Neutral Citation Number: [2024] EWHC 672 (KB)

Appeal Ref: KA-2023-000074
Case No: KB-2019-003694

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2024

Before :

Mrs Justice Yip DBE
Sitting with Costs Judge Nagalingam

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Between :

Simon Coram (Executor of the Estate of Margaret Jean Coram – deceased)	**Appellant**
- and –	
D R Dunthorn & Son Limited	**Respondent**

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Benjamin Williams KC (instructed by **Humphrys & Co**) for the **Appellant**
Kevin Latham (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing dates: Wednesday, 13th March 2024

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Approved Judgment

This judgment was handed down remotely at 12:00 on 22 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE YIP

Mrs Justice Yip DBE :

1. This is an appeal against a decision of Deputy Costs Judge Joseph ("the costs judge") on 30 March 2023 to disallow leading counsel's fees when determining the Appellant's recoverable costs on detailed assessment.

2. In hearing the appeal, I have been assisted by sitting with Costs Judge Nagalingam. I have discussed the arguments and my conclusions with him and am grateful for his assistance.

3. The underlying claim arose out of the Appellant's mother's death from mesothelioma. Her late husband, the Appellant's father, predeceased her. He also died of mesothelioma. In an earlier action, the Respondent admitted that the father was negligently exposed to asbestos dust over a period of around 7 days in the 1970s and paid compensation to his estate. It was the Appellant's case that his mother had been subjected to secondary exposure to asbestos via contact with her husband and/or his clothing when he returned from work. A claim on her behalf was intimated before she died but proceedings were not commenced until after her death.

4. Liability was denied. The Respondent denied that any negligence on its part had materially increased the risk of the deceased developing mesothelioma.

5. The claim was assigned to the fatal mesothelioma list and directions were given by Master Davison, including placing the case in listing category C. It was listed for trial with a three day estimate in the week commencing 2 March 2022.

6. On 7 February 2022, the parties agreed a settlement in the total sum of £75,000 with the Appellant's costs to be assessed on the standard basis if not agreed.

7. Following the settlement, the Appellant's solicitors presented a Bill of Costs which included abated brief fees for leading and junior counsel. The briefs had been delivered on 28 January 2022. The fee charged for leading counsel, Mr Harry Steinberg KC (then QC) was £25,000 plus a success fee uplift of 27.5% and VAT. That for junior counsel, Ms Gemma Scott, was £12,500 plus uplift and VAT. Both fees had been calculated on the basis that they represented 50% of the brief fees for trial and reflected the stage at which settlement was achieved. The total costs claim net of VAT was £178,207.

8. In response to the Bill of Costs, the Respondent served Points of Dispute, contending that the claim for costs was disproportionate and "wholly out of kilter with the issues in the case". The Respondent suggested that the disproportionate amount of costs resulted from an excessive amount of time spent on the case, lack of sufficient delegation to lower grade fee earners, excessive time recording of administrative and day to day work, the use of leading counsel and excessive counsel fees.

9. In reply, the Appellant's solicitors contended that when the claim was commenced it had a value in excess of £200,000 but had been reduced in value by the deceased's untimely death. The Respondent had resisted settlement until just before trial, putting forward arguments that had found favour in an earlier case in entirely different circumstances. It was said that the claim was important and complex, and raised an issue of significant public importance which had ramifications for other cases involving low level exposure which was likely to require determination at appellate level. This

was relied upon in justifying the amount of work done by an experienced Grade A fee earner and the instruction of leading and junior counsel for trial.

10. The costs judge conducted a provisional assessment on 4 October 2022, by which time the only items remaining in dispute were counsel's fees. The costs judge disallowed leading counsel's fees altogether and allowed a fee of £10,000 plus uplift and VAT for junior counsel. The Appellant exercised his right pursuant to CPR 47.15(7) to seek an oral review. This led to the decision which is the subject of this appeal, which confirmed the provisional assessment.

11. For the purpose of the oral review, the Appellant additionally sought to rely upon a statement from Mr Steinberg KC dated 1 March 2023. The costs judge noted that much of what was contained in the statement amounted to submissions that might have been made by Mr Williams KC, who represented the Appellant before the costs judge. Nevertheless, he treated the statement as an amendment to the Appellant's Replies to Points of Dispute and took it into account in reaching his decision.

12. In his statement, Mr Steinberg set out his undisputed experience in mesothelioma litigation. He explained that he first became aware of this case in the autumn of 2021 when Ms Scott approached him. Prior to that, she had advised that leading counsel be instructed. Mr Steinberg read some of the background material, forming the initial impression that it was a very difficult case. That view appears to have been informed to a significant degree by the decision of a Deputy High Court Judge in a case decided in 2020: *Bannister v Freemans PLC* [2020] EWHC 1256 (QB). Mr Steinberg and Ms Scott had appeared for the claimant in that case which failed on its facts. Having found against the claimant on the basis that it had not been established that the deceased had in fact been exposed to asbestos in the occupational setting, the judge went on to consider what the position would have been if he had accepted the claimant's evidence of short-lived exposure to asbestos dust at work. He concluded that, even if the deceased had been exposed to asbestos as claimed, such exposure was de minimis and could not be viewed as resulting in a material increase in the risk of developing mesothelioma.

13. Mr Steinberg considered that the judge in *Bannister* erred in confusing causation and risk and in his treatment of epidemiological evidence. Permission to appeal was refused in that case on the ground that the decision turned on the judge's primary findings of facts. However, Mr Steinberg asserted that the observations made by the judge on the secondary point had had a profound effect on asbestos litigation generally, leading to defendants routinely running the de minimis argument in low exposure cases. Indeed Mr Steinberg described the point as "perhaps the most difficult issue currently arising in industrial litigation and one of the most important in personal injury law as a whole." Some support for his view as to the significance of the *Bannister* decision is to be found in an article published in the Journal of Personal Injury Law entitled *"When is a risk of death trivial? Causation in mesothelioma claims"* (2020) 4 JPIL 244.

14. Mr Steinberg argued that it is common in all mesothelioma cases, whether or not there is an issue of principle, for the parties to instruct leading counsel. I am bound to say that I think this is a substantial overstatement and the argument was not adopted in the submissions made by Mr Williams. However, it was maintained that this case was particularly challenging and that it provided an opportunity to revisit *Bannister* in the

anticipation that the issue would ultimately have to be considered by the appellate courts.

15. In November 2021, although not then formally instructed, Mr Steinberg advised Ms Scott and the Appellant's solicitor that they ought to instruct a medical statistician. A short report was obtained from Professor Norrie. I note that the Appellant did not have permission to rely on evidence from Professor Norrie, nor was this sought at any stage.

16. In mid-January 2022, the Appellant's solicitor invited Mr Steinberg to enter into a conditional fee agreement to appear at the trial. Due to existing commitments, Mr Steinberg was able to accept instructions only if the brief was delivered before the first week in February. In his statement, he details how he then prepared the case for trial and conferred with Professor Norrie by telephone on 3 February. I note that no separate fee was charged for this. By then, the Respondent had entered into negotiations and the case settled on 7 February.

The judgment of the costs judge

17. There was, and remains, no dispute as to the law to be applied in deciding whether leading counsel's fees should be allowed. It is agreed on both sides that the law is appropriately summarised in the White Book 2023 edition at paragraph 47.14.13 (page 1556). The costs judge summarised the relevant principles at paragraphs 24 and 25 of his judgment. It is not suggested that he misstated the law. The judge identified the need to have regard to the following factors:

> "i) the nature of the case;
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> ii) the claim's importance for the client;
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> iii) the amount of damages likely to be recovered;
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> iv) the general importance of the case, that is to say the extent to which it might affect other cases;
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> v) any particular requirements of the case, e.g. the need for legal advice, or for special expertise, e.g. in examining or cross examining witnesses; and
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> vi) any other reason why an experienced and senior advocate may be required."

18. He then set out the relevant parts of CPR 44.3 and 44.4 so far as they applied to assessment on the standard basis. As is well-known, this requires the court to only allow costs which are proportionate to the matters in issue and to resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party, having regard to all the circumstances.

19. Having analysed the competing submissions made to him, the costs judge stated that the decision whether to instruct counsel and when and whom to instruct is for the client. That is uncontroversial. It is something reflected in the conditional fee agreement between the client and solicitor. The costs judge then said that the instruction of leading

counsel results in a significant further liability being placed on the client, in the first instance. He went on:

> "Sometimes, the solicitor will be able to advise with certainty that the financial liability which the client will incur, if he accepts the solicitor's advice, is more than likely to be recovered from his opponent, if the client wins and obtains an order for the payment of his costs. On other occasions, there will be less certainty such that there might be a significant risk that the client will not be held entitled to recover all or part of the additional financial liability he is being advised to incur."

20. The costs judge said that the Points of Dispute put counsel's fees, and particularly Mr Steinberg's fees at risk and that the substance of the objection was clear. He noted though that the Appellant's Replies "did not explain the conducting solicitor's thought process or his reasons for instructing Mr Steinberg at the time he was instructed". He noted there was no statement from the conducting solicitor and that he did not attend the oral review. There was no evidence from Ms Scott or any information placed before the court as to precisely why and when she advised that a leader should be instructed. The costs judge said that the procedure in the Senior Courts Costs Office is usually informal and that evidence can be taken from solicitors informally and the court will also consider and take into account contemporaneous attendance notes. His attention had not been drawn to any specific attendance note which might have been prepared by the solicitor at the time he advised his client to instruct a leader.

21. The result was that there was nothing from the conducting solicitor or Ms Scott to help him understand the thought process which might have justified the instruction of leading counsel. The costs judge acknowledged that this was not of itself fatal but said it was a factor he took into account. He took account of Mr Steinberg's evidence but did not think it helped to any significant degree in deciding whether it was reasonable and proportionate for him to be instructed. He noted that the statement contained factors which seemed to him to take matters no further, for example the characterisation of the claim as a public liability claim rather than an employer's liability claim.

22. The costs judge said that it ought to have been a relatively simple exercise for the conducting solicitor to have furnished the court and the Respondent with his own explanation for advising the client to incur an additional liability of £50,000 (leading counsel's full brief fee) about a month before the trial was due to commence.

23. The costs judge then noted that Master Davison had assigned the case to listing category C, apparently without objection. He said that was surprising, given the considerable significance and importance which the Appellant sought to place on the case. Again, that was not fatal but was, he said, a factor to take into account.

24. The costs judge acknowledged that the case raised some issues which were difficult and complex. He recognised that had the case proceeded to trial, it was probably likely that there would have been argument about the observations in *Bannister*. However, he said that the relevant remarks were obiter dicta and "ought not to be elevated to something more significant or difficult to deal with." He also accepted that there would have been a need for competent and probably detailed cross-examination but said that this did not, of itself, justify the instruction of leading counsel. Further, he did not accept that the

speed at which Mr Steinberg assessed matters following the receipt of the expert statistical evidence demonstrated that it was reasonable and proportionate for a leader to be instructed. He expressly rejected any contention that only leading counsel could have assimilated, applied and advised on the information contained in the relatively short report.

25. The costs judge took account of the value of the claim, noting that from the time when the deceased had died approximately 3 months after the solicitors were instructed it had a claimed value of approximately £115,000. He acknowledged this was a significant sum of money to the Appellant but "not a huge sum in the general scheme of things". He also accepted that the Respondent should not benefit from any advantage it gained from the untimely death of the deceased. Further, he recognised that the case was of importance to the Appellant, who had suffered the double tragedy of losing both his parents to mesothelioma.

26. Having weighed all the circumstances which he identified, and having reminded himself that he should not disallow leading counsel's fees merely because the case was within the capability of the particular junior instructed, the costs judge was not persuaded that it was reasonable and proportionate for leading counsel to have been instructed. He said that whilst no single issue had any precedence over any other, he remained troubled by the absence of any first hand explanation as to why advice which had such a significant financial impact was given to the appellant so close to trial. In any event, there remained a doubt which he was required to resolve in favour of the Respondent.

The parties' submissions

27. On behalf of the Appellant, it is contended that the costs judge's reasoning was flawed and that his decision should accordingly be set aside. It is submitted that the decision to disallow leading counsel's fees was outside the range of reasonable outcomes. In arguing that it was manifestly reasonable for leading counsel to be instructed, the Appellant submits that this was a very distressing case of wrongful death where liability was disputed on substantial grounds in a developing area of jurisprudence. The case involved complex expert evidence. Further, it would openly challenge the correctness of a recent decision of the High Court, where the issues had been described in a leading specialist journal as very significant indeed and likely to require the intervention of the appeal courts.

28. Dealing with the points which the Appellant contends ought to have led to only one outcome, namely the recoverability of leading counsel's fees, these may be divided into the following categories:

    i) the importance and value of the case itself;

    ii) difficult issues of law and fact;

    iii) the complexity of the expert evidence;

    iv) the importance to and impact of the case on other cases.

29. It is submitted that the costs judge significantly understated the impact and significance of *Bannister* and failed to recognise that if *Bannister* was correctly decided this claim would also be dismissed since the factual position presented even greater challenges. Further, the costs judge's analysis of the significance of the obiter dicta in *Bannister* stood in stark contrast to the JPIL commentary. *Bannister* could not be dismissed as a decision on its facts. A successful outcome in this case depended on attacking not only the reasoning in *Bannister* but also the same extremely complex expert evidence and literature that underpinned it. As a result, it is submitted that the costs judge failed to appreciate the need for leading counsel's skilful cross-examination and submissions at trial.

30. It is also submitted that the costs judge mischaracterised Professor Norrie's report placing too much reliance on it being short when it was but an initial report obtained at short notice and intended only to summarise potential flaws in the Respondent's expert evidence which the trial advocate would have to master.

31. The Appellant also contends that the costs judge took irrelevant matters into consideration putting weight upon the absence of any note of the Appellant being advised about the financial risks of instructing leading counsel and placing too much weight on the absence of any evidence from the solicitor. During his oral submissions, Mr Williams argued that the costs judge was proceeding on an erroneous basis that the Appellant was personally at risk of costs, when that was not so, and that this was itself a sufficiently serious flaw as to require this court to set aside his decision and exercise the discretion afresh.

32. It is further contended that the category C listing was an irrelevant factor which should not have been taken into account and, in any event, was obviously due to oversight and nothing more.

33. Further, Mr Williams suggested that the costs judge approached the question of doubt wrongly, having recourse to reliance on resolving doubt in favour of the paying party (pursuant to CPR 44.3(2)(b)) too readily. He submitted that this only arose in marginal cases and was akin to a statement of where the burden of proof lay. He said that CPR 44.3(2)(b) does not require that the benefit of any doubt is given to the paying party such that the slightest doubt should determine the outcome.

34. In response, Mr Latham submits on behalf of the Resppndent that the costs judge's decision is unassailable on appeal. This was an evaluative decision which an appellate court must be slow to reverse. As has been stated on numerous occasions and is well-known, any costs appeal faces a high bar. As Wilson J said in *SCT Finance v Bolton* [2003] 3 All ER 434:

> "For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely".

35. Mr Latham contends that the judgment below is an impressive and thorough analysis of all relevant matters. The Respondent rejects the notion that the costs judge failed to understand the decision in *Bannister* or its relevance to this claim. Further, it is submitted that no proper criticism can be made of the costs judge's treatment of the

expert evidence, including that of Professor Norrie. The Respondent argues the costs judge was entitled to take account of the absence of evidence from the solicitor since he was required to place himself in the "chair" of the solicitor who made the decision to instruct leading counsel. There was no explanation as to why after litigating the claim for more than four years, it was decided to instruct leading counsel so soon before trial. The Respondent contends that the costs judge applied the relevant test entirely appropriately and weighed all relevant factors, reaching an entirely appropriate decision. In short, it is submitted that it was not reasonable or proportionate to instruct leading counsel having regard to all the circumstances of the claim.

Discussion and conclusions

36. There is no disagreement between the parties as to the law that applied to the assessment of costs or as to the approach to be taken on this appeal. Mr Latham did not suggest that the requirement to resolve any doubt in favour of the receiving party could lead to the slightest doubt being determinative, and that is plainly not so. However, the provisions of CPR 44.3(2)(b) go beyond merely setting out where the burden of proof lies. A sensible approach is required reflecting the underlying policy that the intention is that courts should not spend undue amounts of time on resolving issues of costs. The costs judge was right to note the requirement to resolve doubt in favour of the paying party. I do not accept he misstated the relevant test or that he arrived too quickly at recourse to CPR 44.3(2)(b). On the contrary, his judgment makes it clear that he did not do so. It was a point covered at the very end of his judgment, after balancing the factors he identified as relevant.

37. There is no doubt that the subject-matter of this claim was of the utmost importance to the Appellant and his family. The loss of one parent to mesothelioma is traumatic. For the surviving parent then to be diagnosed with and die from the disease is particularly harrowing. The position of the Appellant and his family cannot be viewed otherwise than with profound sympathy. However, the importance of the subject-matter is not to be elided with the importance of the case. In itself the fact that a case involves a death will not justify the instruction of leading counsel. Many, if not most, fatal accident and other wrongful death claims are conducted by junior counsel acting alone. At the time leading counsel was instructed, it was known that the value of the claim was relatively modest in the context of a High Court action. Damages were not required for future care or to cover future pecuniary loss. As the costs judge found, the Respondent should not benefit from the untimely death of the deceased, but that does not detract from the fact that the costs judge had to consider the decision to instruct leading counsel in the context that existed at the time. Part of that context was its monetary value and the limited recoverable heads of claim. The costs judge's approach to the nature, value and importance of this individual claim cannot be faulted.

38. So far as the facts were concerned, the questions raised were not particularly complex. The fact that the Appellant was required to rely on hearsay evidence undoubtedly added to the litigation risks but the relevant focus here was complexity, which is not the same as litigation risk. The factual issues were of no great complexity.

39. The case did raise potentially difficult questions concerning the medical evidence and legal issues. The issues to be determined were identified in the defence. However, it is apparent that neither Master Davison nor the Appellant's advisers viewed the case as one of particular complexity at the time of the hearing to show cause why judgment

should not be entered, as is apparent from the standard directions given, the time estimate for trial and the fact that the case was placed into listing category C, none of which seems to have been challenged by the Appellant. At no stage (including at the time of listing questionnaires) did the Appellant's representatives seek revision of the time estimate or the reassignment of the case for the purposes of listing.

40. In my judgment, the costs judge was right to view the assignment of the case to listing category C, and the absence of any attempt by the Appellant's representatives to revisit that as being of some relevance, albeit not decisive. I am unimpressed by the argument advanced on behalf of the Appellant that the listing category is of no significance to practitioners. Competent representatives are well aware of the importance of assisting the court in listing decisions.

41. The reality is that the approach to listing reflected that, although the case involved some complexity, in itself it was the sort of case routinely covered by junior counsel or as Mr Latham puts it the "bread and butter" for experienced juniors such as Ms Scott who practice in asbestos claims.

42. The real thrust of the reasoning in support of the instruction of leading counsel was eventually spelled out by Mr Williams in his oral submissions on appeal. As the trial approached, this case was seen as another opportunity to "have a go at the *Bannister* point". That, taken with the complexity of the case itself, led the Appellant's representatives to "tool up" for trial. Reading between the lines, it appears that this may have been recognised by the Appellant's representatives at a relatively late stage, by which time the case had been prepared in accordance with the standard directions. Had it been identified as a case which might break new ground earlier, it might have been prepared differently. For example, by seeking to rely on evidence from Professor Norrie and seeking leading counsel's opinion sooner.

43. In his skeleton argument, Mr Williams stated that the directions were given before *Bannister* was decided. In fact, they were given a matter of days after the judgment in *Bannister* was handed down but perhaps at a time when the judgment had not been fully assimilated by the Appellant's representatives.

44. Had they revisited the directions, including the listing category, that would have alerted both the Respondent and the court to the need to consider the allocation of appropriate resources to the trial. That would have been consistent with the overriding objective under CPR 1.1 which includes ensuring that the parties are on an equal footing and allotting an appropriate share of the court's resources. Of course, no one would suggest that a party to a claim would spell out the difficulties they have identified to their opponent. However, identifying that the stance taken by the Respondent suggested that the *Bannister* point was likely to be litigated again would not have prejudiced the Appellant and would have laid down a marker both for the Respondent and the court. That might have cast a different light on the instruction of leading counsel and the subsequent assessment of costs.

45. As it was, the costs judge approached costs on the material before him. He looked for evidence to understand the thought process for instructing leading counsel shortly before trial in a case that up until then had apparently been treated as one that could be managed by junior counsel, with standard directions and a category C listing.

46. The costs judge acknowledged that the obiter dicta in *Bannister* was likely to feature at the trial of this case. He was not wrong to say that obiter dicta should not be elevated into something more significant or difficult to deal with. The observations made at first instance by a Deputy High Court Judge in a claim that failed for other reasons are in no way binding authority. To that extent, *Bannister* did not materially change the issues in this case which had been identified prior to directions being given and upon which junior counsel had advised. Those issues had to be decided on the facts and on the evidence to be presented at trial. It was unnecessary for the costs judge to enter into an analysis of any factual distinctions between *Bannister* and the present case. Nor did he need to dwell on the complexity of Professor Norrie's evidence, which the Appellant did not even have permission to rely on at trial. Instructing leading counsel could not substitute for any deficiency flowing from a failure to instruct an appropriate expert earlier.

47. I accept that it is apparent from the article in JPIL and the extract from Kemp and Kemp to which I have been referred that *Bannister* has attracted some significant attention amongst practitioners in this field. I understand why claimant representatives may be keen to litigate another low exposure case with a view to obtaining resolution of the issue, via the appellate courts if necessary. I also recognise that claimants' representatives rarely get to select the ideal opportunity to develop points of law in personal injury actions as so much depends on which cases insurers choose to fight rather than to settle. However, the mere fact that a case may result in an appeal does not lead automatically to the conclusion that leading counsel should be instructed at trial. The issue remained whether it was reasonable and proportionate to instruct leading counsel in all the circumstances.

48. One consideration was the complexity of the cross-examination of experts. The costs judge acknowledged that there would have been a need for competent and probably detailed cross-examination of the various witnesses, including experts, but found that was not sufficient to justify the instruction of leading counsel. He was entitled to reject any contention (if such was made) that only a leader could assimilate, apply and advise on Professor Norrie's short report.

49. In my judgment, the costs judge was entitled to weigh the absence of any explanation from the Appellant's solicitor or junior counsel as to the thought process which justified the significant and costly decision to instruct leading counsel. As he made clear, the judge did not treat this as decisive but it left him without clear insight into the reasoning behind the decision to instruct a leader in a case which had been conducted to that point as one requiring significant management by an experienced Grade A fee earner and the instruction junior counsel alone. At the point at which leading counsel was instructed both had already done much work, contributing to the overall costs. The reasonableness and proportionality of also instructing leading counsel had to be viewed in that context.

50. It is right that the costs judge had the statement of Mr Steinberg but he was entitled to find that it did not assist to a significant degree in deciding whether it was reasonable and proportionate for him to be instructed. The costs judge was required to put himself into the position of the solicitor at the time he instructed leading counsel rather than to view matters from leading counsel's perspective. It is clear that he did not reject the claim solely on the basis that he did not additionally have a statement from the solicitor. His point was that there was an absence of evidence of the contemporaneous thought

processes that led to the decision to incur the very significant costs of instructing leading counsel in January 2022.

51. In arguing that the costs judge made a significant error in relying on the absence of any contemporaneous evidence of the advice to the Appellant to incur the cost of instructing leading counsel, Mr Williams suggested that the costs judge erred by failing to recognise the reality that there was no financial risk to the Appellant personally because claimant lawyers act in mesothelioma cases under conditional fee agreements with non-recourse terms.

52. I have not seen Mr Steinberg's conditional fee agreement but based on my own experience and that of Costs Judge Nagalingam, it is unlikely that it can be said that the instruction of leading counsel comes with no financial risk to the client. Certainly, as the solicitors' agreement made plain, the instruction of counsel and arrangements for payment were to be discussed with the client. However, this is largely beside the point as I am unable to accept Mr Williams' interpretation of the costs judge's reasoning.

53. The judgment must be read as a whole, rather than by selecting individual parts and analysing them out of context. At paragraphs 44 and 45 of the judgment, the costs judge drew a distinction between uncontroversial decisions and those likely to be contentious. He referred to the instruction of leading counsel resulting in a significant additional financial liability being placed upon the client "in the first instance". At paragraph 48, he suggested it ought to have been simple for the solicitor to furnish his own explanation for advising the client to incur a very significant additional liability about a month before the trial was due to commence. As paragraph 56, he said that the days when litigants could employ almost unlimited resources to fight cases and expect to recover them from the losing party had long since gone. At paragraph 57, he said that he remained troubled by the absence of a first-hand explanation as to "why advice was given to the Claimant which had such a significant financial impact so close to trial."

54. I do not consider that the judgment read as a whole demonstrates a misunderstanding of the reality of the likely financial impact of instructing leading counsel. It is right that any such liability was very unlikely in practice to fall on the Appellant personally but that was not the concern identified by the costs judge. The point was that the instruction of leading counsel in this case and at the stage it occurred was always likely to be seen as contentious since it would drastically increase the claim for costs. The costs judge was entitled to think that it was surprising that the thought process behind something with such a financial impact was not better evidenced. It is clear that the costs judge's analysis was directed towards the reasonableness and proportionality of instructing leading counsel rather than being based on any misunderstanding of where the true liability was likely to rest.

55. Standing back and looking at the judgment below as a whole, it is clear that the costs judge correctly identified the legal principles he had to apply. He carefully analysed the competing submissions and weighed all relevant circumstances. He recognised the need to consider whether the cost of instructing leading counsel was reasonable and proportionate in all the circumstances and that any doubt should be resolved in favour of the paying party. I have not identified any material flaw in his reasoning. This was a careful and balanced judgment in which the costs judge arrived at a decision that was reasonably open to him.

56. That is not to say that it will never be appropriate to instruct leading counsel to appear at first instance in an action of relatively modest value. Plainly, there have been and will continue to be many examples of such cases where it is entirely appropriate for leading counsel to be instructed having regard to the issues which are likely to arise. Without in any way suggesting that this is what happened in this case, I make it clear that any attempt by insurers to argue that *Bannister* should carry weight at the stage of negotiating damages but not when it comes to costs would be deprecated. If a claim is contemporaneously identified as one raising an important point of principle, it may very well be reasonable to instruct leading counsel. Of course, consideration would also need to be given to managing the proportionality of costs overall.

57. Each case will fall to be determined on its own circumstances and in light of the material placed before the judge carrying out the assessment. In this case, I have simply concluded that the costs judge did not err in the exercise of his discretion.

58. In those circumstances, this appeal must be dismissed.