside the scope of an order for costs then the paying party ought to be able to say why that is said to be the case, and the receiving party is entitled to know that, not guess at it.

80. It follows that preliminary point 1, save for the two specific examples of Mr Kennedy's work which the first Defendant claims fall outside the scope of Master Pester's order, must be struck out. Those two objections, insofar as they can be said to survive the findings I have already made, can be considered at the assessment hearing.

81. At preliminary point 6, the first Defendant adds sums already paid under the order of Jacobs J to the amount claimed by the Claimants in their bill of costs and describes the total as "unusually high", particularly in the light of the fees charged by Reynolds Porter Chamberlain for the disclosure exercise.

82. The first Defendant argues that the Claimants have paid for a 'Rolls Royce' service, the cost of which exceeds what is reasonable even on the indemnity basis. Whilst accepting that proportionality is not a consideration on an indemnity basis assessment, the first Defendant refers to *Kazakhstan Kagazy PLC v Zhunus* [2015] EWHC 404 (Comm) and says that he will seek a significant reduction to the costs claimed, both as a preliminary point and on an item by item basis.

83. For present purposes I will leave aside that the Claimant takes issue with the first Defendant's calculation of the level of fees incurred; that there is no principled basis, for assessment purposes, for adding the costs of Reynolds Porter Chamberlain to the costs of Pinsent Mason for the Claimants; and that I can derive no assistance from the assertion that the Claimants' costs are "unusually high" for a very substantial and contentious disclosure exercise in the context of complex, high-value and highly contentious commercial litigation. The only comparator offered is the fees of Reynolds Porter Chamberlain for the same exercise, which according to the first Defendant himself were substantially higher.

84. I will point rather to two obvious difficulties with preliminary point 6. The first is that there is no principled basis upon which this court can make a reduction to the overall costs claimed by the Claimants other than on grounds of proportionality, which as if the first Defendant admits has no application on an assessment on the indemnity basis.

(Nor, for that matter, does *Kazakhstan Kagazy PLC v Zhunus*, which is concerned with the reasonableness and proportionality of costs to be recovered on the standard basis).

85. The second is that preliminary point 6 is of necessity a general point, with no application to any individual item in the bill. It is not open to this court to reduce any of the individual items in the Claimants' bill on the basis that their overall costs are "unusually high". Either a given item of costs is itself reasonable in amount, or it is not.

86. In short, the Claimants are entirely right in saying that preliminary point 6 is inadequately particularised. In fact, it cannot be adequately particularised, because it has no validity either on a general or a particular level. Preliminary point 6 must be struck out.

87. Preliminary point 7 is not as clearly drafted as it could have been, but it appears to comprise three discrete points. The first concerns a claimed lack of delegation of what are described as simple tasks to grade D fee earners. The first Defendant asks the court to make a preliminary ruling to the effect that all document time should be allowed at a given percentage for fee earners at grade A, B, C and D.

88. There is no principled basis upon which the court could make such a preliminary finding on the basis of a vague allegation to the effect that "simple tasks" have not been delegated and an arbitrary proposed division of work on a percentage basis.

89. On an item by item basis, the citation of preliminary point 7 against every timed item in the bill other than the bill preparation items, apart from the shortcomings in that approach that I have already identified, sheds no light upon which of the three separate objections grouped together as preliminary point 7 is said to apply.

90. The first Defendant's delegation argument does seem to me however to be rescued by the fact that he has, in column BC of tab 14, made offers which make it clear which grade of fee earner, on the first Defendant's case, should have undertaken given items of work. It seems to me that those entries that offer a lower grade of fee earner than claimed, can be read as clear and specific item by item challenges and tested on assessment. It will however be incumbent upon the first Defendant to rebut the presumption under CPR 44.5 that each of the relevant items is reasonable in amount.

91. The second part of preliminary point 7 concerns allegedly excessive time. Preliminary point 7 says that excessive time has been claimed "in numerous instances", without identifying them. The first Defendant has however, against every timed entry, asserted in column BC of tab 14 how much time should, on his case, be allowed. Obviously the way in which that has been done derives from a crude 22% formula rather than any genuine attempt to evaluate the time spent on the Claimants' behalf. Hence the proposed disallowance of every 6 and 12 minute item in the bill.

92. I bear in mind however first that paying parties who have not seen an opponent's files may not reasonably be able to say more than that given entries, on their face, appear to be excessive and second, that it must, be open to a paying party to argue that every single timed item in a bill of costs is excessive, should they see fit. If that approach proves to be manifestly unreasonable and to take up a disproportionate amount of court time, then there may be adverse consequences for the paying party, but that can be determined in the course of the assessment. The entries in column BC of tab 14 do seem

to me to set out clearly the first Defendant's position on the timed entries in the bill, and the Claimant has not been deprived of an adequate opportunity to respond.

93. It will still be incumbent upon the first Defendant to rebut the presumption, under CPR 44.5, that each timed item is reasonable in amount. The first Defendant may wish to give some thought to weighing the potential benefits and hazards of maintaining all of his objections to time spent on an assessment under CPR 44.5, but that is a matter for him and his advisers.

94. The third part of preliminary point 7 is a complaint of duplication between fee earners in "numerous instances". The first Defendant says that in such instances, he will "refer to this POD and make an offer of time and clarify the grade of fee earner offered".

95. I have already accepted that it is open to the first Defendant to argue, in respect of any particular time entry, that the relevant work should have been done by a more junior fee earner, and that the first Defendant appears to have identified the relevant entries. The court can adjudicate upon that, but it sheds no light on the issue of duplication. Nor does a broad reference against every timed entry, other than the bill preparation items, to preliminary point 7, which as I have observed does not identify which of the three discrete objections raised at preliminary point 7 are said to apply.

96. In short, the Defendant has not identified those items which are said to be duplicated. This part of preliminary point 7 must, accordingly, be struck out as inadequately particularised.

97. Preliminary point 8 reads:

> "In numerous instances (the Court is politely referred to Ds item-by-item PODs contained within Tab 13 of Cs electronic Bill of Costs), Cs have claimed time for non-fee earner work (such as administrative tasks, IT tasks, considering letters in, items of a Solicitor/Own Client nature – such as GDPR etc).
>
> Purely by way of example (Ds will refer back to this PP on any item-by-item Assessment of Cs Bill), the Court is directed to Items: 58, 83-86, 101, 111, 117, 159, 163, 181, 226, 230, 268, 545, 1069, 1097, 1098.
>
> Ds could have provided many more examples for illustrative purposes, however Ds are conscious that PODs must be short and to the point. In addition, Ds are concerned re the ultimate level of time the Court will be engaged in the Assessment, which is solely as a result of Cs unreasonable costs claim. Therefore, Ds are attempting to minimise the Court resources engaged, whilst maximising efficiency."

98. This point, as drafted, could stand as an illustration of precisely the sort of approach that the Court of Appeal's guidance in *Ainsworth* should have put to an end.

99. Again, preliminary point 8 mixes together three points that should have been made separately. The question of whether work performed is properly characterised as non-fee earner or administrative work is not the same as the question of whether the Claimants have made a claim for considering letters in, or (assuming that this is a valid

objection on assessment under CPR 44.5) for "solicitor/client" work that is, as such, irrecoverable between parties.

100. The first Defendant claims to have identified "numerous instances" of chargeable time claimed which falls under one or another of those headings, but not all of them, nor which of the limited examples offered falls under which heading.

101. This is purportedly justified on the ground of saving court resources, whereas the outcome of this approach, if permitted, would in reality be that the Claimants are left entirely in the dark as to which items are being objected to and upon which grounds. The court could only entertain such wholly unparticularised points in an unfair and disproportionately extended detailed assessment hearing during which the first Defendant would reveal, for the first time, what his case is, and the Claimant would be expected to respond on the spot.

102. The examples given in preliminary point 8 are limited enough to allow, without undue expenditure of time, the identification of which objection applies to which item. Otherwise, for the reasons I have given, preliminary point 8 must be struck out.

103. Preliminary point 9 appears to be a rerun of the excessive time and duplication complaints already raised at preliminary point 7, and the challenge to consideration of incoming communications already raised at preliminary point 8. Apart from eight "example" items said to be duplicative, and an assertion that the first Defendant "could have provided hundreds of examples for illustrative purposes" (again purportedly justified on the grounds of efficiency) no attempt is made to identify which of the items in the Claimants' bill to which each objection is said to apply.

104. My conclusion, accordingly, is that apart from the specific items identified as allegedly duplicative, which can be considered on assessment, preliminary point 9 must be struck out.

105. Preliminary point 11 is set out at some length, but it reduces to three propositions. The first is that the costs claimed by the Claimants for the disclosure exercise, in combination with the costs incurred by Mr Baker and Mr Read, as represented by Reynolds Porter Chamberlain, are in total unreasonable in amount.

106. The second is that Pinsent Masons have not managed the disclosure exercise, in particular reviewing documents for the purposes of privilege, cost-effectively. In this respect, the first Defendant "reserves the right" to serve expert evidence in support. In fact permission would be needed for such evidence, which has not been sought.

107. The third is that a comparison of the Claimants' bill with that of Reynolds Porter Chamberlain, as served in support of Mr Baker and Mr Braid's claim for the costs of the fraud claim, will reveal numerous instances of duplication of work (presumably with that carried out by Reynolds Porter Chamberlain, although that is not made clear), and with consultants Epiq.

108. This is an indemnity basis assessment of the Claimants' costs, in which the first Defendant's complaint about the total of the Claimants', Mr Baker's and Mr Braid's costs is irrelevant.

109. Again, the first Defendant's allegations of mismanaged costs and duplication are wholly unparticularised. If excessive costs are said by the first Defendant to have been incurred through poor management by Pinsent Masons of the disclosure exercise, then it is incumbent upon the first Defendant to identify the items of costs which would not have been incurred had the exercise been properly managed.

110. Similarly, if it is alleged that there has been an avoidable duplication of costs between Pinsent Masons and Reynolds Porter Chamberlain then it is incumbent upon the first Defendant to identify the items in the Claimants' bill and the items in Reynolds Porter Chamberlain's bill that demonstrate such unnecessary duplication.

111. No attempt has been made to do either. Preliminary point 11 must, accordingly, be struck out.

Summary of Conclusions

112. The identical "item by item" objections inserted by the first Defendant into column BB of tab 14 of the Claimants' bill, against every timed item except for three bill preparation items, refer back to a series of preliminary objections whilst making no attempt to identify the items to which each objection is said to apply. In consequence they add nothing to the preliminary points and are in effect meaningless.

113. Preliminary point 1 is struck out save for the two specific examples offered by the first Defendant of work said to fall outside the scope of the authority for costs.

114. Preliminary points 2-4 have already been addressed.

115. Preliminary Point 6 is struck out.

116. The first Defendant's challenges, under the heading of preliminary point 7, as to excessive time and failure to delegate, are sufficiently particularised in columns BC and BD of tab 14 to be heard. The complaint, under the same heading, of duplication is not adequately particularised and is struck out.

117. Preliminary point 8, save for the specific disputed items disputed on various grounds, is struck out.

118. Preliminary point 9, except for specific items identified as allegedly duplicative, is insufficiently particularised and is struck out.

119. Preliminary point 11 is struck out.