Neutral Citation Number: [2023] EWHC 508 (KB) Case No: QA-2022-LDS-000008

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION

The Combined Court Centre, Oxford Row, Leeds

Date: 10th March 2023

Before :

HIS HONOUR JUDGE GOSNELL
(sitting as a Judge of the High Court)

- -

Between :

MR DANNY O'SULLIVAN	**Claimant / Respondent**
- and –	
HOLMES AND HILLS LLP	**Defendant / Appellant**

- -
- -

Mr Meehan (instructed by Kain Knight Costs Lawyers) for the Appellant
Mr Ian Simpson (instructed by JG Solicitors Limited) for the Respondent

Hearing dates: 18th January 2023

- -

Judgment Approved by the court for handing down

His Honour Judge Gosnell :

1. Introduction:

This appeal is brought by the Appellant against the decision of District Judge Batchelor sitting as a Regional Costs Judge on 6th May 2022 when at an oral hearing , she refused to vary the order she had made at a provisional assessment pursuant to CPR 47.15. The detailed assessment proceedings arose from the Respondent having applied for an assessment of his own solicitors' costs (the Appellant) under section 70 Solicitors Act 1974. Permission to appeal was granted by Mr Justice Lavender.

2 Procedural History

The Respondent was involved in an accident and instructed the Appellant Solicitors firm to represent him in a personal injury claim. The claim was successful and the Defendants in that claim paid the sum of £80,000 to the Appellant on the Respondent's behalf. The Appellant negotiated payment of their costs from the Defendant's insurers and accepted the sum of £45,000. They then sought to recover the sum of £17,082.09 from the Respondent pursuant to the terms of their retainer.

3. In October 2020 the Respondent instructed different solicitors who requested that the Appellant serve a Bill of Costs with the intention of challenging the deduction from his damages. The Bill of Costs was drafted and served on 16th October 2020 and on 6th November 2020 the Respondent issued proceedings for an order for assessment under s 70 Solicitors Act 1974. District Judge Batchelor issued directions for an assessment of the Appellant's final statute bill on 2nd June 2021. Amongst the usual directions for Points of Dispute and Replies was an order for the Appellant to give facilities for inspection of their file of papers. Solicitors on behalf of the Respondent undertook this inspection. Points of Dispute and Replies were served and on 14th February 2022 District Judge Batchelor carried out a provisional assessment on the papers pursuant to CPR 47.15 (3). The Appellant wished to challenge the Judge's decision in relation to Points of Dispute 7.1 and 7.2 and exercised its right to an oral hearing. The oral hearing took place on 6th May 2022 when both parties were represented by the same counsel as on this appeal. The Judge found in favour of the Respondent on the two disputed items and dismissed the application to vary her original provisional assessment. There were financial consequences from that decision which included an order for the Appellant to pay the costs of the detailed assessment proceedings.

4. The relevant Civil Procedure Rules

The obligation to file and serve Points of Dispute is found in CPR 47.9 but the requirements about the form of this document is in paragraph 8.2 of the Practice Direction to Part 47. It reads as follows:

> *"Points of dispute and consequences of not serving: rule 47.9*
>
> *8.1 Time for service of points of dispute may be extended or shortened either by agreement (rule 2.11) or by the court (rule 3.1(2)(a)). Any application is to the appropriate office.*
>
> *8.2 Points of dispute must be short and to the point. They must follow Precedent G in the Schedule of Costs Precedents annexed to this Practice Direction, so far as practicable. They must:*
>
> *(a) identify any general points or matters of principle whichrequire decision before the individual items in the bill are addressed; and*
>
> *(b) identify specific points, stating concisely the nature andgrounds of dispute.*
>
> *Once a point has been made it should not be repeated but the item numbers where the point arises should be inserted in the left hand box as shown in Precedent G.*

8.3 The paying party must state in an open letter accompanying the points of dispute what sum, if any, that party offers to pay in settlement of the total costs claimed. The paying party may also make an offer under Part 36."

Precedent G referred to above appears at the end of the judgment in *Ainsworth v Stewarts Law LLP* [2020] EWCA Civ 178.

5. When the court assesses costs between a solicitor and their own client certain assumptions apply which are set out in CPR 46.9:

"Basis of detailed assessment of solicitor and client costs

46.9

(1) This rule applies to every assessment of a solicitor's bill to a

client except a bill which is to be paid out of the Community Legal Service Fund under the Legal Aid Act 1984 or the Access to Justice Act 1995 or by the Lord Chancellor under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

(2) Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.

(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –

(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;

(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

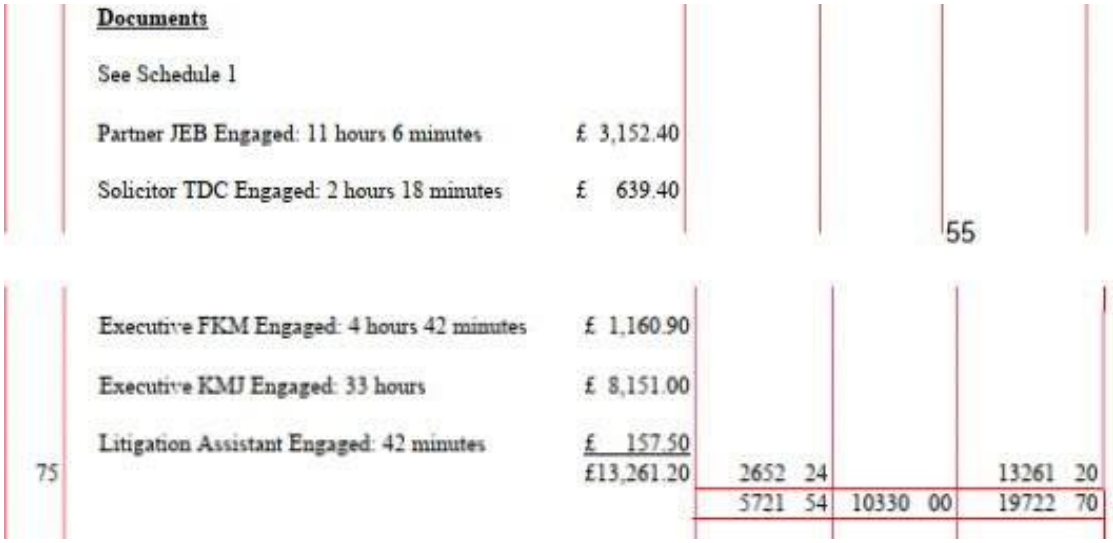
(c)to have been unreasonably incurred if –

(i) they are of an unusual nature or amount; and

(j) (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party."

6. **The Bill and Points of Dispute:**

The Bill of Costs submitted by the Appellant was prepared in traditional form. There were five different fee earners who had done the work at the Appellant firm and there were four different hourly rates to be applied. There were a total of 116 items on the bill and the only two items which were the subject of Points of Dispute 7.1 and 7.2 were items 75 and 107. These were the two items which dealt with work relating to documents. By way of example item 75 looked like this:



	Documents					
	See Schedule 1					
	Partner JEB Engaged: 11 hours 6 minutes	£ 3,152.40				
	Solicitor TDC Engaged: 2 hours 18 minutes	£ 639.40				
						55
	Executive FKM Engaged: 4 hours 42 minutes	£ 1,160.90				
	Executive KMJ Engaged: 33 hours	£ 8,151.00				
	Litigation Assistant Engaged: 42 minutes	£ 157.50				
75		£13,261.20	2652	24		13261 20
			5721	54	10330 00	19722 70

6. In similar fashion dealing with the documents section in part 2 of the Bill item 107 looked like this:

	Documents					
	See Schedule 2					
	Partner JEB Engaged: 8 hours 42 minutes	£2,470.80				
	Executive KMJ Engaged: 8 hours 30 minutes	£2,099.50				
	Litigation Assistant Engaged: 12 minutes	£ 45.00				
107		£4,615.30	923	06		4615 30
			2684	50	5645 00	7777 50

7. Schedule 1 as referred to in item 75 was six pages long and contained 83 separate entries for tasks carried out specifying the fee earner involved, the time spent and the date the work was done. Schedule 2 ran to just over a page and contained 17 entries completed in similar fashion. This method of recording time spent by the solicitor on documents is in accordance with CPR 47 PD paragraph 5.18 which states as follows:

> *5.18 In respect of heads (2) to (10) in paragraph 5.12 above, if the number of attendances and communications other than routine communications is twenty or more, the claim for the costs of those items in that section of the bill of costs should be for the total only and should refer to a schedule in which the full record of dates and details is set out. If the bill of costs contains more than one schedule each schedule should be numbered consecutively.*

8. The Points of Dispute which were the subject of the hearing on 6th May and which were intended to deal with the two items above looked like this:

7.1	**Time claimed in respect of work on documents- item 74** The time claimed in respect of documents is disputed as being either unnecessarily incurred and/or unreasonable in amount. (i.) Partner - 11.1 hours claimed, 8 hours offered (ii.) Solicitor – 2.3 hours claimed, 1.8 hours offered (iii.) Executive 4.7 hours claimed, 3.2 hours offered (iv.) Executive 33 hours claimed, 18 hours offered
7.2	**Time claimed in respect of work on documents- item 106** The time claimed in respect of documents is disputed as being either unnecessarily incurred and/or unreasonable in amount. (i.) Partner – 8.7 hours claimed, 7 hours offered (ii.) Executive – 8.5 hours claimed, 7.2 hours offered (iii.) Litigation Assistant, 0.2 hours claimed, agreed in full

9. The Reply to the Points of Dispute was as follows:

Reply See response to Point 6. The dispute is not compliant, and the Defendant is not in a position to identify which fees are actually in dispute. The Defendant invites the Court to dismiss the point of dispute.

10. When the Appellant referred to Point 6 above it was mistakenly referring to the reply to Point 5 of the Points of Dispute. In this section the Appellant set out a substantive objection to Point of Dispute 5 relying on the presumptions set out in CPR 46.9(3) and upon the authority of the decision of the Court of Appeal in *Ainsworth v Stewarts Law LLP* [2020] EWCA Civ 178. The Appellant sought to argue that the Points of Dispute were inadequately pleaded and did not enable the parties and the court to determine precisely what is in dispute and why. As far as Point 5 of the Points of Dispute was concerned the District Judge at the provisional assessment dismissed the Point of Dispute because she found it was inadequately formulated to enable the court to address it. She formed the same conclusion about Point 7.

11. In relation to Points 7.1 and 7.2 however she reached a different conclusion. Her handwriting is difficult to read but I believe that it says:

> *" Contrary to the totally non-specific dispute set out in 5 & 7 above this dispute is confined to documents time and referenced by individual grades of fee-earner and the disputed documents schedule is available to the court. As such the court is of the view that it can properly decide the point of dispute. The time claimed is unnecessarily incurred and / or unreasonable in amount considering all relevant items both at item 74 and 106. Time allowed as annotated"*

It is accepted that she was mistaken in the item number and it should have read 75 and 107. In relation to Point of Dispute 7.1 the District Judge allowed exactly what was offered in relation to the first three fee earners with a compromise figure in relation to the fourth. In relation to Point of Dispute 7.2 she allowed exactly what was offered.

12. The Appellant requested an oral hearing limited to the District Judge's provisional findings in relation to Points 7.1 and 7.2 of the Points of Dispute. This hearing was listed before District Judge Batchelor on 6th May 2022. At the hearing Mr Meehan for the Appellant sought to persuade the District Judge that the two Points of Dispute ought to be dismissed relying on the presumptions set out in CPR 46.9 (3) and contending that the Points of Dispute were inadequately pleaded in that they failed to state concisely the nature and grounds of dispute in relation to the two items in question bearing in mind the significant number of entries on each of the two schedules. Mr Simpson for the Respondent sought to persuade the District Judge that the Points of Dispute contained sufficient material for the Judge and the Appellant to fairly respond to them. Both counsel relied on the judgment of the Court of Appeal in *Ainsworth v Stewarts Law LLP*.

The Judgment of District Judge Batchelor

13. In a clear and comprehensive ex tempore judgment the District Judge summarised the procedural history of the case in a similar way to the way I have done. She then set out the relevant procedural guidelines including the assumptions set out in CPR 46.9(3) and paragraph 8.2 of the Practice Direction to CPR 47. The Judge then selected various passages from the judgment of Lady Justice Asplin in *Ainsworth v Stewarts Law LLP* from paragraph 37 onwards. I will refer to these passages later in this judgment. The District Judge then explained why she favoured the Respondent's case on the adequacy of the Points of Dispute in the following three paragraphs:

> *10. "Paragraph 39 in Ainsworth sets out the nub of this. "The complaint should be short, to the point and focused" and is repeated. "In the case of a solicitor and own client assessment … in order to specify the nature and grounds of the dispute it is necessary to formulate specific points by reference to the presumptions contained in CPR 46.9(3) which would otherwise apply." It seems to me the solicitors have done that. They have said that the time was either unreasonably incurred or unnecessarily incurred or was not reasonable in amount. They have to specify the specific items in the bill to which they relate. The items in this bill are items 74 and 106 (or 75 and 107 using the correct numbering) and that is the item to which we are referred. "And they must make it clear in each case why the item is disputed." Well they have done that, they have set out their objection and by reference to category of fee earner and by what extent. When undertaking the assessment I then had available to me the very detailed item by item schedule attached to the bill which told me what work each fee earner had done. It cannot be said that the receiving party did not know what was in issue between them. But importantly, in paragraph 39 of Ainsworth it says: "This need not be a lengthy process" and this refers back, in my view, to comments made in paragraph 33 where they set out Sir Rupert Jackson's Review of Civil Litigation Costs and his conclusions: the points of dispute had*

become overlong, expensive to read and expensive to reply to and that points of reply were similarly prolix. That approach was not something that the court wanted to go back to. That is not something that found favour with the court, it did not assist either party in narrowing the issues and it certainly did not assist the parties in dealing with matters in a proportionate manner, and I do not accept that Ainsworth was attempting to go back to that position either.

11. I believe that in the case before me the paying party had appropriately engaged with 46.9(3); they had specified the specific item in the bill. I do not accept this reference that "items" meant "entries" in Ainsworth. To adopt that would mean that each and every timed entry would have to be specifically addressed, and that is going back to what I will describe as the "bad old days" that Sir Rupert Jackson was so keen we move away from. I do not accept that in Ainsworth the Court of Appeal would have said "this need not be a lengthy process" if they were seriously suggesting that each and every timed entry under the documents item in a bill would need to be objected to.

12. In this case I believe that I did have sufficient information to consider the objection being raised in a proper manner, in a proper form, and that the receiving party had had an opportunity to know what the point being raised was and an opportunity to respond before I carried out the assessment. I believe that my decision does not conflict with the decision reached by the Court of Appeal in Ainsworth. I do not accept that there was not enough to go on to reach the decision that I did and I stand by my decision. Therefore, the application made by the defendants is dismissed."

14. **The Grounds of Appeal**

The Appellant relies on six grounds of appeal which are set out below:

"1. The District Judge was wrong in law to find that the Claimant's objections at Points 7.1 and 7.2 of the Points of Dispute complied with PD 47 8.2. Accordingly, the District Judge was wrong to dismiss the Defendant's application. The District Judge should have dismissed the Claimant's objections at Points 7.1 and 7.2.

2. The District Judge was wrong in law to find that the Claimant's objections at Points 7.1 and 7.2 followed the guidance of the Court of Appeal in Ainsworth v Stewarts Law LLP [2020] Civ 178. Ainsworth was binding on the District Judge and accordingly the District Judge was wrong to dismiss the Defendant's application. The District Judge should have dismissed the Claimant's objections at Points 7.1 and 7.2.

3. The District Judge was wrong in law to hold that the Claimant's objections at Points 7.1 and 7.2 adequately set out the nature and grounds of the dispute such that the Defendant was in a position to reply to the objection in order to justify the time claimed.

4. The District Judge was wrong in law to hold that the Claimant's objections at Points 7.1 and 7.2 were formulated by specific reference to the presumptions in CPR 46.9(3).

5. The District Judge was wrong in law to find that the approach suggested by the Defendant would lead to disproportionate Points of Dispute and/or Points of Dispute which required the Claimant to object to each and every document entry.

6. The District Judge was wrong in law to fail to consider the requirements that Points of Dispute should be drawn in such a way so as to enable the court to deal with issues raised in a fair, just and proportionate manner. The District Judge emphasised proportionality, over the requirements of fairness and justice.

15. **Ainsworth v Stewarts Law LLP**

In order to understand the detailed submissions made by both counsel it is necessary to record the salient parts of the judgment of Lady Justice Asplin in the above case. The facts of the case were quite similar. This was also a challenge by a client to his own Solicitor's Bill of Costs for acting on his behalf. He had instructed new solicitors who had examined the previous solicitor's file and had issued proceedings under s.70 Solicitors Act 1974. A Bill of Costs was served and again in this case the focus was on the work done on documents by various fee earners during a particular period of time. The work in the Bill was separated into six different items each representing work done by a particular fee earner and then details of the work actually done were set out in a Schedule containing 32 times entries. The Bill read as follows:

"Work done on Documents

See attached Schedule 1

40. Engaged 1 hr 12 mins (SF)

41. Engaged 2 hours 54 mins (DC)

42. Engaged 2 hrs 24 mins (TA)

43. Engaged 20 hrs 6 mins (LG)

44. Engaged 11 hrs 42 mins (HF)

45. Engaged 8 hrs 30 mins (Paralegals)"

16. Mr Ainsworth's Points of Dispute 10 in relation to items 40-45 was as follows:

"The Claimant requests the court to note that over a period of 11 working days the Defendant seeks to claim 46.8 hours of work which is equivalent to approximately 4.3 hours of time every single day. It is the clear opinion of the Claimant that under any stretch of the imagination, the level of time expended can in no way be justified and against the relevant test, the time expended, and its subsequent cost must be deemed to be unusual in nature and amount.

As with the timed attendances upon the Claimant, the Claimant is mindful of the requirements of the Civil Procedure Rules as to the need to keep Points of Dispute brief and succinct. It must therefore be stated that all entries are disputed. By way of general indication however, the Claimant can confirm the main issues with the document time are as follows:

1. *Significant duplication between fee earners*
2. *Wholly excessive time expended by fee earners reviewing documentation provided by the Claimant*
3. *Too much time claimed generally in relation to preparation4. An excessive level of time claimed in relation to drafting of communications*
5. *Unnecessary inter-fee earner discussions arising due to the duplication*
6. *Excessive time spent collating documentation*
7. *Significant preparation time claimed in relation to meetings with the Claimant.*

It can be confirmed that the above stated list is not exhaustive of the issues but provide a general overview as to the reason why the time claimed is unusual in nature and/or amount. The Claimant reserved their position generally."

17. In response Stewarts Points of Reply in relation to each of items 40-45 stated:

> *"The defendant cannot provide any meaningful reply to this general point. In the absence of itemised points of dispute being served (permission to rely on the same being a matter for the court and the Defendant's position will be reserved), the Court will be asked to dismiss this point"*

Nothing further was served by Mr Ainsworth in response.

18. The original detailed assessment was conducted in front of Chief Costs Judge Gordon Saker. Having heard from advocates for both parties he ruled as follows:

> *"8. In oral submissions, Mr Poole on behalf of the claimant seeks to take a broad brush approach to the document schedule and indicated that what he would like to do is to identify some*

particular items and explain why those are unreasonable, with a view to persuading the court that the time overall should be reduced on a broad brush approach and he candidly accepted, as one might expect, that the items which he would be relying on in particular would be the biggest items in terms of the time spent.

9. The difficulty with that, it seems to me, is that the claimant has not set out in his points of dispute which items he wishes to challenge and why and that does cause, as the defendant has indicated in its reply, a difficulty insofar as – in respect of items which have not yet been identified – they would need to look at the attendance notes to see what work was done and why and the context in which it was done in order to seek to explain why the time claimed is reasonable, if indeed that is the objection, or why a particular fee earner was engaged in doing it and why possibly more than one fee earner was engaged in doing it.

10. The purpose of points of dispute is really to prevent that work being done on the hoof in the course of a hearing. The solicitors are entitled to know specifically which items are challenged and the reasons for the challenge. Insofar as the claimant states that all entries are disputed, it seems to me that it would be beholden on him to explain why each particular entry is challenged and whether he is asserting that no time should be allowed or reduced time should be allowed or whether the work should have been done by a different grade of fee earner. But, as pleaded, the points of dispute, it seems to me, do not raise a proper challenge to the documents items and certainly do not raise a challenge which can be properly answered by the defendant without a considerable amount of time being spent in looking at the papers to reply to that challenge and that, it seems to me, is a process, which if it is to be done, should be done in advance of the hearing rather than at the hearing.

11. One can well understand why Mr Poole is seeking to adopt the approach that he is of encouraging the court to take a broad brush but the difficulty with that approach is that we are not going to be looking at every item, we will only be looking at particular items and presently, apart from Mr Poole, none of us knows which items those are going to be. It seems to me that that does put the defendant in a difficult position. It also puts the court in a difficult position. I read the papers in the light of the Judgment Approved by the court for handing down. Ainsworth v Stewarts Law LLP points of dispute as they are pleaded and I was not able to identify which particular items are challenged or why.

12. In the circumstances, I think the only fair course is to dismiss that point of dispute 10 on the basis that it has not been properly pleaded."

19. The decision of Chief Costs Judge Gordon-Saker was appealed to His Honour Judge Klein sitting as a High Court Judge. He dismissed the appeal supporting the decision at first instance. In the appeal to the Court of Appeal counsel for the Appellant prayed in aid Sir Rupert Jackson's Review of Civil Litigation Costs : Final Report 2009 , in particular the following two paragraphs:

> *"2.7 Points of dispute and points of reply. Points of dispute are said to be overlong, therefore expensive to read and expensive to reply to. Points of reply are similarly prolix. Both of these pleadings are in large measure formulaic and are built up from standard passages held by solicitors on their databases. In addition, there are lengthy passages in the points of dispute and points of reply dealing with time spent on documents. It would be better if the points of dispute…concentrated on the reasoning of the bill, not the detailed items… . . .*
>
> *5.11 Points of dispute and points of reply. Both points of dispute and points of reply need to be shorter and more focused. The practice of quoting passages from well know judgments should be abandoned. The practice of repeatedly using familiar formulae, in Homeric style, should also be abandoned. The pleaders on both sides should set out their contentions relevant to the instant cases clearly and concisely. There should be no need to plead to every individual item in a bill of costs, nor to reply to every paragraph in the points of dispute."*

In response to this report the requirements in the Practice Direction in respect of Points of Dispute were changed , in April 2013, to omit the requirement to *"identify each item in the Bill of Costs which is disputed".*

20. Having reviewed the relevant Rules and Practice Direction in the way I have done earlier in this judgment Lady Justice Asplin came to the following conclusions:

> *"37. Accordingly, 47PD.8 para 8.2 is directly relevant. It makes it absolutely clear that points of dispute should be short and to the point and, therefore, focussed. Furthermore, subparagraphs (a) and (b) leave no doubt about the way in which the draftsman should proceed. General points and matters of principle which require consideration before individual items in the bill or bills are addressed, should be identified, and then specific points should be made "stating concisely the nature and grounds of dispute." Such an approach is entirely consistent with the recommendations and observations made in the Review of Civil Litigation Costs: Final Report, 2009 to which we were referred.*
>
> *38. Common sense dictates that the points of dispute must be drafted in a way which enables the parties and the court to determine precisely what is in dispute and why. That is the very purposes of such a document. It is necessary in order to enable the receiving party, the solicitor in this case, to be able to reply to the complaints. It is also necessary in order to enable the court*

to deal with the issues raised in a manner which is fair, just and proportionate.

39. As I have already mentioned, the complaint should be short to the point and focussed. As para 8.2(b) of 47PD.8 indicates, that requires the draftsman not only to identify general points and matters of principle but to identify specific points stating concisely the "nature and grounds of the dispute". In the case of a solicitor and own client assessment, it seems to me, therefore, that in order to specify the nature and grounds of the dispute it is necessary to formulate specific points by reference to the presumptions contained CPR 46.9(3) which would otherwise apply, to specify the specific items in the bill to which they relate and to make clear in each case why the item is disputed. This need not be a lengthy process. Having explained the nature and grounds of dispute succinctly, the draftsman should insert the numbers of the items disputed on that ground in the relevant box. The principle is very simple. In order to deal with matters of this kind fairly, justly and proportionately, it is necessary that both the recipient and the court can tell why an item is disputed. The recipient must be placed in a position in which it can seek to justify the items which are in dispute.

40. It follows that in my judgment, the sample wording which appears in the hypothetical example at Precedent G is of no assistance to Mr Munro. Para 8.2 itself provides that Precedent G should be followed "as far as practicable". It is only an example and is premised upon a party and party detailed assessment in which the paying party will not have had sight of the relevant documentation and the presumptions in CPR 46.9(3) do not apply. Nevertheless, it seems to me that points of dispute in a solicitor and own client assessment should adopt the format of Precedent G to the extent practicable and that the numbers attributed to the individual items to which a complaint relates should be set out in the appropriate box.

42…….Points of Dispute 10 was general in nature and stated that all items were disputed, that the list provided was not exhaustive of the issues but provided a general overview and that Mr Ainsworth reserved his position generally. It did not contain cross references to the numbers of the items disputed on particular grounds. In fact, it was accepted that it did not state why any item in the bill was disputed. In my judgment, therefore, it did not comply with 47PD.8 para 8.2, nor, for that matter, did it take the form of Precedent G.

The Judge also found that the Costs Judge was not wrong to dismiss the assessment in relation to Points of Dispute 10 rather than take a less draconian course.

21. **The Appellant's submissions**

The Appellant relies on the fact that although there were two disputed items numbered 75 and 107 with completely different figures and schedules the objections at Points 7.1 and 7.2 are drafted in identical terms:

> *"The time claimed in respect of documents is disputed as being either unnecessarily incurred and/or unreasonable in amount."*

22. Although each objection concludes by offering an amount of time against each fee earner, there is no indication or explanation why the time claimed in respect of each fee earner has been reduced. It is submitted that the offers are not binding unless accepted by the receiving party.

23. It is submitted that the District Judge was wrong to conclude that the Points of Dispute had adequately set out the grounds of dispute. The purpose of the Points of Dispute as explained in ***Ainsworth*** is to enable the solicitor to know precisely what is objected to and why so that the solicitor can reply to the complaint and justify the time claimed. The objection raises two wholly separate points, necessity in principle, and reasonableness of quantum as alternatives. How is the solicitor to know whether a particular entry on the bill is said to be unnecessarily incurred or alternatively unreasonable in amount ?

24. It is submitted that the Points of Dispute are wholly generic and contain far less detail that the objections in ***Ainsworth*** which were found to be inadequate. No effort is made to specify which parts of the Schedules are in dispute, either by category of work or date

entry. The fact that the Respondent has referred to individual fee earners was merely a means to group his offers as the Bill broke down the costs by fee earner as can be seen above.

25. ***Ainsworth*** determined that Points of Dispute must set out an objection by reference to the presumptions in CPR 46.9(3). Although the District Judge found that the Respondent had adequately engaged with the presumptions the Appellant questions whether there was an adequate basis for such a finding. There are no references to the presumptions in the Points of Dispute numbered 7.1 and 7.2.

26. The Appellant submits that the District Judge may have been led into error by the Respondent's submissions that a sharp distinction is to be drawn between "items" (being the numbered items on the Bill which are then recorded in a column in Precedent G) and "entries" (which are the record of individual tasks of work done and time spent in the Schedules). The District Judge reasoned that as the Respondent had inserted the relevant item numbers in the Points of Dispute (75 and 107) he had complied with the guidance in ***Ainsworth.*** It is submitted by the Appellant that both Chief Costs Judge Gordon Saker and Lady Justice Asplin use the terms "items" and "entries" interchangeably and that the Rules and ***Ainsworth*** expect more than just correctly recording the item number in the Points of Dispute.

27. The District Judge appeared to be concerned that if the Appellant's recommended approach was followed the Points of Dispute would become lengthy and disproportionate but the Appellant disagrees, submitting that in the context of a challenge to document time, all that is required is a short objection followed by a list of document entries to which that objection is said to apply. It does not require a separate objection for each document entry, nor does it require the claimant to object to each and every entry.

28. **The Respondent's submissions**

The first point the Respondent makes is that District Judge Batchelor is an experienced District Judge and Regional Costs Judge who is used to dealing with detailed assessments and her view as to the sufficiency of the Points of Dispute should be preferred over the subjective views of the Appellant. It is submitted that she was exercising a discretion which was wide in nature and it cannot be said that she exceeded the generous ambit within which a reasonable disagreement is possible.

29. The Respondent reminds the court that the District Judge did dismiss Points of Dispute 5 and 7 as insufficiently pleaded and contrary to the judgment in *Ainsworth.* The District Judge was able to distinguish Points of Dispute 7.1 and 7.2 because the dispute was confined to document time and referenced by individual grades of fee-earner and the detailed document schedule was available to the court. She recorded that the court's view was that it could properly consider the Points of Dispute and did so by allowing the times annotated on the Precedent G form.

30. The Respondent seeks to distinguish the judgment in *Ainsworth v Stewarts Law LLP* on its facts. It concerned an assessment in which each fee-earner's profit costs were claimed as a specific item of 6 such items and by reference to schedule of work done of some 32 timed entries. Point of Dispute 10 as to document time simply aggregated those 6 items and pleaded a series of generic objections as a '*general indication* ... [as to] *the main issues with document time*' without e.g. identifying the fee-earner(s) to which each general objection applied or making any offer either in respect of any one of more of items 40-45 or as a total. As Asplin L.J. stated at §42 the Point was '*general in nature and stated that all items were disputed, that the list provided was not exhaustive of the issues but provided a general overview and that Mr. Ainsworth reserved his position generally* ... [without stating] *why any item in the bill was disputed*'.

31. The Respondent also seeks to rely on the reference in the judgment to Sir Rupert Jackson's Review of Civil Litigation Costs reproduced at paragraph 19 above and paragraph 33 of the judgment in *Ainsworth*. In particular:

> *"It would be better if the points of dispute…concentrated on the reasoning of the bill, not the detailed items… . . . and*
>
> *There should be no need to plead to every individual item in a bill of costs, nor to reply to every paragraph in the points of dispute."*

32. The Respondent submits that Lady Justice Asplin focussed on Points of Dispute having to plead to an item claimed in a Bill of Costs and not to the individual entries that may comprise a schedule to an item. The District Judge in this case did not accept that the reference in Ainsworth to "*items"* meant "*entries"* on the schedule as this would take us back to the "bad old days" that Sir Rupert Jackson wanted to leave behind. The Respondent submits that the District Judge was right to draw this distinction and a fair reading of the judgment of Lady Justice Asplin supports this interpretation, in particular paragraph 5 where she records the fact that Schedule 1 comprised of 32 timed *"entries".* It is submitted that it is fallacious to suggest that Lady Justice Asplin would not have appreciated the conceptual difference between the two.

33. The Respondent submits that the District Judge did consider the presumptions set out in CPR 46.9(3). The Points of Dispute referred to the time claimed being "*unreasonable in amount*" and although CPR 46.9(3) does not use the word necessary it is encompassed by the word "reasonably" which does appear in the Points of Dispute.

34. The Respondent has made submissions in relation to each Ground of Appeal but I will not record them in this judgment as I intend to deal with the Grounds compendiously.

35 **Decision**

As this is an appeal the court is bound by CPR 52.21 which reads as follows:

> *Hearing of appeals*
>
> *52.21*
>
> *(1) Every appeal will be limited to a review of the decision of the lower court unless—*
>
> *(a) a practice direction makes different provision for a particular category of appeal; or*
>
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
>
> *(2) Unless it orders otherwise, the appeal court will not receive—*
>
> *(a) oral evidence; or*
>
> *(b) evidence which was not before the lower court.*
>
> *(3) The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong; or*
>
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*

36. The decision under appeal today is the District Judge's assessment that the Points of Dispute as served were sufficient to comply with CPR 47PD paragraph 8.2 which is set out above. I am not convinced that this is strictly the exercise of a discretion as submitted by the Respondent. It is not a situation where a number of different responses were available to the Judge some of which might be considered objectively justifiable. The District Judge here had a binary choice. Either the Points of Dispute were sufficient to comply with the Practice Direction or they were not. I accept that the decision involved a complex evaluation of a number of factors to reach that choice but it was not strictly the exercise of a discretion. When considering such evaluative choices on appeal however it is right to give sufficient respect to the experience of the decision maker, in this case an experienced District Judge who is also a Regional Costs Judge.

37. There are six Grounds of Appeal but all of them are in fact different reasons why the Appellant says that the District Judge fell into error in not dismissing the two Points of

Dispute under consideration. At the end of the day the appeal can only succeed if I find that the District Judge was wrong to find that the Points of Dispute were sufficiently pleaded to comply with the Practice Direction as interpreted by ***Ainsworth.*** Accordingly, I will deal with this issue exclusively but it is likely that the arguments set out in the individual Grounds of Appeal will be taken into account.

38. The real issue in this case is how the District Judge should have interpreted the case of ***Ainsworth***, which she accepted was binding on her, as a decision of the Court of Appeal. Does the case mean, as the Appellant contends, that Points of Dispute, when dealing with an item like the documents section, which has a list of entries set out in a schedule, have to at least descend into some detail identifying the nature and grounds of dispute in relation to individual entries in the schedule, or, as the Respondent contends, that the receiving party is not obliged to descend into that sort of granular detail by pleading to some or all of the individual entries but can set out his challenges to the items only.

39. I do not think it is helpful to ask whether Lady Justice Asplin knew the difference between "items" and "entries" . I have little doubt that she would have done, if the distinction was explained to her. I think it is more important to ask what she meant by her guidance which I have set out earlier in this judgment. The word "item" is usually defined as " *a thing or a unit especially in a list or collection*"[1] and in that sense both items in the Bill (which I accept is a term of art) and entries in the schedule might both be colloquially termed as "items". There is clearly room for this conclusion as is evident from the judgment of Chief Costs Judge Gordon-Saker:

> *"8. In oral submissions, Mr Poole on behalf of the claimant seeks to take a broad brush approach to the document schedule and indicated that what he would like to do is to identify some particular items and explain why those are unreasonable……*

It is obvious here that the Costs Judge is referring to entries on the schedule but describing them as items.

40. In the succeeding paragraph 9 , in my view, the Costs Judge is referring to items when he means "entries" :

> *The difficulty with that, it seems to me, is that the claimant has not set out in his points of dispute which items he wishes to challenge and why and that does cause, as the defendant has indicated in its reply, a difficulty insofar as – in respect of items which have not yet been identified – they would need to look at the attendance notes to see what work was done and why and the context in which it was done in order to seek to explain why the time claimed is reasonable, if indeed that is the objection, or why a particular fee earner was engaged in doing it and why possibly more than one fee earner was engaged in doing it.*

The point made in the last sentence can only refer to "entries" as he speaks of "doing it" which would be an individual task, not the total sum of work done by one fee earner for a whole specified period, which is all that was set out in the six items in ***Ainsworth***.

[1] Collins English Dictionary

41. The next paragraph of his decision refers to both "items" and "entries" but there is no doubt in my mind that he is making it clear that he did expect the paying party to descend into detail to identify those entries on the schedule that are challenged and what the reasons for the challenge are:

> *10. The purpose of points of dispute is really to prevent that work being done on the hoof in the course of a hearing. The solicitors are entitled to know specifically which items are challenged and the reasons for the challenge. Insofar as the claimant states that all entries are disputed, it seems to me that it would be beholden on him to explain why each particular entry is challenged and whether he is asserting that no time should be allowed or reduced time should be allowed or whether the work should have been done by a different grade of fee earner. But, as pleaded, the points of dispute, it seems to me, do not raise a proper challenge to the documents items and certainly do not raise a challenge which can be properly answered by the defendant without a considerable amount of time being spent in looking at the papers to reply to that challenge and that, it seems to me, is a process, which if it is to be done, should be done in advance of the hearing rather than at the hearing.*

42. I accept that this is the reasoning of the Costs Judge rather than Lady Justice Asplin, but as she was considering on appeal whether the Costs Judge was right to reach the conclusion he did, it would have been open to her to disagree in particular with paragraph 10 of his judgment and rule that the paying party did not have to descend to such granular detail by identifying which individual entries were in dispute. Had she done so, however, it is likely in my view, that she would have granted the appeal and found for the paying party.

43. Reading the judgment as a whole it is clear that when Lady Justice Asplin is referring to items as in paragraph 39 she is referring to entries on the schedule rather than items:

> *" In order to deal with matters of this kind fairly, justly and proportionately , it is necessary that both the recipient and the court can tell why an item is disputed. The recipient must be placed in a position in which it can seek to justify the items which are in dispute"*

If she was referring to items then, for example the disputed item at paragraph 43 reads:*" Engaged 20 hrs 6 mins (LG)"* . The corresponding objection to that item is set out in paragraph 16 above which containing a significant amount of detail about the objections and it was clear which item it related to (as it related to all six items). What was not clear was which entries were challenged and on what grounds. There were seven grounds listed but also it was said that they were not exclusive and so other objections could be raised at the detailed assessment hearing. In this example the receiving party could tell why the overall item was disputed but had no way of knowing which entries were disputed, and if they were on what grounds.

44. Similarly, when Lady Justice Asplin refers in paragraph 42 to Points of Dispute 10 she complains:

> *" It did not contain cross-references to the numbers of the items disputed on particular grounds. In fact, it was accepted that it did not state why any item in the bill was disputed"*

In my view she is referring to entries on the schedule rather than actual items on the Bill. It could perhaps have been fairly argued that the Points of Dispute did identify why a particular item was disputed but it could not be argued that there was any cross referencing to any particular entry on the schedule.

45. A fair reading of the judgment of Costs Judge Gordon-Saker reveals that he dismissed the Points of Dispute because they did not identify which particular entry or entries on the schedule were disputed and why. This is obvious particularly from paragraph 10. If Lady Justice Asplin had decided to dismiss the appeal but for a different reason, that the Points of Dispute did not sufficiently identify which item was in dispute (irrespective of whether the entry could be identified) she would obviously have explained the distinction and why she came to that conclusion.

46. If I am wrong in this interpretation it is very difficult to explain why Mr Ainsworth did not succeed in his appeal. He had clearly identified which items were in dispute and provided a list of reasons which applied to all the items (which themselves had been very briefly expressed). If he was not expected to descend into detail by identifying individual entries on the schedule and providing reasons for challenge it is hard to see how his approach could be challenged.

47. My interpretation of this judgment appears to be shared by the editors of Cook on Costs[2]. In their explanation of the judgment in ***Ainsworth*** they explain:

> *" The points of dispute did not challenge any specific entries to those items notwithstanding that the solicitors file had been inspected by the former client's costs lawyer. The replies indicated that the solicitors could not prepare to deal with such a challenge"*

It is notable that they refer to the failure to challenge any specific entries, rather than items and I have confidence that the editors do know the difference between the two.

48. The editors also seem to recognise the tension between the exhortation to keep the Points of Dispute brief as recommended by Sir Rupert Jackson and the need to provide enough material for the court to make a fair assessment[3]:

> *"In fact , some paying parties have used the reforms as an opportunity to keep the points of dispute brief, and not deal with the objections in detail. Whilst this means the end of long repetitive comments about the documents item in particular, it does take the parties back to a trial by ambush.*

[2] Cook on Costs (2023) p 592 Middleton and Rowley
[3] Cook on Costs p 591

The introduction of provisional assessments militates against brevity and selectivity. The Points of Dispute are the only opportunity the paying party is going to have to influence a judge carrying out a provisional assessment. On that basis, the kitchen sink is almost bound to be pleaded along with everything else."

49. On the basis of my interpretation of the judgment in ***Ainsworth*** the Points of Dispute in the current case do not satisfy the requirements of CPR 47PD paragraph 8.3 in that they do not identify specific points stating concisely the nature and grounds of dispute. The receiving party cannot identify which individual units of work are disputed and why. The assertion that the time was either unnecessarily incurred or unreasonable in amount is an assertion of two alternative allegations which are actually completely different. "Unnecessarily incurred" suggests work was done which did not reasonably need to have been done at all. "Unreasonable in amount" suggests work was reasonably done but it either is recorded incorrectly or took longer than was reasonably necessary. The receiving party is entitled to know which of these two allegations applies to any unit of work challenged so that it can meet the challenge with an explanation or evidence. To allow a generic alternative challenge to stand in relation to potentially any and all entries in the schedule is clearly unfair to the receiving party.

49. I accept the force of the submission by the Appellant that the Points of Dispute in ***Ainsworth*** which were found to be inadequate were actually significantly more extensive than the one sentence Point of Dispute in the current case. I do not think that the distinction which the Respondent seeks to draw is important. In ***Ainsworth*** each separate fee-earner's work was allocated a separate item number. In the current appeal all of the fee earners are identified and their work quantified in the same way as in ***Ainsworth*** but they are grouped in two items with separate schedules of detailed entries. In both cases the item entries are very brief and refer to a more detailed schedule. The principles should apply similarly to both cases. The current appeal and ***Ainsworth*** were both cases where a client was challenging the bill of costs of his own solicitor. This gave him the right to inspect the solicitors file of papers. That right is not available to a litigant on a normal party and party assessment. A client is therefore in a much better position to identify which particular entries are unnecessary or unreasonable in amount than the normal paying party at the end of contested litigation.

50. I fully accept that the District Judge had an understandable concern that she did not want to go back to the "*bad old days*" before 2013. She was right to record Lady Justice Asplin's remark that "*This need not be a lengthy process".* But the length of the process is in the hands of the paying party. If there is a documents section as in this case where there is a schedule with 83 timed but identifiable items it is up to the paying party how many items it wishes to challenge. A sensible paying party may make a value judgment and decide to challenge only the highest and therefore more valuable entries. If the paying party chooses to challenge every single item in the schedule then he is the one adopting a disproportionate course of action which the receiving party has to be able to fairly respond to.

51. This perhaps begs the question what alternative courses were open to the Respondent. If the Respondent wanted to challenge some or all of the entries on Schedules 1 and 2 it could be achieved by producing a counter-schedule of document time. Another method would be to annotate the individual schedules with specific objections attached to the Points of Dispute. Alternatively, it could be achieved by grouping specific objections

together under identified headings and cross-referencing these to specific document times claimed such as :

> *" unreasonable amount of time spent preparing witness statements – entries dated 1.1.18, 3.1.18, 4.5.18 and 7.7.18."*
>
> *" duplication of fee earners reviewing the same document: dated 2.3.18, 4.5.18 and 6.6.18"*

This would give the Solicitor a reasonable opportunity to consider the objection and either concede the same or prepare a reasoned response. It is therefore possible to prepare Points of Dispute which are concise and state the nature and grounds of dispute. How many items are challenged however determines how concise the Points of Dispute can be and this is very much in the hands of the paying party.

52. The decision by the paying party in this case to challenge the whole of both parts of the documents section was likely to produce a disproportionately long and complex detailed assessment. This is no doubt why the Respondent's costs lawyers suggested a "broad brush" approach. This would have meant much less work for them having to actually justify grounds for objection and tactically might well have produced a better result as the Judge might have been tempted to just make a blanket deduction based on a percentage of the overall costs. This might well have been unfair however unless the Judge was satisfied that those costs were unreasonable in amount or unreasonably incurred with the benefit of the doubt going to the receiving party . A difficult task to do fairly without considering the individual entries on the schedule. Also perhaps an unfair process if the receiving party is not given the opportunity to know the case it has to meet.

53. Although the District Judge was clearly concerned that the interpretation of ***Ainsworth*** relied on by the Appellant below would mean that each and every timed entry would need to be addressed, that would only be the case where the paying party chose to challenge each and every timed entry, which is not a proportionate approach. If however he chooses to take such a disproportionate approach then the receiving party is entitled to know why each entry is challenged. This process is , after all, called a *detailed* assessment. A more proportionate approach would involve the Judge only considering a limited number of more valuable entries and ruling on them only. This option had clearly been open to the Respondent.

54. The Respondent relies on the fact that this experienced District Judge recorded that she was able to undertake the detailed assessment as she had available to her the *"very detailed item by item schedule attached to the bill"*. She can, of course, be forgiven for eliding items with entries. I have to accept that she did in fact carry out the assessment, although the receiving party may perhaps have grounds to complain that she merely adopted the Respondent's offers in seven out of the eight entries. The fact that the District Judge is able to carry out an assessment is not, however, the end of the matter. The process must be fair and the interests of the receiving party must be taken into account in ensuring there is a fair process, even when the court is trying to adopt a proportionate approach. In my assessment, the Points of Dispute 7.1 and 7.2 did not give the Appellant a fair opportunity to discern the nature and grounds of the dispute in respect of the various entries in the schedule which were not identified in any way either as unreasonable in amount or unnecessarily incurred.

55. I accept the fact that the Respondent did make offers in respect of the total time recorded by each respective fee earner. Offers are voluntary in detailed assessment proceedings

but they are often helpful to the process, particularly if some of the offers are accepted by the receiving party. I am not convinced however that the offers made do anything to assist the receiving party to discern what is in dispute and why. It is aware generically that the Respondent is saying the overall totals are too high but does not know which entry in particular is considered unreasonable in amount or alternatively should not have been incurred at all .The distinction of course is important because they are two completely different concepts.

56. An issue which has arisen on this appeal is whether the District Judge properly dealt with the assumptions set out in CPR 46.9 (3) which are set out in paragraph 5 of this judgment. Lady Justice Asplin ruled in ***Ainsworth*** that Points of Dispute should be formulated by reference to the presumptions contained in CPR 46.9(3). District Judge Batchelor found:

> *" It seems to me that the solicitors have done that. They have said that the time was either unreasonably incurred or unnecessarily incurred or was not reasonable in amount"*

57. In my assessment there is no engagement at all with the presumptions. There is no assertion by the receiving party that costs have been incurred with the express or implied approval by the client, or that the amount was approved by the client. There was therefore no need for the client to deny these factual assertions in the Points of Dispute. Similarly there was no assertion in the Points of Dispute that costs incurred were of an unusual nature or amount requiring a warning from the solicitor that those costs may not be recoverable. In ***Ainsworth*** there was such an assertion (paragraph 6 of the judgment) and so it was necessary for the Points of Dispute to engage with this presumption. In law the presumptions therefore applied to the current detailed assessment proceedings but they were not actually in issue on the facts. So although the District Judge fell into error by stating that the Points of Dispute had engaged with presumptions it is not determinative of this appeal as, in my judgment, there was no requirement to do so where those presumptions were not in issue.

58. Overall, I have concluded that the District Judge should have ruled that Points of Dispute 7.1 and 7.2 should be dismissed because they failed to adequately set out the nature and grounds of the dispute. In finding otherwise I find that she fell into error and that the appeal should be granted. I accept that this produces a rather draconian result but as explained by Lady Justice Asplin in paragraph 44 of ***Ainsworth*** the Respondent has known since receiving the Replies to the Points of Dispute that this issue would be raised. There was ample opportunity for the Respondent to seek to amend the Points of Dispute to raise the appropriate amount of detail to satisfy the test in CPR 47 PD par 8.2 but he chose not to so thus presenting the rather stark choice which the District Judge had to make.