Neutral Citation Number: [2020] EWHC 3278 (Ch)

Appeal from District Judge – Summary assessment of costs – Correct approach – Guideline Hourly Rates

Case No: BL-2019-MAN-00008
Appeal Ref: M20C296

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE BUSINESS & PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)
ORDER OF DISTRICT JUDGE MATHARU
DATED 11 JUNE 2020

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: Tuesday 1 December 2020

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

Harvey Cohen **(as executor of Eric Hermes, Deceased)**	**Claimant**
- and -	
(1) Marion Fine **(2) Shelley Hermes** **(3) Jonathan Hermes**	**Defendant**

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- -

Mr Michael Fletcher (instructed by **Glaisyers Solicitors LLP, Manchester**) appeared for the **Claimant**
At the request of the First Defendant, and with the agreement of the court and the other parties, **Mr Sholom Fine** represented the **First Defendant**, his wife
The **Second and Third Defendants** appeared in person

Hearing date: Monday 30 November 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HODGE QC

Covid-19 Protocol: *This judgment was handed down remotely by uploading it to the CE-File, by circulation to the parties or their representatives by email, and by posting it to BAILII.*

The date and time for hand-down is deemed to be 4.30 p.m. on Tuesday 1 December 2020

The following cases are referred to in the judgment:

1-800 Flowers Inc v Phonenames Ltd [2001] EWCA Civ 721, [2001] 2 Costs L.R. 286

MacDonald v Tare Holdings Ltd [2001] Costs L.R. 142

McLinden v Redbond [2006] EWHC 234 (Ch), [2006] 4 Costs L.R. 651

Morgan v The Spirit Group Ltd [2011] EWCA Civ 68, [2011] 3 Costs L.R. 449

Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2504 (TCC), [2019] Costs LR 1533

Judge Hodge QC:

1. This is an appeal from a decision of District Judge Matharu dated 11 June 2020. It raises issues as the proper approach to the summary assessment of costs. As well as addressing the approach that was adopted in the instant case, this judgment also suggests how costs assessments might be conducted in future cases, consistently with both the authorities and the need to further the overriding objective. It also gives some consideration to the Guideline Hourly Rates.

Introduction and overview

2. The appellant (and claimant) is Mr Harvey Cohen, a former partner at Glaisyers Solicitors LLP, who sues in his capacity as the professional executor of the Will of the late Mr Eric Hermes (who died on 26 April 2014) which was admitted to probate on 2 December 2015. The claimant was a friend of the deceased and his family and this unfortunate case is said to have caused sadness and embarrassment to him. The three defendants are the deceased's adult children. The dispute arises out of disagreements between the three defendants over the sale of the sole significant asset of the estate, which is a residential property at 18 Stanley Road, Salford M7 4RW. The substantive proceedings under CPR 64 were necessary because of the complete failure of the defendants, over a prolonged period of time, to reach any form of agreement between themselves regarding the sale of the property. Previous attempts to market the property for sale out of court had failed because the second defendant was resistant to any sale (as she lived in the property and wanted to continue to do so); and the third defendant held what are said to be wholly unrealistic expectations about the value of the property and his entitlement to share in the sale proceeds. For her part, the first defendant, who resides in Massachusetts, USA, wanted the property to be sold. The matter had been before the Manchester Beth Din, the Jewish Ecclesiastical Court, without resolution. The claimant therefore felt compelled to issue this Part 8 claim, on 30 May 2019, in which, in addition to an order for the sale of the property, he seeks to recover his costs on the indemnity basis under CPR 46.3 (which provides, as a general rule, that the costs of a trustee or personal representative are to be paid out of the relevant trust fund or estate, and are to be assessed on the indemnity basis).

3. By the time the matter finally came before District Judge Matharu (by telephone) on 11 June 2020 (during the difficulties caused by the Coronavirus pandemic), the case had already been before s.9 Specialist Civil Judges on no less than four separate occasions. Before the District Judge, the claimant was represented by Mr Michael Fletcher FCILEx, an advocate and costs lawyer and a partner at Glaisyers. At no time have any of the three defendants been legally represented. With the agreement of the District Judge and all the other parties, the first defendant was represented her husband, Mr Sholom Fine; and the second and third defendants represented themselves. The District Judge made an order for the sale of the property, with consequential directions; and nothing presently turns on that part of her order. However, at paragraph 7 of her order, the District Judge provided that: "The costs of the claimant of this action are to be paid from the estate of the deceased. Those costs are summarily assessed in the inclusive sum of £27,000.00." It is the summary assessment of the claimant's costs in the inclusive sum of £27,000 which he seeks to challenge. His statement of costs for the hearing (in Form N260), which covered all of the costs of this litigation, had been in the sum of £40,835.50, together with VAT, which brought the total to £48,846. The District Judge refused permission to appeal her summary assessment of the costs but,

on 16 October 2020, the Vice-Chancellor of the County Palatine of Lancaster (Snowden J) granted permission to appeal; and he directed that the appeal should be heard by a s.9 Specialist Civil Circuit Judge. His reasons for granting permission to appeal were that, notwithstanding that the appeal was only about costs, the claimant had a realistic prospect of succeeding in persuading the appeal court that the approach of the District Judge had been flawed for the reasons set out in the grounds of appeal and the accompanying skeleton argument.

The hearing below and the judgment

4. The court has before it a transcript of the (poor quality) recording of the relevant part of the telephone hearing which related to the discussion of the quantum of costs. It extends to some 3 ½ pages of single-spaced text. It would appear that by this time there was only about five minutes of the one-hour telephone hearing remaining. The District Judge heard first from the first defendant's husband (who, at her request, and with the agreement of the court and all the parties, was speaking on behalf of his wife), next from the second defendant, and then (and briefly) from the third defendant. It is a fair reading of the transcript to say that all three defendants were appalled at the level of the claimant's costs - Mr Fine described them as "exorbitant", "outrageous" and "unbelievable"; Ms Hermes described the costs as "unbelievable", and "gargantuan"; and Mr Hermes described them as "much too high" - but they provided no direct assistance to the District Judge in the form of any challenge to individual items in the costs statement. The District Judge then entered into a dialogue with Mr Fletcher (extending over some two pages of the transcript) seeking an explanation as to how the total figure claimed for costs (which, in the context of one substantive hearing, with only one witness statement of substance, she described as "staggering") had been arrived at. The explanation concluded with Mr Fletcher stating that: "The reality is that because of the length of these proceedings, we are almost at two years now including the pre-action work, that regrettably is the figure that they come to". The District Judge then said: "Okay. Your time's up. I am going to give a decision in relation to costs. If you had considered, Mr Fletcher, that this time estimate was insufficient, you should have notified the court. A one-hour ELH was given. I am going to give a decision on costs and you are all to listen." At no stage during this dialogue did Mr Fletcher suggest either adjourning the hearing and re-listing the matter for a summary assessment by telephone, with a time estimate of a further hour, or directing that the claimant's costs should be the subject of a detailed assessment.

5. The approved transcript of the District judge's judgment on costs reads as follows (after I have supplied obvious gaps in the transcript by reference to the underlying documents):

> *1. The issue of costs falls to be considered by the court at the conclusion of a case. Let me deal with the issues of law, if I may. First, what Mr Fletcher tells the court is that having regard to the provisions of CPR 46.3 – those are the court rules that govern the conduct of civil litigation – the court has a limitation on its powers to award costs in favour of a trustee or personal representative. He says that this will apply to a person who is or has been a party to any proceedings in the capacity of trustee or personal representative. He says that Mr Cohen is an executor and thus a trustee or personal representative. In that case, 44.5 [sic: probably 44.3 (5)] does not apply. He says that what that rule says is that the general rule is that that person is entitled to be paid the costs of the proceedings insofar as they are*

not recovered from or paid by any other person out of the estate. That is the principle. That has been followed by me in the substantive decision I made. What it goes on to say is: 'Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis'. What that means is that if there is any doubt as to amounts, then such doubt is to be resolved in favour of the receiving party when it comes to the question of assessing quantum of costs. And he says that costs if ordered on an indemnity basis do not require to be tested on a proportionality basis.

2. Let me just deal with my discretion as to costs in relation to this matter. The submission being made by Mr Fletcher is that this is how it has been spent, proportionality does not come into the equation, and, therefore, they are entitled to some £50,000. He may well be right on the proportionality point that he has made, but that does not exclude reasonableness. It is wholly unreasonable to claim this amount of costs. I am provided with a statement of costs where I shall use examples only. There is duplication and there is exaggeration as follows. We have at items 70 and 71 'Preparing brief and bundle 2 hours 42 minutes' and 'Completing brief and bundle' another hour and 48 minutes. Let us look at item 78: 'Costing the file and preparing this N260 costs statement 3 hours 12 minutes'. Item 83: 'Updating the costs statement', another 36 minutes. Item 81: 'Considering service rules and requirements …', charging an hour for it. Matters of law that they should know and they are seeking to impose upon the defendants. Item 116: 'Considering the bundle', an hour. Preparing his costs statement, checking and signing, 3 hours and 6 minutes at 127. 128, 'Estimated time preparing for hearing', 2 hours. I am not undertaking a detailed assessment. What the court is doing is considering matters in the round. I am considering whether they have been unreasonably incurred or whether they are of an unreasonable amount.

3. I am appalled by the amount of costs that are sought by an executor I do have regard to the point forcefully made by Mr Fine, that it was always available to the executors to act quicker, more expeditiously, more promptly, thereby truncating or reducing any claim for costs. It is absolutely right that a reasonable amount should be recovered by the estate. £50,000 is absolutely not reasonable. All the court is prepared to order is a global total of no more than £27,000. That is both fair and reasonable having regard to the issues and what is reasonable in the circumstances. It seems to be the submission that the principle of indemnity costs engage some entitlement to substantial costs. That is not right and I am satisfied that this statement of costs cannot be substantiated. That is the decision of the court.

The appeal

6. The claimant invites the appeal court to set aside the District Judge's summary assessment and the order allowing the figure of £27,000.00 for costs and to order instead that the claimant's costs be remitted for detailed assessment, with an order made for those costs to be assessed in detail (if not agreed) and for the parties to follow the detailed assessment procedure in CPR 46.10. For the purpose of detailed assessment, the court should direct that the defendants are to be treated as interested third parties; and it should order that the detailed assessment hearing be reserved to a Regional Costs

Judge in Manchester. Finally, the court should make appropriate orders for costs for this permission application and appeal having regard to CPR 46.3 (3).

7. The grounds of appeal are three in number:

(1) The District Judge was wrong and erred in law by failing to have regard, or give proper weight, to the fact that the summary assessment was of the costs of an executor and were to be assessed on the indemnity basis. Thus, it is submitted, that the District Judge applied the wrong test.

(2) The District Judge was wrong and erred in law by failing to have sufficient regard to the components of the N260 costs statement and effectively imposed her own unilateral tariff without any calculation or proper reasoning, contrary to the Court of Appeal's guidance in *1800 Flowers Inc v Phonenames Limited* [2001] EWCA Civ 721, [2001] 2 Costs L.R. 286. The allowance of £27,000.00 against the costs itemised in the claimant's N260 costs statement of £48,846.00 (including VAT, Counsel's fees and disbursements) is said to have been "wholly arbitrary".

(3) The District Judge was wrong and fell into serious procedural error by making it clear throughout the hearing that it was to last only an hour and by failing to consider the options of an adjournment of the claimant's costs for later summary or detailed assessment. This failure resulted in an outcome that was not properly considered, was arbitrary and unjust. Rather than proceed, if there were a lack of judicial time at the hearing on 11 June 2020, an adjournment to some later date could have meant that the claimant's costs would have been subsequently considered thoroughly and with proper attention (as canvassed for in the alternative at paragraph 9 of the claimant's skeleton argument for the hearing on 11 June 2020). As it was, the summary assessment was dealt with in what is said to have been "a very rushed and rather intemperate fashion" resulting, so the claimant submits, in procedural unfairness.

8. Mr Fletcher (who again appears for the claimant) elaborates upon the grounds of appeal in his written skeleton argument submitted in support of this appeal. He relates what happened at the hearing at paragraphs 12 through to 28. The hearing had a time estimate of one hour, with 30 minutes pre-hearing judicial reading time. It had originally been listed at 3.00 pm but, at the court's insistence, on the morning of the hearing this was moved forward to 2.00 pm. This is said to have required some effort on the morning of the hearing by Glaisyers in contacting each of the defendants to advise them of the change, particularly as the first defendant was in a different time zone. Because of the Covid 19 pandemic, the hearing proceeded by telephone. After protracted submissions for the parties (and with the second and third defendants opposing the sale of the property) the District Judge gave a ruling and made an order for sale in the terms sought by the claimant. It is said that the hearing had become "intemperate". The District Judge was concerned at the matter overrunning. The third defendant was said at times to have been difficult to hear and understand. Following the making of the District Judge's order for sale, the attention of the court and the parties focused on costs. The first defendant opposed the claimant having any costs from the estate as a matter of principle, for reasons that are said by Mr Fletcher to have been unclear. The third defendant is said to have submitted that the first defendant should pay the claimant's costs, although the basis for that submission is also said to have been unclear. The District Judge ruled that the claimant's costs should be paid from the estate.

9. On the quantum of costs, when questioned by the District Judge, all three defendants said that the claimant's costs were too much; but they made no specific objections to any particular item of costs in the claimant's N260 costs statement. For the claimant, it was submitted that costs were to be assessed on the indemnity basis and that they were reasonable in light of the manner in which the claim had been opposed and protracted by the conduct of the defendants. As they had made no specific objections to the itemised N260 costs statement, the claimant had nothing to answer in that respect. The District Judge herself took issue with the quantum of the claimant's statement of costs. In her ruling the District Judge: (1) acknowledged that the costs were to be assessed on the indemnity basis, and that proportionality had no part to play; (2) considered the claimant's costs to be unreasonable; (c) referred to items 70, 71, 78, 83, 81, 116, 117, 127 and 128 in the documents schedule to the costs statement as examples of what she considered to be excessive; (4) commented that this was not a detailed assessment; (5) said that she was appalled by the level of costs; and (6) ruled that the sum she would allow was £27,000.00 fully inclusive [against the £48,846.60 claimed in the N260]. There was no calculation or explanation as to how that figure of £27,000.00 had been arrived at. The claimant requested permission to appeal the summary assessment of his costs but, perhaps unsurprisingly, the District Judge refused permission to appeal. She considered that her decision was within the range of her discretion. The hearing then ended.

10. Mr Fletcher submits that the costs before the court were to be assessed on the indemnity basis. They are the costs of a professional executor. The costs were incurred in the sum they were because of the persistent failure of the defendants to agree matters. The District Judge was wrong and erred in failing to apply usual indemnity basis principles (no proportionality test and the exercise of any doubt in favour of the receiving party). That was particularly so against the background that, save for general comments made by the defendants, whilst they considered the costs to be too much, they offered no specific points against the items in the claimant's N260 costs statement. The District Judge was wrong and erred by failing to have proper or sufficient regard to the claimant's N260 costs statement. Whilst observing some items by way of example that she considered excessive, there was no subsequent calculation of those items, or any substituted allowances made.

11. Mr Fletcher submits that the District Judge was wrong and erred by simply allowing a figure of £27,000.00. That figure was inclusive of VAT, counsel's fees and disbursements. There was no explanation of how that figure was reached and no calculation at all. The figure appeared to have been determined wholly arbitrarily. There was insufficient reference to the claimant's N260 costs statement. Reliance is placed on the Court of Appeal case of *1-800 Flowers Inc v Phonenames Limited* [2001] EWCA Civ 721, [2001] 2 Costs L.R. 286. There the Court of Appeal is said to have made it clear that judges conducting a summary assessment cannot impose their own tariff but must focus upon the detailed breakdown of the costs actually incurred. Mr Fletcher then quotes paragraphs 113 to 116 of the judgment of Jonathan Parker LJ (with whom Buxton and Peter Gibson LJJ both agreed). Mr Fletcher submits that the District Judge was wrong, and fell into serious procedural error, by making it clear throughout the hearing that it was to last only an hour and by failing to consider the option of adjourning the claimant's costs for later summary, or detailed, assessment. This failure is said to have resulted in an outcome that was not properly considered and was rushed, with the consequence that it was unjust. Rather than proceeding, if there

was a lack of judicial time at the hearing on 11 June 2020, an adjournment to some later date would have meant that the claimant's costs could subsequently have been considered thoroughly and with proper attention (as canvassed for in the alternative at paragraph 9 of the claimant's skeleton argument for the hearing on 11 June 2020). As it was, it is said that the summary assessment was dealt with in a very rushed and intemperate fashion, resulting, the claimant submits, in unfairness.

12. Paragraph 9 of the skeleton argument for the 11 June hearing read as follows:

> *"In addition to the terms of the draft order, the claimant seeks an order for the summary assessment of his costs. That summary assessment should take place if possible at the hearing on 11 June 2020 (to save and avoid further future costs). If there is insufficient Court time on the 11 June 2020, and in the alternative, the Court is asked to re-list the matter for a summary assessment with an ELH of 1 hour by telephone. In the further alternative, the Court is asked to direct that the claimant's costs be the subject of detailed assessment. In any event, the claimant's costs are to be assessed on the indemnity basis pursuant to CPR 46.3. Having regard to the overriding objective and principles of proportionality, summary assessment is to be preferred to detailed assessment."*

13. The court has received no written submissions from any of the defendants apart from an email to the court, sent on 25 November, by the second defendant which includes the following statements:

> *" ... I want Glaisyers to be paid. I am infinitely grateful for the good work they did and have done for us. I just want the payment to be a fair one.*
>
> *I am not able to pinpoint regarding the costs because I have no knowledge of the area and I cannot afford a solicitor. I do not have the knowledge to be able to go through all the services we are being charged for and to point out the duplications, all the things that we are being overcharged for, and also how unnecessary certain things we are being charged for, were. ...*
>
> *In fact, as I recall it, and as I understood it, the second of the hearings that took place in the High Court would not have been necessary had the solicitor served some papers to my brother, or something akin to this, in the correct way. ...*
>
> *I am grateful to Glaisyers for the good work they have done for us and, of course, I want to pay them for this. But I believe we have been vastly overcharged and I think that certain matters should have been dealt with differently."*

14. The reference to "the second of the hearings that took place in the High Court" would appear be to the hearing that took place before me on 20 November 2019. As I recall, that hearing was ineffective, and was adjourned to 19 December 2019 (with the costs being reserved), because I was told by counsel then appearing for the claimant that it appeared to him that the third defendant had not by then been served with the claim form and supporting documents in accordance with CPR rule 6.9.

15. Due to the Coronavirus pandemic, the hearing of the appeal took place before me remotely by Microsoft Teams. The hearing lasted from about 10.30 am until just after 2.00 pm. At a fairly early stage of the appeal hearing I indicated that I was satisfied,

for reasons I would set out in this reserved judgment, that the District Judge had erred in her approach to the conduct of the summary assessment. Having considered whether I should remit the costs for a detailed assessment by the Regional Costs Judge, I decided, again for the reasons to be set out in this reserved judgment, that I should myself undertake a detailed line-by-line assessment of the elements of the claimant's N260 Summary Assessment Statement of Costs (which extends to 13 pages and comprises no less than 130 separate items in the schedule of work done on documents). This exercise took about two hours; and it was only after it had been completed, and I had assessed the total costs (inclusive of VAT) at £35,703, that it became clear that the claimant had exceeded the figure for costs which had been summarily assessed by the District Judge (even though, as Mr Fine, in particular emphasised, this was significantly less than the total figure of £48,846 which had been sought by the claimant). After hearing submissions on the costs of the appeal, these were awarded to the claimant as it was he who had been the substantially successful party. I then proceeded to conduct a further detailed line-by-line summary assessment of the appeal costs by reference to the more modest six-page N260 Summary Assessment Statement of Costs (comprising a relatively more modest 30 separate items in the schedule of work done on documents). This took about a further 30 minutes; and it produced a total sum (including VAT) of £8,298.12 (against a claim for £9,971.52).

The authorities

16. The commentary at para 44.6.3 of Volume 1 of the current (2020) edition of *Civil Procedure* (headed "Summary assessment—procedure") reads (so far as material):

> *"The court was wrong not to assess costs on the detailed breakdown of costs actually incurred, as shown by the successful party's statement of costs, and instead substituting its own tariff: McLinden v Redbond [2006] EWHC 234 (Ch), [2006] 4 Costs L.R. 651 (Evans-Lombe J). The judge in a trademark dispute summarily assessed the costs at the end of the trial at £10,000 as against the £38,000 claimed. In carrying out the summary assessment the judge had not conducted any sort of detailed analysis of the objector's statement of costs but appeared to have applied his own tariff as to what costs were appropriate for a one-day paper only appeal. That approach was wrong in principle: 1-800 Flowers Inc v Phonenames Ltd [2001] EWCA Civ 721, [2001] 2 Costs L.R. 286.*
>
> *A claimant represented under a CFA claimed damages of £40,000. At trial she was awarded £13,419 plus costs. The costs amounted to £99,000, including a 100% success fee. The trial judge considered that the claim had in reality been a small fast track personal injury case, and on that basis ordered that the defendant should contribute £25,000 to the claimant's costs. On appeal, the Court of Appeal noted that the judge had the claimant's full bill of costs before him but did not make his decision by reference to the detailed breakdown of costs that it contained. It could not therefore be said that he carried out a summary assessment in arriving at the figure of £25,000. The court ordered that the costs should be subject to detailed assessment, to be carried out as if the case had been allocated to the fast track: Morgan v The Spirit Group Ltd [2011] EWCA Civ 68, [2011] 3 Costs L.R. 449. "*

17. Paragraphs 112 to 116 of Jonathan Parker's judgment in the *Flowers* case read as follows:

> *112. The judge was plainly right in saying that the court must control costs. CPR 44PD para 13.13 says in terms that the court will not give its approval to disproportionate and unreasonable costs. Moreover it is in the nature of the jurisdiction to assess costs summarily that the ambit of the court's discretion when carrying out a summary assessment is very wide.*
>
> *113. That said, however, I am of the view that in the instant case the judge erred in principle when he in effect applied his own tariff to the case, without carrying out any detailed examination or analysis of the costs actually incurred by the Opponent as set out in its statement of costs.*
>
> *114. In my judgment, it is of the essence of a summary assessment of costs that the court should focus on the detailed breakdown of costs actually incurred by the party in question, as shown in its statement of costs; and that it should carry out the assessment by reference to the items appearing in that statement. In so doing, the court may find it helpful to draw to a greater or lesser extent on its own experience of summary assessments of costs in what it considers to be comparable cases. Equally, having dealt with the costs by reference to the detailed items in the statement of costs which is before it, the court may find it helpful to look at the total sum at which it has arrived in order to see whether that sum falls within the bounds of what it considers reasonable and proportionate. If the court considers the total sum to be unreasonable or disproportionate, it may wish to look again at the various detailed items in order to see what further reductions should be made. Such an approach is wholly unobjectionable. It is, however, to be contrasted with the approach adopted by the judge in the instant case.*
>
> *115. In the instant case, the judge does not appear to have focused at all on the detailed items in the Opponent's statement of costs. Rather, having concluded that the total of the detailed items was unreasonably high he then proceeded to apply his own tariff - a tariff, moreover, which appears to have been derived primarily from a case in which the Opponent had not been involved and about which it and its advisers knew nothing. In my judgment the jurisdiction to assess costs summarily is not to be used as a vehicle for the introduction of a scale of judicial tariffs for different categories of case. However general the approach which the court chooses to adopt when assessing costs summarily, and however broad the brush which the court chooses to use, the assessment must in my judgment be directed to and focused upon the detailed breakdown of costs contained in the receiving party's statement of costs.*
>
> *116. I would therefore allow the cross-appeal, set aside the summary assessment and direct a detailed assessment of the Opponent's costs.*

18. *McLinden v Redbond* [2006] EWHC 234 (Ch), [2006] 4 Costs L.R. 651 (Evans-Lombe J) was an appeal from a decision on costs in an insolvency application that had come before the Chief Registrar. He had not based his summary assessment of the creditor's costs on the detailed breakdown of costs actually incurred by him as shown in his statement of costs. Rather, having concluded that the total of the detailed items was unreasonably high, the Chief Registrar had then proceeded to apply his own tariff. That approach to the assessment of costs was held to be contrary to authority and therefore wrong in law. The appeal was therefore allowed and the discretion of the Chief Registrar devolved to Evans-Lombe J to exercise in his place. The appellant urged the

appeal court to summarily assess the costs of the hearing before the Chief Registrar. The court's attention was drawn to the course taken by Neuberger J when he allowed an appeal as to costs in the case of *MacDonald v Tare Holdings Ltd* (decided on 7th December 2000 and reported at [2001] Costs L.R. 142). In that case, having drawn attention to a passage at paragraph 235–240 in the *Butterworth's Costs Service* manual saying that in those circumstances " the only option is to order detailed assessment of all the costs which the Appeal Court does not deal with", Neuberger J went on to say this:

> *"No doubt, very often the approach embodied in that paragraph is appropriate. However, it seems to me that in many cases it would be wrong — and I think that this case is one — for this court not to assess the costs below. First, my decision on costs puts an end to whole case because Mr McDonald succeeded in setting aside the statutory demand (the only relief he sought apart from costs) and at this stage he is getting his costs so that is the end of the matter. For things to be drawn out further by a detailed assessment of the costs seems undesirable if it can be avoided."*

Like Neuberger J, Evans-Lombe J concluded that, in allowing the appeal, he should summarily assess the costs in the lower court and substitute his own assessment for the Chief Registrar's assessment of the creditor's costs. To do so would further the overriding objective of dealing with the case justly and at proportionate cost, by saving expense, dealing with the case proportionately, ensuring that it was dealt with expeditiously and fairly and allotting to the case an appropriate share of the court's resources. It would also be consistent with the direction in CPR 1.4 (2) (i) to deal with as many aspects of the case as the court could on the same occasion.

19. The current edition of *Cook on Costs* poses (at para 27.1) the question: How summary is summary? The editors note that, when overturning the decision of the recorder, the Court of Appeal in *Morgan v Spirit Group Ltd* [2011] EWCA Civ 68, [2011] 3 Costs L.R. 449 had made the obvious point that the court must undertake either a summary or a detailed assessment of the costs. The recorder had not done so. Instead, in a single paragraph, the recorder had simply determined a proportionate figure and had added something to that to allow for the existence of what he had, erroneously, described as 'a contingent fee agreement'. Summary though the assessment is intended to be, the court concluded that what had taken place in the lower court was not a summary assessment. So, summary though the procedure may be, it must still recognisably be an assessment.

20. Delivering the judgment of the court in the *Spirit Group* case, Black LJ said this (at paragraph 27):

> *As Lownds v Home Office: Practice Note [2002] EWCA Civ 365, [2002] 1 WLR 2450 shows, it is very important for the judge to take a global view of the proportionality of the costs incurred but, before he fixes a figure for costs, he must advance from that to an item by item consideration of the individual elements of the bill by way of a summary assessment or alternatively, he must direct a detailed assessment which will fulfil that task. Naturally, any judge carrying out a summary assessment appropriately focused on the detailed breakdown of costs will have firmly in mind that the court's discretion when carrying out such an assessment is very wide and that a minute examination of detail is not always required and a*

> *broad brush can, where appropriate, be used. It would be a great pity if the summary assessment procedure were to become bedevilled by formulaic and time consuming intricacy which would often be wholly disproportionate to the exercise being carried out and the nature of the litigation in hand."*

Decision

21. The appeal court will only allow an appeal where the decision of the lower court was either wrong or unjust because of a serious procedural or other irregularity in the proceedings in the lower court: CPR 52.21 (3). Both features are present in the instant case. The District Judge correctly analysed the applicable provisions of the Civil Procedure Rules. However, in the light of the authorities I have referred to above, and for the reasons advanced by Mr Fletcher, the approach of the District Judge to the summary assessment she undertook was wrong. While summary assessment can be "broad brush", a judge still has to consider the individual elements of the bill item by item: see *Flowers*, *McLinden v Redbond*, and *Morgan v Spirit Group*. What is meant by "broad brush", in the present context, is that, unlike the detailed assessment procedure under CPR 47, there is no need for any formal notice of commencement of the assessment, or any detailed bill of costs, or any points of dispute, or any points of reply. But the court must nevertheless address individually each separate objection that may be taken to particular items in the N260 statement of costs.

22. Having now revisited the District Judge's summary assessment, with the result recorded at paragraph 15 above, it can also be seen that the District Judge's approach had produced an unjust result. The claimant's costs were summarily assessed at £27,000 whereas, having considered the individual elements of the bill item by item, I have assessed the total costs at £35,703. In effect, the District Judge had assessed the claimant's costs at only some 75.6% of the figure that I have arrived at by using the approach mandated by binding authority.

23. Having determined that I should allow the appeal, I then had to decide what course I should take in relation to the assessment of the claimant's costs. Mr Fletcher invited the appeal court to direct that there should be a detailed assessment hearing, to be reserved to a Regional Costs Judge in Manchester. It seemed to me that that would be an unattractive course, and that I should myself undertake a summary assessment of the costs, and substitute my own assessment for that of the District Judge, for a number of reasons.

24. First, as in *MacDonald v Tare Holdings Ltd*, my decision on costs will hopefully put an end to this whole case because the claimant has succeeded obtaining an order for the sale of the estate property so the assessment of his costs will the end of the matter (unless it is necessary to come back to court, at further expense, for further directions in connection with the sale). For things to be drawn out further by a detailed (and costly) assessment of the costs seemed undesirable if it could be at all avoided. Secondly, and in agreement both with Neuberger J in *MacDonald v Tare Holdings Ltd* and Evans-Lombe J in *McLinden v Redbond*, it seemed to me that a summary assessment would further the overriding objective of dealing with the case justly and at proportionate cost. It would save expense, deal with the case proportionately, ensure that it was dealt with expeditiously and fairly, and allot to the case an appropriate share of the court's resources. It would also be consistent with the direction in CPR 1.4 (2) (i) to deal with as many aspects of the case as the court could on the same occasion. Thirdly, I was

concerned about the ability of the defendants, as litigants in person, properly to address the requirements of a detailed assessment, in particular in terms of formulating focussed points of dispute. I was concerned that a detailed assessment might, in consequence, produce a less just outcome than a summary assessment. Fourthly, I was concerned that, without conducting a summary assessment, the appeal court would be in no position to deal justly with the costs of the appeal. Although the claimant had been successful in having the summary assessment of the District Judge set aside, until the costs had been finally determined, it would not be possible to identify the ultimately successful party to this appeal. If a detailed assessment were to result in an award of less than £27,000, it would be difficult to characterise the claimant as the ultimately successful, and the defendants as the ultimately unsuccessful, parties to the appeal. Determining the incidence of the costs of the appeal would therefore have to be deferred until after the conclusion of the detailed assessment. I also understood Mr Fine, at least, to favour the appeal court undertaking a summary assessment; and neither of the other two defendants positively opposed that course. However attractive it might have been for the appeal court not to have to embark upon a two-hour, line-by-line assessment of the costs, the interests of justice dictated that, however reluctantly, I should do so.

25. In undertaking that summary assessment, the appeal court had regard to the applicable principles in CPR 44. Where the amount of costs falls to be assessed on the standard basis, the court will only allow costs: (1) which have been reasonably incurred and are reasonable in amount: CPR 44.3 (1); and (2) which are proportionate to the matters in issue: CPR 44.3 (2) (a); and it will resolve any doubt in favour of the paying party: CPR 44.3 (2) (b). By contrast, where (as in the present case) the amount of costs is to be assessed on the indemnity basis, proportionality is not an issue; and, although the court will still only allow costs which have been reasonably incurred and are reasonable in amount, the court will resolve any doubt it may have as to whether costs have been reasonably incurred, or are reasonable in amount, in favour of the receiving, rather than the paying, party: CPR 44.3 (1) and (3). In assessing the reasonableness of the incidence and the amount of costs incurred, the court will have regard to all the circumstances, including the conduct of all the parties, the value of the money or property involved, the importance of the matter to all the parties, the particular complexity of the matter, the skill, effort, and time spent on the case, and the specialised knowledge and responsibility involved: CPR 44.4.

26. I have already indicated the outcome of that summary assessment. I gave reasons for my line-by-line decision on each individual element of the statement of costs as I went through it item by item. Those reasons were (hopefully) recorded on Teams; and it is unnecessary for me to address the process in this reserved judgment, subject only to one matter: that of the applicable hourly rates for two of the eleven fee earners who featured in the statement of costs. It was necessary for the appeal court to determine the applicable hourly rates for those two fee earners in order to address the question whether each affected item in the costs statement was reasonable in amount because those rates exceeded the applicable (Band One) Senior Courts Costs Office Guideline Hourly Rates.

27. Prior to 2010 the Guideline Hourly Rates were increased each year, broadly in line with inflation; but they have not been revised since then. After much deliberation, the Foskett Sub-Committee of the Civil Justice Council (of which I was a member) reported on the Guideline Hourly Rates in 2014, after which further consequential consultation

took place with the Law Society and the Ministry of Justice. However, the then Master of the Rolls (Lord Dyson) concluded, in April 2015, that the existing rates (at 2010 levels) should "remain in force for the foreseeable future and will remain a component in the assessment of costs, along with the application by the judiciary of proportionality and costs management". More recently, in *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2504 (TCC), [2019] Costs L.R. 1533 at [14] O'Farrell J said that:

> *"It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome."*

The same can be said for the currently hourly rates in many North-West commercial litigation solicitors' practices. Doubtless in response to this exhortation, a working group of the Civil Justice Council has been established (under Stewart J) to conduct an evidence-based review of the basis and amount of the Guideline Hourly Rates, and to make recommendations accordingly to the Deputy Head of Civil Justice and to the Civil Justice Council. The working group recognise that the approach to, and the evidence for, fixing Guideline Hourly Rates is a complex matter (as, from my experience on its predecessor, I know only all too well). According to paragraph 27-21 of *Cook on Costs*, the working group was originally due to report towards the end of this year. Although the project was suspended almost immediately upon the outbreak of the Covid-19 pandemic, it still appears to be on schedule as, at the time of writing the current edition, the suspension had been lifted. The editors anticipate a consultation period early in 2021. In the meantime, what is to happen as regards hourly rates?

28. In my experience of sitting in the Business & Property Courts, both in the North-west and in the Rolls Building, the present Guideline Hourly Rates are considerably below the rates actually being charged by the solicitors who practise in those courts. Likewise, the Table of Counsel's Fees bears no relationship to the fees which the courts see being charged for counsel appearing in the Business & Property Courts. In my judgment, pending the outcome of the present review, the Guideline Hourly Rates should be the subject of, at least, an increase that takes due account of inflation. Using the Bank of England Inflation Calculator, it seems to me that an increase in the (Band One) figures for Manchester and Liverpool broadly in the order of 35% would be justified as a starting point (appropriately rounded-up for ease of calculation). That would produce figures as follows (with the present rates shown in brackets):

A 295 (217) B 260 (192) C 220 (161) D 160 (118)

29. These are the rates which I decided to adopt in the present case (subject to the indemnity principle, which meant that the lower rates actually charged to the claimant applied in the case of the majority of the fee earners who have been involved in the present case). There are only two fee earners whose chargeable rates exceeded these revised guideline hourly rates: Ms Rocca (Grade B), who is the principal fee-earner and is charged out at £300 per hour, and Mr Hughes (Grade D), who is a para-legal and is charged out at £175 per hour. Mr Fletcher sought to persuade me to apply these actual rates rather than the rates of £260 and £160 respectively. I rejected his invitation. Whilst I acknowledge that in many cases pending in the Business and Property Courts, the

specific factors identified in CPR 44.4 would justify the application of rates higher than the guideline hourly rates, even after adjusting for inflation, that is not so in the instant case, which does not feature any of the particularly complex, specialist or high value aspects of the work typically encountered in the Business and Property Courts.

30. In overruling her decision to summarily assess the claimant's costs at £27,000, I should make it clear that I have every sympathy for the difficult position in which this very experienced and diligent District Judge found herself. This was a telephone hearing, conducted at a difficult time for the courts due to the pandemic and the consequent staff shortages and rapid and dramatic changes to working practices, where only one party was legally represented and the three defendants (all siblings) were representing themselves, with the first defendant being assisted by her husband and speaking from Massachusetts, USA. The hearing had been listed for only one hour, and the District Judge would appear to have had only five minutes left to hear from everyone on the highly contentious, and important, subject of costs. Understandably, the District Judge received no assistance from any of the defendants in terms of any objections to specific elements in the costs statement. She was taken to none of the relevant authorities which I have reviewed above; nor was she even taken to the relevant commentary in *Civil Procedure*. The District Judge was not referred to, or reminded of, paragraph 9 of Mr Fletcher's skeleton argument (cited at paragraph 12 above); and nor was it submitted to her that, in view of the lateness of the hour, she should either re-list the matter for a future summary assessment or direct that the claimant's costs should be the subject of a future detailed assessment. The District Judge no doubt bore firmly at the forefront of her mind that, having regard to the overriding objective and principles of proportionality, and as submitted in the same paragraph of Mr Fletcher's skeleton, a summary assessment was to be preferred to a detailed assessment. The District Judge had only five minutes to undertake an exercise which, in the event, has taken the appeal court about two hours. She understandably took the view that, if Mr Fletcher had considered the one hour time estimate to be insufficient, he should have notified the court in advance. The District Judge was seeking to protect the defendants from what she regarded as an unreasonable claim for costs which could not be substantiated (as Mr Fine expressly recognised in his submissions to the appeal court). The District Judge's ability to control the level of recoverable costs was constrained by her inability to rely upon the principle of proportionality (because of the indemnity basis of assessment). The approach which she proceeded to adopt was a realistic and pragmatic one that I have frequently adopted, without objection from the relevant parties. The only alternative available to her would have been to have adjourned the costs assessment, which would have led to still further costs being incurred; and these would probably have fallen to be visited upon the defendants. Unfortunately, the claimant has objected to the District Judge's approach to the summary assessment; and that objection is supported and justified by binding authority.

31. What lessons are to be learned from the present appeal? How might costs assessments be conducted in future cases, consistently with the need to further the overriding objective? How can courts avoid the summary assessment procedure becoming "bedevilled by formulaic and time consuming intricacy which would often be wholly disproportionate to the exercise being carried out and the nature of the litigation in hand" (to adopt the words of Black LJ)? First, the court should establish from the paying party how many, and which, individual elements of the statement of costs are subject to challenge. If there is simply no time available to undertake an item by item

consideration of those elements, the court should make this clear; and it should ask whether all relevant parties expressly consent to the court adopting a broad brush, and global, approach to these disputed items, without minutely examining them in any detail. If such consent is forthcoming from all relevant parties, it should be expressly recorded in the court's order. If no such consent is forthcoming from all relevant parties, then the court has the options of: (1) ordering that the assessment (and, if not previously determined, the incidence and/or the basis) of the costs of the relevant hearing will be determined on paper following upon an exchange of short, sequential written submissions from the relevant parties (as O'Farrell J did in *Ohpen Operations*); (2) re-listing the matter for a summary assessment of the costs; or (3) directing that the receiving party's costs should be the subject of a detailed assessment. If a detailed assessment is ordered, the court should exercise its power under CPR 44.2 (8) to order the paying party to pay a reasonable sum on account of costs unless there is good reason not to do so. This salutary power should always be borne firmly in mind as an alternative to a rushed, and procedurally improper, summary assessment.

32. For the reasons I have set out above, this appeal is allowed; the District Judge's summary assessment of costs in the sum of £27,000 is set aside; the costs of and leading up to the hearing before the District Judge are summarily assessed in the total sum of £35,703; and the defendants are ordered to pay the claimant's costs of this appeal, which are summarily assessed in the sum of £8,298.12.