IN THE COURT OF APPEAL (CIVIL DIVISION)ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION

No. CH- 2018-00030

(Master Gordon Saker)

[2019] EWCA Civ 897

7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Tuesday, 26 February 2019

Before:

HIS HONOUR JUDGE KLEIN

(Sitting as a Judge of the High Court)

B E T W E E N :

AINSWORTH — Claimant

- and -

STEWARTS LAW LLP — Respondents

MR. J. MUNRO(instructed by Clarke Barnes) appeared on behalf of the Appellants.

MR. R DUNNE (instructed by Stewarts Law LLP) appeared on behalf of the Respondents.

J U D G M E N T

JUDGE KLEIN:

1 This is an appeal in proceedings for the detailed assessment of solicitor and client costs between the claimant, Mr. Kjerrulf Ainsworth and the defendant, Stewarts Law LLP. In particular, this is an appeal from a final costs certificate dated 8 November 2018 which recorded that the senior costs judge, Master Gordon Saker, had assessed the costs payable by the claimant, ("the client"), to the defendant, ("the solicitors") in the sum of £200,706.05 including £18,000 for the costs of the detailed assessment proceedings.

2 The background to the claimant's engagement of the defendant, the termination of the defendant's retainer and the circumstances in which the detailed assessment proceedings were begun is helpfully set out in the skeleton argument of Mr. Munro who has appeared on this appeal for the claimant as follows.

3 The claimant instructed the defendant as his solicitors on 17 October 2017 to act for him in a dispute with his former partner, Caroline Burnell, after the breakdown of the relationship between them. The claimant was not satisfied with the services of the defendant and therefore terminated the retainer on 23 November 2017. The claimant was entitled to a detailed assessment of the defendant's costs pursuant to s.70 of the Solicitors Act, 1974. An order was made for the same on 5 February 2018. Pursuant to that order the claimant and defendant served a breakdown of costs, points of dispute and points of reply.

4 Continuing with the background chronology, the 5 February 2018 order, to which Mr. Munro refers provided, amongst other matters, that:

> "On or before 6 April 2018, the claimant must serve points of dispute on the defendant's breakdown of costs with narrative including a cash account. The claimant is entitled to inspect the defendant's file of papers at the defendant's offices in advance of the points of dispute being drafted and the defendant will facilitate such an attendance."

5 The 5 February 2018 order also provided that if the defendant wishes to serve a reply, they must do so within fourteen days of service on them of the points of dispute, and it set out how a detailed assessment hearing could be requested, and noted the need for the provision of time estimates.

6 In due course, such a hearing was requested, and it was fixed for the 25 September 2018 and the 26 September 2018, with a time estimate of one and a half days'. It is the final cost certificate given following that hearing which is the subject of the appeal. The claimant filed an appellant's notice seeking permission to appeal the certificate on 12 November 2018, on the same day, Mr Justice Arnold gave permission to appeal.

7 The claimant's grounds of appeal challenged the Master's underlying decision which gave rise to the final cost certificate and which is the subject of an *ex tempore* judgment given on 25 September 2018 in relation to the defendant's claim for work done on documents in the following terms:

> "Master Gordon Saker was wrong to refuse to assess the respondent's profit costs of work done on documents for the following reasons –

(a) the same was a breach of the appellant's rights to detailed assessment of the said costs pursuant to s.70 of the Solicitors Act, 1974.
(b) the same was a breach of the appellant's rights to detailed assessment of the said costs pursuant to the court's order of 5 February 2018, requiring a detailed assessment of bills including the said costs.
(c) the appellant was entitled to be heard by the court as to his challenge to the amount of profit costs for work done on documents.
(d) Master Gordon Saker based his decision on his ruling that the appellant's points of dispute did not contain enough detail as to the challenge to the respondent's profit costs of work done on documents. That ruling was wrong. The appellant's points of dispute contained more than enough detail as to the challenge to the respondent's profit costs of work done on documents. Indeed, the appellant's points of dispute contain more detail as to the challenge to the respondent's profit costs of work done on documents and is required by CPR 47, Precedent G of the Schedule of Costs Precedent, model form points of dispute."

8 As the grounds of appeal suggests and as becomes somewhat clearer from the Master's judgment to which I will make further reference, broadly, the claimant complains that the Master erred in what was, effectively, a case management decision. See CPR 1.4 for example, namely, to exclude from consideration the claimant's objections to the defendant's claim for work done on documents.

9 Before turning to the particular facts of these detailed assessment proceedings, it is necessary to say something about the procedural context of detailed assessment proceedings and the correct approach to this appeal. By CPR 46.9(3):

"Subject to para.2, costs are to be assessed on the indemnity basis but are to be presumed –
(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
(c) to have been unreasonably incurred if –
(i) they are of an unusual nature or amount; and
(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party."

10 The particular significance of the presumption which is rebuttable (see PD 46, para.6.2) that costs have been unreasonably incurred when that presumption applies is that, as is clear from CPR 44.3(1) and which is not in dispute on this appeal, such costs are not allowed, that is they are irrecoverable.

11 CPR 46.10 as its opening words make clear, is the rule governing the procedure for detailed assessment of solicitor/client costs although as I have explained, the 5 February 2018 order modified CPR 46.10 so far as is relevant as that rule expressly allows.

12 CPR 46 says nothing about the form and content of points of dispute. CPR 47, which relates to detailed assessment proceedings more generally, or in other contexts at least, does say something about this. Practice Direction 47, para.8.2 provides:

"Points of dispute must be short and to the point. They must follow Precedent G in the Schedule of Costs Precedents annexed to this Practice Direction, so far as practicable. They must:

(a) identify any general points or matters of principle which require decision before the individual items in the bill are addressed; and
(b) identify specific points, stating concisely the nature and grounds of dispute. Once a point has been made it should not be repeated but the item numbers where the point arises should be inserted in the left-hand box as shown in Precedent G."

13 I have indicated that CPR 47 may not apply to solicitor/client detailed assessments so far as the form and content of points of dispute are concerned. Mr. Dunne who appeared for the defendant on this appeal as he did before the Master made that contention. I see the force in his contention. Under the former cost practice direction, the provisions about the form and content about points of dispute, so far as they applied to other detailed assessment proceedings, were incorporated by reference in the provisions relating to solicitor/client assessments. Although the editors of the 2018 *White Book* suggest otherwise, there is no similar incorporation in the current CPR cost provisions. As it happens, in the circumstances of this case, I do not need to decide if Mr. Dunne's contention is right, as I shall explain.

14 I have already mentioned one provision of Practice Direction 46, there is a second one to which I need to make reference and that Practice Direction 46, para.6.15 which provides that:

"6.15 If a party wishes to vary that party's breakdown of costs, points of dispute or reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties. Permission is not required to vary a breakdown of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation."

15 In other words, so far as is relevant, a client or former client such as the claimant has the *prima facie* right to amend his points of dispute.

16 It is not disputed in this case that an Appeal Court can only interfere with a first instance decision if the Appeal Court concludes that the decision was wrong or was unjust because of a serious procedural or other irregularity in the first instance proceedings. As the grounds of appeal make clear, entirely properly in my view, the claimant challenges the Master's decision on the ground he contends that it was wrong. The 2018 *White Book* contains a helpful note a 52.21.5 on when an Appeal Court is entitled to conclude that a first instance decision is wrong. Most relevant is this extract:

"There are some cases where the first instance judge has made a decision which involved the assessment and balancing of a large number of factors, for example, determining whether an action constitutes abuse of process. Such a decision is not an exercise of discretion because there is only one right answer to the question before the judge. The Court of Appeal is reluctant to interfere with such decision; however, the Court of Appeal will interfere if the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible. The Court of Appeal will also interfere if the judge's decision was plainly wrong."

17 All case management decisions must further the overriding objective, (see CPR 1.2) and in determining whether a case management decision is wrong, in my view, an Appeal Court is entitled to test that decision against the overriding objective. In the present case, the principles applicable to strikeout applications provide a useful guide for three reasons:-

1. Because a statement of case is liable to be struck out if it does not further the overriding objective (See CPR 1.3 for example) and as I shall explain in this case, effectively, it can be said that the Master summarily dismissed the claimant's points of dispute on work done on documents, because the points of dispute did not further the overriding objective.
2. Because in making the case management decision being challenged in this case, it was appropriate for the Master to have in mind whether his response to the points of dispute was proportionate, a requirement which is part and parcel of any decision on a strikeout application if a judge determines that a party has failed to further the overriding objective, for example.
3. In that context, particular consideration has to be given to the consequence that a striking out order might prevent a litigant making oral submissions on a case or point which otherwise has a real prospect of success and, as I have already set out, the claimant apparently complains in his first three grounds of appeal that the Master shut him out from orally advancing a point or case he claims he was entitled to advance.

In this judgment I shall call those first three grounds of appeal the, "Entitlement grounds of appeal".

18 It is therefore helpful to have in mind what the 2018 *White Book* says at notes 3.4.1, 3.4.3 and 3.4.4 as follows:

> "The Court of Appeal drew attention to several alternatives to a strikeout under r.3.4 which may be appropriate to deal with non-compliance with time limits laid down by rules or orders awarding cost on the indemnity basis payable forthwith, ordering a party to pay money into court and awarding interest at a higher or lower rate. In *Walsham Chalet Park Ltd (t/a Dream Lodge Group) v Tallington Lakes Ltd* [2014] EWCA Civ 1607, the Court of Appeal held that on an application under r.3.4 for a strikeout for non-compliance, the *Mitchell-Denton* principles have a direct bearing, even though they relate to applications for relief from sanctions rather than applications to impose a sanction."

19 Although *Mitchell* and *Denton* were said to have a direct bearing and were, in effect, applied, it is to be noted that the Court of Appeal stressed that the ultimate question for the court in deciding whether to impose the sanction or strikeout is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strikeout application under r.3.4 the proportionality of the sanction itself is in issue whereas an application under r.3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed.

20 Although the term, "abuse of the court's process" is not defined in the rules or Practice Direction, it has been explained in another context as using that process for a purpose or in a way significantly different from its ordinary and proper use. The categories of abuse of process are many and are not closed. The main categories which have been recognised in the case law are described in the following paragraphs.

> "The court has power to strike out a *prima facie* valid claim where there is abuse of process. However, there has to be an abuse and striking out has to be supportive of the overriding objective. It does not follow from this that in all cases of abuse, the correct response is to strike out the claim. In a strikeout application the proportionality of the sanction is very much in issue. In *Biguzzi v Rank Leisure Plc* [1999] EWCA Civ 1972 the Court of Appeal drew attention to several alternatives to

strike out under r.3.4. The striking out of a valid claim should be the last option. If the abuse can be addressed by a less draconian course, it should be."

21 In *Hayden v Charlton* [2011] EWCA Civ 791 claims for libel brought by claimants in a legal representation against litigants in person were struck out under r.3.4(2)(c) as there had been a deliberate and wholesale non-compliance with the rules and orders of the court by the claimant which resulted in a serious delay to the progress of the claims including the loss of a trial window. The claimants had not been subject to any unless order, but this was not regarded as a bar to striking out the claims. In considering whether it would be appropriate to strike out the claims, the judge took into account that this had implications for the claimant's rights pursuant to Art.6.1 of the ECHR. However, the judge cited that Lady Justice Hale, as she then was, who said in (inaudible) v Bennett:

> "National laws are entitled to regulate their domestic procedures and this includes prescribing timetables and steps which have to be taken within a limited period. If a claimant has not complied with these rules then normally, he will not be able to complain under Art.6. On appeal in *Hayden* no criticism was made of the judgment at first instance."

22 In this case, the defendant's breakdown of costs began –

1. with an introduction about its engagement in the underlying dispute between the claimant and Ms. Burnell.
2. Identified the fee earners who worked on the underlying dispute and their hourly charge-out rates.
3. Dealt with the cash account and,
4. In particular in three schedules running to about twelve pages, dealt with each occasion when work was done on documents, setting out the date the work was done, what work was done, the time spent and who carried out the work."

23 In response to each of the schedules, the claimant asserted substantively in the same way. By way of example, in response to the whole of schedule three, the claimant asserted as follows:

> "The claimant requests the court to note that over a period of four working days, the defendant seeks to claim 39.4 hours of work which is equivalent to approximately 9.9 hours of time every single day. It is the clear opinion of the claimant that any under any stretch of the imagination, a level of time expended can in no way be justified and against the relevant test, the time expended, and its subsequent cost must be deemed to be unusual in nature and amount. As with the timed attendances upon the claimant, the claimant is mindful of the requirements in the Civil Procedure Rules as to the need to keep the points of dispute brief and succinct. It must therefore be stated that all entries are disputed. By way of general indication, however, the claimant can confirm the main issues with the document time are as follows:-
> 1. Significant duplication between fee earners.
> 2. Wholly excessive time expended by fee earners reviewing the matter with reference to the claim.
> 3. Too much time claimed generally in relation to preparation.
> 4. An excessive level of time claimed in relation to drafting of communications.
> 5. Unnecessary inter-fee earner discussions arising due to the duplication to include the preparation of attendance notes.
> 6. Excessive times spent collating documentation.

7. Significant preparation time claimed in relation to meetings with the claimant. It can be confirmed that the above stated list is not exhaustive of the issues, but provide a general overview as to the reason as to why the time claimed is unusual in nature and/or amount. The claimant reserves their position generally to make further and more detailed representations at court."

24 Having regard to the rebuttal presumption to which I have referred, the clear purpose of the claimant's response was to try to shift the burden of proving the reasonableness of each and every item and so their recoverability onto the defendant. In the case of sch.3 there were twenty-one items which were responded to in this way and there were many more items in schedules one and two which were responded to in this way. It is to be noted that –

1. The claimant sought to respond to the three schedules by making two broad generic complaints, namely that the time spent on each item was excessive and that work was duplicated.
2. But the claimant purported to reserve for himself the right to make whatever other or further objections to each item he wanted to make orally at the hearing.

25 The defendant's reply made these two relevant points:

"The vast majority of objections are of a general broad-brush basis which does little to assist the court. Given that the claimant costs draftsman was granted access and carried out an inspection of the defendant's papers in person prior to the service of points of dispute, this failure is surprising and does little to further the overriding objective. The defendant cannot provide any meaningful reply to this general point in the absence of itemised points of dispute being served, permission to rely on the same being a matter for the court and the defendant's position will be reserved and the court will be asked to dismiss this point."

26 That second point being a reference specifically to the objections to work done on documents in sch.3 to which I have already made reference.

27 During the course of the hearing before the Master, the following exchanges took place between Mr. Paul who was the claimant's representative at the hearing and the Master:

"The Master: While the claimant has indicated that all entries are disputed, it isn't stated why any particular entry is disputed and that does cause the defendant a bit of a problem. Because how can they prepare for a detailed assessment when they don't know what is being alleged against them?
Mr. Paul: Master, the client hears that argument, though it is stated that everything is disputed and therefore, if all time ---
The Master: You have to say why it's disputed.
Mr. Paul: The general principles or general arguments have been adopted.
The Master: They wouldn't know which general objections related to which point. Frankly, to challenge every item is a bit odd, given that the claimant obviously accepts that he instructed Stewarts to do the work, he has attended hearings. Is he seriously challenging every item? To what extent is he challenging it?
Mr. Paul: No, indeed, Master, the reality is such that we could therefore go through every item.
The Master: Well, we couldn't because we don't know what your objections are to every item.
Mr. Paul: If that's the case, Master, the fact is that the points of dispute have been filed that disputes all the items and disputes the document.

> The Master: It doesn't say why.
> Mr. Paul: It doesn't say why, I appreciate that.
> The Master: I can't believe that any client who accepts he instructed a firm of solicitors can actually challenge every single item in a document schedule. He can't say that all this work was unreasonable or wasn't done or shouldn't have been done?
> Mr. Paul: No, indeed, Master.
> The Master: Or that no time should be allowed for documents but say where is the solicitor, how is the solicitor to prepare for dealing with this?"

Then it goes on, the points of disputes conclude:

> "The Master: It can be confirmed that the above-stated lists which is the general objection is not exhaustive. There may be other points which aren't even articulated in the points of dispute.
> Mr. Paul: The problem is, Master, I would obviously insist that the points of dispute is not dismissed because issue is taken. However, I would have difficulty to consider as to how otherwise we could proceed, save that the hearing is adjourned for more detailed points of dispute to be filed."

28 It is notable that the claimant's representative accepted that the points of dispute did not identify particular points of dispute in relation to specific items. The following further exchanges then took place, the Master having been invited to, "dismiss" the objection to the work done on documents:

> "The Master: Okay, we are still at the stage of whether the point should be dismissed for procedural reasons. Is there any reply, Mr. Paul?
> Mr. Paul: Master, the client reiterates that they are more than content to deal with the matter on a broad-brush basis. It is argued that this does not represent a disadvantage to the receiving party inasmuch that they have fully prepared for the case, the papers have been fully prepared and already my learned friend has referred you to many, many entries and clearly, has a very in-depth knowledge of it. The items that would be sort of referred to would obviously be, though potentially my learned friend would say that it's not obvious, would obviously be the larger entries and some consideration of those larger entries would be requested. It cannot be suggested that the receiving party is in the dark entirely, albeit that there hasn't, the generalised arguments have been addressed. They cannot argue that they're in the dark and disadvantaged entirely. They can see the document schedule, they can see the time claimed and it will be evident that the larger items are the ones that are going to be queried or questioned as to their reasonableness and appropriateness but in so considering the matter and a broad brush approach, and having had consideration of the papers, the client does not see how there is any unfair prejudice to the receiving party."

29 Again, it is notable that the claimant's representative suggested that, in fact, the claimant only wanted to challenge the larger items on the three schedules although he, effectively, accepted, rightly in my view, that that would not have been clear from the points of dispute and he contended that the defendant was not, "entirely", in the dark about the claimant's objections. It is implicit from that last contention that it was accepted before the Master that the defendant was somewhat in the dark.

30 The Master then handed down judgment on whether the claimant should be entitled to object to the work done on documents and concluded that he should not. During the course of the judgment the Master said:

> "The difficulty with that, it seems to me, is that the claimant has not set out in his points of dispute which items he wishes to challenge and why, and that does cause, as the defendant has indicated in his reply, a difficulty in respect of items which have not yet been identified. They would need to look at the attendance notes to see what work was done and why and the context in which it was done in order to seek to explain why the time claimed is reasonable, if indeed that is the objection, or why a particular fee earner was engaged in doing it and why, possibly, more than one fee earner was engaged in doing it. The purpose of points of dispute is really to prevent that work being done on the hoof in the course of a hearing. The solicitors are entitled to know specifically which items are challenged and the reasons for the challenge. Insofar as the claimant states that all entries are disputed, it seems to me that it would be beholden on him to explain why each particular entry is challenged and whether he is asserting that no time should be allowed or reduced time should be allowed or whether the work should have been done by a different grade of fee earner, but as pleaded, the points of dispute, it seems to me, do not raise a proper challenge to the documents items and certainly do not raise a challenge which can be properly asked by the defendant without a considerable amount of time being spent in looking at the papers to reply to that challenge and that, it seems to me, is a process which, if it is to be done, should be done in advance of the hearing rather than at the hearing. One can well understand why Mr. Paul is seeking to adopt the approach that he is of encouraging the court to take a broad brush, but the difficulty with that approach is that we are not going to be looking at every item. We will only be looking at particular items and presently, apart from Mr. Paul, none of us knows which items those are going to be. It seems to me that that does put the defendant in a difficult position, it also puts the court in a difficult position. I read the papers in the light of the points of dispute as they are pleaded, and I was not able to identify which particular items are challenged or why. In the circumstances, I think the only fair course is to dismiss that point of dispute on the basis that it has not been properly pleaded."

31 Although the Master was apparently specifically addressing only schedule one there, the parties had apparently accepted before him, and before me on this appeal, that his decision was the same in relation to the other two schedules. The theme clearly running through the Master's decision can be summarised thus.

32 In the Master's view, neither the defendant nor the court knew the case which the defendant had to meet. It is right that the Master did not express himself in this way, but it is to be remembered that the Master's judgment was an *ex tempore* one. The consequence of the Master's decision was that of total profit costs claimed in the sum of about £115,000, the Master did not reduce the sum claimed about £64,000 for work done on documents. The Master also refused to adjourn the hearing on the claimant's application to allow the claimant to file more detailed points of dispute on the work done on documents. The Master then continued the detailed assessment hearing which concluded at just after 4.30 p.m. on the first day fixed for the hearing on 25 September 2018, leaving the remaining half-day free.

33 The Master was entitled to conclude that neither the defendant nor the court knew the case which the defendant had to meet on the individual items in the schedule. By way of example, take this item in schedule one to which reference was made in the hearing before me, "28 October 2017, reviewing further message from the client and preparing to respond LG, a senior associate, six minutes."

34 Looking at the points of dispute in relation to schedule one, it is entirely unclear why this entry is said to represent –

1. Significant duplication between fee earners.
2. Wholly excessive time expended on reviewing matters.
3. Too much preparation time.
4. Perhaps drafting of communications.
5. Inter-fee earner discussions.
6. Excessive document collation time.
7. Excessive meeting preparation time.

35 In other words, it is entirely unclear why the claimant contended that the time spent on this item was excessive or duplicated work. Nor is it possible to say what other challenges might be made to this item which the claimant had, purportedly, reserved the right to make at the hearing.

36 Because neither the defendant nor the court knew the case which the defendant had to meet on the individual items in the schedules –

1. The hearing was likely to take longer than it might have done had the claimant clearly set out his objections.
2. The parties were not on an equal footing because the defendant did not know in advance of the hearing precisely the whole of the claimant's objection to each item in the schedules.
3. The claimant's stance was likely to have costs and resources consequences.

37 I have already indicated that there were many items on the three schedules, each and every one of which the claimant formally objected to. Only half a day remained available to deal with these if the Master was prepared to do so. I agree with Mr. Dunn that half a day was not sufficient or was, at least, likely to be insufficient to address every objection to every item in the schedules, a point which the Master and experienced costs judge probably concurred in, it seems to me particularly from para.10 of his judgment.

38 As Mr. Dunn said in para.48 of his appeal skeleton argument, and as he developed at the hearing before me, the claimant would have had to identify each item objected to, state why and then in respect of each the defendant would have had to go into the file and consider the claimant's instructions on the point. Whether consent was given to incur the item, whether the correct fee earner was involved and whether the time claimed was reasonable.

39 It is likely, at best, that the hearing would have had to be adjourned part-heard, in my view, unnecessarily. It follows therefore that in drafting the points of dispute the claimant did not further the overriding objective. Put in the language of Practice Direction 47, para.8.2, the points of dispute were not, "to the point". They did not summarise all of the particular objections to the specific points which the claimant claimed to apparently wish to advance at the hearing at all or so that the court and the defendant knew or knew sufficiently the case the defendant had to meet.

40 In deciding what should happen at the hearing before him, the Master had or was entitled to make such case management decisions as furthered the overriding objective which, as I have indicated, includes ensuring the parties were on an equal footing and ensuring that only an appropriate share of the court's resources were allocated to the proceedings. In particular, the hearing.

41 There were a range of options open to the Master in practice which might have furthered the overriding objective from, at one extreme, making no order and allowing the claimant to

conduct the hearing in whatever way he liked for as long as he liked to the other extreme, which option the Master took, namely to summarily dispose of the claimant's objections to work done on documents.

42 Subject to the entitlement grounds of appeal, the choice the Master made might only be illegitimate in the sense of not furthering the overriding objective in this case, if that choice was not a proportionate response to the claimant's failure himself to further the overriding objective. In this case –

1. The hearing was fixed about five months before it took place.
2. By the 5 February 2018 order the claimant had the right to inspect the defendant's file of papers and that right was apparently exercised.
3. From April 2018, so from about five months before the hearing, the claimant knew from the defendant's reply to the points of dispute that the defendant was complaining that it could not properly respond to the points of dispute on work done on documents because of the generic content of the points of dispute on that work and the claimant also knew that the defendant would be asking the Master to, "dismiss" the claimant's objections.
4. The claimant had the *prima facie* right to amend the points of dispute and give further particulars of his objections to work done on documents but did not do so.
5. The claimant's representative at the hearing before the Master clearly appreciated that the points of dispute did not particularise the claimant's complaints about individual items on the three schedules and he clearly also appreciated that the defendant was somewhat in the dark over the claimant's objections. That is something which the claimant's lawyers ought to have appreciated too simply from reading the points of dispute.
6. As I have explained, if the claimant had been allowed to proceed with his challenge, each and every one of the items in the three schedules, at the very least, the hearing before the Master would have had to have been adjourned part-heard. Even had it been appropriate for the Master to consider only a selection of items, either because it was appropriate to adopt a broad-brush approach or because the claimant abandoned his challenge to some of the items, I am not confident on the available information the hearing before the Master could have been concluded in the available time.
7. It was incumbent on the parties to ensure that the court had an accurate time estimate for the hearing before the Master, a point reinforced by the 5 February 2018 order, to ensure it is reasonable to suppose that the hearing did not have to be adjourned part-heard.

43 I have to remind myself that the matter before me is an appeal and the question I have to ask myself is not what would I have done had I been the first instance judge, but rather, am I satisfied that the Master's decision was outside the range of acceptable decisions so that it was wrong for that reason or, perhaps more accurately, so that it was plainly wrong.

44 The Master's decision was a robust decision but subject to the entitlement grounds of appeal, for the seven reasons I have just set out, I am not satisfied that it did not further the overriding objective. A focus on the overriding objective shows why two arguments Mr. Munro advanced on this appeal do not help the claimant. Mr. Munro said that the points of dispute in this case were in the form of Precedent G, indeed, he said that they were more detailed than Precedent G. Even accepting that –

1. Precedent G applies in this case because Practice Direction 47 does, which is a disputed point.
2. The points of dispute contain as much detail as or more detail than Precedent G which is also a disputed point.
3. Practice Direction 47, para.8.2 is complied with simply by the adoption of Precedent G which, as I have explained, it is not. It does not follow that there was no overarching obligation on the claimant to further the overriding objective.

45 Mr. Munro also pointed out that in practice, cost judges frequently adopt a benign approach to the content of points of dispute, being content to accept generic objections to categories of work. That may be so, and it is possible to understand why that is so where the detailed assessment is of *inter partes* costs where –

1. The burden of proof is effectively on the receiving party in the run of the mill standard basis assessment and,
2. Where the paying party does not have access to the receiving party's solicitor file.

46 Even if the Master might have approached this case in that way, it does not follow that –

1. The claimant is somehow relieved in its case from furthering the overriding objective.
2. It was the only legitimate course to take or that it is the practice was the only way the overriding objective could be furthered.
3. That would have furthered the overriding objective in this case.
4. That this case is not distinguishable because the assessment was to be conducted on the indemnity basis and the claimant had access to the defendant's file. Or
5. The Master's decision was wrong.

47 It follows therefore that subject to the entitlement grounds of appeal, I am not satisfied that the Master's decision was outside the range of acceptable decisions and that it did not further the overriding objective or that it was plainly wrong or, indeed, wrong at all.

48 Do the entitlement grounds of appeal justify departure from that conclusion? Although the claimant does not articulate the entitlement grounds of appeal in this way, if right, the logical consequence is that there was only one legitimate response the Master could give to the points of dispute and the contention that the claimant's objections to work done on documents should be summarily dismissed, namely, that no order should be made and that the claimant should be permitted to conduct the hearing in whatever way he liked for as long as he liked.

49 At the hearing before me, Mr. Munro accepted, properly in my view, that if the Master's decision was otherwise upheld as a legitimate case management decision because I was not satisfied that it did not further the overriding objective, the entitlement grounds of appeal took the claimant's appeal no further and did not assist the claimant. Nevertheless, in fairness to the claimant, I will consider briefly the entitlement grounds of appeal in their widest possible terms.

50 Contrary to those grounds of appeal, I do not accept that the claimant had the unrestricted right to litigate the detailed assessment proceedings, just as any other litigant who has a claim with a real prospect of success does not have an unrestricted right to litigate such a claim. If such a litigant did, the court can never strike out his statement of case or make an unless order which might have that consequence, and the court's case management powers would be severely limited. Such rights such a litigant has, and the claimant in this case had, to access to the court is, and in this case was, qualified by the obligation or the entitlement of the court to case manage the proceedings in issue consistently with the overriding objective. Once that qualification is borne in mind, and bearing in mind too the conclusions I have already reached, the entitlement grounds of appeal do not assist the claimant or change the conclusion I have otherwise reached.

51 Put in the language of Art.6 of the European Convention of Human Rights, I cannot say that the claimant did not have a fair hearing within a reasonable time before an independent and impartial Tribunal established by law. It follows therefore that the appeal is dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

** This transcript has been approved by the Judge **