Neutral Citation Number: [2015] EWHC 1687 (TCC)

Case No: HT-2014-000036

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th June 2015

Before:

MR JUSTICE COULSON

- -

Between:

TRANSFORMERS AND RECTIFIERS LIMITED	**Claimant**
-and -	
NEEDS LIMITED	**Defendant**

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- -

Mr Justin Mort QC (instructed by **GBH Law Ltd**) for the **Claimant**
Mr Ben Elkington QC (instructed by **Browne Jacobson LLP**) for the **Defendant**

Hearing date: 21st May 2015

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Approved Judgment

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

....

MR JUSTICE COULSON

Mr Justice Coulson:

1. Introduction

1. During an otherwise mundane hearing about the costs of earlier interlocutory steps in these proceedings on 21st May 2015, an issue arose as to whether a judge who had not made the relevant costs orders could nevertheless summarily assess the costs which were the subject matter of those orders. The claimant submitted that he could; the defendant argued that only the judge who had made the orders could undertake that summary assessment. I explained to the parties how and why I considered the defendant's submission to be wrong but, given the potentially wide importance of the point, I indicated that I would provide a short ruling in writing.

2. It is unnecessary to set out the convoluted interlocutory history of this matter. Suffice to say that, in a series of orders made by Edwards-Stuart J in October and November last year, the defendant obtained, at the last minute and on somewhat uncertain grounds, an adjournment of the trial due in December. However, at the claimant's insistence, the trial date was preserved for the hearing of preliminary issues as to contractual terms. There was no dispute that the defendant was the sole cause of the wasted costs created by these events, so Edwards-Stuart J ordered the defendant to pay two sets of the claimant's costs. They were the costs arising out of his order of 14.11.14 and the subsequent order of 20.11.14. Both those orders were made after consideration of the papers: neither had required a hearing.

3. In addition, there was a third tranche of costs which had not been the subject of an existing order, arising out of the claimant's application to set aside the adjournment of 7.11.14. After hearing argument on 21st May, I ordered that those costs should also be paid by the defendant to the claimant.

4. On behalf of the claimant, Mr Mort QC then sought a summary assessment of those three sets of costs, namely the two sets ordered by Edwards-Stuart J on the papers in November 2014, and the costs which I ordered at the hearing. Mr Elkington QC objected to that course, saying that, since two of the three orders had been made by Edwards-Stuart J, rather than me, I did not have the jurisdiction to carry out a summary assessment.

2. The Relevant Parts of the CPR

5. CPR Part 44.6 provides as follows:

> "44.6 (1) Where the court orders a party to pay costs to another party (other than fixed costs) it may either –
>
> (a) make a summary assessment of the costs;
>
> or
>
> (b) order detailed assessment of the costs by a costs officer,
>
> unless any rule, practice direction or other enactment provides otherwise."

6. Paragraph 9.7 of Practice Direction 44 provides:

> "9.7 The court awarding costs cannot make an order for a summary assessment of costs by a costs officer. If a summary assessment of costs is appropriate but the court awarding costs is unable to do so on the day, the court may give directions as to a further hearing before the same judge."

7. Also of relevance to this issue is the overriding objective (r.1.1(1)) in its new form which states that the overriding objective is to enable the court "to deal with cases justly and at proportionate cost."

3. The Common Sense Position

8. It seems to me that, not only is there nothing in the rules or the PD which prevents a different judge from summarily assessing the costs of a hearing conducted (or an order made) by a different judge, but such a blanket prohibition would make no practical sense. Obviously, in the majority of cases, it will be appropriate, even necessary, for the same judge to conduct the summary assessment. If, for example, there was a contested hearing, and the detail of any summary assessment exercise carried out thereafter depended on the views formed by the judge about the parties' submissions, or the witnesses, or their conduct generally, then it would be inappropriate for any other judge to attempt the exercise. But an inflexible rule that the same judge must, in every case, conduct the summary assessment, cannot be derived from the CPR.

9. The provision at paragraph 9.7 of the PD (paragraph 6 above) is permissive: if time does not permit the summary assessment then and there, it *may* be heard later by the same judge. Equally, therefore, it *may* be heard by another judge.

10. Nor would a blanket ban be in accordance with the overriding objective. It is often the case that a summary assessment is the only just and proportionate way to deal with costs. It would be absurd if such an exercise could not be undertaken because of, say, the death or indisposition of the judge who conducted the original hearing or made the original order, or because he or she is on circuit and is unable to deal with the matter when it arises. Some degree of flexibility must be permissible.

11. That is particularly so where, as here, the two orders made by Edwards-Stuart J (and therefore the focus of Mr Elkington QC's submissions) were made, not on the basis of and following a contested hearing, but as a result of a paper application supported by written evidence. In circumstances where there was no hearing, and the order was made on the basis of the papers, the summary assessment of costs can just as easily be undertaken by another judge, because precisely the same material is available to him or her as was available to the judge who made the original order.

12. Accordingly, in the absence of any binding authority to the contrary, I would conclude that I had the necessary jurisdiction summarily to assess the costs identified in the two orders of Edwards-Stuart J.

4. Authority

13. However Mr Elkington QC argued that there was Court of Appeal authority which obliged me to reach a different conclusion. He referred to the case of ***Mahmood & Anr v Penrose & Others*** [2002] EWCA Civ 457. That was a case in which both sides were representing themselves. By reference to the previous version of the PD, the Court of Appeal said that the judge had erred in summarily assessing the costs of a hearing which had taken place before a recorder.

14. In my view that case can be distinguished on a number of grounds. The most important is that the words of the PD then under consideration were different. The version then in force read: "If a summary assessment of costs is appropriate but the Court awarding costs in unable to do so on the day, the Court ***must*** give directions as to a further hearing before the same judge". In other words, the obligation was mandatory. As set out in paragraph 6 above, that is not now the position: the word 'must' has been deleted, and the word 'may' has been added. Mr Elkington QC said that this change made no difference but, for the reasons I have given, I disagree.

15. Secondly, of course, ***Mahmood*** was decided under the old version of the overriding objective. I take the view that the new emphasis on proportionality means that, again for the reasons I have already explained, an absolute bar on another judge summarily assessing costs would, at least in certain circumstances, be disproportionate and therefore not in accordance with the overriding objective.

16. Thirdly, ***Mahmood*** was concerned with the summary assessment of costs of a hearing. Different considerations may apply in such a situation. That is not this case.

17. Finally, ***Mahmood*** was a case in which counsel did not appear on either side. It is not clear whether any argument was addressed to the court on the point at all. It is very doubtful whether the Court of Appeal intended to lay down a principle to be followed in all subsequent cases.

18. For all those reasons, I therefore conclude that my preliminary view, expressed at paragraph 12 above, is unaffected by the decision in ***Mahmood***.

5. Conclusion

19. I consider that, in appropriate circumstances, another judge may be able summarily to assess the costs arising out of a hearing conducted (or an order made) by another judge. I do not consider that there is any binding authority under the current version of the CPR to the contrary. In circumstances where, as here, the costs orders made by Edwards-Stuart J did not arise out of a hearing, but were made solely on a consideration of the relevant papers, it seems to me that there is no practical or sensible reason why I cannot summarily assess the costs in question. I therefore do so.