Case 63
Bloomsbury Law Solicitors

v

Macpherson

[2017] 6 Costs LR 1049

Neutral Citation Number: [2017] EWHC 2708 (QB)
High Court of Justice, Queen's Bench Division
3 November 2017

Before:
Warby J (sitting with Master Leonard as an assessor)

Headnote

Following hard-fought costs disputes between the appellant solicitors and a former client, the court ordered the respondent to pay 75% of the appellant's costs of the assessment process. The appellant sought to appeal the Master's decision relating to the assessment of those costs.

Six issues were raised on appeal; (1) the Master had erred in concluding that the costs of assessment were disproportionate; (2) the hourly rates adopted by the Master for the assessment of the Grade A Fee Earner's costs were too low, having been allowed at £240 per hour in 2012 rising to £320 per hour in 2015; (3) the Master had been wrong to disallow the claim for various heads of costs relating to an order of June 2014; (4) the Master had been wrong to disallow the costs of an application for a stay pending the conclusion of an appeal (reported at [2016] 3 Costs LR 443); (5) the Master had been wrong in disallowing a claim for costs incurred in carrying into effect his order for the payment out of £85,000.00 the respondent

had paid into court; (6) the Master was wrong to order that interest on costs should run at only 2% above base rate.

The court allowed the appeal on the issue relating to costs associated with the order of June 2014, on the basis that the costs were in fact part of the costs of the detailed assessment proceedings. Those costs related to the costs incurred by the appellant firm after conclusion of the Part 8 proceedings regarding the Schedule of Costs for the assessment proceedings; matters relating to the respondent's original claim for interest at the Judgment Act rate of 8% on the amount by which the interim payment he had been ordered to make represented an overpayment; and arranging payment into court of the £85,000.00 the appellant had been directed to pay pending the appeal. The judge had been under a misapprehension as to the exact nature of the costs claimed and had erroneously accepted an argument that these were not costs of the Part 8 claim.

However, on all other issues the appeal was dismissed.

Cases Cited

AEI Rediffusion Music Ltd v *Phonographic Performance Ltd* [1999] 1 WLR 1507

Ahmud & Co Solicitors v *MacPherson* [2016] 3 Costs LR 443; [2015] EWHC 2240 (QB)

Aldi Stores Ltd v *WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748

Bim Kemi AB v *Blackburn Chemicals Ltd* [2004] 2 Costs LR 201; [2003] EWCA Civ 889

Bloomsbury Law Solicitors v *Macpherson* [2016] 6 Costs LR 1227; [2016] EWHC 3394 (QB)

Giambrone and Others v *JMC Holidays Ltd* [2003] 2 Costs LR 189

Higgs v *Camden & Islington Health Authority* [2003] 2 Costs LR 211; [2003] EWHC 15 (QB)

Home Office v *Lownds* [2002] 2 Costs LR 279; [2002] EWCA Civ 365; [2002] 1 WLR 2450

Hunt v *RM Douglas (Roofing) Ltd* (1988) Costs LR (Core) 136; [1990] 1 AC 398

Involnert Management Inc v *Aprilgrange Ltd and Others* [2015] 5 Costs LR 813; [2015] EWHC 2834 (Comm); [2015] 2 CLC 406
King v *Telegraph Group Ltd* [2004] 3 Costs LR 449; [2004] EWCA Civ 613; [2005] 1 WLR 2282

Judgment

1. **Warby J:** This is an appeal from orders made by Master Simons on 23 August 2016. It is brought by permission of Sir Alastair Macduff, granted on 23 May 2017. It is the third appeal from decisions made by Master Simons when resolving hard fought costs disputes between the appellant solicitors and a former client.

Background

2. It was as long ago as April 2012 that the appellant ("Bloomsbury") brought proceedings under Part 7 of the CPR ("the Part 7 claim") against the respondent ("Mr Macpherson") for billed and outstanding costs and disbursements of around £270,000. This was the net unpaid sum allegedly due under a large number of invoices rendered by Bloomsbury to Mr Macpherson over a period of time in respect of work done in various pieces of litigation. The total sum due under these invoices was some £416,000.

3. After some interlocutory complexities, the detail of which it is unnecessary to recite, Master Leslie entered default judgment on the Part 7 claim for £6,600 and damages to be assessed. He also awarded Bloomsbury the costs of the claim, to be assessed. Pending the assessment Mr Macpherson was ordered to make an interim payment on account in the sum of £176,250.

4. By the same order, at the request of Mr Macpherson, and to avoid the need to issue formal Part 8 proceedings, Master Leslie transferred the assessment to the Senior Courts Costs Office ("SCCO"), to proceed by way of a non-statutory assessment of costs. For ease of reference, albeit inaccurately, the assessment process has been referred to as "the Part 8 claim", and I will adopt that label. It was later directed that the assessment should cover all the 81 bills that had

[been] rendered by Bloomsbury, including bills that had previously been paid and were not the subject of the claim.

5. The assessment was then undertaken by Master Simons, in June 2014. By day seven of a hearing originally listed for nine days he had assessed 41 of the bills at a total of £276,899.36 including VAT. At that point, the parties compromised the dispute over the remaining bills, and on 16 June 2014 an order was made for the assessment of Bloomsbury's bills in the total sum of £323,000, with interest of £7,000.

6. Argument on costs followed. On 20 June 2014, Master Simons ordered that Bloomsbury should pay all the costs of the Part 8 claim. He had reduced the total billed costs by some 23%. Having done so, he thought it appropriate to have regard to the statutory rule that where a solicitor recovers less than 80% of his billed costs he must pay the costs of the assessment (s 70 of the Solicitors Act 1974). The upshot was that on 16 June 2014 the Master ordered Bloomsbury to pay all the costs of the assessment.

7. Bloomsbury sought to appeal that decision. Pending the appeal, Patterson J DBE granted a stay of the Master's order of 16 June 2014. On 4 August 2014, the Master ordered Bloomsbury to pay £85,000 into court "by way of interim payment in respect of the sums owing to [Mr Macpherson] as overpayment of fees". The appeal ("the First Appeal") was heard by Males J sitting with an assessor the following year.

8. On 29 June 2015 Males J allowed the First Appeal. The judge held that the Master had been wrong to adopt the Solicitors' Act approach. He substituted an order that Bloomsbury should recover 75% of its costs of the assessment process: *Ahmud & Co* v *Macpherson* [2015] EWHC 2240 (QB); [2016] 3 Costs LR 443 (the decision was made before a name change). As a result, on 28 October 2015, the Master directed that the £85,000 paid in the previous August should be paid out to Bloomsbury, with interest.

9. On 18 December 2015 Master Simons ruled that two of Bloomsbury's bills were non-compliant with the Solicitors Act 1974, as they did not adequately identify what it was that the client was being charged for. Bloomsbury's second appeal was a challenge to that decision. It was dismissed by Lewis J: *Bloomsbury Law Solicitors* v *Macpherson* [2016] EWHC 3394 (QB); [2016] 6 Costs LR 1227.

10. In August 2016, the Master conducted the assessment of

Bloomsbury's costs of the Part 7 and Part 8 claims against which the present appeal is brought.

Issues

11. On this third appeal Bloomsbury raises six issues about the Master's decisions and orders of 23 August 2016.

(1) Proportionality. Bloomsbury challenges the Master's finding that, as a starting point, its bills for the Part 7 claim and the Part 8 claim were both disproportionate.
(2) Hourly Rates. Bloomsbury complains that the hourly rates adopted by the Master for the assessment of its senior "Grade A" fee-earner's costs were too low.
(3) Costs associated with the Master's Order of June 2014. Bloomsbury contends that the Master was wrong to disallow its claim for various heads of costs related to this Order.
(4) Stay costs. Bloomsbury argues that the Master was wrong to disallow the costs of an application it made to Master Simons for a stay pending the conclusion of the First Appeal.
(5) Costs of procuring repayment. The Master disallowed a claim by Bloomsbury for costs incurred in carrying into effect his order for the payment out of the £85,000 it had paid into court. Bloomsbury contends that the Master was wrong to do so.
(6) Interest on costs. Bloomsbury complains that the Master was wrong to order that interest on its costs should run at 2% above base rate to a date in October 2015, thus depriving it of interest at the higher, Judgment Act rate for many months.

Applicable Principles

12. The applicable principles are well-established and uncontroversial. An appeal such as this is a review, not a rehearing: CPR 52.21(1). To succeed, the appellant must persuade the appeal court either that the decision of the lower court was wrong, or that it was unjust because of some procedural or other irregularity: CPR 52.21(3). Only the first of these criteria is relevant here.

13. An appeal court will not upset a discretionary decision unless it is shown that the lower court has either erred in principle in its approach, or ignored a relevant factor or taken account of an irrelevance, or reached a decision that was so wholly wrong that the court is driven to conclude that it has failed to carry out a fair and

proper balancing exercise: see, for instance, *AEI Rediffusion Music Ltd* v *Phonographic Performance Ltd* [1999] 1 WLR 1507, 1523 (Lord Woolf MR).

14. A somewhat similar approach is to be taken to decisions which require the court to take into account, weigh, and balance multiple factors in order to arrive at an overall evaluative decision. Such a decision is not a discretionary one, but the nature of the exercise means it is one with which an appeal court will be reluctant to interfere; though it will do so if there are circumstances which would invalidate the exercise of discretion: *Aldi Stores Ltd* v *WSP Group plc* [2007] EWCA Civ 1260; [2008] 1 WLR 748 [16].

15. The appeal court will accord due weight to any advantages possessed by the lower court. Factors that are often given weight in this context include the experience of the judge involved and the benefit of having examined detailed material before, during, and sometimes after a lengthy hearing over a period of several days. Both those factors are relevant here. Master Simons was a very experienced costs judge. Unusually the proceedings, the costs of which he was assessing, had been conducted before him over a period of seven days.

16. Finally, when considering whether a decision of the lower court was "wrong" the appeal court must have regard to the way the parties argued their cases before the lower court: *King* v *Telegraph Group Ltd* [2004] EWCA Civ 613; [2005] 1 WLR 2282 [54].

Conclusions

17. Applying these principles, my conclusions on the issues raised by this appeal are, for the reasons that follow, these:

(1) Master Simons did not err in his conclusions on proportionality. He made no error of principle, or of approach. In any event I would uphold his conclusion.
(2) The Master's decision as to the appropriate hourly rate for the Grade A fee-earner's work involved no error of principle and was well within reasonable bounds. I uphold it.
(3) The Master was wrong to reject Bloomsbury's claims for costs associated with his order of June 2014. The appeal on that issue is allowed.
(4) Master Simons was right to disallow Bloomsbury's claim for the costs of its stay application to him.

(5) The Master was right to disallow Bloomsbury's claim for the costs of obtaining repayment of funds from the Court Funds Office.
(6) The Master was entitled to reach the decision which he did, so far as interest on costs is concerned. He made no error of principle in doing so.

18. In the result, the appeal succeeds to a limited extent (the total sum involved in ground (3) is £5,262). Otherwise, the appeal is dismissed.

Reasons

Proportionality

19. The bill in respect of the Part 7 claim ("the Part 7 Bill") was £48,557. The Bill in respect of the Part 8 claim ("the Part 8 Bill") was £183,996.43. The Master was unequivocal in his description of these figures. At [22] he described the Part 7 costs as "grossly disproportionate". At [23] he said the Part 8 bill involved costs "at a level that … is something outside of my experience" given the nature of the claim. The time spent was "vastly disproportionate", he said: [24].

20. The test of proportionality which the Master rightly applied was the test that applied to cases commenced before 1 April 2013 (it is preserved, for the purposes of this case, by CPR 44.3(7)). The test was set out in CPR 44.5 which provided, so far as relevant:

> "(1) The court is to have regard to all the circumstances in deciding whether costs were – (a) if it is assessing costs on the standard basis – (i) proportionately and reasonably incurred; or (ii) were proportionate and reasonable in amount …
>
> (2) In particular the court must give effect to any orders which have already been made.
>
> (3) The court must also have regard to –
>
> (a) the conduct of all the parties, including in particular – (i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
>
> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done."

21. The Costs Practice Direction gave guidance about the application of that test, explaining that "11.1 In applying the test … the court will have regard to rule 1.1(2)(c)". Rule 1.1(2)(c) provided that:

"the overriding objective of dealing with cases justly includes, so far as practicable, …

(c) dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; (iv) to the financial position of each party."

22. The Costs Practice Direction went on to say the following:

"11.1 … The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

11.2 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim, and may even equal or possibly exceed the amount in dispute."

23. As is well-known, further, authoritative, guidance on the right approach for the costs judge to adopt when assessing proportionality was given by the Court of Appeal in *Lownds* v *Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 [31]–[39]. Lord Woolf CJ (giving the judgment of the court) explained that a two-stage approach is necessary. At the first stage, the court must take a "global approach", which will indicate whether the total sum claimed is or appears to be disproportionate, having particular regard to the considerations listed

in CPR 44.5(3). A preliminary judgment on this issue must be made at the outset. Where the court determines at this stage that the costs globally are or appear disproportionate it will want to be satisfied that the work done in relation to each item was necessary and, if it was, reasonable in amount. Otherwise, the questions are whether it was reasonable to do the work and, if so, whether the costs are reasonable in amount. Thus, a more rigorous test is applied to the bill if the preliminary assessment is that the global picture is one of disproportionate costs. At the second stage, if it has found the overall bill to be proportionate, the court may nevertheless conclude that parts of the bill are disproportionate.

24. Master Simons adopted the two-stage approach, and reached the initial global view that both bills appeared to be disproportionate. He therefore went on to apply the more rigorous necessity test to individual disputed items. In reaching his initial view, the Master addressed in turn each of the criteria specified in CPR 44.5(3). In doing so he had regard to conduct. He held that the parties' conduct had increased the overall costs. But he declined to make any positive findings as to whether Bloomsbury or Mr Macpherson or both were at fault for bringing about what he found to be a disproportionate level of costs.

25. Bloomsbury's first and main ground of appeal against the decision on proportionality is that this was an error of principle. The argument is that the conduct of the other party is highly relevant, and must be taken into account at this first stage; it should have been assessed; Mr Macpherson's conduct was highly unreasonable, and led to an increase in the level of costs incurred; accordingly, the costs should not have been held to be disproportionate.

26. Bloomsbury also identifies what it contends are further errors in the Master's application of the criteria in CPR 44.5(3). Its case has been somewhat fluid, in that the appellant's skeleton argument goes beyond the Grounds of Appeal, and Mr Marven (who is not the author of those documents) has skilfully developed additional points in his oral argument. But Mr Mallalieu makes no complaint of any of this. Accordingly, there are now four further criticisms of the Master to be considered, namely he was wrong (a) to find that the proceedings were not complex; (b) to find that they were not difficult; (c) having held that they were important to both parties, to find that this did not

affect proportionality; (d) in his approach to the assessment of the value involved.

27. I do not accept any of Bloomsbury's criticisms of the way in which the Master undertook his task.

28. Bloomsbury's main ground of attack is not supported by the passage from *Lownds* on which particular reliance is placed. The Master said that it was "quite clear that these costs have increased considerably because of the antagonism between the parties" but he did not propose to make any findings as to whether this was Mr Ahmud's fault or Mr Macpherson's fault; the parties "were at loggerheads" and it would be against public policy to allow increased costs for that reason.

29. It is said by Bloomsbury that the Master's approach was "contrary to the approach laid down in para [38] of *Lownds*". In that paragraph, Lord Woolf CJ said this:

> "38. In deciding what is necessary the conduct of the other party is highly relevant. The other party by co-operation can reduce costs, by being unco-operative he can increase costs. If he is uncooperative that may render necessary costs which would otherwise be unnecessary and that he should pay the costs for the expense which he has made necessary is perfectly acceptable. Access to justice would be impeded if lawyers felt they could not afford to do what is necessary to conduct the litigation. Giving appropriate weight to the requirements of proportionality and reasonableness will not make the conduct of litigation uneconomic if on the assessment there is allowed a reasonable sum for the work carried out which was necessary."

30. As its opening words make clear, however, this passage is directed to the second stage of the two-stage process, at which the court (having reached the preliminary view that the costs are disproportionate) is applying the test of necessity. The passage offers no support for the submission that it was wrong for the Master to reach his preliminary global view without deciding whether the paying party was at fault for driving up the costs by unreasonable behaviour. On the contrary.

31. The passage which precedes this paragraph of *Lownds* tends to underline the point. In para [37] Lord Woolf said this:

> "37. Although we emphasise the need, when costs are disproportionate,

> to determine what was necessary, we also emphasise that a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. The danger of setting too high a standard with the benefit of hindsight has to be avoided. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty."

If at the second stage the court gives due weight to conduct and adopts a "sensible standard of necessity" it is able to comply fully with CPR 44.5(3)(a) without the need to engage in a minute or detailed analysis of the parties' behaviour before arriving at its preliminary, global view on proportionality.

32. The court is bound to have regard to conduct when assessing proportionality, at the first and at the second stage. But it cannot be said, and is not said, that the Master failed to do this. The criticism is the much narrower one, that he was duty bound to make findings as to fault. In my judgment, no such hard and fast rule can be laid down. The extent to which, and the way in which conduct falls to be taken into account at the first stage will be fact-sensitive. There may be cases in which it is possible swiftly to reach a clear conclusion on one or two discrete and straightforward issues, and thereby attribute responsibility to one side or the other for the fact that costs have been driven beyond what is proportionate. But that will by no means always be the case. In my judgment Morland J was right to conclude, in *Giambrone* v *JMC Holidays Ltd* [2003] 2 Costs LR 189 [37]–[38], that the court in *Lownds* never envisaged that the costs judge giving a preliminary judgment on proportionality would "plough through in detail" a mass of factual material. The initial global view should be taken without recourse to excessively detailed examination of the available material.

33. I have reviewed the list of matters which it is said the Master should have assessed in this case, and heard some limited argument about them. That is enough to make it clear that a proper assessment of the ten items advanced as justifying the size of the bills would have necessitated the resolution of several substantial factual disputes, requiring quite a detailed review of a number of aspects of the case.

Accordingly, I reject the contention that the Master's approach involves a failure to comply with CPR 44.5(3)(a).

34. To approach the matter in the way advocated by Bloomsbury would risk the first stage becoming, in itself, a disproportionate exercise. Here, Master Simons was right to reach his preliminary view without conducting any detailed investigation of the procedural squabbles and mutual recrimination which riddle the parties' points of dispute and replies. Looked at overall, this is a practical and fair approach. A party which has been forced by its opponent's conduct to incur disproportionate costs will not lose out. Such a party will be able to show at the second stage that individual items in its bill were necessitated by the conduct of the other side.

35. I would also endorse the observation of Morland J in *Giambrone* at [56] that "it should be almost never necessary to appeal the preliminary decision, at the first stage, of proportionality". Those observations have added weight in a case such as this, where the costs judge has, as he himself put it, "a unique knowledge of [the] case, having carried out the detailed assessment over seven days and … dealt with numerous interlocutory applications".

36. There is a further reason for rejecting this ground of appeal, which has to do with the way that Bloomsbury put its case before Master Simons. The transcript makes clear that the argument for Mr Macpherson had become quite heated at times, with some quite serious allegations being levelled at Mr Ahmud. In response, counsel for Bloomsbury expressly adopted a detached approach, which eschewed an invitation to make findings of fact as to misconduct. The Master was expressly told that "we are not seeking findings" and that some of the allegations "would require witness evidence or cross-examination". There has been some dispute on this appeal about just how far counsel was backing away from inviting findings as to conduct. It appears to me, however, that there is an uneasy mismatch between the way the case was conducted before the Master and the grounds of appeal which fresh counsel have formulated and argued before this court.

37. I am not persuaded that the Master erred in his approach to complexity or difficulty. He was extremely well placed to assess such matters, and the conclusions he reached were in my judgment well within legitimate bounds. Indeed, I would expressly endorse his findings.

38. The Master acknowledged that the case was important to Bloomsbury for cash flow reasons, and important to Mr Macpherson as he would have to pay the bills. He went on to say that "those things negative themselves out". Mr Marven submits that this is to be read as a finding that the importance of the case to one party cancels out its importance to the other. That involves an error of principle; the two findings should have been treated cumulatively, as support for a finding of proportionality. This is a point with some superficial attraction. In the end, however, I think the force of the criticism is more semantic than substantive. I accept Mr Mallalieu's interpretation of the Master's reasoning, namely that he was treating the importance of the matter to both parties as insufficient to justify an otherwise disproportionate bill.

39. I turn to Bloomsbury's final point on proportionality. In its written Grounds of Appeal Bloomsbury contends that the Master erred by taking into account on this issue the fact that Mr Macpherson had been successful in reducing the firm's bills by over 20%. This is said to be wrong in principle because the decision of Males J on the First Appeal rested on the substantial reduction in the bills which the client had achieved on assessment. The effect of the Master's approach was to expose Bloomsbury to double jeopardy on that question, it is said.

40. In my judgment, this is misconceived. The reason that Males J decided that Bloomsbury should receive 75% of its costs of the Part 8 claim was that this broadly represented the extent to which it was the successful party on that claim. In para [20] of his judgment the Master was carrying out a different exercise. He was considering "the amount or value of the property which was involved". He was seeking to identify what had really been at stake in the Part 8 claim. Nominally, it was the entire amount of the disputed bills. Mr Macpherson had made no offers. But in reality, everyone knew that the true issue was how much of a reduction should be imposed. The reduction actually achieved was a factor to which the Master was fully entitled to have regard when making his assessment of the value of what was in dispute. There is no element of double-counting or double jeopardy.

41. I add that in my judgment the Master's initial global views on proportionality were undoubtedly right. Costs of nearly £50,000 reflecting (for instance) more than 99 hours work on documents alone are, on the face of it, grossly disproportionate to the nature,

complexity and value of the Part 7 claim, its importance to the parties, and all the other factors listed in CPR 44.5(3). This was properly assessed as an essentially straightforward debt-collection exercise involving a substantial but not enormous sum. It was hard fought, but it was not legally or procedurally complex, and had no truly exceptional features.

42. The figure of £183,996.43 for the Part 8 proceedings is equally startling. The attempt to justify costs on this scale on the basis that this costs assessment was comparable to a seven-day trial fails utterly, for the reasons given by the Master. Even if that were a reasonable comparison, the time and costs claimed would still be substantially over the top, in my judgment. The tasks involved should not have been complex or particularly time-consuming, if reasonable records had been maintained. Yet here, the receiving party's solicitor claims remuneration for no less than 489 hours, in addition to the costs of costs lawyers, and counsel. The claim includes as much as 131 hours on drafting and checking the breakdowns of the solicitor's own bills.

Hourly Rates

43. The Master accepted that it was reasonable for Mr Ahmud, as a Grade A fee-earner, to work on the case. But he did not allow in full all the hourly rates claimed for that work. Having concluded, correctly in my judgment, that the bills should be subjected to the more demanding test of necessity the Master allowed rates as follows:

Year	Claimed	Allowed
2012	£270	£240
2013	£300	£300
2014	£300	£300
2015	£350	£320

44. In 2012 Ahmud & Co was based in Outer London for which the guideline hourly rates for summary assessment, set in 2010, were £229–267 (SCCO Guide to the Summary Assessment of Costs, *Civil Procedure* Vol. 1 p. 1665). The figure claimed for 2012 is just above the top end of this range. The rate allowed is slightly below the mid-point of the range, and nearly 90% of the rate claimed. The substantial increase between 2012 and 2013 is accounted for by the fact that in 2013 Ahmud & Co moved from outer London to Mayfair. The Master accepted that the increased overheads justified a 25% increase to the

£300 per hour claimed by the firm, which he allowed in full. This was less than the guideline rate of £317. The Master rejected Bloomsbury's claim for a further increase of over 15% in 2015, when the office was still in Mayfair. But he still allowed an extra £20 per hour, taking the rate to just above the guideline rate, which remained at £317.

45. The criticism advanced by Mr Marven is that the Master effectively applied the guideline rates without any sufficient basis on which to do so. This was not a guideline rate case, he submits. I accept that the guidelines are aimed at helping judges assess costs after hearings of not more than a day; they may be inappropriate for longer and more complex litigation: *Higgs* v *Camden & Islington HA* [2003] EWHC 15 (QB) [39]–[40] (Fulford J). I note also that the Guidelines themselves state that "an hourly rate in excess of the guideline figures may be appropriate for Grade A fee earners in substantial and complex litigation".

46. At the risk of repetition, however, the Master was right to find that this was not complex or difficult litigation. His conclusions on those issues plainly informed his decision on rates, as was proper. The case was much longer than a one day hearing, but it did not place any special demands on the litigator, or it should not have done so. Nor did it have any of the other features that are recognised as justifying enhanced hourly rates. Factors mentioned in the note to the Guidelines from which I have just quoted include high value, urgency, and an international element, or other factors which "would justify a significantly higher rate to reflect higher average costs". None of these are present here. The demands placed on the Grade A fee-earner here do not bear comparison with those involved in *Higgs*, which was a clinical negligence claim for some £3.5m plus substantial education costs.

47. In my judgment, the rates allowed for 2012 and 2015 cannot be criticised. They are well within the range that it was properly open to the Master to allow, in the light of his findings about conduct and complexity. They are not far short of the rates claimed, and are reasonable rates for litigation that has no particularly unusual features other than, perhaps, the degree of mutual animosity exhibited by the parties. That is a feature of the case that might make it necessary to spend more time on the case, but not something that would justify an enhanced hourly rate. Although the Master did not make this point, it is reasonable to bear in mind that these are rates for a solicitor

representing himself. The absence of an external client to whom the professional is accountable is a factor that should temper the rates to be allowed.

Costs Associated with the Order of 14 June 2014

48. In Part 4 of its bill for the Part 8 claim Bloomsbury claimed some £5,262 in respect of costs incurred by the firm after the conclusion of the Part 8 proceedings before Master Simons. The costs were said to relate to three matters: (i) dealing with Mr Macpherson's schedule of costs in relation to the Part 8 claim (pursuant to the costs order made by the Master, but reversed on appeal); (ii) Mr Macpherson's claim of 17 June 2014 for interest at the Judgment Act rate of 8% on the amount by which the interim payment he was ordered by Master Leslie to make represented an overpayment; and (iii) arranging the payment into court of the £85,000 which Master Simons directed Bloomsbury to pay pending the appeal to Males J.

49. Master Simons disallowed all these claims, on principle. He accepted an argument advanced on behalf of Mr Macpherson, that these were not costs of the Part 8 claim, and there was no costs order to which any of these costs could be linked. The Master said "I think these are not costs of the detailed assessment proceedings. The detailed assessment proceedings end when I make my order."

50. Mr Marven submits that this cannot be right in principle. A final decision may leave all manner of consequential matters to be worked out. The costs, for instance, of drafting an order to reflect the outcome, and discussing that drafting with the other side, are incurred after the order is made but are nonetheless costs "of and incidental to" the proceedings themselves within the meaning of s 35 of the Senior Courts Act 1981. Mr Marven argues that all these matters might have been addressed at the final hearing, when the Master dealt with the costs of the Part 8 claim, and submits that if that had been done nobody would have questioned whether the costs were part of the proceedings. He poses the rhetorical question: if the Master is right, must the work be done for free?

51. In my judgment these are powerful points, to which Mr Mallalieu was unable to provide any convincing answer. On my reading of the Master's judgment he seems to have been under a misapprehension as to the exact nature of the costs that were being claimed in this part of the bill. He appears to have thought that the

whole amount related to Mr Ahmud attending unilaterally before Master Leslie on 3 July 2014, to raise questions about the Master's "understanding of interest rate (if any) when the court makes an order pursuant to CPR 25.2". One can see how the Master might have been confused. The bill could certainly have been clearer. But there is no doubt now that it relates to the three matters which I have identified above. And I do not consider that the Master's disallowance of all those costs can be justified on the principle he identified.

52. Timing cannot be a sufficient criterion. Nor do I believe that this decision can be justified, as Mr Mallalieu has submitted, on the basis that the costs relate to some proceedings other than and distinct from the Part 8 claim, such as the post-judgment costs assessment or the appeal to Males J. The process of addressing an opponent's costs schedule is an integral part of proceedings. If an assessment process follows, those costs may be dealt with as part of that process, but if not (and there is no settlement of the issue) the sensible course must be to treat those costs as incidental to the parent litigation. Issues about the consequences of an overpayment on account are "incidental" to the proceedings in which the payment on account was ordered. So are the costs of carrying into effect an order of the court to make a payment into court. In this case, the proceedings to which those steps were integral or incidental were the Part 8 claim before Master Simons.

53. Mr Mallalieu has sought to justify on a different basis the Master's decision to disallow Bloomsbury's costs of attending without notice before Master Leslie. I do not think he is justified in that, in the absence of a respondent's notice. I add that without deciding the point that Mr Mallalieu makes I am not convinced of its validity at this stage. He submits that nothing is recoverable because no order was made at that hearing. True, the general rule is that no costs are recoverable if the court makes an order which does not mention costs (CPR 44.10(1)(a)(i)), and this may apply when no order at all is made. But by CPR 44.10(2) the general rule is displaced where the court makes "any … order or direction sought by a party on an application without notice [which] … does not mention costs"; in such a case the order will be "deemed to include an order for applicant's costs in the case". The other party can apply at any time to vary that deemed order: rule 44.10(3). No such application has yet been made.

54. For these reasons I allow the appeal against the disallowance of

Part 4 of the bill. This is sufficient to dispose of this part of the appeal. The Master made a further observation, that if he was wrong on the principle then "these costs seem to me to be totally disproportionate to the issues". I can see some force in that, especially when it comes to Bloomsbury's claim for the attendance before Master Leslie. It is however common ground that this part of the Master's reasoning could not justify disallowing the entirety of Part 4 of the bill. This and other points are available to be raised as part of the assessment, if one is required.

Costs of Procuring Repayment

55. This part of the appeal relates to some £3,730 which Bloomsbury says it incurred in extracting from the Court Funds Office the £85,000 which Master Simons ordered to be repaid after the successful appeal to Males J. Master Simons disallowed those costs on the same basis: that they fell outside the detailed assessment. The case advanced by Bloomsbury in its Grounds of Appeal is this was wrong, and that these costs were and are "incidental to" the Part 8 claim. That is the submission that was made by Bloomsbury to Master Simons.

56. In oral argument Mr Marven has not advanced that point. He has noticed an obstacle in its way: that when making his order for payment out of the £85,000 Master Simons made a costs order. He ordered that the costs should be reserved. Mr Marven has a way round the obstacle. He points to the general rules about the effect of an order for costs reserved in 44PD 4.2: "The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case." No later order has been made. Mr Marven submits that the consequence is that the fall-back position applies: these costs are treated as costs in the case, and follow the event of the Part 8 claim, which was success for Bloomsbury.

57. This is almost the opposite of the argument that was run before the Master and in the Grounds of Appeal, but no objection has been raised on that score. There is a more substantial problem. 44PD 4.2 sets out rules about the "general effect" of orders that the court will "commonly make before trial". This reserved costs order was made *after* the conclusion of the substantive claim. I accept Mr Mallalieu's submission that it would not be right to apply the fall-back rule about the "general effect" of reserved costs orders made before trial with hindsight, to a case where the reserved costs order was made after the

trial. At that stage the outcome was known, and there would have been no obstacle to the Master making an order for costs in favour of the successful party. Evidently, he did not think that appropriate. The effect is that whilst it would seem to have been open to Bloomsbury (and may yet be open to it) to go back to court to seek a specific costs order in this respect, that has not been done. Its appeal on this point must be dismissed.

Stay Costs

58. On 16 July 2014 Bloomsbury filed an application notice seeking a stay of Master Simons' order of 16 June 2014 pending its (ultimately successful) appeal against that order. The application was returnable on 4 August 2014. In the meantime, a parallel application had been made in the appellant's Notice, and was granted by Patterson J DBE on 31 July 2014. The application to the Master therefore became redundant. Nonetheless, the costs of that application were included by Bloomsbury in Part 5 of the Part 8 bill. The claim (for £435) was disallowed by Master Simons. Rightly so.

59. There was a hearing on 4 August 2014, because Mr Macpherson had applied for an order that Bloomsbury pay him £85,000. An order was made on 4 August 2014 reflecting this. It contained an order for costs reserved. On that basis, the point that Bloomsbury argued before Master Simons in August 2016 was along the lines set out above: the order took effect as an order for costs in the case, which it should recover as the successful party. That argument was said to apply to the costs of Bloomsbury's application, as well as the costs of Mr Macpherson's application. This argument failed before the Master, however because, as Mr Mallalieu was able to show by reference to the transcript, the Master referred to his notes of the earlier hearing and clarified what had taken place. His notes said this: "Claimant's application dated July 16 upon hearing Mr Ahmud and Mr Stacey, no order in view of the stay ordered by Pattison J on 29 July 2014."

60. Reading that together with the formal order dated 4 August 2014 it is plain that the latter related solely and exclusively to Mr Macpherson's application. No formal document was drawn up reflecting the Master's decision and order on Bloomsbury's application for a stay. But the Master's note is an unequivocal record of what in fact occurred. He decided to make no order. The position is as the

Master stated in the course of argument below [p. 31B of the Transcript]: "So there's reserved costs in respect of the defendant's application, but there's no order for costs in respect of the claimant's application." This part of the appeal is dismissed.

Interest on Costs

61. For reasons that have not become clear, no order reflecting the Master's decision has ever been sealed. This has for the most part not presented difficulties. On this part of the appeal however it has made things a little more difficult. Bloomsbury's skeleton argument did not seem to me accurately to reflect what had been ordered. There are some muddles over precise dates to be seen in the transcript of proceedings. After careful study of the transcript in conjunction with the draft order and counsel's submissions I have concluded that the order made below awarded interest to Bloomsbury as follows.

(1) Interest on the costs of the applications heard by Master Leslie on 11 July 2012 at 2% above base rate from 11 July 2012 to 7 October 2015.
(2) Interest on the Part 7 costs from 7 October 2015 at the Judgment Act rate of 8%.
(3) Interest on the Part 8 costs at 2% above base rate from 16 June 2014 to 15 October 2015 and thereafter at the Judgment Act rate of 8%.

62. Bloomsbury's complaint relates to the award of interest at a rate other than the Judgment Act rate, before 7 and 15 October 2015. It is said that this is contrary to the decision in *Bim Kemi AB* v *Blackburn Chemicals Ltd* [2003] EWCA Civ 889; [2004] 2 Costs LR 201. The court is said to have held in that case that "interest on the costs of the ultimately successful party should run from the date of the original costs order, rather from the date of the order on appeal". Those words do not appear in the judgment, and the authorities reveal that the position is rather more subtle than this.

63. The default position is that interest on costs is payable at the statutory rate from the date of the order to the date of payment: see *Hunt* v *RM Douglas (Roofing)* [1990] 1 AC 398. In *Bim Kemi* the court held that, this being so, there was "no reason" why the ultimately successful party, Blackburn, "should not have interest at the judgment rate as from 30 January 2002, that being the date of the

order of the trial judge", because that is the position that would have obtained "if the judge had made the order which we now hold he should have made in Blackburn's favour".

64. That, no doubt, is the usual starting point. But CPR 40.8 gives the court a discretion in the matter of Judgment Act interest. It is headed "Time from which interest begins to run" and provides as follows:

> "(1) Where interest is payable on a judgment pursuant to s 17 of the Judgments Act 1838 … the interest shall begin to run from the date that judgment is given unless –
>
> (a) a rule in another Part or a practice direction makes different provision; or
>
> (b) the court orders otherwise.
>
> (2) The court may order that interest shall begin to run from a date before the date that judgment is given."

65. Relevant provisions are also to be found in CPR 44.2(6)(g), which provides that the court's discretion as to costs may extend to "an order that a party must pay … – (g) interest on costs from or until a certain date, including a date before judgment". This provision is not tied to the interest entitlement under the Judgment Act.

66. It is clear, therefore, that the Master had the power to make an order about interest on costs which did not give the receiving party interest at the Judgment Act rate from the date of judgment. The court always has a discretion to award interest on costs from a date before the date of judgment, or a date after the date of judgment.

67. The exercise of the discretion under CPR 40.8(1)(b) in respect of interest on costs was considered by Leggatt J in *Involnert Management Inc* v *Aprilgrange Ltd* [2015] EWHC 2834; [2015] 2 CLC 406. He held (at [20]–[24]) that the discretion was unfettered by any express or implicit restriction in the parent Act or the CPR. It would be wrong to "order otherwise" simply because the Judgments Act rate is considerably higher than commercial rates, as that would usurp the function of the Secretary of State. But the court can order interest to run from a date later than the date of judgment if that is what in current circumstances justice requires. He went on to say at [23] that:

> "In terms of what justice requires, I do not think it just to make an order under which interest begins to run at the rate appropriate for unpaid judgment debts before the paying party could reasonably be expected to pay the debt; and in a case where the court has ordered a suitable interim payment to be made on account of costs, I do not think it reasonable to expect the party liable for costs to pay the balance of the debt until it knows exactly what sums are being claimed by the party awarded costs and has had a fair opportunity to decide what sums it accepts are properly payable."

68. Leggatt J thought it desirable to choose an objective benchmark by reference to which to set the date from which interest should run. He selected three months after the date of the order for costs, that being the deadline for commencing detailed assessment proceedings: CPR 47.7. For the period before that, the judge awarded interest at a commercial rate of 2% above base rate.

69. The reasoning that lay behind the Master's orders in the present case may not be plain and obvious on the face of his brief rulings, taken in isolation. But when these are read in the context of the arguments presented to him by the parties, the position becomes clear enough.

70. The case for Mr Macpherson was that the Master should follow *Involnert* and that the effect of doing so would be that no interest at all was awarded until October 2015. It was only then that Mr Macpherson was told what Bloomsbury was claiming in respect of the costs of the Part 7 and Part 8 proceedings. The case for Bloomsbury was, as it still is, that interest at the Judgment Act rate should be awarded on the Part 7 costs from the dates of judgment in that matter, and on the Part 8 costs from the date of judgment on that aspect. Before the Master, Bloomsbury had an alternative fall-back position so far as interest on costs prior to October 2015 is concerned. This was that such interest should be recoverable at a commercial rate, as in *Involnert*. The Master effectively adopted that middle-ground solution. He was plainly not wrong to do so. Such a decision was being urged on him by Bloomsbury, albeit as an alternative course. It was a legitimate decision to reach.

71. In substance, what the Master evidently sought to achieve was a situation whereby, in respect of each phase of the litigation, Bloomsbury would recover Judgment Act interest from the date when

its bills were delivered and Mr Macpherson knew what he was being asked to pay. The firm would be fairly compensated for being out of pocket before that time by the award of interest at a commercial rate from the dates of the orders for costs in its favour.

72. It is in the context of this analysis that one has to read the following observation made by the Master when giving judgment on the question of interest on the Part 8 costs:

> "I do not think it is appropriate for Judgment Act interest to run right from 16 June 2014. *I think we have to look at the peculiarities of this case that this is a detailed assessment of the solicitor's own costs.* However, I do think it is appropriate that commercial rate interest is recoverable."

73. The words I have emphasised are criticised by Mr Marven as reflecting an approach that was wrong in principle. There is no relevant peculiarity in this case, he submits. But the underlying point is one that was made in argument by counsel then appearing for Mr Macpherson (at p. 35D–F of the transcript). Whereas in *Bim Kemi* the receiving party was a commercial enterprise which had borrowed externally to fund the litigation, the claimant in this case was a solicitor conducting the litigation on his own, and not borrowing or spending money to do so. In those circumstances, the award of interest at a commercial rate is a reasonable exercise of discretion, so far as the period before delivery of the bills is concerned.

74. The Master's decision on this issue was a rational one, well within the ambit of his discretion, and this aspect of the appeal must therefore be dismissed.

Final Observations

75. In conclusion, I wish to express my appreciation of the help provided by both counsel and, in particular, by the assessor with who I have sat, Master Leonard. He has been of the greatest assistance. If the costs involved in Part 4 of the Part 8 bill require assessment, then it seems appropriate that this should be undertaken by him.

Robert Marven (instructed by Bloomsbury Law Solicitors) appeared for the appellant.

Roger Mallalieu (instructed by TM Costings Ltd) appeared for the respondent.