Neutral Citation Number: [2019] EWHC 3421 (QB)

Case No: QA-2019-000240

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURTS COSTS OFFICE
(MASTER LEONARD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2019

Before:

MR JUSTICE STEWART

- -

Between :

PME	**Appellant**
- and -	
THE SCOUT ASSOCIATION	**Respondent**

- -
- -

Mr Roger Mallalieu (instructed by **Bolt Burdon Kemp**) for the **Appellant**
Mr Robin Dunne (instructed by **BLM Solicitors of London**) for the **Respondent**

Hearing date: 3rd December 2019

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Approved Judgment

Mr Justice Stewart:

Introduction

1. This is an appeal against an Order of Master Leonard in the Senior Courts Costs Office. His Order was made on 30th July 2019. The material paragraph is:

> "1. The detailed assessment will proceed to a hearing on the remaining issue of hourly rates only, with a time estimate of 2 and a half hours."

2. Master Leonard gave permission to appeal.

3. The Appellant's single ground of appeal is:

> "The Master was wrong to conclude that, pursuant to CPR 47.24, the scope of the appeal before him was limited to a limited form of re-hearing of the single decision taken by the ACO in respect of hourly rates at the oral hearing on 15th August 2018 and/or that the Appellant was not entitled to a "full" re-hearing of the detailed assessment as a whole."

ACO is the abbreviation used, which I shall adopt, for an "Authorised Court Officer" whose powers are provided for, in relation to detailed assessment of costs, in CPR 47.3.

The Statutory and Procedural framework

4. Section 1 of the Courts Act 2003 imposes a duty upon the Lord Chancellor to ensure an efficient and effective system to support the carrying on of the business of the courts. Section 2 provides that the Lord Chancellor may appoint such officers and other staff as appear to him to be appropriate for the purpose of discharging that duty. Paragraph 2 of Schedule 1 Civil Procedure Act 1997 provides for the Civil Procedure Rules (CPR) to provide for the exercise of the jurisdiction of any court within the scope of the rules by officers or other staff of the court.

5. In the Appendix to this judgment I have set out relevant provisions from the Civil Procedure Rules. In summary:

   i) The jurisdiction of an ACO is in CPR 47.3, supplemented by PD 47 paragraph 3;

   ii) CPR 47.15, supplemented by paragraph 14 of PD 47, deals with provisional assessments, whether by an ACO or a judge.

   iii) Appeals from ACOs are governed by CPR 47.2-47.24, supplemented by PD 47, paragraph 20.

Master Leonard's decision

6. Master Leonard dealt with two points. Apart from the matter which is before this court, it was argued before him that an ACO cannot conduct a provisional assessment. He rejected that argument and it has not been pursued on appeal.

7. The Master gave a detailed and careful judgment. I will during the court of this judgment refer only briefly to it, since I have to deal with the arguments presented to me which substantially overlap with the legal arguments put before the Master.

Factual background

8. The facts of the underlying case do not affect the matter of principle. The Claimant accepted a Part 36 offer of £29,500 on 22nd August 2017. The Order for costs was made on 20th November 2017. Because the bill was within the limits set out in PD 47, paragraph 14.1, it was subject to the provisional assessment procedure in CPR 47.15. The ACO who carried out the provisional assessment was Ms Kenny. She carried it out on 23rd May 2018. Pursuant to CPR 47.15 (7) a copy of the bill, as provisionally assessed, was sent to each party with a notice that they could challenge any aspect of the provisional assessment. Apparently, no Precedent G – a copy of the points of dispute/replies annotated with the ACO's decision - was provided, as it should have been in accordance with PD 47, paragraph 14.4 (2). No point is taken about this.

9. On 7th June 2018 the Appellant requested an oral hearing in respect of two aspects of the ACO's decision, namely hourly rates and documents time. The oral hearing took place on 15th August 2018. The documents point was not pursued. The hourly rates were revised by the ACO.

10. On 5th September 2018 an Appellant's Notice was filed. In section 5 this sought "a de novo detailed assessment hearing before a costs judge or district judge of the High Court so the preliminary issues and costs can be considered and assessed afresh". By paragraph 4 of the Grounds of Appeal it was stated that the Claimant sought "a de novo detailed assessment hearing so that all issues and costs not agreed are heard afresh and assessed in the usual manner. Therefore, all decisions made by Costs Officer Kenny at the provisional assessment and subsequent hearing are appealed". Thus, the Appellant sought to open all disputed matters on the Bill which had been assessed by the ACO, not just the hourly rates which were the only live issue at the hearing before her on 15th August 2018.

11. After a full hearing on the law, Master Leonard ruled that the only matter which could be appealed was "the remaining issue of hourly rates".

Preliminary matters

12. The following matters can be stated:

i) Provisional assessment is part of the detailed assessment procedure. It falls within CPR Part 47 which is titled "detailed assessment of costs". Detailed assessment is defined under Rule 44.1 as meaning "the procedure by which the amount of costs is decided by a Costs Officer in accordance with Part 47." A "Costs Officer" can mean a costs judge, a district judge or an ACO. Provisional assessment under Rule 47.15 applies to "any detailed assessment proceedings" which are within the financial limits set out in PD 47, paragraph 14.1. Rule 47.15 is under section IV

of Part 47. This deals with "the procedure where points of dispute are served". It occurs only after a request for a detailed assessment has been filed (PD 47, paragraph 14.3).

ii) An ACO is not a judge but an appointed Civil Servant. For this reason there are a number of safeguards namely:

(1) Where a party objects to the detailed assessment being carried out by an ACO the court may order it to be made by a costs judge or a district judge (CPR 47.3(2)). If all relevant parties agree that the assessment should not be made by an ACO, the court will list the hearing before a costs judge or a district judge. (PD 47, paragraph 3.2);

(2) Unlike appeals from a costs judge or a district judge which are governed by a Part 52, there is a specific procedure for appealing the decision of an ACO. This is dealt with in CPR 47.21-47.24 and 47 PD paragraph 20. The important distinctions, reflecting the fact that an ACO is not a judge are:

a) There is a right to appeal. Permission is not required.

b) The appeal lies to a costs judge or a district judge.

c) Any further appeal from the costs judge or district judge would be a first appeal within the meaning of Part 52. It would therefore have to satisfy the lower threshold for permission provided for in CPR 52.6, rather than the more stringent threshold in CPR 52.7.

(3) An appeal against the decision of an ACO is by way of re-hearing (CPR 47.24; PD 47, paragraph 20.4). An appeal from a judge under Part 52 is, by CPR 52.21, (1) "limited to a review of the decision of the lower court", absent particular circumstances. In a Part 52 appeal, unless otherwise ordered, oral evidence which was not before the lower court will not be received by the appeal court unless otherwise ordered; also the appeal court will only allow an appeal where the decision of the lower court was wrong or unjust because of serious procedural or other irregularity in the proceedings in the lower court.

Discussion

13. The Appellant submits that, according to CPR 47.23, the appeal procedure in relation to an ACO appeal is that an Appeal Notice must be filed "within 21 days after the date of the decision against which it is sought to appeal." Under any provisional assessment, whether by an ACO or a judge, the party can "challenge any aspect of the provisional assessment" by complying with the procedure in CPR 47.15 (7). The provisional assessment procedure provides for an oral hearing if a request is made. If no request is made and served within 21 days of receipt of the notice of the bill as provisionally assessed, then the provisional assessment becomes binding upon the parties (save in exceptional circumstances). The Appellant submits that a party can choose not to challenge the provisionally assessed bill at an oral hearing, but can appeal it either (i) if it has been provisionally assessed by a Judge, to a County Court

or High Court Judge under Part 52, or (ii) if it has been provisionally assessed by an ACO to a Costs Judge under CPR 47.2-47.24. The Appellant further submits that if a party chooses this route, the 21-day period for appealing commences after the provisional assessment has become binding. This, it is said, follows from the fact that until that period has expired there is nothing to appeal. In other words, a party can file a notice to appeal not before 21 days and not after 42 days from the date of receipt of notice of provisional assessment of the bill.

14. The difficulty with this submission is the words " …any party who wishes to challenge any aspect of the provisional assessment must, within 21 days of receipt of the notice, file and serve a written request for an oral hearing. If no such request is filed and served within that period, the provisional assessment shall be binding upon the parties". The natural meaning of these words is that, once the 21 days have expired then, absent such a request, the decision is not open to challenge whether by way of an oral hearing or by an appeal. If that is correct, then Rule 47.15(7) mandates a party to proceed to, and receive the decision from, an oral review before any appeal can be filed. This would also seem sensible since, particularly in the case of a provisional assessment by a Judge where a party wishes to appeal under Part 52, a properly reasoned decision of the point sought to be appeal is required, not just a brief note on a bill following a paper provisional assessment.

15. The Appellant submits that because of the provision in CPR 47.24 whereby the court will "re-hear the proceedings which gave rise to the decision appealed against, the re-hearing is not simply a re-hearing of the specific matter but of the entire "proceedings". The Appellant submits that those proceedings are the detailed assessment proceedings as a whole. It is correct that the appeal is by way of re-hearing, as provided for in CPR 47.24 and PD 47 paragraph 20.4. However, are the "proceedings which gave rise to the decision appealed against" the detailed assessment proceedings as a whole, or the hearing before the ACO? I rule that it is the latter. This is for the following reasons:

    (i) A provisional assessment is not a "hearing". A "hearing" is fixed when specific items are challenged. Therefore, a "re-hearing" is a further hearing of a "hearing" that has taken place. This is the oral hearing and not the provisional assessment on paper. There was a dispute about this. The Appellant's case was that the provisional assessment on paper was a 'hearing'. It was said that the Senior Court Costs Office Guide, at paragraph 13.1, when dealing with provisional assessments says: "the bill will be referred for provisional assessment (a hearing on paper only)….." . Further, PD47 paragraph 14.3 refers to 'when the receiving party files a request for a detailed assessment hearing' and paragraph 14.3(c) requires an additional copy of any paper bill and a statement of the costs to be filed "on the assumption that there will not be an oral hearing following the provisional assessment", thereby, it is said, distinguishing between a hearing and an oral hearing. In my judgment the paper exercise is not a 'hearing'. If it were, it would be subject to the provisions in Rule 39.2 and the general rule that hearings are to be in public, subject only to the matters in Rule 39.2(3). In fact, not only are paper provisional assessments not dealt with in public, PD47 paragraph 14.4(1) prohibits the parties from attending. The distinction between what is, and what is not, a 'hearing' can also be seen to be drawn in the separate rules concerning detailed assessment of LSC

funded clients' costs and costs which are payable out of a fund other than the Community Legal Service Fund – see CPR Rules 47.18(5) and 47.19(4). The wording of PD47 paragraph 14.3, though it could perhaps be better worded, does not undermine my conclusion. I suspect that following this judgment the drafting in the SCCO Guide may need some slight revision.

(ii) PD 47 paragraph 20.5 requires, if possible, a "suitable record of the judgment appealed against", and, where reasons for the decision have been officially recorded by the court, an approved transcript. If there is no official record then the officer's comments written on the bill or advocate's notes of the reasons will be acceptable. These paragraphs envisage focus upon the decision made by (or as PD47 paragraph 20.5 says "the judgment appealed against" of) the ACO.

16. Therefore, the correct construction of the "decision" of an ACO in the detailed assessment proceedings (CPR 47.21), read in conjunction with 47.24, which is that the court "re-hear the proceedings which gave rise to the decision appealed against", provide that the only decision which can be appealed and re-heard is the oral decision by the ACO. This is notwithstanding the fact that PD47 paragraph 14.4(2) refers to the results of the paper provisional assessment as 'decisions' and that CPR 47.21 enables a party to appeal 'against a decision' in the detailed assessment proceedings. If the wording needs to be explained, I would suggest that the words in the Practice Direction are infelicitously chosen. The provisional assessment on paper does not give rise to a 'decision' which can be the subject of an appeal. It would perhaps be better described as provisional assessment of items on the bill which either become binding on the parties if no oral hearing is requested or which, if an oral hearing is requested, gives rise to decisions capable of being appealed.

17. The Appellant addressed the court about the different potential meanings of the word "re-hearing". The court was taken to authorities on the meaning of appeals by way of "re-hearing" under RSC Order 55 (appeals to the High Court), RSC Order 58 (appeals from Masters etc.) or RSC Order 59 (appeals to the Court of Appeal). Thus:

i) In *Tanfern Limited v Cameron-MacDonald* [2001] 1 WLR 1311 Brooke LJ said:

> "under the old practice, the appeal to a judge was a re-hearing in the fullest sense of the word, and the judge exercised his/her discretion afresh, while giving appropriate weight to the way the lower court had exercised its discretion in the matter…"

Later at [36]-[37] Brooke LJ referred to the fact that this type of appeal still survives the advent of the Civil Procedure Rules in relation to appeals against ACOs.

ii) In *EL Du Pont De Nemours and Co v St Dupont* [2006] 1 WLR 2793 Aldous LJ distinguished in the Rules of the Supreme Court, between appeals under RSC Order 55 and 59 and those from those from Masters to a judge in Chambers under RSC Order 58. In the latter:

> "on those appeals the judge treated the matter as though it came before him for the first time. The parties were able to bring

> forward fresh evidence which had not been before the Master and constrained by restrictions applicable to the Court of Appeal. The judge hearing the appeal was able to exercise any discretion afresh."

18. All this I accept. However, none of it is of assistance in determining the meaning of which proceedings are to be re-heard. The proceedings which are to be re-heard are those before the ACO when the ACO came to the oral decision.

19. Of some importance is CPR 47.15(10). This provides a disincentive to requesting an oral hearing (whether by judge or by an ACO) in that, unless the court otherwise orders, a party requesting an oral hearing will pay the costs of and incidental to that hearing unless achieving an improvement by 20% or more of the sum provisionally assessed. One may posit the example of a bill claimed at £50,000 where the provisional assessment was £30,000. Assume a party challenged the bill on one ground only and received only £2,000 more at an oral hearing. They would then bear the costs of an incidental to that oral hearing. If in the case of a provisional assessment and oral hearing by an ACO an Appellant could have a full appeal on all disputed bill items, what would be the costs consequence if the one item in the oral hearing still came out at £2,000, but by reason of the other challenged items the party obtained £40,000? Who would then the costs of the hearing before the ACO? The Appellant submitted that the matter would be arguable in that one party could say that they have achieved the correct result on appeal and therefore should have the costs of the hearing before the ACO as well as before the Judge, whereas the other party could say that the points should all have been taken at the oral hearing. This would be another unfortunate potential consequence of the Appellant's stance.

20. The Appellant accepted that the logic of his argument was that either party could 'keep its powder dry'. Thus, for example, the receiving party may ask for an oral hearing before the ACO on, say one bill item only. After that had been decided, the paying party (as well as the receiving party) had 21 days to appeal the entire bill, even though it had not previously notified any challenge to the provisional assessment. It is not easy to see how parties could advise their client or make sensible offers if the Appellant's submission were correct.

21. The consequences of the Appellant's case are wholly undesirable. They involve potential substantial wastage of the court and the parties' time and resources. That would be an affront to the Overriding Objective which requires a court to deal with a case justly and at proportionate cost. The provisions in CPR 47.3(2) [read in conjunction with 47PD paragraphs 3.2 and 3.3] and the appeal provisions peculiar to ACOs properly cover the justice of allowing a party full access to a judge after an oral hearing. Of course if the Rules properly construed led to the conclusion that the Appellant's case on appeal was correct, then this court would have to so decide. However, for the reasons already given, they do not.

22. All these conclusions are consistent with drawing distinction between a provisional assessment and oral hearing before an ACO, and a provisional assessment and oral hearing before a judge. In this regard I agree entirely with the Master when he said at [72]:

> "I am quite unable to accept that the Claimant's right to judicial determination is in any way compromised by the proper application of the rules in the way I have described. The Claimant has had a choice at every step, of what to contest and what not to contest. The process of appeal should not represent an opportunity for a party to demand a re-hearing of decisions which that party has previously accepted."

23. In other words:

    i) At the stage of provisional assessment the parties can accept the provisional assessment or challenge it – with risk as to costs.

    ii) If they challenge it they have to set out the items which are challenged. These are then determined at the oral hearing.

    iii) Parties may challenge all the decisions in the provisional assessment. There is no limit.

    iv) However, if they do not then they are entitled to (a) an oral determination of the issues they have identified and (b) an appeal by way of re-hearing of the decision in relation to those issues.

24. For those reasons the Master was correct and the appeal is dismissed.

APPENDIX

Powers of an authorised court officer
47.3

(1) An authorised court officer has all the powers of the court when making a detailed assessment, except –
(a) power to make a wasted costs order as defined in rule 46.8;
(b) power to make an order under –
(i) rule 44.11 (powers in relation to misconduct);
(ii) rule 47.8 (sanction for delay in commencing detailed assessment proceedings);
(iii) paragraph (2) (objection to detailed assessment by authorised court officer); and
(c) power to make a detailed assessment of costs payable to a solicitor by that solicitor's client, unless the costs are being assessed under rule 46.4 (costs where money is payable to a child or protected party).
(2) Where a party objects to the detailed assessment of costs being made by an authorised court officer, the court may order it to be made by a costs judge or a district judge.

……

Provisional Assessment
47.15
(1) This rule applies to any detailed assessment proceedings commenced in the High Court or the County Court on or after 1 April 2013 in which the costs claimed are the amount set out in paragraph 14.1 of the practice direction supplementing this Part, or less.
(2) In proceedings to which this rule applies, the parties must comply with the procedure set out in Part 47 as modified by paragraph 14 Practice Direction 47.
(3) The court will undertake a provisional assessment of the receiving party's costs on receipt of Form N258 and the relevant supporting documents specified in Practice Direction 47.
(4) The provisional assessment will be based on the information contained in the bill and supporting papers and the contentions set out in Precedent G (the points of dispute and any reply).
(5) In proceedings which do not go beyond provisional assessment, the maximum amount the court will award to any party as costs of the assessment (other than the costs of drafting the bill of costs) is £1,500 together with any VAT thereon and any court fees paid by that party.
(6) The court may at any time decide that the matter is unsuitable for a provisional assessment and may give directions for the matter to be listed for hearing. The matter will then proceed under rule 47.14 without modification.
(7) When a provisional assessment has been carried out, the court will send a copy of the bill, as provisionally assessed, to each party with a notice stating that any party who wishes to challenge any aspect of the provisional assessment must, within 21 days of the receipt of the notice, file and serve on all other parties a written request for an oral hearing. If no such request is filed and served within that period, the provisional assessment shall be binding upon the parties, save in exceptional circumstances.
(8) The written request referred to in paragraph (7) must –
(a) identify the item or items in the court's provisional assessment which are sought to be reviewed at the hearing; and
(b) provide a time estimate for the hearing.
(9) The court then will fix a date for the hearing and give at least 14 days' notice of the time and place of the hearing to all parties.
(10) Any party which has requested an oral hearing, will pay the costs of and incidental to that hearing unless –
(a) it achieves an adjustment in its own favour by 20% or more of the sum provisionally assessed; or
(b) the court otherwise orders.

……

VIII APPEALS FROM AUTHORISED COURT OFFICERS IN DETAILED ASSESSMENT PROCEEDINGS

Right to appeal
47.21 Any party to detailed assessment proceedings may appeal against a decision of an authorised court officer in those proceedings.

Court to hear appeal
47.22 An appeal against a decision of an authorised court officer lies to a costs judge or a district judge of the High Court.

Appeal procedure
47.23
(1) The appellant must file an appeal notice within 21 days after the date of the decision against which it is sought to appeal.
(2) On receipt of the appeal notice, the court will –
(a) serve a copy of the notice on the parties to the detailed assessment proceedings; and
(b) give notice of the appeal hearing to those parties.

Powers of the court on appeal
47.24 On an appeal from an authorised court officer the court will –
(a) re-hear the proceedings which gave rise to the decision appealed against; and
(b) make any order and give any directions as it considers appropriate.

PRACTICE DIRECTION 47 - PROCEDURE FOR DETAILED ASSESSMENT OF COSTS AND DEFAULT PROVISIONS

……

Powers of an authorised court officer: rule 47.3
3.1 The court officers authorised by the Lord Chancellor to assess costs in the Costs Office and the Principal Registry of the Family Division are authorised to deal with claims where the base costs excluding VAT do not exceed £35,000 in the case of senior executive officers, or their equivalent, and £110,000 in the case of principal officers.
3.2 Where the receiving party, paying party and any other party to the detailed assessment proceedings who has served points of dispute are agreed that the assessment should not be made by an authorised court officer, the receiving party should so inform the court when requesting a hearing date. The court will then list the hearing before a costs judge or a District Judge.
3.3 In any other case a party who objects to the assessment being made by an authorised court officer must make an application to the costs judge or District Judge under Part 23 setting out the reasons for the objection.

……

Provisional assessment: rule 47.15
14.1 The amount of costs referred to in rule 47.15(1) is £75,000.
14.2 The following provisions of Part 47 and this Practice Direction will apply to cases falling within rule 47.15—
(1) rules 47.1, 47.2, 47.4 to 47.13, 47.14 (except paragraphs (6) and (7)), 47.16, 47.17, 47.20 and 47.21; and
(2) paragraphs 1, 2, 4 to 12, 13 (with the exception of paragraphs 13.4 to 13.7, 13.9, 13.11 and 13.14), 15, and 16, of this Practice Direction.

14.3 In cases falling within rule 47.15, when the receiving party files a request for a detailed assessment hearing, that party must file—
……
(c) an additional copy of any paper bill and a statement of the costs, including a statement of the costs claimed in respect of the detailed assessment drawn on the assumption that there will not be an oral hearing following the provisional assessment;

…..

14.4
(1) On receipt of the request for detailed assessment and the supporting papers, the court will use its best endeavours to undertake a provisional assessment within 6 weeks. No party will be permitted to attend the provisional assessment.
(2) Once the provisional assessment has been carried out the court will return Precedent G (the points of dispute and any reply) with the court's decisions noted upon it. Within 14 days of receipt of Precedent G the parties must agree the total sum due to the receiving party on the basis of the court's decisions. If the parties are unable to agree the arithmetic, they must refer the dispute back to the court for a decision on the basis of written submissions.

…….

Appeals from authorised court officers in detailed assessment proceedings: rules 47.22 to 47.25
20.1 This Section relates only to appeals from authorised court officers in detailed assessment proceedings. All other appeals arising out of detailed assessment proceedings (and arising out of summary assessments) are dealt with in accordance with Part 52 and Practice Directions 52A to 52E. The destination of appeals is dealt with in accordance with the Access to Justice Act 1999 (Destination of Appeals) Order 2016.
20.2 In respect of appeals from authorised court officers, there is no requirement to obtain permission, or to seek written reasons.
20.3 The appellant must file a notice which should be in Form N161 (an appellant's notice).
20.4 The appeal will be heard by a costs judge or a District Judge of the High Court, and is a re-hearing.
20.5 The appellant's notice should, if possible, be accompanied by a suitable record of the judgment appealed against. Where reasons given for the decision have been officially recorded by the court an approved transcript of that record should accompany the notice. Where there is no official record the following documents will be acceptable—
(a) the officer's comments written on the bill;

(b) advocates' notes of the reasons agreed by the respondent if possible and approved by the authorised court officer.

When the appellant was unrepresented before the authorised court officer, it is the duty of any advocate for the respondent to make a note of the reasons promptly available, free of charge to the appellant where there is no official record or if the court so directs. Where the appellant was represented before the authorised court officer, it is the duty of the appellant's own former advocate to make a note available. The appellant should submit the note of the reasons to the costs judge or District Judge hearing the appeal.

20.6 Where the appellant is not able to obtain a suitable record of the authorised court officer's decision within the time in which the appellant's notice must be filed, the appellant's notice must still be completed to the best of the appellant's ability. It may however be amended subsequently with the permission of the costs judge or District Judge hearing the appeal.