IN THE UPPER TRIBUNAL **Appeal No. HS/1516/2020**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST TIER TRIBUNAL (HESC)
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)
Tribunal Ref EH344/19/00037

Between

JW

Appellant

and

WIRRAL METROPOLITAN BOROUGH COUNCIL

Respondent

BEFORE UPPER TRIBUNAL JUDGE WEST

Hearing date: 19 February 2021
Decision Date: 16 March 2021

Representation: Mr John Friel, counsel (for the Appellant)
(instructed by SEN Legal)

Mr Matthew Smith, counsel (for the Respondent)
(instructed by the Council)

DETERMINATION

The application for permission to appeal against the decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) dated 17 July 2020 under file reference EH344/19/00037 is granted on ground one of the grounds of appeal, but not on grounds two and three.

The appeal against that decision is allowed. The decision of the First-tier Tribunal contains an error of law.

The decision is remade. The Council acted unreasonably in in attempting to bring placement (Section I) into the appeal. The Council's conduct was such as to justify making an order for costs.

The costs payable by the Council are summarily assessed to be in the sum of £22,000.00 including VAT. The Council is to pay that sum to the Appellant within 28 days of the date of the letter sending out this decision.

This determination is made under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the young person in these proceedings. This order does not apply to (a) the young person's parents (b) any person to whom the young person's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the young person where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

PRELIMINARY MATTERS

This decision follows a remote hearing which has been consented to by the parties. As required, I record that:

(a) the form of remote hearing was A (audio by telephone), a video hearing by Skype having to be aborted because of difficulties with the available technology. A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, involving an application for permission to appeal and, if granted, an appeal to follow, on pure matters of law. Further delay would be inexpedient as this is an appeal involving the liability for costs in the case of the special educational needs of a young person in which the decision of the First-Tier Tribunal under appeal was made on 17 July 2020, following an earlier substantive decision made on 26 May 2020

(b) the documents to which I was referred were contained in (i) a small partially numbered First-tier Tribunal paper bundle of at least 72 pages (ii) a large (but badly and repetitively numbered) First-tier Tribunal paper bundle of at least 688 pages (and apparently with no Section D) (iii) an Upper Tribunal paper bundle of 188 numbered pages (iv) an Appellant's authorities bundle of 71 pages (v) a Respondent's authorities bundle of 72 pages (vi) an additional submissions bundle from the Appellant containing a skeleton argument of 16 pages and enclosures (vii) an additional submissions bundle from the Respondent containing a skeleton argument of 4 pages and enclosures (viii) a Respondent's spreadsheet of 611 rows and 9 columns relating to the summary assessment of costs

(c) the order and decision made are as set out above.

REASONS

Introduction

1. This case concerns the following questions:

(i) whether the Tribunal failed to give adequate reasons for its costs decision

(ii) whether the Tribunal failed to apply the correct test in relation to the application for costs/used too restrictive a test of liability

(iii) whether the Tribunal took into account an irrelevant consideration or behaved unfairly in considering whether to make a self-cancelling costs order.

2. The parties to the appeal are the mother of the young person, who is the Appellant, and the Respondent, which is the Wirral Metropolitan Borough Council ("the Council"). In order to preserve his anonymity, and meaning no disrespect to him, I shall refer to the Appellant's son only as "A". A is now 23, but has complex learning and developmental disorders. The appeal is against the costs decision of Judge McCarthy dated 17 July 2020 in which he refused the Appellant's application for costs against the Council in the sum of £35,176.30. That followed a decision of the First-Tier Tribunal dated 26 May 2020, which followed an adjournment after an all day hearing on 1 April 2020 when it was agreed that the Tribunal should then determine the appeal on the papers without a further oral hearing. In its decision the Tribunal decided that

(1) the appeal was allowed

(2) the Council was to amend A's EHCP so that the contents of Sections B and F were as set out in V7 of the working document

(3) the Tribunal recommended that Sections C, D, G, H1 and H2 were amended so as to accord with the wording of V7 of the working document

(4) the Council was to amend Section E of A's EHCP so as to reflect the consequential amendments to Section E as set out in V7 of the working document.

The Adjournment Application

3. On 30 March 2020 Judge Brayne heard an application by the Council for the adjournment of the substantive hearing, an application which he rejected,

although he ordered that the late evidence received by the Tribunal be admitted in evidence. In the course of his order of the following day he stated that

> "It is now apparent that there is a Version 5 working document in existence, and I understand that most of the amendments are those suggested by the appellant, and there has been little or no narrowing of the issues within Sections B and F. The LA, it appears, has three reasons for this lack of progress: the first is that there are some issues of fundamental principle involved, and the second is that the proposed wording is too wordy, and the document should not be this lengthy given that reports are appended. The LA has now agreed to put into writing what those points of principle are, which should assist the Tribunal to address what are important issues. The third reason is that the LA is still considering a change of placement, and without an EP report of its own has been unable to progress that. I deal with the request for a postponement to enable that EP assessment to take place below, but observe here that it does not justify failing to engage with the working document process. Mr Owen [counsel then instructed] accepted that the LA does not have expert evidence to refute much of the Appellant's proposed wording, and asks the Tribunal to take an inquisitive role and rely on its own expertise. I made clear that the Tribunal must have good reason for departing from expert opinion, and is not in a position to supply evidence itself. Given that the LA should have obtained the evidence to justify changes to the EHCP at annual review, it is not in a strong position to resist amendments actually supported by expert opinion. The position in relation to the working document process is indeed still unsatisfactory, but not a reason for postponing the hearing.
>
> Mr Owen argued for a postponement on two grounds …
>
> I am satisfied that it would be disproportionate to postpone, for what is an unknown length of time, to enable an eventual health care assessment to take place. The hearing should take place and, it is hoped, will be able to consider the respective parties' positions on the basis of the available evidence. Mr Owen repeated the LA's application to postpone for an EP report, which the Tribunal has refused to order on previous occasions. Mr Friel argued that the appropriate way to challenge the refusal was not a postponement

> application less than 48 hours before the hearing, but an application at the time for review of the Registrar's decision and, if still refused, an Upper Tribunal appeal. I take note of the fact that the principal reason stated in the supplementary evidence as to why the LA wants an EP assessment is to inform the possibility of a change of placement, despite the LA making clear that Section I is not disputed for the purpose of this appeal. I also agree with the submission from Mr Friel that Sections B and F should be resolved now, in order for any consideration about a change of placement to take place once the provision which [A] needs has been decided."

The Hearing of 1 April 2020

4. On the following day the substantive hearing took place, but it was adjourned until 18 May 2020 for a determination before the panel on the papers without a further oral hearing. In the course of his adjournment decision dated 9 April 2020 Judge Brayne stated, by way of background to the appeal, that

> "7. [A] attends Ruskin Mill College, which is identified in Section I of his EHCP as a specialist residential placement. It is jointly funded by education and social care. The placement is not disputed in this appeal.
>
> …
>
> 9. This was not a straightforward hearing for reasons entirely unconnected with the need for a remote hearing. [The Appellant], in our view with good cause, challenged the LA's decision following annual review to remove, in the name of making the Plan more precise, a great deal of required provision for speech and language, physiotherapy and occupational therapy. There was no evidence that need had reduced and no decision or recommendation at annual review for such changes. Her mistrust of the LA has been exacerbated by frequent references throughout the course of the appeal to a desire by the LA to change placement, so that [A] attends a day placement in the Wirral. This was never raised at annual review and, despite materials relating the proposed College being included in the bundle, has never been within the Tribunal's remit, as Section I is not appealed. Failures by the LA to involve the CCG in the annual review have led to an absence of up to date

> assessments for sections C and G. The CCG has agreed to carry out the assessments, but the public health emergency means this will probably not happen for several months, and old information has to be relied on.
>
> 10. Fortunately the LA, having failed at the point of carrying out the annual review to consult with any of its own professionals other than staff at Ruskin Mill College, now accepts that it is not in a position to challenge any of the opinions in relation to need and provision set out by the Appellant's own independent expert witnesses. Mr Owen said he was instructed to question Dr Willis about aspects of his opinion on IQ scores, potential for further progress and level of qualifications pursued, but having put his questions he agreed he could not challenge those opinions. He asked the Tribunal to exercise an inquisitorial approach towards the Appellant's witnesses' conclusions. We are indeed an inquisitorial Tribunal, but in the absence of specific challenges it is not appropriate for us to question otherwise unchallenged evidence unless – which is not the case – we have identified a reason to do so.
>
> 11. Having identified that there are no identified issues of actual need or required provision in dispute between the parties, the difficulty presented to the Tribunal was that the quality of the working document was extraordinarily poor. Having been subjected to what appeared to be an over-zealous cut-and-paste approach, Sections B, C, D, F, G and to a lesser extent H failed appropriately to distinguish between need and provision, and between what is educational and what is a health or a social care need in relation to a special educational need. The length of the resulting document was excessive, not least because of the absence of any attempt at conciseness, and the extraordinary extent of duplication. Had the document been more carefully drafted in terms of amendments sought it would have been difficult for the LA, properly advised, to resist conceding the appeal in light of the absence of any alternative evidence."

5. With regard to the need to adjourn, he said that

> "13. The parties are agreed – or, in the case of the LA unable to submit otherwise – that the content of the Appellant's proposed amendments to Sections B and F are supported by the evidence. The parties are agreed that the content of sections D and H are no longer

> disputed. The parties are agreed that there is no up-to-date healthcare assessment and therefore the content of the 2018 EHCP remains appropriate, with minor updates as supported by the evidence. The parties are agreed that the need for reference to be made to provision to help [A] prepare for life beyond College within relevant sections. For the avoidance of doubt it is confirmed by the LA that [A] needs a waking day curriculum, residential provision, one to one provision and integrated therapies. It is agreed, or at least not disputed, that the wording of the proposed amendments does not comply with the requirements for an EHCP and requires amendment, following which it will either be agreed by the LA or determined by the Tribunal without further oral hearing. It is agreed that no new matters are to be raised, as there is no dispute as to principle. It is agreed that, in principle, the Appellant's appeal will succeed. It is agreed that if the contents of Sections D and G are not settled by agreement the Tribunal can only recommend changes. (The same would apply to Sections D and H, but it is reported that they are now agreed.)"

The Decision Of 26 May 2020

6. The Tribunal reconvened on 18 May 2020 and issued its decision on 26 May 2020. On that occasion the Tribunal held that

> "Sections B and F
> 6. Only sections B and F now require the Tribunal's attention. It had been hoped that, because the evidence on which those contents would be based was not in dispute, it would not be necessary for the Tribunal to play any role, other than to make a consent order. Regrettably this has not proved possible, and the Tribunal is now asked to settle the wording of these sections. There is no disagreement as to [A]'s special educational needs, or to the provision required to meet them. This fact was explicitly recorded in the adjournment order (see paragraph 10). Despite this agreement, a generous time limit, and the involvement of experienced counsel, the relatively straightforward task of converting agreed needs and provision into agreed text has not been achieved.
>
> …
>
> 8. The parent's position can now be summarised as follows. Sections B and F were revised by Mr Friel (and the agreed content of the social care and health care

sections also incorporated) into a V7 of the working document. This was sent to the LA. The LA responded by producing a working document which did not comply with the Tribunal's code, and which did not explain why the LA wished to delete particular content. The Tribunal was now invited, rather than to consider each part of the respective documents where content differed, to choose between the LA's version and the parent's version. (Criticisms of the LA's overall conduct were included, all of which have already been fully aired and none of which helped the Tribunal in making its decision.)

…

Sections B and F: The Tribunal's decision and reasons

10. The LA has been unable to justify the removal of content from the 2018 Plan, which is why the Tribunal explicitly agreed in the adjournment order to the need for Mr Friel to draw on that content, in addition to the recommendations in more recent expert reports, when redrafting his proposed amendments to Sections B and F. It was noted, in the order, that because the Plan under appeal was the 2019 EHCP, a 2018 Plan could not itself be the working document. This was clearly explained in the adjournment order and, to the best of the Tribunal's understanding, this approach had also been accepted and agreed by the parties at the hearing, including the LA's counsel. The LA's justification of deletions on the basis that the content came from the 2018 Plan is, at this stage of the appeal, muddled and misconceived.

11. The LA's extensive references to social care and health care in its position statement is irrelevant, and shows further confused understanding by the LA, given the agreements reached and recorded.

…

13. The LA has offered, in summary, no material justification for its proposed deletions of parental amendments, other than to complain of the parent's use of the 2018 material. It has offered no alternative wording. The position statement is entirely silent on matters of substance, and therefore provides confusion rather than assistance to the Tribunal when it comes to deciding whether to accept the LA's proposed deletions.

> 14. The only point on which it is possible to agree with the LA in this final stage of the appeal is that Mr Friel's redraft of Sections B and F remains extraordinarily verbose and does not come close to complying with the requirements of the Code of Practice. These sections still need an entire rewrite so that essential needs and provision are summarised for the benefit of the actual user of the Plan, with reports of course available for those needing to access the full expert assessments, opinions and recommendations. However, the actual reason for additional content, to properly capture needs and provision, is not challenged.
>
> 15. It is not the task of judicial officer holders to redraft entire sections of a Plan. We considered the possibility of adjourning for more work to be done on the wording, but concluded that this would be disproportionate, bearing in mind the overriding objective and the need to avoid further delay and cost. It would also now be somewhat optimistic, in light of the history of the appeal, the ill-tempered discussion at the oral hearing, and the accusatory tone and content of the most recent position statements, to expect the parties and, in particular, their representatives, to manage this collaboratively."

The Tribunal's Decision on Costs

7. It was in advance of that decision, on 11 May 2020, that the Appellant issued her application for costs incurred since 13 September 2019, although she conceded that she would not seek the costs of the working document incurred after 1 April 2020. Having considered the evidence and the respective written submissions of the parties in relation to the costs application, Judge McCarthy set out his decision as follows:

> **"The application**
> 1. The Tribunal received the application for an order in respect of costs on 11 May 2020. The application was received before the Tribunal's decision finally disposing of the proceedings was issued, which was on 26 May 2020, and therefore is in time.
>
> 2. Attached to the application is a schedule of costs totalling £35,176.30, broken down into legal fees (£19,906.80 including VAT), Counsel's fees (£8,298.00 Including VAT) and experts' fees (£6,971.50, including VAT of £365.00).

3. The application is chaotic, often resembling nothing more than a stream of consciousness. As a result, it is difficult to follow and at times contradictory.

4. At paragraph 38 of the application, the appellant says:

> It is therefore submitted that the majority of the costs incurred in this case have been incurred by the Authority acting unreasonably, in removing provision particularly in Section F and requiring expert evidence on all the issues which were removed from Section F and which have been effectively retained with some minor alterations in the current Tribunal decision.

5. At paragraph 39(i) of the application, the appellant says:

> Having seen the Grounds of Appeal, the Authority's continued attempt to change to Wirral College meant that costs flow from that point in time.

6. Both these comments suggest the appellant is seeking the entirety of her costs. However, this does not sit well with other parts of the application. For example, at paragraph 13:

> No claim for costs has been made to producing an amended Working Document and any work associated with amending the Working Document. It is accepted that the submission to the Tribunal in relation to the amended Working Document by the agreed date of 11 May is not capable of being subject to an order for costs because the Working Document proved to be too complex.

7. This is despite the preceding 12 paragraphs containing arguments about the respondent's unreasonable conduct in the way it failed to comply with the Tribunal's guidance and directions regarding the working document process.

8. I also note that the application at paragraph 39(iii) confirms that costs in relation to the working document process are not sought. In addition, the application concedes that the hearing on 1 April 2020 was necessary.

9. Paragraph 40 concludes the application with the following.

> The application for costs therefore is drafted on a specific issue of where the Authority has acted unreasonably in seeking to treat the case as a Section I appeal, and has left aside any attempt to claim costs for the work incurred in sorting out the Working Document that is now going to the Tribunal, and in relation to health and social care.

10. Although these contradictory statements mean it is less than clear what costs the appellant is actually seeking, the concluding paragraph delimits the application in terms of what conduct the appellant says was unreasonable. The application is limited to the question of whether the respondent's attempt to bring placement (section I) into the appeal was unreasonable conduct.

11. The respondent's submissions were received on 2 June 2020. It denies misleading the appellant into thinking the case involved issues regarding placement (section I), and confirmed this in a letter dated 11 March 2020. By way of explanation for the way the appeal was conducted, the respondent says at the end of paragraph 7:

> Again, with hindsight, deft interpersonal skills on the part of the LA and more rigorous assistance to control the drafting may have alleviated that problem, but the relationship between the LA, the Appellant and her representatives has been unfortunate, as is noted at para 15 of the [Tribunal's] decision of 26/5/20. It is wrong and unfair to suggest that the defence of the appeal was vexatious or designed to harass the other side rather than advance the resolution of the case or permitted of no reasonable explanation.

12. The appellant's further submissions were received on 9 June 2020, through stretching to 16 pages, and thereby equalling the length of the application, are again disorganised and hard to follow. Instead of addressing new issues, they are merely an unnecessary recitation of the 3 points made in the application.

The criteria for a costs award

13. Before I examine the detail of the application for a costs award, I remind myself and those reading this decision of the relevant legal provisions.

14. This is primarily a no costs jurisdiction and the power to make a costs order is limited. Rule 10 of the Tribunal Procedure (First Tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 provides that the Tribunal may make a wasted costs order against a party or may make an order for costs if it considers that the party, or its representative, has acted unreasonably in bringing, defending or conducting the proceedings. It is clear the principle of "costs following the event" does not apply.

15. Establishing unreasonableness requires a high threshold. Unreasonable conduct is conduct which is vexatious, designed to harass the other side even if as a result of excessive zeal and not improper motive. The test is whether conduct permits of a reasonable explanation (*HJ v London Borough of Brent* [2011] UKUT 101 (AAC) and *Ridehalgh v Horsefield* [1994] EWCA Civ 40).

16. In *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 0290 (AAC) the Upper Tribunal indicates that withdrawals and concessions at a late stage are not in themselves unreasonable conduct (see paragraph 35 onwards). Further broad guidance regarding when the Tribunal might make a costs order is given by the Upper Tribunal in *MG v Cambridgeshire County Council* [2017] UKUT 00172 (AAC).

Consideration

17. Establishing whether there has been unreasonable conduct in the proceedings is a pre-condition for making a costs order and therefore I begin by considering if the evidence and arguments reveal the respondent LA acted unreasonably when defending the appeal.

18. I begin by recognising that, in the decision issued on 26 May 2020, Judge Brayne was critical of the behaviour of both parties in the proceedings. His criticisms in paragraphs 6 to 15 are not directed to one side over the other but to both. The following extract from paragraph 15 sets the scene very clearly:

> We considered the possibility of adjourning for more work to be done on the wording, but concluded that this would be disproportionate,

> bearing in mind the overriding objective and the need to avoid further delay and cost. It would also now be somewhat optimistic, in light of the history of the appeal, the ill-tempered discussion at the oral hearing, and the accusatory tone and content of the most recent position statements, to expect the parties and, in particular, their representatives, to manage this collaboratively.

19. From these comments, I conclude that the behaviour and conduct of both parties fell far short of what the Tribunal would expect and the parties sought to conduct matters in a hostile adversarial manner contrary to the approach the Tribunal would expect.

20. I think it would be useful at this juncture to remind the parties about how the concept of a wasted costs jurisdiction developed to ensure legal or other representatives complied with their duty to the courts. The provisions of section 29 of the 2007 Act extends those duties to the Tribunals. It is in this context that the guidance given by the House of Lords in *Medcalf v Weatherill & Anor* [2002] UKHL 2 remains apposite to understand the Tribunal's approach to applications for an order in respect of costs under rule 10(1)(a) because the overriding objective means the Tribunal must at all times act fairly and justly to all parties.

> "[52] The introduction of a wasted costs jurisdiction makes an inroad into this structure. It creates a risk of a conflict of interest for the advocate. It is intended and designed to affect the conduct of the advocate and to do so by penalising him economically. Ideally a conflict should not arise. The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court (*Arthur Hall v Simons* [2000] 3 WLR 543.) But the situation in which the advocate finds himself may not be so clear cut. Difficult tactical decisions may have to be made, maybe in difficult circumstances. Opinions can differ, particularly in the heated and stressed arena of litigation. Once an opposing party is entitled to apply for an order against the other party's legal representatives, the situation becomes much more unpredictable and hazardous for the advocate. Adversarial perceptions are introduced. This is a feature of

> what happened in the present case. The factors which may motivate a hostile application by an opponent are liable to be very different from those which would properly motivate a court."
>
> 21. Although the parties have not behaved in a manner approved of by the Tribunal, as set out in directions and guidance, I am satisfied neither party went so far as to overstep the duty they have to the Tribunal. Their animosity was towards each other and the Tribunal had to adopt its primary adjudicative role more forcefully than might otherwise have been the case.
>
> 22. When I consider this legal approach in the context of the application, which is poorly made for the reasons I have given, I conclude the respondent has no case to answer because there is nothing in the context of this appeal that can be regarded as reaching the high threshold of unreasonable conduct.
>
> 23. In the alternative, I have considered whether I should make a self-cancelling order in respect of costs against each party. Although the respondent has made no application, I have power to make an order of my own volition. I have decided it would benefit neither party nor the Tribunal to make such an order (whereby I would make an equal cost order against each party so they cancel each other out but remain on record)."

Permission to Appeal

8. Judge McCarthy's decision refusing the application for costs was made on 17 July 2020. The Appellant sought permission to appeal to the Upper Tribunal from that decision. Permission to appeal was refused by Deputy Chamber President Meleri Tudur on 22 September 2020.

9. The Appellant applied to the Upper Tribunal on 21 October 2020 and sought an oral hearing of the application. I made case management directions for the oral hearing of the appeal on 29 October 2020, which I heard (ultimately by telephone after technological problems developed with the Skype video hearing) on the afternoon of 19 February 2021. The Appellant was represented by Mr John Friel of counsel (instructed by SEN Legal). The Council was also represented by counsel, Mr Matthew Smith, who had not appeared below (instructed by the Council itself).

Rolled Up Application & Appeal

10. In advance of the oral hearing of the permission application, I raised with the parties the possibility of dealing with the application as a rolled-up hearing, with the substantive appeal being decided at the same time as the determination of the application for permission to appeal, so as to dispense with the need for a second hearing in the event that permission to appeal were to be granted. The parties very sensibly agreed to that course of action, so as to dispense with the need for a second oral hearing in the future. I shall therefore deal with the application for permission to appeal and the substantive appeal together in this decision.

The Grounds of Appeal

11. There were three grounds of appeal:

(i) the Tribunal failed to give adequate reasons for its decision

(ii) the Tribunal failed to apply the correct test in relation to the application for costs/used too restrictive a test of liability

(iii) the Tribunal took into account an irrelevant consideration/behaved unfairly in considering whether to make a self-cancelling cots order.

12. I have set out the respective parties' submissions below under the headings of the three grounds of appeal.

The Costs Jurisdiction

13. Section 29 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides that:

> "(1) The costs of and incidental to–
>
> (a) all proceedings in the First-tier Tribunal, and

> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may–
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) *"wasted costs"* means any costs incurred by a party–
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred,
>
> the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section *"legal or other representative"*, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf".

14. By virtue of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 ("the 2008 Rules"), it is provided that

> "10(1) Subject to paragraph (2), the Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or

(b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

…

(3) The Tribunal may make an order in respect of costs on an application or on its own initiative.

(4) A person making an application for an order under this rule must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver a schedule of the costs claimed with the application.

(5) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice under rule 17(6) that a withdrawal which ends the proceedings has taken effect.

(6) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(7) The amount of costs to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

> (b) agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person"); or
>
> (c) assessment of the whole or a specified part of the costs, including the costs of the assessment, incurred by the receiving person, if not agreed.
>
> (8) Following an order for assessment under paragraph (7)(c), the paying person or the receiving person may apply to a county court for a detailed assessment of costs in accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis.
>
> (9) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed".

The Authorities

15. The parties cited a number of authorities to me. Some of them are merely fact-specific illustrations of the general principles on which adverse costs are made in the SEND jurisdiction and raise no point of principle. Some are contained in citations of them in other cases and do not need to be repeated. Others do not fall for further consideration in the light of the conclusions which I have reached and I have not therefore cited all of them in this decision, but only those which are germane to my decision.

16. In ***HJ v. Brent LBC (SEN)*** [2011] UKUT 191 (AAC) Upper Tribunal Judge Jacobs said of the jurisdiction under rule 10 of the 2008 Rules

> "6. Three issues arise: Did the local authority or its representative act unreasonably in defending or conducting the proceedings? If so, should the Upper Tribunal make a costs order against the authority? If so, in what amount?
>
> *The caselaw*
> 7. The meaning of 'unreasonable' was discussed by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 232:

> '"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.
>
> [The term "negligent" was the most controversial of the three. It was argued that the 1990 Act, in this context as in others, used "negligent" as a term of art involving the well-known ingredients of duty, breach, causation and damage.
>
> Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach:
>
> (1) As already noted, the predecessor of the present Order 62 rule 11 made reference to "reasonable competence". That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders.
>
> (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client.
>
> We cannot regard this as, in practical terms, a very live issue, since it requires some ingenuity to postulate a situation in which a legal representative causes the other side to incur unnecessary costs

> without at the same time running up unnecessary costs for his own side and so breaching the ordinary duty owed by a legal representative to his client. But for whatever importance it may have, we are clear that "negligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.][1]
>
> …
>
> We were invited to give the three adjectives (improper, unreasonable and negligent) specific, self-contained meanings, so as to avoid overlap between the three. We do not read these very familiar expressions in that way. Conduct which is unreasonable may also be improper, and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. We do not think any sharp differentiation between these expressions is useful or necessary or intended."[2]

The Court was there concerned with wasted costs, but the reasoning is equally applicable to unreasonable conduct.

8. The Court of Appeal considered an equivalent provision to rule 10(1)(b) in *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398. The case concerned a claim for unfair dismissal and breach of contract before an employment tribunal. Having secured a postponement of the hearing on the ground of ill health, the claimant then withdrew his claim. The tribunal ordered him to pay the whole of the employer's costs on the ground that he had acted unreasonably. Mummery LJ discussed a number of points of general relevance.

9. First, the proper issue was the conduct of the proceedings, not the decision to withdraw:

> '30. … The crucial question is whether, in all the circumstances of the case, the claimant withdrawing his claim has conducted the proceedings reasonably. It is not whether the withdrawal of the claim is in itself reasonable …'

[1] These paragraphs were not cited by Judge Jacobs, but Mr Friel cited them in his skeleton argument as part of his submission and it is convenient to cite them here as part of the quotation.
[2] This paragraph does not appear in ***HJ***, but was cited by Judge Jacobs when he repeated his exposition of the law in ***Buckinghamshire CC v. ST (SEN)*** [2013] UKUT 939 (AAC).

10. Second, the costs that may be awarded are not limited to those that are attributable to the unreasonable conduct:

> '40. … The principle of relevance means that the tribunal must have regard to the nature, gravity and effect of the unreasonable conduct as factors relevant to the exercise of the discretion [whether to order costs], but that is not the same as requiring BNP Paribas to prove that specific unreasonable conduct by the applicant caused particular costs to be incurred.'

11. Third, costs must not be punitive:

> '41. … the indemnity principle must apply to the award of costs. It is not, however, punitive and impermissible for a tribunal to order costs without confining them to the costs attributable to the unreasonable conduct.'

12. Fourth, the unreasonable conduct is relevant at three stages:

> '41. … As I have explained, the unreasonable conduct is a precondition to order costs and it is also a relevant factor to be taken into account in deciding whether to make an order for costs and the form of the order.'

13. The decision of the Court of Appeal in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919 is also relevant. The court decided that: (i) a party's ability to pay is not a relevant factor; and (ii) an award should cover as a minimum the costs attributable to the unreasonable behaviour.

…

16. I cannot award costs just because the father effectively won his case. That would undermine the restricted basis of the power under rule 10(1)(b). It is always possible to look at matters after the event with the benefit of hindsight. I must not do that.

17. In making my assessment, it is not proper to second guess a party's decisions in the course of litigation. Merely because particular evidence in the end secured a particular outcome, it does not follow that it was

> unreasonable to defend the case or that it was unreasonably conducted … The significance of individual reports have to be considered in the context of the way the evidence unfolded, as well as in the developing circumstances of the availability of school places and other factors. The reasonableness of a party's conduct has to take into account the ongoing and evolving nature of the proceedings.
>
> …
>
> 20. As to the last minute decision to concede, the authority did ask for a postponement. That would have avoided the costs of attendance, but the First-tier Tribunal refused the application. Moreover, a hearing was probably necessary in order to ensure that the disposal of the case was formally correct.
>
> 21. It would be unreasonable if any officers of the authority had acted with any improper motive or for an improper purpose in the handling of the case. However, I do not accept that there is any basis for accusing the officers concerned of doing so. There is no evidence to support such allegations or implications. They may reflect the father's genuine perception, but there is no objective basis for them."

17. In considering the rule 10 jurisdiction in ***MG v. Cambridgeshire CC*** [2017] AACR 35, [2017] UKUT 172 (AAC), Upper Tribunal Judge Rowley stated that

> **"Guidance**
> *The exception rather than the rule*
>
> 26. It is crucially important for me to begin by emphasising that nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.
>
> 27. Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious

cases. In other words, an order for costs will be very much the exception rather than the rule. The observations of Openshaw J in *In the matter of a Wasted Costs Order made against Joseph Hill and Company Solicitors* [2013] EWCA Crim 775, albeit made in the context of wasted costs orders in criminal proceedings, are no less relevant to applications for costs under rule 10:

> "We end with this footnote: there is an ever pressing need to ensure efficiency in the Courts: the judges, the parties and most particularly the practitioners all have a duty to reduce unnecessary delays. We do not doubt that the power to make a wasted costs order can be valuable but this case, and others recently before this Court, demonstrate that it should be reserved only for the clearest cases otherwise more time, effort and cost goes into making and challenging the order than was alleged to have been wasted in the first place."

Three-stage process

28. In considering an application for an order for costs on account of "unreasonable conduct" under rule 10(1)(b), a three-stage process should be followed:

(1) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings?

(2) if it did, should the tribunal make an order for costs?

(3) if so, what is the quantum of those costs?

29. So, first the tribunal must determine whether there has been relevant unreasonable conduct. There is no element of discretion. Rather, appropriate findings must be made on an objective basis. Any further analysis of the first question is beyond the scope of this decision.

30. In contrast to the first, the second and third questions involve the exercise of a broad discretion. I must emphasise the crucial second question. It is all too easy for a tribunal to fall into the trap of, having found "unreasonable conduct", moving straight to considering the amount of costs which should be awarded, without giving any thought as to whether an order for costs should be made at all. In considering the second question the tribunal will have regard to all the

> circumstances. It will bear in mind, for example, the nature of the unreasonable conduct, how serious it was, and what the effect of it was. In appropriate cases the tribunal may consider the conduct of the parties more generally, and whether it is proportionate to make an order for costs. In addition, by rule 10(6) the tribunal may not make an order for costs against a party who is an individual without first considering that person's financial means.
>
> *Summary or detailed assessment?*
>
> 31. By rule 10(7) the amount of costs to be paid under an order may be ascertained by summary assessment, agreement of the parties or detailed assessment. It will be a rare case indeed which necessitates a detailed assessment. A summary assessment will be more proportionate, and there will be far less delay. Naturally, a tribunal must clearly state whether the assessment is to be a summary or detailed one."

18. Finally, with regard to the roles of an EHCP, Judge Ward said in ***East Sussex County Council v KS (SEN)*** [2017] UKUT 273 (AAC)

> "83. … Mr Lawson as noted above submitted that an EHC plan is used to fulfil a number of roles: for instance, as a procedural document for use in the classroom, as a list of what needs to happen and as a form of pleading before tribunals. I accept that it may have that multiplicity of roles and that each may have differing implications for how it is drafted. A document for use by professionals delivering services to a child or young person it may be, yet its statutory underpinning means that it also defines rights and responsibilities. While nobody would wish to see an EHC plan as a "lawyers' playground", nor can its legal implications be ignored."

The First Ground of Appeal

The Appellant's Submissions

19. For reasons of clarity, I shall set out the Appellant's submission in the skeleton argument produced for the hearing for the permission application before me (that is cast in considerably clearer terms than was the original application for costs). By way of background to his application Mr Friel submitted that the original application for costs referred firstly to the 2018

EHCP which, following the Annual Review in 2019, was simply stripped out, as Judge Brayne stated (page 79, paragraph 9):

> "[The Appellant], in our view with good cause, challenged the LA's decision following an Annual Review to remove, in the name of making the Plan more precise, a great deal of required provision for Speech and Language, Physiotherapy and Occupational Therapy. There was no evidence the need had reduced and no decision or recommendation at the Annual Review for such changes".

20. The Tribunal went on to point out:

> "Her mistrust in the LA has been exacerbated by the frequent references throughout the course of the appeal to a desire by the LA to change placement so that [A] attends a day placement in Wirral. This was never raised at the Annual Review … Failures by the LA to involve the CCG in the Annual Review have led to the absence of an up-to-date assessment for Sections C and G. The CCG has agreed to carry out the assessments…."

21. The original appeal was then lodged (A13) and at paragraph 1.7 the point was made that A's complex needs had not changed and there was no professional evidence to support the Council's changes to the Plan at all. These were intended to remove Ruskin Mill College from Section I.

22. The initial application for costs pointed out in paragraph 14 that the Council conducted the appeal on the basis that Section I was in play and that it could nominate a different college, namely Wirral Metropolitan College, and change Section I from Ruskin Mill College. It failed to recognise that the appeal was only against Sections B and F and plainly conducted the appeal on the basis that the Council could persuade the Tribunal to change the placement from Ruskin Mill, i.e. that it was an appeal against Sections B, F and I, which it was not. The authority was blind to the fact in law that it could not change Section I.

23. As was set out in the response to the Council's reply on 9 June 2020, the case commenced because in October 2018 the Appellant sought transport for A, who was highly disabled, whereupon the Council stated that it would review

the Plan and threatened the suitability of the placement. The Annual Review then took place, which confirmed the placement. It was clear that, from the very outset of the appeal, the Council failed to recognise that the appeal did not allow it to change the placement. Its admissions of its inability to change the placement (on 11 March 2020) were recorded by Judge Brayne at the hearing on 30 March 2020 (the Council again having changed its position). It then changed its position for the third time on 1 April 2020. The Council ultimately was forced to recognise that it could not change section I and challenge Ruskin Mill. Nonetheless, it had conducted the case from the very beginning on the basis that it had set out to change the college from Ruskin Mill to a local college and then it conducted its response to the appeal on that basis. The letter of 11 March 2020 was an admission of negligence. Even then the authority tried to go back on its admission of 11 March 2020.

24. In its case, the Council submitted that A could return home with his mother, move into supported living on The Wirral, move into residential accommodation or, subject only to being supported by advice from an Educational Psychologist, go to Wirral Metropolitan College. None of this, however, was supported by any evidence.

25. Given that A was severely disabled, plainly could not live by himself and was too disabled to live at home, to threaten to change the plan if transport was sought set the scene and was an act of hostility. Then to continue the case on the basis that the Council intended to change the college when it had no legal basis to do so was certainly very upsetting and amounted to, in the case of a mother of a severely disabled young man, harassment.

26. Part of the Council's case to change Section I to Wirral College from Ruskin Mill was that it needed a Psychologist to assess A. The Tribunal rejected that application and it was renewed and rejected on 30 March 2020 at the hearing held by Judge Brayne. At that hearing the Council then changed its position (paragraph 4) and sought again to bring in Section I to change Ruskin Mill (which was outside the limits of the appeal) and to renew the application for an Educational Psychologist's assessment. The Tribunal recorded that:

> "[Counsel] accepted that the LA does not have any expert evidence to refute much of the Appellant's proposed wording and asks the Tribunal to take an inquisitive role and rely on its own expertise. I made it clear that the Tribunal must have good reason for departing from expert opinion and is not in a position to supply evidence itself."

27. Judge Brayne made it clear (page 91, paragraph 2) that the main reason why the Council applied for an adjournment was to obtain an Educational Psychologist's report which sought, despite that fact that Section I was not in play, to challenge Ruskin Mill College in Section I as an appropriate placement. He stated

> "I take note of the fact the principal reason stated in the supplementary evidence as to why the LA wants an EP assessment is to inform the possibility of a change of placement, despite the LA making it clear that Section I is not disputed for the purpose of the appeal."

28. Thus on 11 March 2020 the Council effectively conceded that Section I was not capable of being raised with the Tribunal; it then changed its mind on 30 March, then it agreed again that it could not challenge Ruskin Mill. Then on 1 April 2020 it attempted to go back on its concession. The Council had from the very outset challenged Ruskin Mill as not being appropriate (page A45, paragraph 38/39). This was emphasised in the parental response (page C463 to C465 and C497). That submission pointed out that there was no jurisdiction in the Tribunal to deal with Section I. That warning was completely ignored. The Council continued to adduce irrelevant evidence on the basis that it thought that in law it could challenge Section I (see, for example, D1–D33).

29. Mr Friel submitted that the definition of negligence in ***Ridehalgh v Horsefield*** most definitely applied to the conduct of the Council in this case in that:

(1) the Council commenced the case with no evidence and no lawful justification for its new EHCP

(2) it plainly argued for Wirral College and for an Educational Psychologist's report in order to justify a case to be presented to the Tribunal in support of Wirral College. That was a failure to understand the nature of the appeal

(3) it continuously challenged the appropriateness of Ruskin Mill, which could only be done in a Section I appeal.

(4) it had removed specific provision from the 2018 EHCP with no evidence and no professional evidence. No evidence was then obtained. That was a major error and it was negligent.

30. Its conduct was also unreasonable because, having agreed on 11 March 2020 that Ruskin Mill was appropriate and would not be changed, yet it subsequently again sought to challenge the placement at Ruskin Mill, as Judge Brayne commented on

> "the frequent references throughout the course of the appeal to the desire by the LA to change the placement so that [A] attends a day placement in Wirral."

31. Judge Brayne referred to the fact that that issue was never raised at the Annual Review and, despite materials relating to a proposed college being included in the Bundle, had never been within the Tribunal's remit, as Section I was not appealed.

32. Notwithstanding all of this, commented Mr Friel, although the Council quite plainly sought on numerous occasions to challenge Ruskin Mill in Section I, Judge McCarthy's decision did not deal with that issue at all, which was plainly raised in the application and his reasons did not address it. His decision at paragraphs 18 and 19 did not deal with those issues at all.

33. Judge McCarthy referred in paragraph 11 simply to the statement by the Council that the defence of the appeal was not vexatious or designed to harass the other side rather than advance the resolution of the case or that it permitted no reasonable explanation. However, the continued attempt to place Section I within the Tribunal's jurisdiction, the presentation of no evidence for

the purpose of doing so and the repeated applications for an Educational Psychologist were not referred to at all by him.

34. In addition, the Tribunal recorded in its decision of 31 March 2020 that the Council had requested the Tribunal to take an inquisitorial role and rely on its own expertise (page 90). Judge Brayne made it clear that it was not in a position to supply evidence itself. He pointed out that the Council should have obtained the evidence to justify changes to the EHCP at the Annual Review and was not in a strong position to resist amendments sought by expert opinion. Equally, the renewal of the application for an Educational Psychologist was referred to and was dismissed (page 91, paragraph 2). That application was repeated before the Tribunal on 1 April 2020 (paragraph 10), where Judge Brayne was again asked with his colleagues to challenge the expert witnesses for the Appellant.

35. The renewed attempt, twice made, to seek to obtain the Tribunal to act as a further advocate for the Council, was again an unreasonable or negligent act; the Tribunal could not be partisan - that was trite law (page 80/81). Yet again, however, there was no reference to that conduct at all in Judge McCarthy's decision.

36. The last issue was that after 1 April 2020, having agreed directions, the Council did not comply with the directions and, as the Tribunal pointed out in its final decision (page 98, paragraph 13), offered no justification for its position and no alternative wording to the EHCP. In paragraph 8 of that decision (page 97) the Tribunal considered the Council's conduct by responding to compliance with the Tribunal's direction not by working on the working document, but producing a working document which did not comply with the Tribunal's code and which did not explain why the Council wished to delete particular content.

37. Those issues were raised before the First-tier Tribunal in submissions, but Judge McCarthy's decision did not address the conduct of the Council, in seeking to obtain the assistance of the Tribunal to act as a second

representative effectively for the Council on 30 March and 1 April 2020 and, having agreed directions, failing to comply with them.

38. With regard to the adequacy of the Judge's reasons, Mr Friel relied on De Smith's *Judicial Review* 8th ed., paragraph 7-105 to 7-106 which state that

> "The reasons must generally state the decision-maker's material findings of fact (and, if the facts were disputed at the hearing, their evidential support) and meet the substance of the principal arguments that the decision-maker was required to consider. If the decision was made on the basis of the evidence of witnesses or experts, reasons for preferring one witness or an expert to another should generally be explained. In short, the reasons must show that the decision-maker successfully came to grips with the named contentions advanced by the parties, and must tell the parties in broad terms why they lost or as the case may be, won. Provided reasons satisfy these core criteria, they need not be lengthy ...
>
> Some general guidance on the standard of reasons required may also be derived from the consideration of the purposes served by a duty to give reasons. Thus, reasons should be sufficiently detailed to make quite clear to the parties – and especially the losing party – why the decision-maker decided as it did to avoid the impression that the decision was based on extraneous considerations other than matters raised at the hearing. Reasons must be sufficient to reveal whether the Tribunal made any error of law. Reasons must also enable the court to which an appeal lies to discharge its appellate function and when this is limited to questions of law, it will only be necessary to explain the exercise of discretion and set out the evidence for the findings of fact in enough detail to disclose the decision-maker had not acted unreasonably. The reasons should refer to the main issues in the dispute, but need not necessarily deal with every material consideration. Brevity is an administrative virtue, and elliptical reasons may be perfectly comprehensible when considered against the background of the arguments at the hearing."

39. Measured by those criteria, submitted Mr Friel, the judgment was clearly defective and inadequate reasons had been given by the Judge for his conclusion.

The Council's Submissions

40. Mr Smith submitted that the Appellant's complaint was that the Judge gave no reasons why he concluded that the high threshold of unreasonable conduct had not been reached. The Council submitted, however, that the entirety of the judgment was an explanation of just that conclusion.

41. It might be summarised as:

(1) the application was chaotic and it was difficult to identify on what basis the Tribunal had been invited to find unreasonable conduct

(2) it was clear from paragraphs 6 to 15 of the earlier decision of 26 May 2020

(3) exercising a value judgment, the Tribunal found that neither party had crossed the high threshold warranting a conclusion that it had acted unreasonably for the purposes of rule 10 of the 2008 Rules.

42. Whether one agreed with those reasons was beside the point. It was very clear why the Tribunal made the decision which it did. The reasoning easily met the standard set in ***English v Emery Reimbold & Strick*** [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [14] and [27 – 30].

> "14. It is an unhappy fact that awards of costs often have greater financial significance for the parties than the decision on the substance of the dispute. Decisions on liability for costs are customarily given in summary form after oral argument at the conclusion of the delivery of the judgment. Often no reasons are given. Such a practice can, we believe, only comply with article 6 if the reason for the decision in respect of costs is clearly implicit from the circumstances in which the award is made. This was almost always the case before the introduction of the new Civil Procedure Rules, where the usual order was that costs "followed the event". The new rules encourage costs orders that more nicely reflect the extent to which each party has acted reasonably in the conduct of the litigation. Where the reason for an order as to costs is not obvious, the judge should explain why he or she has made the order. The explanation can

usually be brief. The manner in which the Strasbourg court itself deals with applications for costs provides a model of all that is normally required.

...

27. At the end of a trial the judge will normally do no more than direct who is to pay the costs and upon what basis. We have found that the Strasbourg jurisprudence requires the reason for an award of costs to be apparent, either from reasons or by inference from the circumstances in which costs are awarded. Before either the Human Rights Act 1998 or the new Civil Procedure Rules came into effect, Swinton Thomas LJ, in a judgment with which Sir Richard Scott V-C, who was the other member of the court, agreed, said in *Brent London Borough Council v Aniedobe* (unreported) 23 November 1999; Court of Appeal (Civil Division) Transcript No 2000 of 1999, in relation to an appeal against an order for costs:

> "this court must be slow to interfere with the exercise of a judge's discretion, when the judge has heard the evidence and this court has not. It is also, in my view, important not to increase the burden on overworked judges in the county court by requiring them in every case to give reasons for their orders as to costs. In the great majority of cases in all probability the costs will follow the event, and the reasons for the judge's order are plain, in which case there is no need for a judge to give reasons for his order. However, having said that, if a judge does depart from the ordinary order (that is in this case the costs following the event), it is, in my judgment, incumbent on him to give reasons, albeit short reasons, for taking that unusual course."

28. It is, in general, in the interests of justice that a judge should be free to dispose of applications as to costs in a speedy and uncomplicated way and even under the approach to costs and judgments dealing with costs will more often need to identify the provisions of the rules that have been in play and why these have led to the order made. It is regrettable that this imposes a considerable burden on judges, but we fear that it is inescapable.

29. However, the Civil Procedure Rules sometimes require a more complex approach to costs and

> judgments dealing with costs will more often need to identify the provisions of the rules that have been in play and why these have led to the order made. It is regrettable that this imposes a considerable burden on judges, but we fear that it is inescapable.
>
> 30. Where no express explanation is given for a costs order, an appellate court will approach the material facts on the assumption that the judge will have had good reason for the award made. The appellate court will seldom be as well placed as the trial judge to exercise a discretion in relation to costs. Where it is apparent that there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making the order. This has always been the practice of the courts: see the comments of Sachs LJ in *Knight v Clifton* [1971] Ch 700, 721. Thus, in practice, it is only in those cases where an order for costs is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons against an order that relates only to costs."

43. That the Appellant could have argued (but did not) that it was perverse to conclude that the Council had not crossed the threshold showed that sufficient and proper reasons were given.

Analysis

44. I do not place any reliance on the conduct of the Council in relation to the production of the working document after 1 April 2020. Mr Friel sought to argue that the Council's conduct after that date was indicative of its conduct earlier in the litigation, but it seems to me that its conduct prior to the 1 April 2020 hearing must stand or fall and be assessed on its own merits, not with regard to a subsequent period for which it has been accepted that the costs cannot be recovered. If the Appellant has conceded that the costs of the production of the working document could not be claimed in the costs application, as she has done, I do not see how the Council's conduct after that date can be taken into account one way or the other in assessing its behaviour up to and including 1 April 2020, but not thereafter. Although I have recited extracts from the Tribunal's final decision of 26 May 2020 by way of

background to the present application, I do not place any weight on them in the context of the present application insofar as they relate to conduct after 1 April 2020.

45. I entirely agree with Judge McCarthy's criticisms of the application for costs as original drafted and his strictures on it as set out in paragraphs 3 to 10 of his decision. Applications for costs in particular should be pithy, succinct and focussed; this one was not. Applications for costs should not be prolix, meandering and difficult to follow; this one was. The basis of the application should be clearly set out at the outset. It should not be necessary to embark on an elaborate textual exegesis in order to work out what the basis of the application is. Judge McCarthy made clear, however, in paragraph 10 that the concluding paragraph of the application, paragraph 40, delimited the application in terms of the conduct which the Appellant said was unreasonable. The application was limited to the question of whether the Council's attempt to bring placement (Section I) into the appeal was unreasonable conduct. Attempts to smuggle in criticisms of the Council for stripping out the EHCP or attempting to use the Tribunal as a surrogate advocate are outside the ambit of the application and cannot be smuggled in by a sidewind. I shall refer to that aspect of the matter again in the context of quantum.

46. However, it seems to me that Judge McCarthy has not adequately explained why he found that the application was not made out. He has not referred at all to the central question of whether the Council's attempt to bring placement (Section I) into the appeal was unreasonable conduct.

47. What he did instead was to refer to Judge Brayne's criticism of both parties, but that was in relation to the drafting of the working document after 1 April 2020. The criticisms of Judge Brayne in paragraphs 6 to 15 of the decision of 26 May 2020 only related to that aspect of the litigation. Judge McCarthy did not, however, deal with the conduct of the Council on or before that date, which was in fact the basis of the adverse costs application.

48. His conclusion – which is a statement of a conclusion rather than a statement of reasons - was that

> "19. From these comments, I conclude that the behaviour and conduct of both parties fell far short of what the Tribunal would expect and the parties sought to conduct matters in a hostile manner contrary to the approach which the Tribunal would expect.
>
> …
>
> 21. Although the parties have not behaved in a manner approved of by the Tribunal, as set out in the directions and guidance, I am satisfied that neither party went so far as to overstep the duty they have to the Tribunal. Their animosity was towards each other and the Tribunal had to adopt it primary adjudicative role more forcefully than might otherwise have been the case."

49. Again, however, that was in relation to the drafting of the working document after 1 April 2020, which was not the subject of the application, not the conduct of the Council on or before that date, which was actually the basis of the application.

50. What the Judge should have done was to address the central plank of the application and either accepted or rejected it and explained why that was so. His reasons need not have been extensive, but they should have addressed the central point of the application.

51. The position was best explained by Lord Brown in the House of Lords in ***South Bucks DC v Porter (No. 2)*** [2004] 1 WLR 1953, where he said of a decision in the planning context (but the principles laid down are of general application):

> "35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have

> in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.
>
> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

52. Valiantly though Mr Smith sought to persuade me to the contrary, I am satisfied that Judge McCarthy's decision did not comply with the guidance of Judge Rowley in ***MG*** as to the determination of the first stage of the adverse costs application.

53. In the first place, the Tribunal must determine whether there has been *relevant* unreasonable conduct. At that stage there is no element of discretion. Rather, appropriate findings must be made on an objective basis. In this case, findings of fact were not made on an objective basis. What was stated was a conclusion and one which was not actually based on the ground on which the application was made.

54. As to Mr Smith's reliance on the decision in ***English v Emery Reimbold & Strick,*** I entirely accept that in most cases decisions on liability for costs are customarily given in summary form after oral argument at the conclusion of the delivery of the judgment and that in most cases the reason for the decision is clearly implicit from the circumstances in which the award is made. However, this application required a more detailed explanation, even if not an elaborate one, of the reasons for the conclusion that no order was appropriate and should have referred to the actual basis on which the application was made.

55. Again, it is true that an appellate court or tribunal should be slow to interfere with the exercise of a judge's discretion when the judge has heard the evidence and the appellate body has not, but in this case Judge McCarthy was not the judge who heard heard the original evidence on which the application was based.

56. Mr Smith also submitted that it was not enough to establish that the appellate court or tribunal might, or would, have made a different order. It was of the essence of such a judicial discretion that on the same evidence two different minds might reach widely different decisions without either being appealable and it was only where the decision exceeded the generous ambit within which reasonable disagreement was possible that an appellate body was entitled to interfere with the decision. Here, however, where the Tribunal went wrong was in relation to the first stage of the adverse costs application as identified by Judge Rowley in ***MG***. At that stage the Tribunal must determine whether there has been relevant unreasonable conduct. At that stage there is no element of discretion; rather, appropriate findings must be made on an objective basis.

57. I am therefore satisfied that there was an error of law in the costs decision of 17 July 2020 and that I should therefore give permission to appeal on the first ground of appeal.

58. What, then, of the resolution of the substantive appeal? It seems to me that there is no point in remitting the matter back to the First-tier Tribunal for resolution of that issue and that I am as well-placed as anyone to determine the appeal (I deal below with the question of quantum) - hence my question to the parties before the hearing of the permission application about whether the matter should proceed as a rolled-up hearing.

59. As Judge Rowley said in paragraph 51 of ***MG***

> "Given the parties' knowledge of the background it is not necessary for me to give detailed reasons. My findings which are set out below are specific to this case, and are of no precedential value to any other cases."

60. The first issue is whether the Council acted unreasonably in attempting to bring placement (Section I) into the appeal. I have carefully considered all the information before me, including the First-tier Tribunal's file. I also remind myself that the threshold is a high one. There is no need for me to make this decision any longer by embarking on an extensive discussion of the Council's conduct. Suffice it to say, without reservation, that I agree with the careful and considered comments of Judge Brayne on the issue and I adopt them.

61. To reiterate what Judge Brayne said on 31 March 2020 (with emphasis added)

> " … The LA, it appears, has three reasons for this lack of progress … *The third reason is that the LA is still considering a change of placement, and without an EP report of its own has been unable to progress that. I deal with the request for a postponement to enable that EP assessment to take place below, but observe here that it does not justify failing to engage with the working document process.* Mr Owen [counsel then instructed] accepted that the LA does not have expert evidence to refute much of the Appellant's proposed wording, and asks the Tribunal to take an inquisitive role and rely on its own expertise. I made clear that the Tribunal must have good reason for departing from expert opinion, and is not in a position to supply evidence itself. *Given that the LA should have obtained the evidence to justify*

> *changes to the EHCP at annual review, it is not in a strong position to resist amendments actually supported by expert opinion ...*
>
> I am satisfied that it would be disproportionate to postpone, for what is an unknown length of time, to enable an eventual health care assessment to take place ... *I take note of the fact that the principal reason stated in the supplementary evidence as to why the LA wants an EP assessment is to inform the possibility of a change of placement, despite the LA making clear that Section I is not disputed for the purpose of this appeal* ..."

62. In the aftermath of the hearing on the following day Judge Brayne further stated (with emphasis added)

> "7. [A] attends Ruskin Mill College, which is identified in Section I of his EHCP as a specialist residential placement. It is jointly funded by education and social care. *The placement is not disputed in this appeal.*
>
> …
>
> 9. This was not a straightforward hearing for reasons entirely unconnected with the need for a remote hearing. *[The Appellant], in our view with good cause, challenged the LA's decision following annual review to remove, in the name of making the Plan more precise, a great deal of required provision for speech and language, physiotherapy and occupational therapy.* There was no evidence that need had reduced and no decision or recommendation at annual review for such changes. *Her mistrust of the LA has been exacerbated by frequent references throughout the course of the appeal to a desire by the LA to change placement, so that [A] attends a day placement in the Wirral. This was never raised at annual review and, despite materials relating the proposed College being included in the bundle, has never been within the Tribunal's remit, as Section I is not appealed ...*
>
> 10. … *the LA, having failed at the point of carrying out the annual review to consult with any of its own professionals other than staff at Ruskin Mill College, now accepts that it is not in a position to challenge any of the opinions in relation to need and provision set out by the*

> *Appellant's own independent expert witnesses.* Mr Owen said he was instructed to question Dr Willis about aspects of his opinion on IQ scores, potential for further progress and level of qualifications pursued, but having put his questions he agreed he could not challenge those opinions. He asked the Tribunal to exercise an inquisitorial approach towards the Appellant's witnesses' conclusions. *We are indeed an inquisitorial Tribunal, but in the absence of specific challenges it is not appropriate for us to question otherwise unchallenged evidence unless – which is not the case – we have identified a reason to do so."*

63. It is perfectly clear that from the outset the appeal was about the contents of Section B and F of the EHCP (see pages A 2, 4 and 13). Nevertheless the Council sought to challenge the placement from the beginning (see page A45). It was pointed out by the Appellant that the appeal did not include Section I (see pages C463, 465 and 497). The Council finally accepted that that was so on 11 March 2020.

64. Notwithstanding that acceptance on 11 March 2020, there was then a volte-face on the part of the Council and Judge Brayne had to record on 31 March 2020 that

> "I take note of the fact that the principal reason stated in the supplementary evidence as to why the LA wants an EP assessment is to inform the possibility of a change of placement, despite the LA making clear that Section I is not disputed for the purpose of this appeal"

and 9 days later (and I stress this point) that

> "Her mistrust of the LA has been exacerbated by *frequent references throughout the course of the appeal to a desire by the LA to change placement, so that [A] attends a day placement in the Wirral.* This was *never* raised at annual review and, despite materials relating the proposed College being included in the bundle, has *never* been within the Tribunal's remit, as Section I is not appealed."

65. I am therefore satisfied that the Council acted unreasonably in attempting to bring placement (Section I) into the appeal.

66. The second question is whether I should exercise my discretion to make an order for costs. I am satisfied that the Council's conduct was such as to justify making an order for costs. The effect of the conduct was that the Appellant incurred significant unnecessary costs. There is nothing to suggest that it would be disproportionate to make an order. I should add that, given that the Council is a local authority, the provisions of rule 10(6) are not applicable.

The Second Ground of Appeal

The Appellant's Submissions

67. Mr Friel submitted secondly that Judge McCarthy had failed to apply the criteria of the Court of Appeal in ***Ridehalgh***, although he had referred to the decision in paragraph 15 of his decision.

68. He repeated that the conduct of the Council had been negligent for the reasons set out in paragraph 29 above, namely that

(1) the Council commenced the case with no evidence and no lawful justification for its new EHCP

(2) it plainly argued for Wirral College and for an Educational Psychologist's report in order to justify a case to be presented to the Tribunal in support of Wirral College. That was a failure to understand the nature of the appeal

(3) it continuously challenged the appropriateness of Ruskin Mill, which could only be done in a Section I appeal

(4) it had removed specific provision from the 2018 EHCP with no evidence and no professional evidence. No evidence was then obtained. That was a major error and it was negligent.

69. If the Judge had applied the ***Ridehalgh*** criteria correctly, he would have found that the Council was negligent in those respects.

The Council's Submissions

70. It seemed to the Council that this ground was raised because the Tribunal did not explicitly discuss "negligence". Mr Smith submitted there was no error of law. To try to analyse by reference to different conceptualisations such as impropriety or negligence which might or might not amount to unreasonableness could be dangerous in itself. It could lead to a conclusion that a finding of negligence automatically satisfied the test of unreasonableness, which it did not, even if negligent conduct would very frequently be unreasonable.

71. The Tribunal correctly identified the law in paragraphs 13 to 16 of its decision. What had to be identified was whether a party or its representative had acted unreasonably in bringing, defending or conducting the proceedings. That was exactly what the Tribunal did. There was no reason to suspect that it somehow thought that negligence in the bringing, defending or conduct of the proceedings could not amount to unreasonable conduct. The Tribunal reminded itself in paragraph 15 that the test was whether conduct permitted of a reasonable explanation.

72. The rest of the Appellant's submissions appeared to be simply an expression of dissatisfaction at the result of the Tribunal's exercise of its value judgment as to whether the Council had acted unreasonably such that it would be just to make a costs order against it. In the absence of perversity (which, by its very nature, was usually very easy to spot), such expressions did not reveal any point of law upon which to appeal. As was extremely well known, in the context of value judgments

> "It is, of course, not enough for the [party] to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely

> different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere"

(per Asquith LJ in ***Bellenden (formerly Satterthwaite) v Satterthwaite*** [1948] 1 All ER 343, at p.345, cited with approval by Lord Fraser of Tullybelton in ***G v G*** [1985] 1 WLR 647 at pp.651H-652A, with whom the rest of the House of Lords agreed).

Analysis

73. Judge McCarthy set out the criteria for an award of costs in paragraphs 13 to 16 of his decision. In paragraph 14 he correctly cited rule 10 of the 2008 Rules and accurately summarised the grounds on which an adverse costs order could be made.

74. In paragraph 15 he cited Judge Jacobs in ***HJ*** and the decision in ***Ridehalgh v. Horsefield*** and correctly stated that establishing unreasonableness required a high threshold. Unreasonable conduct was conduct which was vexatious, designed to harass the other side, even if as a result of excessive zeal and not improper motive. The test, again as he correctly stated, was whether the conduct permitted of a reasonable explanation.

75. In paragraph 16 he cited the decision in ***Willow Court Mgt Co (1985) Ltd v. Alexander*** [2016] UKUT 290 (AAC) to the effect that withdrawals and concessions at a late stage were not in themselves unreasonable conduct (see paragraph 35 onwards) and he also referred to the guidance provided about when a costs order might be made by Judge Rowley in ***MG.***

76. Given what the Judge said in paragraphs 13 to 16 of his decision, I am satisfied that he had the decisions in ***HJ*** and ***Ridehalgh*** (as well as ***Willow Court*** and ***MG***) firmly in his mind. It is inherently unlikely that, having just referred to them, he would then have applied the wrong or too restrictive a test in considering whether or not the requisite threshold for an adverse costs

order had been reached. Indeed, as Mr Friel essentially admitted in paragraph 28 of his skeleton argument, the same matters which were relied on as being negligent could equally well be categorised as being unreasonable. Moreover, as the Court of Appeal said in ***Ridehalgh***, conduct which is unreasonable may also be improper and conduct which is negligent will very frequently be (if it is not by definition) unreasonable. No sharp differentiation between those expressions is useful or necessary, either generally or in respect of the facts of this case. The real gravamen of the Appellant's complaint is not the test which the Judge applied, but the adequacy of his reasoning in reaching the conclusion which he did, with which I have dealt above.

77. I do not therefore give permission to appeal on the second ground of appeal.

The Third Ground of Appeal

The Appellant's Submissions

78. Mr Friel submitted thirdly that the Tribunal's conclusion (paragraph 22) - that the Council had no case to answer because nothing in the context of the appeal could be regarded as reaching the high threshold of unreasonable conduct - was a further error of law.

79. In the first place, the reasons did not address the areas of unreasonable or negligent conduct brought to the Tribunal's attention or indeed refer to them at all.

80. Secondly, the concept of no case to answer was a concept known to the criminal law and was not importable into civil practice or procedure, or at least not in these circumstances or on that basis.

81. Thirdly, said Mr Friel, it was unfair of the Judge (or was an irrelevant consideration) to consider whether he could make a self-cancelling costs order (paragraph 23); one could not make a cancelling order unless one knew that the costs of each side cancelled out and unless one could specifically identify the conduct of each side which could be classified as unreasonable.

The decision therefore strayed into area outside the knowledge of both parties and was an irrelevant consideration.

The Council's Submissions

82. Mr Smith countered that it was not unfair for a Judge to indicate that he had thought of making an order concerning something that neither party had sought, but then deciding against it. As it had occurred to the Judge, it was courteous and transparent to communicate his thoughts, but the point had no more significance than that. That position could be contrasted with the converse. Where the Tribunal chose to make an order which neither party had sought and without having invited submissions on it, that was likely to be procedurally irregular and unfair, but that was not what happened here.

Analysis

83. The point is a short one and can be disposed of shortly. Mr Friel's first point is really an iteration of his first and second grounds of appeal, with which I have dealt above.

84. Secondly, all that Judge McCarthy was in substance saying was that the application had not been made out on the balance of probabilities and was therefore rejected. (The concept of no case to answer is incidentally known in civil law (see the commentary in the White Book at CPR 32.1.6), but the difficulty with it – and therefore why it is so rarely encountered in practice - is that, save in exceptional circumstances, it requires a prior election by the party making the application not to call any evidence, even if the application is subsequently rejected by the trial judge and is therefore a very high risk strategy.)

85. Thirdly, the Judge did not make any such order. He adumbrated about it, but eventually decided against doing so. Given that he did not do so, I can see no objection in him referring to what he had considered doing, but ultimately decided not to do so. What he did was neither unfair nor did it taint his decision with an irrelevant consideration.

86. I do not therefore grant permission to appeal in respect of the third ground of appeal.

Quantum

87. Having reached the conclusions above, what remains is the question of quantum. Mr Friel suggested that I remit that aspect of the matter back to the First-tier Tribunal for resolution. Given the tortured procedural evolution of the case and the amounts at stake, whilst I have seriously considered that option, I have decided that the most appropriate course is to cut the Gordian knot and determine the question of quantum myself to obviate the need for yet another hearing. To remit the sums at stake back for a yet further hearing on a detailed assessment seems to me disproportionate given the amounts at stake. As Judge Rowley said in paragraph 50 of **MG**

> "It will, therefore, be necessary to consider the entire application for costs afresh. Section 12(2)(b)(ii) of the 2007 Act enables me to re-make the decision if I think it is appropriate to do so in the exercise of my discretion. I have given careful consideration as to whether I should do so, or whether I should remit the matter to be re-heard by the First-tier Tribunal. Given the not insignificant time which has elapsed in the meantime, together with the delay and expense which would be cause by remitting the matter, and the fact that I consider I have sufficient material before me to enable me to determine the application, in the exercise of my discretion I will deal with the matter."

88. I shall therefore summarily assess the costs, the preferred option of Judge Rowley in paragraph 31 of ***MG***. I do not need to repeat what she said about the assessment of costs in paragraphs 31 to 47 of her decision, all of which respectfully adopt. I do, however, draw specific attention to what she said in paragraph 48 of her decision:

> *"How detailed should the reasons be on a summary assessment?*
> 48. The very essence of a summary assessment is that it is a summary process. It follows that the reasons should not, and I would go so far as to say must not, be elaborate. They should be concise and focused.

> Provided they show that the tribunal has acted judicially, and briefly explain to the parties why they have won or lost (read against the background known to the parties), they will be sufficient."

89. The application was based on a schedule of costs totalling £35,176.30, broken down into legal fees (£19,906.80 including VAT), Counsel's fees (£8,298.00 Including VAT) and experts' fees (£6,971.50, including VAT of £365.00).

90. Mr Smith submitted that, if the Upper Tribunal was minded to make an order for costs, it was invited to have regard to the accompanying spreadsheet. Columns A, B, C, D and H were as set out in the schedule accompanying the claim for costs. Column E set out the time which the Council submitted should be allowed and column F the hourly rate which should be allowed. Column I briefly set out the objections of the Council.

91. The fee earners in respect of whom charges had been raised were MMN (Melinda Nettleton – a grade A solicitor for the purposes of the guidelines for summary assessment), RDW, presumably Rebecca De Winter, a paralegal (grade D), RGN, presumably Richard Nettleton, a trainee solicitor (grade D) and WK, presumably Wendy Kitchin, a level 3 Associate of the Chartered institute of Legal Executives (allowed at grade C for the purpose of the submissions, even though a Fellow of the Chartered institute of Legal Executives and a solicitor would also be grade C for the first 4 years of practice, notwithstanding the longer periods of study required – level 3 was usually a 2 year course).

92. The times claimed for those fee earners were MMN 39.7 hours, RDW 1.2 hours, RGN 0.35 hours and WK 40.8 hours, a total of 82.05 hours.

93. Given the heavy reliance on counsel and the fact that the Appellant's solicitors had complicated rather than simplified the substantive appeal, Mr Smith submitted that no more than guideline rates should be allowed. The

Appellant's solicitors were based in Bury St. Edmunds, which was a national band 2 area.

94. The guideline rates were £201 for grade A, £146 (C) and £111 (D). In 2014, the Master of the Rolls had declined to recommend an increase to guideline rates.

95. There was no reliable data available to deal with the effect of the passage of time since the guidelines were set in 2010. Some argued that the pressure on fees was downwards not upwards. In any event, the fact that the Council had not argued that more work should have been delegated to lower grades, given the involvement of counsel and the fact that no issue had been raised with WK being allowed at grade C, meant that overall nothing more than guideline rates was justified.

96. For some reason MMN reduced her hourly rate to £185 in the schedule from 11 March 2020. It looked as if on 17 February 2020 the client raised costs concerns and on 20 February 2020 the solicitors notified the client of a reduced hourly rate. If that was an appropriate hourly rate, then it was appropriate throughout and not just from March 2020.

97. The rates allowed in the spreadsheet were MMN £185, WK £146 and RDW and RGN £111.

98. The objections ought to be fairly self-explanatory. Claims for considering routine incoming letters and emails had been reduced to nil. The Practice Direction to CPR part 47 stated at paragraph 5.22(1):

> "Routine letters out, routine e-mails out and routine telephone calls will in general be allowed on a unit basis of 6 minutes each, the charge being calculated by reference to the appropriate hourly rate. The unit charge for letters out and e-mails out will include perusing and considering the routine letters in or e-mails in".

99. Most routine letters and emails took far less than 6 minutes. Nonetheless it was recognised that it would be too laborious to time record for routine communications. Accordingly, notwithstanding that they might need to be considered and dealt with, a swings and roundabouts method of including the cost of dealing with incoming routine letters and emails in the charge made for outgoing routine letters and emails had been established.

100. The Appellant should not therefore be seeking to recover between the parties the costs of dealing with incoming routine letters and emails. Notwithstanding that, many such claims had been made. They were highlighted in blue in the schedule. The references in the Schedule to "RC" referred to (incoming) Routine Correspondence.

101. Individual miscellaneous objections were highlighted in yellow.

102. Objections where a global time ought to be allowed in respect of a number of entries were highlighted in pink.

103. The objections raised by the Council reduced the time to 58.5 hours. At the hourly rates referred to in the submissions, the claim for profit costs reduced to £9,724.20 plus VAT of £1,944.84.

104. So far as the fees of counsel were concerned, they should be allowed at no more than £4,475 plus VAT of £895. That was made up of a brief fee of £2,000 plus a further 9 hours at £275 plus VAT. Had the appeal and the costs application been pursued succinctly that would have been a reasonable time.

105. As for the experts, it was for the Upper Tribunal to decide to what extent it made allowances. The decision of 9 April 2020 referred to Dr Willis and Myra Pontac, but not to Melinda Eriksen, Dr. Soppitt or Jane Stewart Parry. In passing it was noted that the report fee of Dr Soppitt should in any event be £1,920 inclusive of VAT (rather than £1,950), as the invoice refers to 8 hours' work at £240 per hour inclusive of VAT.

Analysis

106. As stated above, I am satisfied that there is no reason in this case to suggest anything other than a summary assessment. Whilst I have found unreasonable conduct on the part of the Council, in my judgment that conduct is not such as to justify an order on the indemnity basis and my assessment will accordingly be on the standard basis. I therefore start by determining what costs were reasonably incurred and were reasonable in amount.

107. In doing so I take into account all of the circumstances and any relevant factors in CPR 44.4(3). In fact, I find that in this case there are no relevant circumstances other than those set out in CPR 44.4(3). The relevant circumstances are

> "(a) the conduct of all the parties, including in particular -
>
> (i) conduct before, as well as during, the proceedings; and
>
> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
>
> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;
>
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (e) the skill, effort, specialised knowledge and responsibility involved;
>
> (f) the time spent on the case;
>
> (g) the place where and the circumstances in which work or any part of it was done ..."

108. As to (a), in my judgment the only relevant conduct of either party is on the part of the Council in persisting in retaining placement (section I) as an issue when the appeal was never about that.

109. As to (b) and (c), the matter was self-evidently important to both parties.

110. As to (d), there was nothing unduly complex, difficult or novel in the case.

111. As to (e), whilst the Council has specialist knowledge in this area, there is nothing in the case which caused it to bring to it any particular skill and experience far in excess of the average solicitor in the field. There is nothing to suggest that 44.4(3)(g) (the place where and the circumstances in which the work was done) was an issue in this case.

112. The most significant factor in this matter is (f), the time spent on the case. I find that the Appellant did actually spend the amount of time claimed. However, that is not the end of the matter. I must determine whether the time was reasonably spent. Was it reasonable for the Appellant's lawyers to do the work and, if so, was it done within a reasonable time and was it proportionate to the matters in issue? I remind myself that, since I am assessing the costs on the standard basis, any doubt should be resolved in favour of the Council as the paying party.

113. I accept Mr Smith's submission that the heavy reliance on counsel and the fact that the Appellant's solicitors had complicated rather than simplified the substantive appeal means that no more than guideline rates should be allowed and that the guideline rates were £185 (rather than £201 for the reasons stated in paragraph 96 above) for grade A, £146 for grade C and £111 for grade D.

114. For the reason set out in paragraph 96 I consider that as a matter of principle the Appellant should not recover between the parties the costs of dealing with incoming routine letters and emails such as are highlighted in blue in the schedule.

115. As to the individual miscellaneous objections highlighted in yellow, on a summary assessment I find the overwhelming majority of them to be frankly footling in the extreme and I take no account of them.

116. As to the objections where it was submitted that a global time ought to be allowed in respect of entries highlighted in pink, again on a summary assessment I find most of them to be frankly footling in the extreme and I take no account of them.

117. The removal of the time for incoming routine correspondence (as set out in blue) reduces the time to 74.7 hours. At the hourly rates referred to in the submissions, the claim for profit costs is reduced to £12,291.83 plus VAT of £2,458.37, a total of £14,750.20.

118. So far as counsel's fees are concerned, it seems to me that the earlier fees were reasonably incurred and were in reasonable amounts and that the brief fee for the hearing was likewise reasonably incurred and was in a reasonable amount. I award nothing in respect of the drafting of the costs application. The claim for counsel's fees therefore comes out at £6,015.00 plus VAT of £1,203.00, a total of £7,218.00.

119. As for the experts, again it seems to me that the fees of all of the experts were reasonably incurred and were in reasonable amounts. The fact that the decision of 9 April 2020 does not refer to all of them by name does not mean that their individual fees were not reasonably incurred. I accept the point which Mr Smith made that the report fee of Dr Soppitt should in fact be £1,920 inclusive of VAT, as the invoice refers to 8 hours' work at £240 per hour inclusive of VAT. That makes a total including VAT of £6,941.50.

120. The three sub-totals of £14,750.20 plus £7,218.00 plus £6,941.50 come out at a global figure of £28,909.70.

121. Having conducted an assessment on the standard basis, I must step back and consider whether the overall sum is proportionate. It was not the entirety of the Council's defence of the action which was unreasonable, although a very important aspect of the case was taken up by the futile placement argument. Moreover, one of the problems with the application was that, as I have said above, it attempted to smuggle in criticisms of the Council

for stripping out the EHCP or attempting to use the Tribunal as a surrogate advocate, but those matters were outside the ambit of the application as formulated and cannot subsequently be smuggled in by a sidewind. I consider that it is appropriate and proportionate to reduce the sum of £28,909.70 to take account of the fact that it was not the entirety of the Council's defence of the action which was unreasonable and to discount the sum by virtue of the fact that some of the costs incurred by the Appellant were incurred in relation to matters of which complaint was purported to be made, but which were in fact made outside the ambit of the application as originally formulated. The appropriate and proportionate figure is £22,000, which equates to approximately a 25% reduction of the headline figure. In my judgment that sum is proportionate. It bears a reasonable relationship to the matters which were in issue, the nature of the case and the additional work generated by the conduct of the Council.

122. Accordingly, I assess the costs payable by the Council to be in the sum of £22,000.00 including VAT.

123. I order that the Council pays that sum to the Appellant within 28 days of the date of the letter sending out my decision.

Conclusion

124. I therefore grant permission to appeal on ground one, but not on grounds two and three.

125. I allow the appeal on that ground.

125. I remake the decision of the Tribunal. I am satisfied that the Council acted unreasonably in attempting to bring placement (Section I) into the appeal.

126. I am also satisfied that the Council's conduct was such as to justify making an order for costs.

127. I assess the costs payable by the Council to be in the sum of £22,000.00 including VAT.

128. I order that the Council pays that sum to the Appellant within 28 days of the date of the letter sending out my decision.

Mark West
Judge of the Upper Tribunal

Signed on the original 16 March 2021