Neutral Citation Number: [2011] EWCA Civ 68
Case No: A2/20Q9/2514

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Cambridge County Court
His Honour Judge O'Brien

Royal Courts of Justice
Strand, London, WC2A 2LL
02/02/2011

B e f o r e :

LORD JUSTICE WARD
LORD JUSTICE PATTEN
and
LADY JUSTICE BLACK

Between:

KATHERINE MORGAN	**Appellant**
- and -	
THE SPIRIT GROUP LIMITED	**Respondent**

Mr Jamie Carpenter (instructed by Messrs Godfrey Morgan) for the Appellant
Mr Simon J Brown (instructed by Messrs Berrymans Lace Mawer) for the Respondent

Hearing dates : 15th December 2010

HTML VERSION OF JUDGMENT

Lady Justice Black :

1. This is an appeal brought by Mrs Katherine Morgan in relation to the costs order made by His Honour Judge O'Brien on 30 October 2009 at the conclusion of the trial of her personal injury claim. For ease, I will refer to the appellant and the respondent, The Spirit Group Limited, as the claimant and the defendant as they were in the court below.

2. On 13 November 2004, the claimant slipped in a nightclub owned by the defendant and fractured her wrist. Liability was ultimately admitted by the defendant but there was a one day trial on 10 March 2009 in relation to the assessment of damages. The claimant sought general damages for pain, suffering and loss of amenity in the sum of £9,000 to £10,000 (exclusive of interest) and special damages in the total sum of £31,092.48 (also exclusive of interest), the detail being set out in a long schedule under various headings. Judge O'Brien awarded a total of £13,419.03 inclusive of interest for general and special damage.

3. The claimant sought her costs. She produced an itemised bill of costs showing a grand total of £99,206.29 inclusive of VAT and disbursements. The litigation had been conducted under a conditional fee agreement with a 100% success fee by the claimant's husband who was described in the claimant's bill of costs for

detailed assessment as a senior solicitor with 16 years post qualification experience. The bill incorporated a figure of £39,412.80 by way of success fees (including the success fees of counsel who represented the claimant) plus VAT thereon of £6,824.74. By my calculation, if one deducts that figure from the grand total of the bill, it leaves a figure, inclusive of VAT, of £52,968.75, although I note that counsel for the claimant, Mr Carpenter, calculates that "base costs (profit costs and disbursements) excluding VAT totalled £40,124.78" which does not appear to tally with that. Even if one deducts the further sum of £4,260 in respect of the after the event insurance premium, as Mr Brown, counsel for the defendant submits should be done when calculating base costs, an anomaly remains.

4. It was plain to the judge at the end of the damages hearing that the question of costs was by no means straightforward, there being issues in relation to offers that had been made and about conduct. He therefore adjourned the question of costs to a further one day hearing, which took place on 30 October 2009, when he heard submissions from both sides and ordered that the defendant "pay a contribution of £25,000 towards the claimant's costs". He considered that the claim had been, in reality, "a little fast track personal injury case which has been turned by the solicitor conducting the case into what is (if the expression be understood) a federal case" and that costs should be looked at as if the case had been allocated to the fast track. He was apprehensive about the expense of a detailed assessment of costs and, entirely understandably, decided to take a robust course, which he set out at the conclusion of his judgment as follows:

> "23. In order, therefore, to save the parties from themselves.. ..it seems to me that the appropriate way for me to do justice in respect of the costs is to look at this case principally as what should have been a fast track case, and to look at the damages recovered - £13,419 - and to consider what it is proportionate to expect the defendant to pay. Now, absent the question of contingent fee agreements, I would have thought the very limit of what is reasonable for a defendant who has conducted the case properly to pay to a claimant by way of costs in a straightforward case such as this - the absolute limit would be £20,000 (it is probably more like £15,000). Having regard to the fact that there are some contingent fee agreements, and not with a view to satisfying the increase which they may incur, but simply having regard to the fact that they are there, it seems to me that substantial justice is done in this case if I make an order that the defendant shall contribute the sum of £25,000 to the claimant's costs. That is the order which I make, which, as I say, is also to cover today's hearing."

5. Leading up to this conclusion, the judge had made some very damning findings about the claim and the way in which the litigation had been conducted. As well as determining that it was a straightforward minor personal injury action that one would normally have expected to be allocated to the fast track, damages plainly being within the limit for that track, his observations included that the claim was "a 'greedy' claim", that the claimant's view of the appropriate measure of damages was "wholly untenable" and aspects of the damages claim "astonishing and wholly unsustainable" and "truly breathtaking", that "every stage [in the history of the case] involves enormous expenditure", and that the "oppressive conduct of this case" carried on even in relation to the costs issue.

6. The judge's order resulted in the claimant filing grounds of appeal setting out ten respects in which the judge was alleged to have erred in the exercise of his discretion with regard to costs and, in due course, a respondent's notice from the defendant, arguing that the determination of the judge was correct for four extra reasons that he had not, himself, given and, in the alternative, inviting the Court of Appeal, if it were to decide to set that order aside, to make a separate order in the defendant's favour because of the unreasonable conduct of the claimant and/or her advisers or to deduct a substantial amount from her costs for this reason.

CPR r 44.3

7. CPR r 44.3 deals with the court's discretion as to costs and the circumstances that are to be taken into account in exercising it. R 44.3(6) sets out certain of the orders which the court may make under the rule and reads:

> "(6) The orders which the court may make under this rule include an order that a party must pay-
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> (a) a proportion of another party's costs;
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> (b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment."

Detailed and summary assessment: CPR r 44.7

8. CPR r 44.7 provides:

"44.7 Procedure for assessing costs

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."

9. Although the judge had the claimant's full bill of costs before him, it is common ground between the parties that he did not make his decision by reference to the detailed breakdown of costs that it contained and that it cannot properly be said that he carried out a summary assessment of costs in arriving at the figure of £25,000.

10. The costs ordered here were not fixed costs so were not excluded from CPR r 44.7 on that basis and the only rule to which we were taken which may perhaps "provide otherwise" than the provisions of CPR r 44.7 is CPR r 44.3(6)(b). Was the judge entitled to rely on CPR r 44.3(6)(b), or indeed any other manifestation of his discretion, to circumvent the normal process of either assessing the costs summarily himself or referring them for detailed assessment? Notwithstanding the breadth of the arguments set out in the documentation for the appeal, by the time of the hearing before us that question was the real focus of the debate between the parties, and the issue to which oral argument was principally addressed.

The main thrust of the submissions

11. The defendant's contention is that judge's order was an order for the payment of a stated amount in respect of another party's costs, properly made under CPR r 44.3(6)(b) which was a provision to which the judge particularly called attention during the costs hearing and which counsel then representing the defendant had submitted provided the jurisdiction to make an order of the type that was ultimately made. Even if the order was not made under CPR r 44.3(6)(b), the orders listed in CPR r 44.3(6) are only examples of the orders that a court may make in respect of costs and the court's discretion is wide, and certainly wide enough to permit the judge to make the order that he did.

12. The claimant's argument is that the authorities establish that a judge may not make a costs order, whether under CPR r 44.3(6)(b) or otherwise, which fixes a figure for costs without reference to the work actually done and thereby side-steps a consideration of the detail of a party's claim for costs. Mr Carpenter, points out that CPR r 44.3(6)(b) appears to be rarely used, the only reported example of its possible use being in *SCT Finance v Bolton* [2002] EWCA Civ 56 (in which, in fact, the Court of Appeal overturned the judge's costs order). Mr Carpenter accepted that it was "a curious power" and that its intended purpose was difficult to establish if, as he said, it could not be used to make the sort of order that the judge made here. It is alone amongst the orders listed in CPR r 44.3(6) in not being followed by a summary or detailed assessment. He suggested that if it has a purpose, it is to permit a token contribution to be ordered towards costs in a figure not remotely intended to reflect the real costs.

The authorities

13. Argument concentrated on three authorities: *1-800 Flowers Inc* v *Phonenames Ltd* [2001] EWCA Civ 721, *SCT Finance* (supra), and *Lownds* v *Home Office: Practice Note* [2002] EWCA Civ 365.

1-800 Flowers Inc v Phonenames Ltd

14. *Flowers* was an appeal in a trademark case from a decision of Jacob J, as he then was, who had himself been hearing an appeal from the Registrar of Trade Marks. The appeal before Jacob J lasted a day, with judgment the following morning, allowing the opponent's appeal. The judge ordered the applicant to pay the opponent's costs of the appeal and accepted an invitation to make a summary assessment. Each side put in a statement of costs and made submissions as to detailed items. The judge took the view that the costs claimed by the opponent were "out of order" and that "whatever [people] were doing it was wholly disproportionate to what such a one-day case would involve". He then assessed a figure for the costs by reference to the sort of figures that he saw in other cases ("If this had been the sort of case I have seen daily in the provinces, or even see here, the figures would seem very large even at £10,000....) rather than by reference to the detail of the work done in that case.

15. The Court of Appeal allowed the opponent's appeal on this issue and substituted a detailed assessment. The judge had "erred in principle when he in effect applied his own tariff to the case, without carrying out any detailed examination or analysis of the costs actually incurred by the Opponent as set out in its statement of costs".

16. Jonathan Parker LJ, with whom the other members of the court agreed, said:

> "114. In my judgment, it is of the essence of a summary assessment of costs that the court should focus on the detailed breakdown of costs actually incurred by the party in question, as shown in its statement of costs; and that it should carry out the assessment by reference to the items appearing in that statement. In so doing, the court may find it helpful to draw to a greater or lesser extent on its own experience of summary assessment of costs in what it considers to be comparable cases. Equally, having dealt with the costs by reference to the detailed items in the statement of costs which is before it, the court may find it helpful to look at the total sum at which it has arrived in order to see whether that sum falls within the bounds of what it considers reasonable and proportionate. If the court considers the total sum to be unreasonable and disproportionate, it may wish to look again at the various detailed items in order to see what further reductions should be made. Such an approach is wholly unobjectionable. It is, however, to be contrasted with the approach adopted by the judge in the instant case.
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> 115. In the instant case, the judge does not appear to have focused at all on the detailed items in the Opponent's statement of costs. Rather, having concluded that the total of the detailed items was unreasonably high he then proceeded to apply his own tariff - a tariff, moreover, which appears to have been derived primarily from a case in which the Opponent had not been involved and about which it and its advisers knew nothing. In my judgment the jurisdiction to assess costs summarily is not to be used as a vehicle for the introduction of a scale of judicial tariffs for different categories of case. However general the approach which the court chooses to adopt when assessing costs summarily, and however broad the brush which the court chooses to use, the assessment must in my judgment be directed to and focused upon the detailed breakdown of costs contained in the receiving party's statement of costs."

SCT Finance v Bolton

17. In *SCT Finance*, the judge had ordered that the claimant's costs should be paid by the defendant, subject to detailed assessment on the standard basis but subject also to an overall ceiling of £15,000 because the costs had been allowed to escalate out of all proportion to the amount at stake. Estimates of costs had been placed before the judge totalling over £50,000 and the aggrieved claimant appealed on the basis that the judge had exceeded the generous ambit of his discretion as to costs.

18. At paragraph 25 of his judgment, Wilson J (as he then was), referred to CPR r 44.3(6)(b). He thought that it may be, on a strict view of that sub-paragraph, that it was not apt to cover an order for detailed assessment subject to a ceiling of a stated amount. However, he continued:

> "But paragraph (6) identifies seven types of order which the general discretion under paragraph (1), derived from s 51(1) of the Supreme Court Act 1981, is said only to "include". Para 1(b) provides that the court has discretion as to the amount of costs payable by one party to another; and I have no doubt that a court can properly identify the amount thus payable as being such costs as are calculated by detailed assessment but subject to a quantified ceiling. So in my view the judge had ample discretion to make the order which he did."

19. However, Wilson J went on to conclude that the judge had exercised his discretion in an unprincipled manner. He was ordering a detailed assessment on the standard basis. In assessing costs on the standard basis, CPR r 44.4(2)(b**)** requires the court only to allow costs which are proportionate to the matters in issue. This means, as CPR r 44.5(l)(a) makes clear, that both the nature of the work in respect of which the costs were incurred and the amount of such costs must be proportionate. By directing standard assessment, the judge had therefore already made full allowance for any lack of proportion in the amount of the costs and the ceiling that he imposed in order to reflect the lack of proportion in the costs would in fact bite into costs which the costs assessor was satisfied were proportionate. For this and other reasons, the court allowed the appeal and removed the ceiling imposed by the judge.

Lownds v Home Office: Practice Note

20. *Lownds v Home Office* is an important early decision of principle in relation to the costs provisions of the CPR. It postdates *SCT Finance* and, of course, the *Flowers* case. The facts are not material. Lord Woolf CJ took the opportunity to resolve the uncertainty that existed as to the relationship between the requirement of reasonableness and the requirement of proportionality in relation to the assessment of costs and the question of whether the proportionality test is to be applied to the costs globally or on an item by item basis. He said:

> "31 what is required is a two-stage approach. There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r 44.5(3) states are relevant. If the costs as a whole are disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This in turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner.
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> 32. The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately."

21. Lord Woolf considered that there was no conflict between this approach and the approach of the court in *Flowers.* He found Jonathan Parker LJ's approach of looking again at each item if the total sum was considered to be unreasonable or disproportionate very much in accord with the two-stage approach that the court in *Lownds* was commending. He also expressed agreement that Jacob J had been wrong to base his decision on his experience of a single case but said that that did not mean Jacob J was not entitled to have regard to his general experience.

22. The claimant submits that *Flowers* and *SCT Finance* both illustrate the dangers of a judge reacting to what he considers to be an excessive claim for costs other than through the usual channels of summary or detailed assessment and, together with *Lownds*, demonstrate that it was not open to Judge O'Brien to fix the claimant's costs at £25,000 without any form of assessment.

23. It is common ground that *SCT Finance* is not on all fours with the current case - here a contribution of a stated sum was ordered, there costs were to be paid subject to detailed assessment with a ceiling. The defendant seeks also to distinguish the *Flowers* case. The problem in that case, he submits, was that Jacob J purported to make a summary assessment and then failed to do so whereas that was not what the judge was

doing here. Given that he had determined that the claim was extravagant and given what he had found about the way in which the litigation had been conducted, the bill of costs proffered would not have been a helpful guide to what costs were reasonable whereas the detail may have assisted Jacob J. What Judge O'Brien was doing, therefore, submits Mr Brown, was exercising his power to fix costs without an assessment. He had concluded that even on the most generous detailed assessment, the claimant could not recover more than £25,000 and so took that figure. That was a much more elegant solution, Mr Brown submits, than the alternative routes by which he could have reflected the unreasonable way in which the claim had been pursued, for example awarding only a percentage of the costs, because these routes would have necessitated an assessment and, in carrying that out, the costs judge would have had to assess the self-same factors that had led to the reduced percentage in the first place. Furthermore, the judge's solution avoided any risk of double jeopardy in the claimant losing part of her costs because the trial judge gave her only a percentage of them to reflect his view that they were disproportionate only to have them further reduced by the costs judge for the same reason. He submitted that this was not a case in which a tariff was imposed as it was in *Flowers*. This very experienced judge took what he knew to be the range of reasonably incurred fast track costs and gave the claimant a figure at the top end of that range.

24. Mr Brown also submitted that the Court of Appeal made its decision in *Flowers* without reference to the full costs scheme and may have reached a different conclusion if its attention had been drawn to the power in r 44,3(6)(b) to order a stated amount in respect of costs. This submission does not, however, withstand scrutiny. The Court of Appeal in *Lownds*, which undoubtedly did have the full costs scheme in mind, looked again at *Flowers* and did not suggest that there was any flaw of this type in that decision.

25. Mr Brown himself relies on *Lownds* submitting that his argument is assisted by paragraph 32 of it, which can be found set out at paragraph 20 of this judgment. Given that that paragraph must be read with paragraph 31, however, I do not see how it materially advances his case.

26. In my view there is no proper basis on which to distinguish between what Jacob J did in *Flowers* and what Judge O'Brien did. It would be extraordinary if Jacob J was wrong because he accepted an invitation to carry out a summary assessment but then failed to look at the detail of the costs incurred and Judge O'Brien was not because he never even purported to embark on a summary assessment. Detailed or summary assessment is clearly intended by the CPR to be the normal procedure for calculating costs, except where the costs are otherwise fixed. That intention would risk being significantly undermined if the procedure adopted here were to be endorsed as a proper exercise of discretion. Furthermore, I can see little material difference between Jacob J having reference to his own experience of costs in trademark appeals (not just in one such case, as his judgment makes clear) which was taken as imposing a judicial tariff and Judge O'Brien's drawing on his considerable experience of civil litigation and, in particular, of the costs of fast track cases.

27. I have much sympathy with the very practical and, no doubt, cost saving approach taken by the judge here but I am afraid that it was not an approach that was open to him in the light of *Flowers* and of the general guidance in *Lownds*. As *Lownds* shows, it is very important for the judge to take a global view of the proportionality of the costs incurred but, before he fixes a figure for costs, he must advance from that to an item by item consideration of the individual elements of the bill by way of a summary assessment or alternatively, he must direct a detailed assessment which will fulfil that task. Naturally, any judge carrying out a summary assessment appropriately focused on the detailed breakdown of costs will have firmly in mind that the court's discretion when carrying out such an assessment is very wide and that a minute examination of detail is not always required and a broad brush can, where appropriate, be used. It would be a great pity if the summary assessment procedure were to become bedevilled by formulaic and time consuming intricacy which would often be wholly disproportionate to the exercise being carried out and the nature of the litigation in hand.

28. The costs order made by the judge, in so far as it fixed a figure for the defendant's contribution to the claimant's costs, must accordingly be set aside. An assessment of costs must be carried out and, the situation no longer being one in which summary assessment would be appropriate, it will have to be a detailed assessment of costs.

Other aspects of the appeal

29. That does not mean, however, that all aspects of the judge's decision on costs are necessarily overturned.

30. Whilst not normally having access to all the fine detail of the way in which the litigation has been conducted, the trial judge can be uniquely placed to form a view as to its broader characteristics and as to the other factors which need to be taken into account in deciding what costs should be awarded. He is entitled to reflect this view in a variety of different ways. He may, for example, make an order for payment of only a proportion of a party's costs, as the parties contemplated in submissions to Judge O'Brien here. Alternatively, it is open to him to determine, as Judge O'Brien did, that trial costs should be restricted to fast track costs despite the case being a multi-track case, see *Drew* v *Whitbread* [2010] EWCA Civ 53 (particularly paragraph 26), and that may mean that the costs judge will be bound by that (paragraph 28, ibid). He may also give indications as to the way in which the trial has been conducted (paragraph 37, ibid).

31. The judge here dedicated a full court day to the costs question. He was provided with evidence and argument on the subject from the parties and he set out his conclusions about it in his judgment. If those conclusions survive this appeal, they will be material to the detailed assessment.

32. I turn therefore to the submissions advanced by the claimant in relation to the judge's conclusions about the conduct of the litigation and other matters relevant to costs. In so doing, I will not allude to every matter very clearly set out in the argument although each one has been taken into account.

33. I propose first to deal with the arguments that feature in grounds 2, 3, and 6, of the Grounds of Appeal, these grounds all focusing upon the judge's conclusions about the conduct of the case.

34. Mr Carpenter argues that the judge was wrong to treat the claim as having been exaggerated in a way which should properly sound in costs. The claimant did recover less than she sought but there was never any finding that she was dishonest or exaggerated the extent of her injuries and the discrepancy in what she sought and what she recovered is accounted for by a difference in view as to whether the injury should be treated as having resulted in some permanent disability or not, whether the claimant should recover the entire cost of a family holiday in Australia which she said had been ruined, and what level of care was required for her.

35. He submits that the judge was also wrong to hold that the claimant's solicitors had conducted the claim unreasonably or gave too much weight to this factor, failing to balance against it the unreasonable conduct on the part of the defendant. He says that the judge could not properly take a view about this without going through the solicitors' files. He rehearses various arguments as to the reasonableness of the conduct of the litigation on the claimant's behalf and the unreasonableness of the defendant's approach (with regard to mediation, admission of liability etc.) and complains that the judge gave no reasons for preferring the defendant's solicitor's account of the conduct of the claim to Mr Morgan's.

36. I do not consider any of these grounds to have merit. The judge had formed his own view of the facts, with the benefit of having experienced the litigation at first hand in the form of the quantum trial and the subsequent costs hearing and there is no material upon which to say that he was not entitled to come to the views that he did, which were by no means confined to a concern that the claimant recovered less than she had hoped to recover. It was well within his discretion to take his conclusions on these matters into account in determining what order should be made as to costs.

37. By way of ground 4, Mr Carpenter submits that the judge was wrong to treat the level of costs claimed as itself evidence of conduct that was relevant on the question of costs. That ignored the guidance in section 11.1 of the Costs Practice Direction to the effect that the relationship between costs and damages is not always a reliable guide to proportionality. By taking this approach, he also exposed the claimant to the risk of double jeopardy in that she may obtain an order for less than full costs and then have those costs reduced further for disproportionality. He also complains that the judge thought the costs, net of success fees, were higher than they actually were.

38. I do not accept these arguments. The guidance only says that:

> "The relationship between the total of the costs incurred and the financial value of the claim *may* not be a reliable guide." [my emphasis]

Lownds specifically requires a judge to take a global look at the costs to see whether the total sum claimed appears to be disproportionate and that is what the judge did. This was a ranging shot and total precision in

the figures was not required. As to double jeopardy, this is an inevitable feature of certain aspects of the regime and something which the judge (in the case of a summary assessment) or the costs judge (where a detailed assessment is ordered) has to guard against when getting down to the individual components of the bill.

39. Ground 5 asserts that the judge was wrong to conclude that the case should have been allocated to the fast track or placed too much weight on that factor. It is submitted that the claimant reasonably believed at all times that her claim was worth at least £15,000 and her ultimate award fell short of that by only £1,600. It is also submitted that the allocation of the case to the multi-track did not increase the costs.

40. I do not see any merit in this ground either. As with grounds 2, 3 and 6, the judge was particularly well placed to reach the conclusion that he did, based upon his view of the litigation. At paragraph 18 of the judgment, he accepted the submissions of the defendant's then counsel that "[f]rom the outset of the matter it should have been considered as, and dealt with as, a straightforward personal injury claim on the fast track with two issues: causation and quantum". This was a view he was entitled to take and the various factors that he put into the balance provided a proper foundation for him to exercise his discretion by deciding that costs should be approached as if this had been such a fast track case. There was also plenty of material supporting the notion that if the case had been run in a more reasonable way at a more realistic level, as would have been the case had it been acknowledged to be a fast track case, the costs would have been less by virtue of there being, for example, less correspondence, less need for preparation and advice and, possibly, more chance of settlement.

41. I need not examine the remaining grounds of appeal as they are subsumed into the argument that has led me to the conclusion that the judge erred in fixing a figure for costs and should have provided for assessment in the normal way.

42. The upshot is that as there is no reason to interfere with the judge's determination that the costs of the case should be approached as if it had been a fast track case, the matter will go to the costs judge for detailed assessment on that basis. The other observations of the judge in his costs judgment will also remain relevant for the costs judge save in so far as they relate to the fixing of a figure of £25,000 by way of costs. The costs judge should not feel constrained in any way by this figure and will, of course, scrutinise the itemised bill rigorously in the normal way.

43. Accordingly, the appeal will be allowed in that the judge's order for the defendant to pay a contribution of £25,000 towards the claimant's costs will be set aside. There will be substituted an order that the defendant will pay the claimant's costs subject to a detailed assessment to be carried out as if the case had been allocated to the fast track.

The defendant's position

44. The defendant originally intended to pursue an argument that the judge had been wrong to reject their submission that, in the light of the offer of settlement that they made, the matter should have been approached on the basis of *Carver* v *BAA* [2008] EWCA Civ 412, but abandoned this argument before the hearing. The defendant's skeleton argument indicates, however, that in the event that the judge's costs order were to be set aside, the defendant would advance an argument, in various configurations, that the claimant should not recover her full costs on a standard basis. In the event, whilst the appeal *has* been allowed, the effect of this is not to leave the question of costs once again at large. The judge's determination that the costs should be approached on the fast track basis stands and, in that way, the claimant will inevitably suffer a significant reduction in the costs that she recovers in comparison to the figure that would have resulted from a detailed assessment on the multi-track basis. Indeed, Mr Brown suggested in oral argument that a detailed assessment of costs on a fast track basis would in fact produce a smaller costs order than the £25,000 the judge actually awarded and in relation to which the defendant pursued no active appeal.

45. In arriving at his decision that the costs should be approached as if the claim had been a fast track claim, the trial judge took into account the sort of matters upon which the defendant relies in this court to justify a costs order (or partial costs order) in his favour or a reduction in the claimant's costs by, for example, confining the order to a proportion of them only. Such an order is not therefore justifiable. All the relevant factors are reflected already in the order that the defendant will pay the claimant's costs subject to a detailed assessment

to be carried out as if the case had been allocated to the fast track, particularly bearing in mind that the costs judge will carry out that assessment with reference not only to that overarching direction but also to the judge's detailed observations about the true nature of the action and the way in which the litigation had in fact been conducted on behalf of the claimant, as I made clear, inter alia, at paragraph 42 above.

Lord Justice Patten

46. I agree.

Lord Justice Ward

47. I also agree.