Neutral Citation Number: [2024] EWHC 153 (KB)

APPEAL REF: QA-2022-000157

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th January 2024

Before :
MR JUSTICE RITCHIE
- -

BETWEEN

MIAH IBAR LONE

Appellant/Claimant

- and -

MICHAEL ANDREAS PETROU

Respondent/Defendant

The Appellant/Claimant appeared in person.
V A Orphanou of counsel (instructed by **AJ Angelo**) for the **Respondent/Defendant**

Hearing date: 26th January 2024
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APPROVED JUDGMENT

This judgment was handed down remotely at 14.00pm on Monday 29th January 2024 by circulation to the parties or their representatives by e-mail .

Mr Justice Ritchie:

The appeal

1. This is an application for permission to appeal two decisions of costs Judge Leonard (the Judge) made in the High Court of Justice on 14.7.2017 and 19.5.2022.

2. On 14.7.2017 the Judge ordered that the Claimant's bills of costs be assessed in the sum of £104,060 (rounded up), and that the Claimant would pay the Defendant's costs of the detailed assessment summarily assessed at £21,285 and gave directions for the cash account hearing.

3. On 19.5.2022 the Judge made a consent Order that the Defendant owed the Claimant £78,513 after assessing the cash account and made ancillary costs Orders relating to a hearing on 14.7.2017 (the Claimant to pay the Defendant £1,245); a hearing on 6.12.2021 (the Defendant to pay the Claimant £200); a hearing on 18.1.2022 (no costs award); and for the Claimant to pay the Defendant's costs of the Claimant's appeal assessed at £30,609.

4. By notice of appeal issued on 22.7.2022 the Appellant sought, in 14 grounds, to set aside the Order.

5. The grounds of appeal related to the May 2022 Order but the skeletons in support sought to attack an Order made in 2017.

6. Permission to appeal was refused by Sir Stephen Stewart on the papers on 1.3.2023.

Bundles and evidence

7. The appeal Court was provided with an appeal bundle by the Appellant, a Respondent's bundle and skeleton arguments (one from the Appellant, dated 7.2.2023 and one from the Respondent dated 15.1.2024). The Appellant also relied upon a witness statement sworn on 16.11.2023.

The issues

8. The "overriding" issue in the permission to appeal application according to the Appellant's skeleton was the asserted failure by the Judge in 2017 properly to work out whether more than 20% had been assessed off the Claimant's bill of costs. The Judge found that the bill was for £134,435 (rounded down) and the agreed sum at the assessment was £104,079 (rounded down). The latter is over 22% less than the former but the Appellant asserts that the Judge should have ignored the "letters in" fees charged in the bill of costs, which would have reduced it to £122,961 (rounded down) such that the assessed reduction would then have been less than 20%.

9. The secondary issue in the permission application was the Appellant's assertion that the Judge wrongfully failed in May 2022 to look at the Defendant's lawyer's retainer

and so, submits the Appellant, no costs should ever have been awarded and the Defendant's bill of costs for the Claimant's failed appeal should have been struck out.

10. There are lots of tertiary issues.

Appeals - CPR 52

Permission to appeal - CPR 52.6

11. Under CPR r. 52.6(1) permission to appeal may be given only where this Court considers that: (1) the appeal would have a real prospect of success or (2) there is some other compelling reason for the appeal to be heard.

Prospects

12. I take into account the leading authorities on how the first part of that test is applied which include *Swain v Hillman* [2001] 1 All ER 91, a Court of Appeal decision in which, in summary, the Court ruled that the prospects have to be realistic as opposed to fanciful. I also take into account *Tanfern ltd v Cameron-MacDonald* [2000] 1 WLR 1311, in which the Court ruled that the Appellant does not have to prove a greater than 50% prospect of succeeding and gave guidance on the process.

Fresh Evidence

13. This appeal is restricted to the evidence before the lower Court unless, under CPR r. 52.21(2) and the three grounds in *Ladd v Marshall* [1954] 1 W.L.R. 1489 (CA), new evidence is allowed in because it was: (1) not obtainable with reasonable diligence before the lower Court, (2) would have an important influence on the result and (3) is apparently credible, though not incontrovertible.

Review of the decision

14. I also take into account the under CPR r. 52.21 every appeal is a review of the decision of the lower Court.

Findings of fact

15. I take into account the decisions in *Henderson v Foxworth* [2014] UKSC 41, per Lord Reed at [67] and *Grizzly Business v Stena Drilling* [2017] EWCA Civ. 94, per Longmore LJ at [39-40] and *Deutsche Bank AG v Sebastian Holdings* [2023] EWCA Civ. 191, by Lord Justice Males at [48] - [55], that any challenges to findings of fact in the Court below have to pass a high threshold test. The trial Judge has the benefit of hearing and seeing the witnesses which the appellate Court does not. The Appellant needs to show the Judge was plainly wrong in the sense that there was no sufficient evidence upon which the decision could have been reached or that no reasonable Judge could have reached that decision.

16. The threshold was summarised by Lord Justice Lewison *in Volpi v Volpi* [2022] EWCA Civ. 464, [2022] 4 WLR 48, at paras. 2-4 and 52:

"2. The appeal is therefore an appeal on a pure question of fact. The approach of an appeal Court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal Court should not interfere with the trial Judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal Court that it would not have reached the same conclusion as the trial Judge. It does not matter, with whatever degree of certainty, that the appeal Court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable Judge could have reached.

(iii) An appeal Court is bound, unless there is compelling reason to the contrary, to assume that the trial Judge has taken the whole of the evidence into his consideration. The mere fact that a Judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial Judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial Judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal Court can therefore set aside a judgment on the basis that the Judge failed to give the evidence a balanced consideration only if the Judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal Court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.

3. …

4. Similar caution applies to appeals against a trial Judge's evaluation of expert evidence: *Byers v Saudi National Bank* [2022] EWCA Civ. 43, [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the Judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial Judge is not bound to accept it: see, most recently, *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ. 1442, [2022] 1 WLR 973 (although the Court was divided over whether it was necessary to cross-examine an expert before challenging their evidence). In a handwriting case, for example, where the issue is whether a party

> signed a document a Judge may prefer the evidence of a witness to the opinion of a handwriting expert based on stylistic comparisons: *Kingley Developments Ltd v Brudenell* [2016] EWCA Civ. 980."
> …
> "52 … It need hardly be emphasised that "plainly wrong", "a decision ... that no reasonable Judge could have reached" and "rationally insupportable", different ways of expressing the same idea, set a very high hurdle for an Appellant.
> 54. These considerations apply with particular force when an appeal involves a challenge to the Judge's assessment of the credibility of a witness. Assessment of credibility is quintessentially a matter for the trial Judge, with whose assessment this Court will not interfere unless it is clear that something has gone very seriously wrong. It is not for this Court to attempt to assess the credibility of a witness, even if that were possible, but only to decide, applying the stringent tests to which I have referred, whether the Judge has made so serious an error that her assessment must be set aside."

Appeals against case management decisions

17. When considering the permission decision in an appeal from a case management decision, the Court may take into account whether the issue is of sufficient significance to justify the costs of appeal; the procedural consequences of the appeal; and whether it would be more convenient to determine it after the trial (CPR r.52 PD 52A para 4.6).

18. Appeals from case management decisions and costs decisions also have a high threshold test, see *Royal & Sun v T & N* [2002] EWCA Civ. 1964, in which Chadwick LJ ruled as follows:

> "37. … these are appeals from case management decisions made in the exercise of his discretion by a Judge who, because of his involvement in the case over time, had an accumulated knowledge of the background and the issues which this Court would be unable to match. The Judge was in the best position to reach conclusions as to the future course of the proceedings. An appellate Court should respect the Judge's decisions. It should not yield to the temptation to "second guess" the Judge in a matter peculiarly within his province.
> 38. I accept, without reservation, that this Court should not interfere with case management decisions made by a Judge who has applied the correct principles, and who has taken into account the matters which should be taken into account and left out of account matters which are irrelevant, unless satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the Judge."

19. In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ. 1537, at [52] the Master of the Rolls said:

> "We start by reiterating a point that has been made before, namely that this Court will not lightly interfere with a case management decision. In *Mannion v Ginty* [2012] EWCA Civ. 1667 at [18] Lewison LJ said: "it has been said more than once in this Court, it is vital for the Court of Appeal to uphold robust fair case management decisions made by first instance Judges."

20. In *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ. 1258, the test in considering an appeal against a decision of this nature was neatly encapsulated by Sir Terence Etherton MR at paragraph 68:

> " … The fact that different Judges might have given different weight to the various factors does not make the decision one which can be overturned. There must be something in the nature of an error of principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable."

Chronology of the action

21. In 2013 the Defendant was having severe marital difficulties and so entered a written retainer with the Claimant solicitor for representation which was contained in a letter dated 16.8.2013. The Claimant acted for the Defendant for three years and then came off record because the Defendant was not paying his costs. A solicitor and client assessment was started and the Claimant put in his bill of costs in the sum set out at paragraph 7 above. The Defendant had made payments on account of £59,254. The balance left outstanding was over £70,000.

22. A two day detailed assessment was listed in June 2017 and in the first day and a half, during which both parties were represented by counsel and the Claimant was present, it became apparent that the hearing was going to need more Court days. The Judge allowed the parties to take a short adjournment to see if they could negotiate the remaining issues and the parties reached agreement that the assessed costs would be in agreed specific sums item by item, all of which they had agreed. There was insufficient time to complete the hearing so the parties informed the Judge that they had settled and the case came back before the Judge six days later. On the 14th of July 2017 the Judge noted in the recitals to the Order that the Claimant's bill of costs had been "assessed at £104,060". In fact, that was an agreed sum between the parties. The Judge then went on to consider the costs of the assessment and awarded the Defendant his costs because more than 20% had been assessed off the Claimant's bill of costs. Those costs were summarily assessed at £21,285. Other Orders were made at the same time.

23. On the 15th of August 2017 the Claimant appealed in the wrong division. The appeal was refused on paper but was renewed and came before Mr Justice Williams on the 18th and 19th of December 2019. He gave judgment on the 20th of December 2019 (the judgment is in draft but sighed as approved and contains typos). The copy I have has no neutral citation number. He noted that the Claimant applied in the week before the detailed assessment hearing for an adjournment, leave to amend the bill of costs and an interim payment on account. That application was rejected by the Judge because it was made by e-mail, a route not permitted at that time, and no fee had been paid. Williams J. had the benefit of the transcript of the detailed assessment which showed that the Judge made decisions in respect to various points as the case progressed but on 29th June 2017 the Claimant again applied for an adjournment to amend the bill. This application was withdrawn. It became apparent at midday on the 30th of June that more Court time would be needed and the Judge gave the parties the opportunity to enter discussions. After an adjournment the parties returned to Court the same day and the Claimant's costs draughtsman told the Judge that he was happy to say the parties had "reached agreement covering all of the items in the bill of costs" but the parties had not calculated the total and so were unable at that time to work out whether more than 1/5 of the total bill had been assessed off under their agreement. The hearing was adjourned to 6th July for a 30 minute appointment. The parties attended then and the total was given of £104,060. This represented a 22.6% reduction and led to costs being awarded to the Defendant. The Claimant sought to persuade the Judge that there were special circumstances relating to various offers and counter offers made but the Judge rejected those submissions and summarily assessed the Defendant's costs at £21,285.

24. Williams J noted that various directions Orders were made in the appeal, some of which were not complied with by the Appellant. The Respondent had filed a skeleton argument which was not included in the appeal bundle and many documents were duplicated. The Appellant's grounds of appeal and skeleton were not drafted in an appropriately professional way. Williams J. had to reframe the arguments so that they were recognisable as grounds of appeal. At the commencement of the appeal the Claimant applied to adjourn yet again. He suggested he wanted to brief counsel and had had insufficient time to prepare. This application was refused. Williams J identified 9 grounds of appeal with 6 sub grounds. They were:

> "i) The Master was wrong not to adjourn the hearing in Order to allow the proposed Appellant to file an amended bill of costs and to provide for a longer time estimate which would have enabled the assessment process to have been completed by the Master.
> ii) The Master was wrong to delegate the assessment of a very significant part of the bill to the costs draughtsman whose summary approach led to an excessive reduction in the fees allowed
> iii) The Master was wrong to reduce items 34 and 37 in the bill because they represented time that the proposed Appellant had actually spent at court.

iv) The Master was wrong to disallow legal research in respect of financial eligibility for legal aid because it was work that had been carried out.
v) The Master was wrong to reduce the number of letters out allowed for in items 16 and 37 because the letters had been written reasonably.
vi) The Master was wrong to invite the proposed Appellant to withdraw his claim for incoming letters because they were provided for in the solicitor/ client retainer letter.
vii) Alternatively, if the Master was correct to exclude them in their entirety that figure should have been removed from the total sum of the bill for the purposes of calculating the 1/5 rule.
viii) The Master was wrong to reduce the allowance for routine items from £22.52 to £18 per item.
ix) The Master was wrong to Order the proposed Appellant to pay the proposed Respondent's costs. He should have determined that there were special circumstances meriting a different Order. The case of *Stone Rowe Brewer v Just Costs Ltd* permits such a departure. The Master should have found the following to be special circumstances:
a) Misconduct of the proposed Respondent and his costs draughtsman in making false statements to the Master.
b) The conduct of the proposed Respondent's costs draughtsman had unreasonably protracted the hearing.
c) The narrow margin by which the proposed Appellant had failed to beat the 1/5 rule.
d) The fact that the proposed Appellant had beaten the proposed Respondent's offer of £105,000.
e) The proposed Respondent's failure to beat a pre-assessment proceedings offer made by the proposed Appellant.
f) The summary assessment of the Proposed Respondent's costs was flawed and the proposed Respondent should not have been awarded the costs of 7 and 14 July."

25. Williams J. then went on to refuse permission on each of the grounds put forward as follows:

> "The Master was wrong to delegate the assessment of a very significant part of the bill to the costs draughtsman whose summary approach led to an excessive reduction in the fees allowed
> 31. The proposed Appellant submits that Master Leonard in effect forced the parties to accept an arbitrary and summary process for the assessment of some 48 items of the bill. He submits that when one has regard to the level of success he had had up to that point, the

amounts which were agreed between the costs draughtsman in respect of the rest of the bill show that that process was arbitrary and unfair.

32. The transcript makes clear that Master Leonard did not force the parties to accept a process by which their costs draughtsman sought to reach agreement on the costs to he allowed. He extended an invitation to the parties to attempt a process which might result in the conclusion of the assessment process that day. It is clear from the transcript that the costs draughtsman consulted with their clients and agreed to attempt that process. The proposed Appellant was present in court and in discussion with his costs draughtsman throughout. At the conclusion of the discussions between the two costs draughtsman the parties went back into court and the court was told that the figures had been agreed. The proposed Appellant did not dissent from what his costs draughtsman said. In any event a period of six days then ensued between the conclusion of the hearing on 30 June and the resumption of the hearing on 6 July. At the commencement of the hearing on 6 July the Master was told that the total sum was agreed. The proposed Appellant was present in court and did not dissent. In the circumstances I am entirely satisfied that the proposed Appellant had agreed to adopting that procedure and had agreed to the figures which emerged from it. The transcript makes clear that Master Leonard did not force the parties to adopt this and had identified that if there were remaining items in dispute he would determine them and that an alternative was to adjourn to a further one or two day hearing some months hence. The proposed Appellant is a professional man and must have been entirely clear as to the options before him. There is no merit in his criticism of the process which was adopted. He consented both to the process and to the figures which emerged from it. That is an entirely legitimate means of resolving a dispute between the parties. Had the costs draughtsman been able to do so before the assessment process and agreement would have been reached and no assessment would have ensued. Had they reached agreement prior to the assessment hearing itself a consent Order may have been lodged. The fact that the agreement was reached partway through the assessment process is neither here nor there. It is part and parcel of court hearings that it is open to the parties to reach agreements at any point prior to the delivery of judgment and the ceiling of the Order. This was a process which was entirely legitimate and consented to. It resulted in agreed figures which subsequently became part of the Order. There is no merit in the proposed Appellant's criticism of the process that was adopted.

33. Having agreed both to the process and the figures he is bound by the outcome. It is trite a party can only seek to set aside an Order or to appeal from an Order which reflects an agreement reached between the parties in very limited circumstances. Fraud, misrepresentation, some mistakes might mean that the consent of a party was vitiated such that they should not be held to the agreement. A supervening event which alters the fundamental basis upon which the agreement was reached might also invalidate the agreement. None of these criteria apply to the agreement as to the costs to be allowed and thus there is no merit in the proposed Appellant's criticism of the figure which emerged from the process. that the proposed Appellant had actually spent at court.

34. Master Leonard did not reach item 34. His rulings ended in respect of item 33. Thus in respect of items 34 and 37 these were items which were agreed between the two costs draughtsman. It is therefore not open to the proposed Appellant to assert that the Master was wrong to reduce this item in respect of the time at court.

The Master was wrong to disallow legal research in respect of financial eligibility for legal aid because it was work that had been carried out.

35. The transcript of the hearing on 30 June deals with this at page 32 through to page 33. The Master disallows the item on the basis that legal research in respect of legal aid eligibility is not chargeable work. The proposed Appellant has not identified any authority or matter of practice which would suggest that this conclusion is wrong. There is therefore no merit in this ground.

The Master was wrong to reduce the number of letters out allowed for in item 16 and 37 because the letters had been written reasonably.

36. The letters at item 37 were reduced by agreement between the costs draughtsman and it is not therefore open to the proposed Appellant to dispute that given the agreement that was reached. In respect of item 16 this is dealt with in the transcript of the hearing of 30 June between pages 24 and 27. In the course of the hearing, Master Leonard inspects the file in Order to look at that correspondence. He records that some of the correspondence are very short emails amounting to 1 line. He indicates that claiming for each one as a separate letter may not be appropriate. The proposed Appellant's costs draughtsman invites him to approach the matter with a broad brush. This is what the Master then does allowing *50* letters for the substance of what is done. Whilst the proposed Appellant may be right that the letters were written and whilst I'm also alive to the fact that this was a bill being assessed on an indemnity basis where any doubt as to the reasonableness of the item would be resolved in favour of the proposed Appellant it is clear that

Master Leonard having looked at the letters did not consider that one line emails could properly be characterised as a letter out attracting the full charge for such an item. That it seems to me is a matter within and the proposed Appellant has been unable to identify any argument which would indicate that Master Leonard' s decision was outside the wide parameters of his discretion. There is therefore no merit in this point.

The Master was wrong to invite the proposed Appellant to withdraw his claim for incoming letters because they were provided for in the solicitor client retainer letter.

37. Throughout the bill separate charges were made for letters in. The retainer letter between the proposed Appellant and the proposed Respondent permitted a charge to be made for letters in. Thus on the face of the bill it was a legitimate charge. However in the replies to the points in dispute which was signed by the proposed Appellant himself it states "*in Order to progress matters, the RP (receiving party) agrees to waive his claim for charging letters in despite the parties agreeing to it under contract. See letter of engagement dated 16 August 2013."* This stance was confirmed by the proposed Appellant's costs draughtsman during the hearing. The transcript for 29 June at page 17 lines 16 to 22 records this explicitly. It is therefore simply not open to the proposed Appellant to assert that the Master was wrong when this was conceded both in the replies and in the hearing. Alternatively if the Master was correct to exclude them in their entirety that figure should have been removed from the total sum of the bill for the purposes of calculating the 1/5 rule.

38. The proposed Appellant argued that if these charges were not permissible they should have been taken off the total amount of the bill which would then have reduced the headline figure by £11,476. If that had been removed the headline figure would have been £122,961 and the total amount allowed of £104,000 would then have meant the bill was not reduced by more than 20%.

39. This contention has some superficial attraction. It face is the Court of Appeal in *Bentine* (see below) ruled that the wording of Section 70 (10) Solicitors Act 1974 is to be construed according to its natural meaning. In that case the Court of Appeal considered similar arguments in respect of items which were said to be irrecoverable. They concluded that the wording of the section required the court to look at the 'amount of the bill' which was represented by the headline figure rather than seeking to identify particular components which might alter the starting point for the 1/5 rule assessment.

40. Even had the Court of Appeal not provided such guidance which points clearly to the proposed Appellant's contention being wrong

rejected the argument. The bill that was rendered by the proposed Appellant to the proposed Respondent prior to the assessment process identified the headline figure as £134,437.30. The bill that went into assessment was for the same psalm and the points in dispute and the replies dealt with that. It was a concession made in the replies that led to the figure for the letters in being excluded. This was clearly part of the assessment process and so I conclude that the exclusion of that sum of £11,476 should not lead to a reduction in the headline amount. Having regard to both of those points I do not consider that there is any merit in this ground.

The Master was wrong to reduce the allowance for routine items from £22.50 to £18 per item.

41. Letters out were charged by the proposed Appellant at £18 per item until 17 November 2014. It was not therefore a decision of the Master to allow £18 per item up until November 2014. There is no basis for this ground.

The Master was wrong to Order the proposed Appellant to pay the proposed Respondents costs. He should have determined that there were special circumstances meriting a different Order. The case of *Stone Rowe Brewer-v-Just Costs Ltd* permits such a departure. The Master should have found special circumstances

42. The proposed Appellant submits that there were a raft of matters which the Judge ought to have taken into account as amounting to special reasons which would have justified this applying the 1/5 rule in some way even by making no Order for costs. The proposed Appellant invited me to consider the *Stone Rowe Brewer* case and said it was authority for the proposition that a wide range of matters might amount to special reasons including beating an offer.

43. Section 70 of the Solicitors Act 1974 provides as follows

"(9) Unless-

(a) the Order for assessment was made on the application of the solicitor and the party chargeable does not attend the assessment, or

(b) the Order for assessment or an Order under subsection (10) otherwise provides, the costs of an assessment shall be paid according to the event of the assessment, that is to say, if the amount of the bill is reduced by one fifth, the solicitor shall pay the costs, but otherwise the party chargeable shall pay the costs.

(10) The costs officer may certify to the court any special circumstances relating to a bill or to the assessment of a bill, and the court may make such Order as respects the costs of the assessment as it may think fit.

44. The Court of Appeal have considered the operation of section 70 (9) and (10) in *Wilson solicitors LLP-v-Bentine and Stone Rowe*

Brewer LLP -v- Just Costs Ltd [2015] EWCA Civ 1168. In the first of the appeals the Court of Appeal considered what fell within the 1/5 rule and in the second appeal they considered the meaning of special circumstances. In Bentine the Court of Appeal held that as a matter of statutory interpretation the figure to which the l /5 rule applied is the amount of the overall bill presented by the solicitor. That was the ordinary and natural meaning of the words which Parliament intended to be applied. The Court of Appeal held that there was no good reason for dividing up different elements within the bill for the purposes of the application of the 1/5 rule and that the sum presented in the bill and the sum allowed on assessment were the two figures to which the 1/5 rule applied. The Court of Appeal considered that an earlier decision which permitted different parts of the bill to be treated differently and thus excluded from the 1/5 rule had been decided per incuriam; see paragraphs 20 - 58.

45. In the *Stone Rowe Brewer* appeal the Court of Appeal held that the test for special circumstances was *'whether something so outside a run-of-the-mill case has occurred as to justify departing from the primer face the result given by the default one fifth rule in section 70 (9)'* [#67] simply that one is looking for something significant and out of the ordinary course which justifies departing from the rules set by Parliament. The Court of Appeal said that is a value judgment which experienced costs Judges are well placed to make. The Court of Appeal emphasised that the starting point in the 1/5 rule is a statutory rule which is a piece of consumer protection which defines the winner. Special circumstances have to be viewed in this light and the extent to which they provide justification for the court imposing a different costs Order still requires the court to have regard to the statutory winner.

46. The transcript of the covers the costs arguments. The costs argument was advanced by the proposed Appellant. Prior to that hearing he would have known that the total sum agreed put him to the territory of the 1/5 rule and that he was facing the likelihood of an Order that he pay the proposed Respondents costs. He was therefore in a position to identify matters which would have amounted to special reasons. As the transcript shows the only matter which he raised was the fact that the sum agreed and assessed meant he had beaten the offer of the proposed Respondent. The Master identified that this was different to having beaten and offer made by yourself which plainly would be highly relevant to the determination of costs. However the Master identified that beating an offer made by the other party was quite a different matter. The usual approach in costs is to consider whether the receiving party has beaten an offer they made. If they have that will be a powerful consideration in

support of an argument that they should receive some benefit in terms of the costs consequences. Equally in respect of the paying party where the receiving party fails to secure a sum greater than an offer made by the paying party that might be a powerful reason for making a costs Order more beneficial to the paying party. Thus I am quite satisfied that the proposed Appellant having beaten and offer made by the proposed Respondent value in the costs evaluation. Most significantly though the proposed Appellant did not advance any of the arguments that he now advances in this appeal. One of the points made at sub paragraphs (a) through to (h) were made to Master Leonard save for the beating of the proposed Respondent's offer. It is therefore not permissible for the proposed Appellant to seek to criticise the Master's decision based on matters that were not advanced in argument before the Master. The proposed Appellant submitted that matters such as the conduct of the proposed Respondent's costs draughtsman and the inordinate time he took up ought to have been in the Master's mind as a relevant consideration. I do not accept that it is the Master's function of his own motion to consider issues which might amount to special circumstances when he has legal representatives before him. No doubt Master Leonard had dealt with many cases in the intervening week and would not have been mulling over whether any special circumstances existed for departing from the 1/5 rule. It is for either the cost draughtsman or in this case the proposed Appellant himself to advocate the reasons why they say special circumstances exist. Given that he did not do so at the time it is not open to him to advance such arguments now. Insofar as he advanced an argument about having beaten the proposed Respondent's offer the decision of Master Leonard in that regard was well within the parameters of his discretion. Although the proposed Appellant argued that Master Leonard had applied the 1/5 rule to rigidly giving the statutory provision too much weight I do not agree. As the Court of Appeal made clear the 1/5 rule identifies a statutory winner and so even if special circumstances are established the statutory winner retains the benefit of that position. There is therefore no merit in the proposed Appellant's challenge to the costs Order made. The summary assessment of the Proposed Respondent's costs was flawed and the proposed Respondent should not have been awarded the costs of 7 and l4th July.

47. The proposed Appellant argues that the award of the Respondent's costs for the hearing on 14 July was wrong and that the proposed Respondent was just costs building. He also challenges the sum that was summarily assessed. He argues that the hearing on 14 July arrays because there was a mistake in the cash account but that was a simple mistake as to the addition of VAT. However the

> outcome of the hearing on 14 July was that further directions were given in Order to finally determine the cash account point the transcript of the hearing of 14 July and that of 6 July suggests there is more to the cash account issue than the proposed Appellant asserts. In any event he does not identify any argument in respect to the Master's decision making on the costs which suggests that his decision was wrong. In the circumstances this ground is without merit. In respect of the amount summarily assessed the bare challenge in the grounds of appeal is not supplemented in the skeleton and nor were any points made in oral argument. I therefore have no idea what it is that the proposed Appellant complains about in respect of the amount summarily assessed. I am therefore unable to see any merit in these grounds.
>
> Conclusion
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> 48. Having regard to all of those conclusions it will be apparent that I do not consider that this appeal had any prospect of success still less a real prospect of success. On closer analysis of all of the points made by the proposed Appellant they evaporate. In the course of the hearing the proposed Appellant made submissions which suggested that he was critical of the conduct of his costs draughtsman in various ways. If he was dissatisfied at the time no dissatisfaction or concern was expressed to Master Leonard. In any event if there are any criticisms the proposed Appellant wishes to make in respect of his costs draughtsman they are not matters which provide any foundation for an appeal.
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> 49. As a result I refuse permission to appeal in respect of all of the grounds advanced by the proposed Appellant."

26. On the 19th of May 2022 the cash account was considered and the various costs for the appeal and the hearings since were assessed. The Order made by the Judge states that the terms of settlement "were agreed" for this hearing. The Judge set out the Order I have summarised above which dealt with the costs of the hearing of the 14th of July 2017, 6th December 2021, 18th January 2022 and the appeal before Williams J. The Judge also awarded the Claimant £78,513, being the balance outstanding on the bill of Costs.

27. Straight after that consent Order, on the 19th of May 2022, the Claimant applied for a stay. This was dismissed by the Judge on the 27th of June.

28. On the 25th of July 2022 the Claimant issued a notice of application for the Judge to recuse himself with the Claimant asserting that he had no confidence that the Judge would uphold his judicial duties. He also applied to vary the Order of 19th May to include payment by instalments and applied to add as a party to the proceedings: the Solicitors Regulation Authority. I have not seen the Order made on those applications.

The Appeal

29. The Claimant issued a notice of appeal on the 22nd of May 2022. By this notice the Claimant expressly only appealed the consent Order on the 19th of May 2022 but did not call it a consent Order. The Claimant applied to set it aside and also made other applications for: (1) the Respondent to provide a copy of his retainer within 14 days; (2) the Respondent to provide documentary evidence of the payments made to his solicitors and counsel; (3) the Respondent to provide a sealed copy of "the application to strike out the Appellants appeal". The Claimant also re-applied for a stay of execution. The skeletons filed after the notice went far further and sought to attack the 2017 order and the May 2022 Order.

Analysis of each ground

30. The grounds of appeal contained abusive language alleging that the Judge was biassed. I ignore those. There is no evidence provided to support that wild assertion.

Consent Orders appealed

31. Many of the grounds below relate to Orders which were entered by agreement between the Claimant and the Defendant. Insofar as any ground of appeal relates to a consent Order in my Judgment the ground of appeal has no realistic prospect of success unless the Appellant has put forward a reason to undermine the consent Order which is valid in law. The standard reasons are: fraud, misrepresentation, mutual mistake or the like. No such evidence has been provided.

Second attempt to appeal

32. In so far as any of the grounds are second attempts to appeal the 2017 Order, the first attempt having failed before Williams J, in my judgment they are an abuse of the Court's process and totally without merit.

The 20% rule

33. In the skeleton argument the Appellant asserted that the "overriding ground of appeal" that he put forward was that the Judge made an error in June 2017 by failing to use the correct starting figure for his bill of costs when determining whether, on assessment, it had been reduced by more than 20%. I have set out above some of the rationale for this argument but the more detailed rationale was that the Appellant asserted that the Judge decided that he could not receive payment for letters in and therefore this was not awarded in the assessment.

34. To substantiate this ground of appeal the Appellant would have needed to have provided the transcript of the hearing before the Judge in June 2017 but he did not. Secondly, he made exactly the same point on the first appeal and this was dismissed by Williams J in December 2019 for the reasons set out above. It is an abuse of process for a litigant to apply a second time for permission to appeal when he has already applied, in time, and permission has been refused. Far worse though, this Appellant put together an

appeal bundle which did not include his previous notice of appeal, grounds of appeal or the Judgment of Williams J. refusing permission for the appeals. This Appellant is a solicitor of the Supreme Court. This Court was only made aware of the contents of the judgment in the previous appeal because the Respondent appeared and put in a Respondent bundle which included that Judgment.

35. **Ground 1: Costs statement served late.** This was an assertion that the Respondent's "bill of costs" (singular) should have been struck out for failing to comply with practice direction 44 paragraph 9.5 (4). That practice direction requires a statement of costs for a hearing to be filed and served not less than 24 hours before the time fixed for the hearing. Later in the skeleton the Appellant appears to allege that two breaches had occurred, one at the detailed assessment hearing in 2017 and the other at the appeal hearing in 2019.

36. Because this ground was put forward years out of time in relation to the 2017 Order Sir Stephen Stewart, on the 1st of March 2023, required the Appellant to apply for permission to bring the appeal out of time by 4pm on 19 April 2023 and gave directions which required the appeal bundle to contain as a minimum the relevant parts of the transcript of the hearing before the Master on the 29th to 30th of June 2017; the relevant parts of the transcript of the hearing before the Master on the 20 of October 2022 and a formal application notice.

37. The application time limit was not complied with. I note that the appeal bundle contains the transcript of the hearing on 14th of July 2017 but not the hearings of 29th and 30th of June 2017 therefore it did not comply with Sir Stephen Stewart's directions. Nor did it have any transcript of the hearing on the 20th of October 2022. I also note that the Appellant applied on 21.4.2023 for an extension of the time limits in the Order of 1st March 2023 (he was out of time for the application for permission for Ground 1). He also applied for an oral renewal of his application for permission and for relief from sanctions.

38. No further Order is set out in the appeal bundle relating to the appeal.

39. I do not grant permission to the Appellant, 5 years out of time, for an extension of time to appeal on ground 1, the Order made by consent in 2017. The application was not made in time in accordance with Sir Stephen Stewart's Order. The bundle breaches Sir Stephen Stewart's Order. No adequate reason was put forwards for the failure to appeal earlier. The Claimant's witness statement sworn on 16.11.2023 provides no reasonable excuse. There is no evidence to support when the Defendant's statements of costs were actually served in any witness statement and there was nothing in the appeal bundle by way of emails or letters showing the dates of service. No transcript was relied upon to show whether these points were taken at the relevant hearings. Even if I had granted an extension of time to appeal, I would have refused substantive permission on this ground.

If there was anything in this point in relation to the 2017 Order it should have been taken in the 2019 appeal.

40. **Ground 2: Disproportionality**. In this ground the Appellant asserts that the Judge failed to consider the disproportionate level of the Defendant's fees compared to the Claimant's fees for the appeal determined by Williams J. The Defendant's fees were over £45,000 and the Appellant's fees were just over £8,000.

41. To determine how the Judge came to his decision on the assessment of the costs of the appeal in the sum of £30,609, I would need to see the Judge's reasoning. The Appellant has not put any Judgment of the Judge in the appeal bundle and there is no transcript of the hearing on 19th May 2022. The Order made on that date states "and upon terms of settlement being agreed". That Order contains, at item 5, the Order that the Claimant should pay the appeal bill provisionally assessed by costs officer Kenny and the costs of its assessment in the total sum of £30,609. Not even the provisional assessment was put in the Appellant's appeal bundle. The Respondent provided the provisional assessment carried out by Sally Kenny in his bundle. That included a statement that she had seen the retainer and noted the bill of costs of the Defendant was signed and found no breach of the indemnity principle.

42. At the appeal hearing I asked to see the Appellant's costs schedule to be able to explore the allegation of disproportionality. However, the Appellant's bill of costs was not in the appeal bundle. Therefore, the details of the alleged disproportionality could not be examined. I consider that this ground of appeal has no realistic prospect of success because: (1) the evidence to prove it was not provided; (2) the assessment of the Defendant's costs was agreed; (3) the sum was put into a consent Order; (4) there is no copy of the transcript of the hearing on the 19th of May 2022 in the appeal bundle or his reasoning so I cannot analyse the Judge's reasoning or see whether this matter was raised before the Judge by the Claimant at the time.

43. **Failure to provide retainer.** An additional assertion made within ground 2, which should have been put in a separate ground, is the Appellant's submission that the Judge failed to see or consider the retainer between the Defendant and his solicitors for the costs awarded to the Defendant. In my judgment this ground has no realistic prospect of success. There are various reasons for that conclusion. Firstly, there is no transcript of the hearing on the 19th of May 2022 or of the Judge's reasons before me, therefore this Court is unable to analyse whether the Judge did see the retainer. Secondly, Miss Kenny the costs assessor, expressly stated she did see the retainer. Thirdly, I do not know whether the Claimant raised this point at the hearing. If he did not then he would have to explain on appeal why he did not raise it earlier. Such arguments cannot be raised only on appeal, they have to be raised at the hearing to which they apply unless there is a good reason why they were not raised.

44. **Ground 3:** in this ground the Appellant again raises disproportionality. I have dealt with that ground above.

45. **Ground 4:** in ground 4 the Appellant again raises the alleged failure to produce a retainer but does not say at which hearing. I assume this refers to the May 2022 hearing. I have dealt with this point above.

46. **Ground 5:** in this ground the Appellant asserts that the Judge failed to consider various additional points of dispute filed by the Claimant, the most significant of which is the retainer point. I have dealt with that above. No other point is set out or detailed in the ground.

47. **Grounds 6 (i) and (ii):** the Appellant asserts that this is an additional ground for "striking out" the Respondent's bill of costs on the ground of disparity between the cost schedule produced at the hearing before Williams J. (£37,630) and the cost schedule for the detailed assessment (£45,152). In my judgment this ground has no realistic prospect of success. That is because: firstly, there is no transcript of any Judgment provided by the Judge on the 19th of May; secondly, there is no transcript of the hearing; thirdly, the Order was a consent Order and hence agreed by the Appellant and fourthly, I have no evidence of whether the Appellant took this point at the hearing.

48. **Ground 7: duplicated items.** The Appellant asserts that there were £4,770 worth of duplicated items in the Defendant's bill of costs. The Appellant does not identify which bill of costs this relates to. The ground goes on to suggest that the "Master" failed to spot the duplication until it was pointed out. Therefore, this ground does not appear to be a ground of substance because no actual error is alleged. It is not alleged that the Master rejected the point. In this ground is a further assertion in relation to unspecified items of costs of £21,000 but the ground appears to state that the issue was resolved and the item was reduced to £1,200. The other reasons stated in ground 2 also apply. Therefore, this ground does not have any realistic prospect of success.

49. **Ground 8:** in ground 8 the Appellant repeated his ground relating to the failure of the Defendant to produce the retainer to the Judge. I have dealt with this above.

50. **Ground 9:** in ground 9 the Appellant relies on all of the Appellant's points in his points of dispute dated 1.3.2022, however that document was not in the appeal bundle. More specifically the Appellant asserted that the Defendant claimed the cost of the attendance of a solicitor who did not attend a hearing. The hearing was not identified. The Appellant claimed that the Defendant's bill of costs included duplicated work with counsel and failure to use the appropriate grade of fee earners. At the appeal hearing the Appellant made no effort to justify or evidence these assertions. The Defendant's bills of costs were not in the appeal bundle. Furthermore, without seeing a transcript of the hearing on the 19th of May or the Judge's reasoning on the 19th of May it is not possible for this Court to understand what decisions the Judge took (if any). In addition,

it is apparent on the face of the Order of the 19th of May that the parties reached agreement on all items in it. This ground does not have any realistic prospect of success.

51. **Ground 10:** the Appellant asserts in this ground that the Judge insisted that the Appellant's costs be limited to litigant in person rates. The Appellant asserted that solicitor litigant rates should be 2/3rds of the normal rates. This ground might have had some legs if the assessment being appealed was the Appellant's bill of costs. However, that occurred back in 2017. This ground appears to relate to the hearing in May 2022**.** The only part of the Order made on the 19th of May which awarded costs to the Claimant was paragraph 1 in the sum of £1,245. No attempt was made at the appeal hearing to explain whether this ground of appeal applied to that sum. The Claimant's relevant bill of costs in relation to that sum for that hearing was not in the appeal bundle. The Order was made by consent. I do not consider that this ground has any realistic prospect of success.

52. **Ground 11:** in ground 11 the Appellant asserted the Judge showed bias towards the Respondent. The evidence produced in support in the appeal bundle was non-existent. The assertion made in the grounds was that the Claimant had to persuade the Judge to award him costs when the Defendant's counsel failed to attend a previous hearing and a wasted costs Order was made. The Claimant asserts that he obtained the Order which he wished on this issue and therefore this ground of appeal does not have any relevant substance.

53. **Ground 12: Recusal application.** In this ground the Appellant mentions an application for recusal which he made alleging bias by the Judge which he himself accepts he aborted. This actually occurred after the May Order. The Appellant also asserts there is "overwhelming" evidence that the Respondent's bill of course was "doubtful". The Appellant asserts that the only explanation for the prejudice and bias is that the Judge either knew the Defendant or was being influenced by a "third party". No evidence was put before me or was contained in the appeal bundle to justify these assertions. In my judgment they are totally without merit and were an abuse of the Court process. This is particularly worrying because the Appellant is a solicitor of the Supreme Court.

54. **Ground 13: Strike out application.** The phraseology of this ground is as thick and sticky as 10 day old porridge. The Appellant appears to complain that the Master failed to consider the Appellant's costs of resisting an application to strike out the Respondent's application to strike out the Appellant's appeal. The Appellant asserts that one of these applications was never made and an Order was made for costs to be reserved. This ground of appeal was not explained during the hearing. No copy of any relevant Order with costs reserved was highlighted in the appeal bundle. In the Appellant's skeleton argument marked as "final" no ground 13 is mentioned, it stops at 12. Without a copy of the transcript of the hearing of 19th May or the reasons given by the Judge for the Order he made; without copies of the applications and taking into

account that the May Order was by agreement between the parties, I do not consider this ground has any realistic prospect of success.

55. **Ground 14: Appellant was forced to change his position and settle the issues.** The Appellant asserts that by reason of the failures set out in grounds 1-13 he was forced to change his position and compromise the proceedings. He asserts that: the Respondent's bill was grossly disproportionate; the Judge deprived the Appellant of the ability to seek to strike out a potentially fraudulent claim for £12,000 of costs for an application to strike out the appeal which was never made; the Judge deprived the Appellant of the opportunity to challenge the general accuracy of the Defendant's bill on duplication of work and duplication by using counsel; the Defendant's costs were disproportionate; the Defendant sought the costs of a solicitor attending a hearing when the solicitor did not do so.

56. In relation to this mixed bag of complaints some overlap with matters I have already dealt with above. As to the others, there was no evidence in the appeal bundle of any of them. The Defendant's bills of costs were not in the appeal bundle. Therefore, at the hearing the Appellant was unable to point to the relevant matters to explain his complaints. In addition, there was no transcript of the May hearing or the Judge's reasoning. Furthermore, the May Order was made by consent. This ground does not have realistic prospects of success.

The Respondent's submissions

57. I am grateful to the Respondent for providing vital documents omitted by the Appellant, attending and making short and accurate submissions to the effect that the Appellant was misleading the appeal Court at the interlocutory stages of this appeal by failing to disclose the details of the appeal made against the 2017 Order and the full decision by Mr Justice Williams in 2019.

Conclusions

58. For the reasons set out above I refuse to extend time to appeal the Order of 2017 and refuse to grant permission for any of the grounds of appeal put forward by the Appellant because none has any realistic prospect of success. There is no other good reason to grant the appeal.

59. The stay imposed on paragraphs 4-7 of the Order made on the 19th of May 2022 but issued the 20th of May 2022 is terminated forthwith.

60. I award costs against the Appellant in favour of the Respondent in the sum of £2,000 plus VAT in relation to counsel's fees and £200 + VAT in relation to solicitors fees for the appeal.

61. I will mark the appeal totally without merit because I consider that it is.

END