



Case No: CL1706106

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

Thomas Moore Building  
Royal Courts of Justice  
London WC2A 2LL

Date: 30/07/2019

**Before :**

**MASTER LEONARD**

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**Between :**

**PME**  
**- and -**  
**The Scout Association**

**Claimant**

**Defendant**

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**Samuel Hayman** (instructed by **Bolt Burdon Kemp**) for the **Claimant**  
**Robin Dunne** (instructed by **BLM**) for the **Defendant**

Hearing dates: 3 May 2019  
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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.

.....  
**MASTER LEONARD**

**Master Leonard:**

1. This is the Claimant's appeal from the assessment by Ms Kenny, the SCCO's Principal Costs Officer, of costs payable by the Defendant under an order dated 20 November 2017. Ms Kenny first assessed the bill provisionally on 23 May 2018. The Claimant requested an oral hearing on two issues: hourly rates and document time.
2. That hearing took place on 15 August 2018. At the start of the hearing, the Claimant conceded Ms Kenny's provisional finding on document time. Ms Kenny went on to make findings on hourly rates only.
3. The Claimant then filed an Appellant's notice under CPR 47.21. At section 5, which requires an appellant to set out the order appealed against, the notice read:

“... The Claimant appeals the decisions of Costs Officer Kenny in assessing the Claimant's costs in the sum of £23,626.28... The Claimant seeks a de novo detailed assessment hearing before a costs judge or district judge of the High Court so the preliminary issues and costs can be considered and assessed afresh...”
4. The Grounds of Appeal stated that the procedure for appealing a decision of an authorised court officer is set out at CPR 47.21 to 47.24, as supplemented by Practice Direction paragraphs 20.1 to 20.6, and relied upon the fact that permission to appeal, under CPR 47.21, is not required. They added:

“... Accordingly, the Claimant seeks a de novo detailed assessment hearing so that all issues and costs not agreed are heard afresh and assessed in the usual manner. Therefore all decisions made by Costs Officer Kenny at the provisional assessment and subsequent oral hearing are appealed...”
5. The Grounds of Appeal went on to identify three preliminary issues. The first was that there is no requirement for permission to appeal against a decision of Ms Kenny. The second was the Claimant's argument that the appeal hearing would, effectively, be a new detailed assessment on the standard basis. The third was an argument to the effect that a “costs officer” does not have jurisdiction to summarily assess costs.
6. The appeal was listed before me on 14 February 2018. On the day the Claimant raised a new argument to the effect that Ms Kenny did not have jurisdiction to conduct a provisional assessment at all. The hearing was adjourned, so that two issues could be argued before me: whether the appeal is limited to the issues actually considered by Ms Kenny on 15 August 2018, and whether Ms Kenny had jurisdiction to undertake a provisional assessment.
7. This is my judgment on those two points. In so far as I am called upon by the parties' submissions to interpret the Civil Procedure Rules, I do so, in accordance with CPR 1.2(b), with a view to giving effect to the overriding objective of dealing with cases justly and at proportionate cost. That includes, by virtue of CPR 1.1(2), ensuring that cases are dealt with expeditiously and fairly and allocating to them an appropriate share of the court's resources.

## The Jurisdiction of Authorised Court Officers

8. The term “costs officer” can be misunderstood. CPR 44.1 provides, for the purposes of interpreting CPR 44 to 47, that it means a costs judge, a district judge or an authorised court officer. In practice, at least in the SCCO, the term is most commonly used to describe authorised court officers like Ms Kenny: senior civil servants, authorised under statute to assess costs, from whose decisions appeal lies as of right to a Costs Judge. I shall employ the CPR term “authorised court officer”.
9. Section 1 of the Courts Act 2003 imposes a duty upon the Lord Chancellor to ensure that there is an efficient and effective system to support the carrying on of the business of courts including the Senior Courts. Section 2 provides that the Lord Chancellor may appoint such officers and other staff as appear to him appropriate for the purposes of discharging that duty.
10. Paragraph 2 of Schedule 1 to the Civil Procedure Act 1997 provides for the Civil Procedure Rules to provide for the exercise of the jurisdiction of any court within the scope of the rules by officers or other staff of the court.
11. CPR 47.3 sets out the jurisdiction of an authorised court officer:

“(1) An authorised court officer has all the powers of the court when making a detailed assessment, except –

  - (a) power to make a wasted costs order as defined in rule 46.8;
  - (b) power to make an order under –
    - (i) rule 44.11 (powers in relation to misconduct);
    - (ii) rule 47.8 (sanction for delay in commencing detailed assessment proceedings);
    - (iii) paragraph (2) (objection to detailed assessment by authorised court officer); and
  - (c) power to make a detailed assessment of costs payable to a solicitor by that solicitor’s client, unless the costs are being assessed under rule 46.4 (costs where money is payable to a child or protected party).

(2) Where a party objects to the detailed assessment of costs being made by an authorised court officer, the court may order it to be made by a costs judge or a district judge.  
(Practice Direction 47 sets out the relevant procedure.)”
12. The rule is supplemented by part 3 of Practice Direction 47:

“3.1 The court officers authorised by the Lord Chancellor to assess costs ... are authorised to deal with claims where the base costs excluding VAT do not exceed £35,000 in the case of senior executive officers, or their equivalent, and £110,000 in the case of principal officers.

3.2 Where the receiving party, paying party and any other party to the detailed assessment proceedings who has served points of dispute are

agreed that the assessment should not be made by an authorised court officer, the receiving party should so inform the court when requesting a hearing date. The court will then list the hearing before a costs judge or a District Judge.

3.3 In any other case a party who objects to the assessment being made by an authorised court officer must make an application to the costs judge or District Judge under Part 23 setting out the reasons for the objection.”

13. Appeals from authorised court officers are dealt with at CPR 47.21 to 47.24:

“47.21 Any party to detailed assessment proceedings may appeal against a decision of an authorised court officer in those proceedings...

47.22 An appeal against a decision of an authorised court officer lies to a costs judge or a district judge of the High Court...

47.24 On an appeal from an authorised court officer the court will –  
(a) re-hear the proceedings which gave rise to the decision appealed against; and  
(b) make any order and give any directions as it considers appropriate.”

20.1 This Section relates only to appeals from authorised court officers in detailed assessment proceedings. All other appeals arising out of detailed assessment proceedings (and arising out of summary assessments) are dealt with in accordance with Part 52 and Practice Directions 52A to 52E. The destination of appeals is dealt with in accordance with the Access to Justice Act 1999 (Destination of Appeals) Order 2016.

14. Practice Direction 47 makes these provisions for appeals:

20.2 In respect of appeals from authorised court officers, there is no requirement to obtain permission, or to seek written reasons.

20.3 The appellant must file a notice which should be in Form N161 (an appellant’s notice).

20.4 The appeal will be heard by a costs judge or a District Judge of the High Court, and is a re-hearing.

20.5 The appellant’s notice should, if possible, be accompanied by a suitable record of the judgment appealed against. Where reasons given for the decision have been officially recorded by the court an approved transcript of that record should accompany the notice. Where there is no official record the following documents will be acceptable—

(a) the officer’s comments written on the bill;

(b) advocates’ notes of the reasons agreed by the respondent if possible and approved by the authorised court officer...”

## Provisional Assessment

15. CPR 47.15 governs provisional assessment. For present purposes these are the relevant provisions:

“(1) This rule applies to any detailed assessment proceedings commenced... on or after 1 April 2013 in which the costs claimed are the amount set out in paragraph 14.1 of the practice direction supplementing this Part, or less.

(2) In proceedings to which this rule applies, the parties must comply with the procedure set out in Part 47 as modified by paragraph 14 Practice Direction 47.

(3) The court will undertake a provisional assessment of the receiving party’s costs on receipt of Form N258 and the relevant supporting documents specified in Practice Direction 47...

(4) The provisional assessment will be based on the information contained in the bill and supporting papers and the contentions set out in Precedent G (the points of dispute and any reply).

(5) In proceedings which do not go beyond provisional assessment, the maximum amount the court will award to any party as costs of the assessment (other than the costs of drafting the bill of costs) is £1,500 together with any VAT thereon and any court fees paid by that party.

(6) The court may at any time decide that the matter is unsuitable for a provisional assessment and may give directions for the matter to be listed for hearing. The matter will then proceed under rule 47.14 without modification.

(7) When a provisional assessment has been carried out, the court will send a copy of the bill, as provisionally assessed, to each party with a notice stating that any party who wishes to challenge any aspect of the provisional assessment must, within 21 days of the receipt of the notice, file and serve on all other parties a written request for an oral hearing. If no such request is filed and served within that period, the provisional assessment shall be binding upon the parties, save in exceptional circumstances.

(8) The written request referred to in paragraph (7) must –

- (a) identify the item or items in the court’s provisional assessment which are sought to be reviewed at the hearing; and
- (b) provide a time estimate for the hearing.

(9) The court then will fix a date for the hearing and give at least 14 days’ notice of the time and place of the hearing to all parties.

- (10) Any party which has requested an oral hearing, will pay the costs of and incidental to that hearing unless –
- (a) it achieves an adjustment in its own favour by 20% or more of the sum provisionally assessed; or
  - (b) the court otherwise orders.”

16. Paragraph 14 of Practice Direction 47 reads, insofar as pertinent:

“14.1 The amount of costs referred to in rule 47.15(1) is £75,000.

14.2 The following provisions of Part 47 and this Practice Direction will apply to cases falling within rule 47.15—

(1) rules 47.1, 47.2, 47.4 to 47.13, 47.14 (except paragraphs (6) and (7)), 47.16, 47.17, 47.20 and 47.21; and

(2) paragraphs 1, 2, 4 to 12, 13 (with the exception of paragraphs 13.4 to 13.7, 13.9, 13.11 and 13.14), 15, and 16, of this Practice Direction.

### **The Jurisdiction of an Authorised Court Officer: The Claimant’s Submissions**

17. Mr Hayman, for the Claimant, refers to paragraphs 43.205 and 43.206 of *Friston on Costs* (3<sup>rd</sup> edition) on the apparent omission of CPR 47.3 from the list of provisions included at Practice Direction 47, paragraph 14.2:

“... The rules and directions that have been excluded are, in general, those that relate to detailed assessment hearings-as one would expect... It is, however, less easy to understand why the provisions relating to authorised court officers should be excluded (a putative exclusion that arises out of the fact that CPR, r 47.3, has been excluded). If it is true to say that authorised court officers are not permitted to conduct provisional assessments, it would be a strange state of affairs, not least because PD 47, para 14, expressly preserves the applicability of CPR, r 47.21 (which is a provision that relate solely to the power to appeal a decision of an authorised court officer). Whilst there is no authority in the point, it is likely that the putative exclusion of CPR, r 47.3, is simply an error. This would be in keeping with the fact that, in the SCCO, authorised court officers carried out the majority of the provisional assessments...”

18. Mr Hayman argues that Practice Direction 47, paragraph 14 imposes jurisdictional restrictions on provisional assessments. It does not include, at paragraph 14.2, CPR 47.3. It follows that authorised court officers have no jurisdiction to undertake a provisional assessment.

19. Further, the omission of CPR 47.22 to CPR 47.24 from the list at Practice Direction 47, paragraph 14.2 means, he says, that while there is provision for appealing from the decision of an authorised court officer, the rules do not set out any procedure for doing so. CPR 52 does not apply, and it is not open to a judge to invent appeal procedure. This leaves a significant vacuum which can only be explained by the conclusion that an authorised court officer has no jurisdiction to undertake a provisional assessment.

20. Mr Hayman suggests that these are examples of significant conflicts within the rules governing the jurisdiction of authorised court officers and provisional assessment procedures. He argues that one can find other examples in the fact that the court's jurisdiction to impose a sanction for delay in commencing detailed assessment proceedings under CPR 47.8 is excluded from the jurisdiction of an authorised court officer, whereas the power to impose a sanction for delay in requesting a detailed assessment hearing under CPR 47.14 is not. He suggests, further, that I identified other conflicts between CPR 47.21 and other provisions of CPR 47 in *Bello v Teclé* (SCCO 19 December 2014, unreported).
21. Given that CPR 47.3 has been omitted, in error, from the list of provisions at Practice Direction 14, paragraph 14.2, Mr Hayman submits that although the court has the capacity to correct obvious drafting errors, this is not a case where it should do so.
22. The test, he submits, is set out in *Inco Europe Ltd & Others v First Choice Distribution* [2000] 1 WLR 586, as recently reiterated in *Qader v Esure* [2016] EWCA Civ 1109. The court must be satisfied that the intended purpose of CPR 47 and Practice Direction 47 is to give power to authorised court officers to undertake provisional assessments and that, by inadvertence, the person who drafted the rule and practice direction inadvertently failed to achieve that. The court must also, crucially, be sure of the provisions that would have been implemented, had the error been noticed: otherwise, the court would cross the boundary between construction and legislation.
23. Mr Hayman argues that the anomalies and inconsistencies in CPR 47 and Practice Direction 47, as to the jurisdiction of authorised court officers, is so confused as to mean that the court cannot be certain as to what is intended. The confusion is exacerbated, he says, by the fact that although the parties have the right to request that an authorised court officer should not undertake a detailed assessment, in the case of provisional assessment they will not know, until after the provisional assessment taken place, who has undertaken it. That, he argues, is a significant curtailment of the parties' rights.
24. Mr Hayman referred me to a number of documents evidencing the evolution of the provisional assessment rules, from the recommendations of Jackson LJ to their consideration by the Civil Procedure Rule Committee ("CPRC"). He points out, for example, that CPR 47.21 does not seem to have been included in the original list of rules contemplated for Practice Direction paragraph 14.2.
25. I should mention that at the conclusion of his oral submissions, Mr Hayman invited me to treat CPR 47.15 as a "self-contained code". I am afraid that I cannot find any substance in this submission. CPR 47.15 is part of CPR 47. It would in my view be wholly inappropriate to treat it as a self-contained, separate regime.

### **The Defendant's submissions on the Jurisdiction of an Authorised Court Officer**

26. It will be evident from my conclusions that I agree with most of Mr Dunne's arguments for the Defendant, so I will not recite them here. I will mention that I agree both with his submission that it would be appropriate, insofar as necessary, to apply to the CPR the purposive approach to interpretation described, for example, in *R (on the application of Quintavalle v Secretary of State for Health)* [2003] UKHL 13 (Lord

Bingham at paragraphs 7 and 8), and also that it is, in this case, unnecessary to do so to allow the rules to have their intended effect.

27. As Mr Dunne rightly says, excluding authorised court officers (who generally, have much shorter waiting lists and faster turnaround times than costs judges, and who undertake the bulk of provisional assessments) from provisional assessments would have a highly detrimental effect upon the service offered to users of the SCCO. It would engender significant delays. It seems to me in any event that the Claimant's interpretation of the rules does not stand up to analysis.

### **Conclusions on the Jurisdiction of an Authorised Court Officer**

28. *Friston on Costs* is an invaluable work, and one does not disagree lightly with the author's conclusions, even the sort of tentative conclusion suggested at paragraph 43.206. I do, however, respectfully disagree. I do not accept that CPR 47.3 has been accidentally omitted from Practice Direction 47, paragraph 14.2. Nor do I accept that its omission has any significance at all. I say that for these reasons.
29. One must first bear in mind the relative status of the Civil Procedure Rules and the accompanying Practice Directions. The Civil Procedure Rules are created by secondary legislation, and have the force of statute. The Practice Directions do not. Practice Directions must be observed, but they cannot displace or overrule the Civil Procedure Rules.
30. A Practice Direction may be given the force of a rule by the Civil Procedure Rules themselves. Paragraph 14 of Practice Direction 47 has the force of a rule only in so far as CPR 47.15 provides for that. What CPR 47.15, at paragraph (2), actually says is that "In proceedings to which this rule applies, *the parties must comply* with the procedure set out in Part 47 as modified by paragraph 14 Practice Direction 47." (My emphasis).
31. CPR 47.15(2), in cross-referencing to paragraph 14 of Practice Direction 47, says what the parties must do in proceedings to which rule 47.15 applies. It does not go beyond that. Its effect is, expressly, procedural, not jurisdictional.
32. CPR 47.15 does not purport to, nor does it, alter or undermine the jurisdiction conferred upon authorised court officers by CPR 47.3. CPR 47.3 is, in my view, not specifically mentioned at Practice Direction 47 paragraph 14.2 because there is no need to do so. It has to do with the jurisdiction of an authorised court officer, not with the procedures with which the parties must comply.
33. It seems to me questionable whether it is strictly necessary to include CPR 47.21 in the list at paragraph 14.2, because it is not so much a rule to be complied with as a right of appeal. One can however see the sense of doing so. It completes the list of procedural provisions to which the parties to an assessment under CPR 47.15 should have regard.
34. It is, however entirely unnecessary to mention, at Practice Direction 47 paragraph 14.2, rules CPR 47.22 to CPR 47.24. That is because they set out procedures for the appeal, to which CPR 47.15 does not apply. Again, it seems to me that their omission from paragraph 14.2 has no significance. They do not belong there.



35. In short, it seems to me that the Claimant's construction of CPR 47.15 and practice Direction 47 paragraph 14.2 is both insupportable and contrary to the overriding objective. The procedural and jurisdictional difficulties referred to by the Claimant, in my view, do not arise.
36. It may well seem inconsistent that authorised court officers have jurisdiction under CPR 47.14 but not CPR 47.8, but that does not seem to me to have much bearing on the matter in hand. As for *Bello v Teclé*, I do not accept that in my judgment in that case, I identified any inconsistencies or anomalies in CPR 47 or in practice Direction 47. I believe I did no more than to point out that the proposition that one can appeal from a provisional assessment is inconsistent with the rules.
37. As for CPR 47.3(2), if a party objects to a particular assessment being heard by a court officer then they can (and should, if delay is to be avoided) apply for an order to that effect at the outset, without waiting for the case to be assigned. That aside, any experienced costs draftsman or costs lawyer (who tend to deal with most bills submitted to the SCCO) will know perfectly well whether an authorised court officer is likely to deal with the assessment, and if they are not sure they can ask. The suggestion that the undertaking of provisional assessments by authorised court officers in any way erodes the parties' right to choose, seems to me to be fanciful.
38. Because of the conclusions I have reached, it is not necessary for me to consider whether it is appropriate to apply the *Inco Europe Ltd & Others* to put right any drafting error. The rules seem to me to work perfectly well as they are.
39. If I had thought it necessary to do so, then I would agree with Mr Dunne that I should. I do not accept Mr Hayman's submissions that the intention behind the rules to be unclear, and I do not find helpful his attempts to persuade me to speculate upon the thought processes of the CPRC.
40. The reality is that most bills of £75,000 or less are provisionally assessed, and in the SCCO most of them are assessed by authorised court officers. It seems to me obvious that the CPRC cannot have intended that CPR 47 and the accompanying Practice Direction should at once confer upon authorised court officers jurisdiction to assess bills of up to £35,000 (or, in certain cases, up to £110,000) and at the same time exclude them from assessing the great majority of those bills by virtue of the fact that they will, under 47.15, be provisionally assessed. If the omission of CPR 47.3 from the list of provisions at Practice Direction 47, paragraph 14.2 had been an error, then the obvious thing to do would have been to correct the error by adding it.

### **The Scope of the Appeal: The Claimant's Submissions**

41. Mr Hayman submits that time for appealing does not begin to run until such time as all issues in the provisional assessment process have been decided. CPR 47.15(7) provides that the provisional assessment only becomes binding 21 days after the parties have received notice of the assessment on paper and if neither party requests a review hearing.
42. There does not, he says, appear to be any logical mechanism applicable under the rules to govern how an appeal from an authorised court officer should work within the provisional assessment procedure. That said, it is clear that the provisional assessment

cannot bind the parties and therefore that the cost officer's decisions are not final until proceedings have been concluded. It cannot be right that the Claimant's right to appeal would arise on receiving the provisional findings of the authorised court officer.

43. It cannot be a satisfactory solution to that, he suggests, to say that any decision any decision not pursued to a review hearing must be binding, so that a right to appeal only accrues in relation to items pursued in oral review hearings. Such a finding, he submits, would be perverse and contrary to the express wording of the rule to the effect that where a review is requested, the first stage of the provisional assessment process is not binding.
44. There is no guidance in the Civil Procedure Rules as to how the oral review should be conducted. In particular, the rules do not limit the issues to be determined at that hearing to those put forward in the request. It is therefore open to the court to revisit any of its findings of the oral review, whether raised by the party or not. That is another reason why, logically, time to appeal should not run until all the issues have been determined.
45. These submissions are, says Mr Hayman, consistent with paragraph 3.4 of Jackson LJ's report on the provisional assessment pilot from January 2012., In which he saw the processes a two-stage process, the conclusion of which a dissatisfied party could appeal.
46. Mr Hayman refers to the decision of HHJ Wood at Liverpool County Court in *Mehmi v Pincher* (unreported, 20 July 2015). In that case, a receiving party's costs had on provisional assessment been disallowed in their entirety, due to their failure to file with the court, in compliance with the Civil Procedure Rules, documents evidencing the contract of retainer. The defaulting party applied both for an oral review under CPR 47.15 (7) and for relief from sanction under CPR 3.9.
47. HHJ Wood found (paragraph 38) that the disallowance of costs and provisional assessment was a judicial determination, not a sanction, so that relief from sanction was not required. He also found (paragraph 25) that as the oral hearing is not an appeal, there is nothing in the rules that prevent additional material being provided in the course of that hearing. He added this (at paragraph 39):

‘... There is a built-in entitlement to an oral review on *any aspect* of the provisional assessment. The provisional assessment is not binding if there is such a review, and therefore its effect is nullified, with the matter proceeding for detailed assessment in the old-fashioned way on the identified aspects, say that there is a costs disincentive in the 20% adjustment required’.
48. As to the production of documents of the hearing, he said this (at paragraph 45):

‘... When an oral hearing is requested under CPR 47.15(7), although the hearing is limited to those items in the bill which are challenged under subparagraph (8) and thus is circumscribed, it is in other respects a detailed assessment, in which the judge must surely have the power to direct the receiving party to produce documents to enable it to “reach its decision”’.

49. Mr Hayman argues that it is inconsistent with the costs provisions of CPR 47.15, which go he says to the entirety of the costs of the detailed assessment process, that the scope of the oral hearing should be limited to the issues raised on making the request. The court must have the power to revisit any issues it sees fit, which is also consistent with its wide powers under CPR 47.24. An appeal by way of re-hearing is by its nature an appeal on the issues, not a review of a particular decision.
50. Referring again to the recommendations of Jackson LJ on the provisional assessment pilot, Mr Hayman suggests that the only reason for requiring the parties to identify the issues to be heard at, and the time estimate for, an oral hearing is to assist with administration. The court can then judge an appropriate time estimate.
51. Mr Hayman refers to *Zuckerman on Civil Procedure: Principles of Practice* (3<sup>rd</sup> edition) at paragraph 24.228: the principle of minimal interference does not apply to decisions given by bodies that did not hold a hearing or by a judicial officer of any judge. That is why an appeal against a decision of an authorised court officer in detailed assessment proceedings is by way of a rehearing.
52. Referring also to *Armitage v Nurse* [2000] 2 Costs L.R. 231, Mr Hayman argues that the Claimant has a right to expect to be able to appeal as of right. That is an article 6 right, not to be interfered with. It would be significantly prejudiced by limiting the right to appeal to the issues raised an oral hearing. The alternative is to require a party to raise absolutely every issue, at an oral hearing, before the authorised court officer before exercising a right to appeal.
53. Finally, Mr Hayman raises the alternative argument that there are exceptional circumstances which support the Claimant's right to raise new issues on the appeal. Except for issues of hourly rates and proportionality, the papers returned by Ms Kenny did not offer any reasoning for the decisions made. Mr Hayman submits that Practice Direction 47, paragraph 14.4 (2) requires that. If such information is not provided, the party deprived of it cannot, by definition, be in a position to comply with the requirement to identify the items that he or she wants the court to address in a hearing. It is not right, he says, in such circumstances, that the Claimant should face a time limit for deciding which items to challenge from the provisional assessment.

### **The Scope of the Appeal: The Defendant's Submissions**

54. Mr Dunne argues that a party has the right to appeal the decisions of an authorised court officer to a costs judge, not to seek to rerun the entire assessment from the beginning. So much is clear from CPR 47.21, which make it expressly clear that the appeal is against a decision of an authorised court officer. Practice Direction 47, similarly, provides for a record of the "judgment" or "decision" appealed against to be produced.
55. The appeal is against the oral review, not the provisional assessment. The rehearing can only be in relation to decisions made at the oral review. The Claimant has confused the test of a re-hearing, in which the costs judge considers an issue afresh as opposed to considering whether the authorised court officer was wrong, with the misconceived proposition that the entirety of the bill and the points of dispute are, on the appeal, at large.

56. The Claimant was entitled, if he chose, to seek an oral review of every decision made by the authorised court officer on the provisional assessment. He then had an unqualified right to appeal if still dissatisfied with any of the authorised court officer's decisions. He did not take the first step, except in so far as the decisions concerned hourly rates and document time, and even then he conceded one of them at the oral hearing. The only issue left to be determined in appeal is hourly rates.

### **The Scope of the Appeal: Conclusions**

57. The Civil Procedure Rules do not make express provision for appeals from a provisional assessment, whether from an authorised court officer or otherwise. To my mind, that is because there is no right of appeal from a provisional assessment. If a party wishes to challenge the provisional assessment, that party must request an oral hearing.
58. To interpret the Civil Procedure Rules in any other way would be to allow a party to bypass the oral hearing procedure and go straight to appeal (presumably seeking any necessary permission from the appeal court). That would undermine the aim of the provisional assessment process, which is to save costs and court resources either by disposing of a hearing altogether or by proceeding to a hearing on limited issues.
59. It would also fall foul of the objections I identified in *Bello v Teclé*, when I concluded that CPR 47.21 does not confer a right to appeal from decisions made on provisional assessment. I will restate here, for ease of reference, my reasons for coming to that conclusion.
60. It cannot be intended that a party should have two rights to appeal, once on the provisional assessment and once again on any subsequent hearing.
61. Given that there is only one opportunity to appeal, it cannot be right that the time for appealing should run from the date of the provisional assessment, which remains provisional and subject to further adjustment until the time for requesting such further adjustment has expired.
62. The 21-day time limit for appealing (whether under CPR 47.21- 47.23 or CPR 52.12) run from the date of decision, and is clearly intended to run from the date of a decision known to the parties. Notice of provisional assessment may not arrive until some time after the relevant decision is made, and it does not advise the parties of the date of the decision. It would make no sense for the rules to provide that, following provisional assessment, time for appealing should run concurrently with time for requesting a hearing, but for a shorter period expiring on a date unknown to either party.
63. Nor can it be right that time for appealing runs, following provisional assessment, from the end of the 21-day period for requesting a hearing, when the provisional assessment becomes final and binding. The prescribed 21-day period for appealing will by that point already have expired.

64. It follows that the time for appealing under CPR 47.21 runs from the date of an oral hearing. That appeal will be an appeal from the oral hearing and any right of appeal will lie from decisions made at the oral hearing.
65. Mr Hayman's submission to the effect that a rehearing must be a rehearing of the issues, begs the question of what the "issues" actually are. The point of an appeal by way of rehearing is as I understand it is, first, that the appeal judge is not limited to considering whether the judge (or authorised court officer) below was wrong, and second that there is more scope for introducing new evidence. It remains, however, an appeal from the decisions of the court below.
66. In effect Mr Hayman is saying that an appeal by way of rehearing is a fresh hearing: a completely new start, with no reference to what has gone before. I do not think that that can be right. If it was, CPR 47.21 to 47.24 would not refer to an appeal from a decision of an authorised court officer and there would be no point in the provisions of Practice Direction 47, paragraph 20, for the obtaining of a record of the decision made by the authorised court officer. In fact the entire process of preparing a notice of appeal and supporting materials, as required by the CPR 47 and Practice Direction 47, would be a waste of time and costs. One would instead just request a new hearing.
67. That aside, I do not agree with Mr Hayman's submission that the parties are free to raise at the oral hearing issues that were not identified in the request for that hearing, as required by CPR 47.15(8). The parties are, in my view, permitted to raise only the issues specified in the request.
68. I am unable to entertain the suggestion that the requirement, at CPR 47.15(8), that a party requesting an oral hearing define the items on the bill to be reviewed and provide a time estimate, is there only for administrative purposes. By limiting the issues to be addressed that provision embodies the key aim of provisional assessment: to save costs and court resources.
69. The limited nature of an oral hearing was recognised in *Mehmi v Pincher* by HHJ Wood, with whom I respectfully agree. As he put it, an oral hearing is "a detailed assessment in the old-fashioned way on the identified aspects... the hearing is limited to those items in the bill which are challenged under subparagraph (8) and thus is circumscribed..."
70. It cannot be right that an oral hearing should be circumscribed (as it is) in the way described by HHJ Wood, and yet that an appeal from that oral hearing should not. Such an illogical arrangement would defeat the purpose of the provisional assessment process, which provides the parties with an opportunity to consider provisional decisions and to take forward, in an oral hearing, only the issues they choose to take forward. If they do, and are unsatisfied with an authorised court officer's decision at the hearing, then they have an automatic right of appeal. If they do not, there is nothing to appeal.
71. In short, it seems to me that the Claimant cannot raise on this appeal issues he did not put to the authorised court officer, because (a) by excluding those issues from his request for an oral hearing, he terminated his right to raise them and (b) insofar as he did not, he chose not to raise them.

72. I am quite unable to accept that the Claimant's right to judicial determination is in any way compromised by the proper application of the rules in the way I have described. The Claimant has had a choice, at every step, of what to contest and what not to contest. The process of appeal should not represent an opportunity for a party to demand a rehearing of decisions which that party has previously accepted.
73. I can find nothing in the costs provisions of CPR 47.15 to support the Claimant's case. Nor can I see that CPR 47.24 has any relevance. Of course the court, on appeal, will make any order and give any directions it considers appropriate. That no bearing on the scope of the issues before the court.
74. I cannot accept Mr Hayman's "exceptional circumstances" argument. The "exceptional circumstances" provisions of CPR 47.15(7), where the circumstances justify it, allowing extension of time to request an oral hearing. They do not furnish a pretext for reintroducing, on appeal, issues not raised at the oral hearing itself.
75. Nor do exceptional circumstances exist. In *Bello v Teclé* the paying party's advisers, faced with provisional decisions for which no adequate reasoning was given, requested clarification on the basis that they could not advise the client as to whether to request an oral hearing. No clarification was forthcoming, and I found that sufficient to establish exceptional circumstances.
76. In this case, the Claimant did not request clarification of the authorised court officer's decisions. On the contrary, the Claimant requested an oral hearing, and chose the issues to be addressed at that hearing. Clearly there was no difficulty in understanding the rationale for Mr Kenny's decisions, and the "exceptional circumstances" argument being run now is, as Mr Dunne says, an afterthought, brought in an attempt to broaden the issues on appeal.

### **Footnote**

77. I have mentioned that one of the issues raised in the Grounds of Appeal is that Ms Kenny as a "costs officer" did not have the right to summarily assess the costs of the hearing before her. I do not know whether that point was put to Ms Kenny, but in case it is to be pursued before me I shall not pre-judge it. I would only make these observations, strictly subject to any further submissions.
78. The Claimant relies in this respect upon the provisions of paragraph 9.7 of Practice Direction 44, which provides that "The court awarding costs cannot make an order for a summary assessment of costs by a costs officer."
79. This seems to me first to confuse the term "costs officer", which I as I have mentioned, is defined at CPR 44.1 to include a district judge and a costs judge, with the term "authorised court officer", and second to overlook the fact that Ms Kenny did not (as far as I can see) make an order for summary assessment. She just assessed costs summarily, in the usual way, under CPR 47.20(5).
80. I would suggest that the real point of paragraph 9.7 of Practice Direction 44 is only to prevent an order being made by the judge who has heard a case, delegating the summary assessment of costs to a "costs officer", as defined in CPR 44.1. It cannot be

intended to prevent a district judge, costs judge or authorised court officer from undertaking a summary assessment under CPR 47.20(5).

### **Summary of Conclusions**

81. I do not believe that there is a viable argument to the effect that authorised court officers have no jurisdiction to conduct provisional assessments. It seems to me that the clear intention of the rules is that they should, and that the Claimant's interpretation of the rules to the contrary is insupportable.
82. There is no appeal from a provisional assessment, only from an oral hearing, if requested. That appeal, whether under CPR 42.21 or otherwise, will be limited to decisions made at the hearing.
83. In this case the Claimant accepted the authorised court officer's provisional assessment on all but two points, and then accepted one of the remaining points at the beginning of the oral hearing. It would be contrary to the overriding objective to accept that the Claimant has the right to go back on his own decisions and restart the entire detailed assessment process through the appeal procedure.
84. In consequence, unless the Claimant wishes to raise before me the question of Ms Kenny's right to summarily assess the costs of the oral hearing, which I shall not pre-determine without submissions, the one issue remaining before me on the appeal is that of hourly rates.