Neutral Citation Number: [2022] EWHC 1223 (QB)

Case No: QA-2020-000126
Claim No: HT-2016-000314
SCCO Ref: SC-2019-BTP-000509

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
FROM THE SENIOR COURT COSTS OFFICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2022

Before:

MRS JUSTICE FOSTER DBE

Sitting with:

MASTER MARK WHALAN

- -

As an Assessor

Between:

CELTIC BIOENERGY LIMITED

Claimant

— and —

KNOWLES LIMITED

Defendant

- -
- -

Mr Andrew Lyons (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Dr Mark Friston (instructed by **Isca Legal LLP**) for the **Defendant**

Hearing date: 11 November 2021

- -

Approved Judgment

MRS JUSTICE FOSTER DBE:

INTRODUCTION

1. This is a Defendant's appeal from a decision of Master Campbell ("the Master") made on 18 February 2020, in which he refused to allow the Defendant permission under CPR 47PD to amend once more its Points of Dispute in the course of an assessment of the Claimant's costs. The Appellant Defendant, whom I shall refer to here also as "the Paying Party", sought to raise for the first time in the third version of their Points of Dispute, an issue with respect to the Claimant Respondent's ("the Receiving Party") Conditional Fee Agreement.

2. Permission to appeal the Master's ruling was granted by Stewart J on 25 September 2020.

3. This judgment has been read by Master Whalan who fully agrees with its reasoning and conclusions.

Background

4. The Receiving Party is a bioenergy firm, the Paying Party is a consultancy. There is a long history between the parties, both commercial and with respect to disputes. The essentials are that in 2010, the Receiving Party was engaged by Devon County Council ("DCC") on a design and construction project. Disputes arose between the Receiving Party and DCC about the amount to be paid under the construction contract, and there were claims for loss and expense and the deduction of liquidated damages. Also in 2010, the Receiving Party instructed the Paying Party to provide advice and representation in those disputes which were dealt with some in adjudication, and others by way of commencing arbitration. In due course the Receiving Party assigned its rights against DCC to the Paying Party, reserving, in the Deed of Assignment, a right to enforce payment or claim damages. It was also provided by a side letter that any sums obtained, less fees, would be held for the Receiving Party's benefit. It appears DCC entertained concerns about making payments to the Paying Party. Further, as between the Receiving Party and the Paying Party, issues arose as to the Paying Party's entitlement to payment for services in the course of adjudications. They too became the subject of arbitration and an *ad hoc* Arbitration Agreement was made allowing all of the disputes to be resolved in arbitration.

5. The background is complicated but relevantly thereafter, an Award was made by the Arbitrator on 6 September 2016 following the Paying Party's applications under Sections 39 and 47 of the Arbitration Act 1996. The Award included declarations that the Paying Party had complied with certain of the *ad hoc* Arbitration Agreement terms, which involved the withdrawal of invoices it had served, and the provision of indemnities it had offered as to not pursuing sums under the 2010 assignment of rights to them.

6. The Receiving Party contended that the declarations from the Arbitrator had been obtained by misrepresentations on the part of the Paying Party. An application was made to the High Court and on 20 March 2017 Jefford J allowed an Application on the basis that the Receiving Party had acted fraudulently in obtaining the Arbitrator's

Order of September 2016. Costs of £167,837.00 including VAT were ordered by Jefford J. Initially, the Receiving Party had not asked for costs on the indemnity basis, but came to make an application to the Judge that they should so be paid. In January 2019, the Judge dismissed that application.

7. Importantly, in the course of the Receiving Party's unsuccessful application for the indemnity basis, their solicitors made a statement dated 4 January 2019, revised on 9 January 2019, in which they explained certain details of their retainer, including that their contract of retainer was a discounted conditional fee agreement. They explained in the statement that it provided for 'success' in the event that:

> "*The Client receives from the Opposing Party the sum of or a sum in excess of £250,000 in payment in aggregate of the costs incurred or to be incurred by the Client.*"

8. On 17 July 2019 the Receiving Party served (late) a Notice of Commencement and a Bill of Costs for £168,837 inclusive of VAT.

9. The narrative to the Bill of Costs referred to the fact of the conditional fee agreement, but did not repeat the detail that had been included in the January 2019 solicitors' statement referred to above.

10. Thereafter, the chronology was as follows.

11. An extension of time was requested on 24 July 2019 for the Points of Dispute due on 9 August 2019; it was agreed up to 6 September 2019. On that day a document entitled "Holding Points of Dispute" was filed but accompanied by a further request for more time in the following terms:

> "*As previously envisioned and advised, reinforced now by advice from counsel, we will require a little more time to serve Full Points of Disputes.*
> *In the interests of saving the time and costs of making a protective application we would prefer if this could be dealt with by agreement between ourselves.*
> *We anticipate we will require a further 21 days and we shall be grateful if this can now be agreed.*"

12. The Respondent filed replies to the Points of Dispute on 25 September 2019. Around 27 September 2019, a further document entitled "Detailed Points of Dispute" was served by the Appellant. Replies to this were served in due course on 3 October 2019. These "Detailed Points of Dispute" made no mention of any point arising under the CFA. A detailed assessment hearing was requested by the Receiving Party on the 21 October 2019 and it was set down in November to be heard on 18 February 2020.

13. On 14 January 2020 a further document entitled "Supplementary Points of Dispute" was served by the Paying Party. It raised a new point centred on the CFA and queried whether the indemnity principle had been complied with, raising an issue as to what they argued was the apparent circularity of the definition of success in CFA.

The Master's Decision

14. At the detailed assessment before the Master on 18 February 2020 the Receiving Party submitted that the operative Points of Dispute were those that were first to be served, and took objection to the second and third iterations. The Master was invited to refuse to admit the second iteration of the Points of Dispute (which he referred to as "points of dispute two"), and to decide that as a preliminary issue. He did so, giving a short *ex tempore* judgment, the material part of which is set out in full below.

15. Less weight had been placed by the Receiving Party on objection to the second, so-called "Detailed Points of Defence" and the Master, reflecting that position, held as follows:

> "*10. I consider [counsel for the receiving party] was correct in doing so. The view I take about points of dispute two is that they simply supplement the "holding" points of dispute. It is true in one sense that the level of detail is not insufficient. I have read out the practice direction that points should be short and succinct. However, it seems to me that points of dispute two are compliant with the Practice Direction. Given also the date on which they are served back in September 2019, there are no questions of any ambushes arising. I am satisfied here that those points should be admitted, and I accept the application for variation to the "holding" points so that the paying party is entitled to rely on them.*
>
> "*11. The issue in relation to the recently served supplemental point [sic] served on 4 January 2019 is much more controversial. Mr Kemp, the partner at DAC Beachcroft handling the case on behalf of the claimant, made a witness statement in support of an application to Jefford J for indemnity costs to be paid. He sets out in terms paragraph 68 [et seq.] the nature of the funding agreement between his firm and the claimant, and states clearly that the work was undertaken subject to CFA, and sets out various details in relation to it. Therefore, in my view it can be [sic] as clear as it can be that in January 2019 the paying defendants, (although they were not paying defendants then but now are), knew of the nature of the funding arrangements between their opponents and their solicitors.*
>
> "*12. The bill, as I have said, served in July 2019, and at page 3 it states clearly that the work was undertaken in compliance with the conditional fee agreement, which allows for recovery of hourly rates and that there was no breach of the indemnity principle. It seems to me therefore that the paying party was on notice of the CFA at an early time and it was open to it then to take points on the indemnity principle.*
>
> "*13. Mr Lyons says simply this is all too late. The supplementary point of dispute could have been served at the outset, but delivering the document now puts his clients in considerable difficulties. It may be that they would wish to make a witness statement addressing the points raised. That would inevitably require an adjournment of the hearing today which they are anxious to proceed with. The objections he says*

are wide-ranging and not focused. Mr Lyons also points to the general conduct of the defendants in these proceedings, which have been the subject of observation and a finding of fraud by Jefford J in her judgement. See for example paragraphs 98 and 99.

"*14. However, Mr[sic]Friston who appears for the paying party, submits that that is conduct arising in the arbitration proceedings. It is not conduct in the detailed assessment. He continues that it would indeed be a very rare event if the application was refused. He accepts that there was a finding of fraud against his client, but the perpetrator of that fraud has lost his job as a result. These are complex proceedings and the reason for the extension of time requested in September last year serving the points of dispute was that the Costs Lawyer had to draft them had come into the case "new", as he put it, and he was concerned that there were possibly costs not within the ambit of the judge's order that had found their way into the bill. All of these needed careful consideration. Subsequently, Mr Friston was asked to give advice on the nature of the retainer and he accepts fully the amended points of dispute was raised based upon his advice. He submits that the information about the CFA in Mr Kemp's witness statement was "tucked away" as he expressed it, and although it would have been open to the paying party to raise specifically the indemnity challenge earlier, points to be admitted were served more than a month ago, in any event they have already served a reply.*

"*15. The points which weigh with me are that as long ago as January 2019 the defendant was put on enquiry as to the nature of the funding arrangement between the receiving party and its solicitors, but it took a whole year for that to gravitate into a supplemental point of dispute. There was then a second bite of the cherry when that point could have been taken which was when the bill was served, which states plainly in terms that there was a conditional fee agreement.*

"*16. Mr Friston has informed the court that the Costs Lawyer needed extra time to prepare the points of dispute. However, this was not in the context of a large bill involving several years work requiring divisions into parts. On the contrary, one of the objections made by the paying party is that only five months work has been involved. In these circumstances, it seems to me Costs Lawyer was on notice and ought to have been alert to the fact that there may have been an indemnity issue points to take, yet this was only served in January 2020.*

"*17. The overriding objective is clear that the court must deal with cases justly and at proportionate cost, and has a duty under rule 1.1 to ensure that the case, here the detailed assessment, proceeds promptly and fairly. If I allow the supplementary point to stand, then inevitably there will be an adjournment of the detailed assessment today, has been listed for months, and they do not consider that it is a just or reasonable outcome so far as the receiving party is concerned. For those reasons I agree with Mr Lyons it is simply too late. The point was there for the taking months ago. To raise it within a few weeks or less than a month*

> *of the hearing, with no application being made before today when it was clear that the claimant was objecting, and giving, in my view, the receiving party inadequate notice of it, inevitably will require today's hearing to be adjourned. That is not in my view a just outcome. Therefore for those reasons the application fails.*"

The Paying Party's Arguments

16. Dr Friston, in a sustained and elegant argument submitted, as is the case, that the Practice Direction is expressed in terms of a discretion to exclude, and thus the default position is that documents will be admitted. The discretion to exclude protects the other party from an ambush however this was not a case in which the Receiving Party could say they were ambushed he submits. The third version of the Points of Dispute was filed on 15 January 2020 more than a month before the detailed assessment hearing, they were about page long and were cogent and uncomplicated.

17. He argued that the potential CFA issue was, in effect, concealed, because the information in the narrative to the Bill of Costs did not repeat the detail to be found in the statement of January 2019. The centrality to costs of a CFA when considering possible issues concerning the indemnity principle put an obligation on a party to refer properly to the terms of the CFA in the narrative. He referred to PD 47 paragraph 5.11(3):

> "*The background information included in the bill of costs should set out … a brief explanation of any agreement or arrangement between the receiving party and his legal representatives, which affects the costs claimed in the bill.*"

18. This is acknowledged not to be prescriptive, but does operate as a safeguard, he submitted. A further safeguard is the fact that if issue is taken, pursuant to PD 47 paragraph 13.2(i), a copy of the contract of retainer or other information provided by the legal representatives to the client explaining their charges has to be lodged. This occurs, however, only if the point is put in issue. There is also a duty on the Court (see *Bailey v IBC Vehicles Limited [1998] 3 All ER 570 at 572*) to seek further information if necessary. Dr Friston advanced a further "safeguard" which is the submission that what is known as the "*Bailey* presumption" afforded by the certificate to the Bill of Costs, may not apply in every case, but again, this depends on having sufficient knowledge in order to raise an issue. He accepted that queries could of course be raised in any event, but submitted that this would be time wasting and would tend to encourage unnecessary applications.

19. Dr Friston also argued there was "no rule" that all points had to be included in the first Points of Dispute.

20. In his submissions to the Master Dr Friston had frankly explained that it was only when he had been instructed and had read the papers that the possibility of a point about the CFA was noticed. This may have been some time in fact after the solicitors had indicated Counsel been instructed.

21. The Master at that point had interrupted Dr Friston in the course of his submissions to remind him that he had also submitted that in September 2019 that the costs lawyer

came into the case cold, and the whole purpose of the extension of time given at that stage was so that the costs lawyer could read the papers. Those papers surely would have included the relevant witness statement containing the details of the CFA, and he was on enquiry about the point then. In answer to the Master, Dr Friston said that that person may not have realised the significance of it, and reiterated that the narrative to the Bill did not refer to the details.

22. Dr Friston sought also to say on behalf of the Paying Party that responsibility for the late amendment to the Points of Dispute was shared between his client and the Receiving Party because of the sparse description of the CFA in the narrative information. An "unrealistic expectation of vigilance" had been placed on his client by the Master in suggesting that they should have noticed the full descriptive effect of the CFA in the January 2019 solicitors' statement.

23. The Master again said, "The point was there for the taking at that stage surely?" He was plainly unimpressed by the submission that the Bill did not give further detail, at a later stage. In the Master's view, had the Bill been silent as to how the matter had been financed, there might have been a point, but it had in fact mentioned the CFA. The point that the Master made forcefully was that the information had been available for over a year before the point was taken. Dr Friston accepted, fairly, that the information was there and available to the Paying Party, but he asked the Master "to take a realistic approach".

24. Before this Court he emphasised the possibility that the CFA might, on his argument, be unenforceable which would mean the solicitors were not entitled to claim profit costs, which was very significant, and that the Master had got the balance wrong, indeed unlawfully so, in referring to the loss of a court date and inconvenience to the Receiving Party as relevant and/or decisive in refusing permission to rely upon a further iteration of the Points of Dispute. He emphasised that his clients were not in breach of any prescriptive rule and that they had been penalised for "having shown restraint when drafting the first iteration of the points of dispute". The Master's decision would encourage a "kitchen sink" approach and cause delay.

25. In support of his argument that an error of law had been made he said the Master took into account an irrelevant matter namely the listing of the hearing for a day. He suggested, contrary to the submission on behalf of the Receiving Party before the Master, that in fact the parties could have dealt with the issue then and there and no adjournment would have been required. The Master wrongly failed to include as a material factor the fact that the Receiving Party had not commenced the detailed assessment proceedings until some two years after the relevant period. The result of the errors was that the injustice to the Paying Party was improperly balanced against the injustice to the Receiving Party.

26. In submissions to the Court Dr Friston said that the Master misunderstood the point concerning the narrative information, and failed to recognise the "burden of vigilance", the earlier materials revealed a technical point that only a specialist would appreciate, and the Master had not taken into account all the relevant points made.

Receiving Party's Argument

27. The essential submission of the Receiving Party was that it had been "just too late" for the Paying Party yet again to recast their Points of Dispute raising a wholly new issue.

28. The issue was available to be taken at any time after the Receiving Party commenced the assessment process, and it must, in effect, have been overlooked. It seems clear that Counsel was instructed sometime in October 2019 before the likely detailed assessment hearing in February 2020, and that it was Counsel who eventually noticed the point arising on the solicitors statement. Nonetheless, it was not until the following January that it was articulated in a yet further version of the Points of Dispute. In these circumstances, said Mr Lyons for the Paying Party, it is impossible to impugn the Master's analysis that the Costs Lawyer was on notice and ought to have been alert to the fact that there may have been an indemnity issue point to take.

29. In submissions to the Master, below, the Receiving Party had emphasised that the time estimate of one day had been given on the basis of the points raised by the challenges made in the earlier Points of Dispute documents. The wholly different issue raised in the third Points of Dispute would probably require a witness statement from the client. As a matter of substance, in answer to the assertion that there was an element of circularity in referring to the sum of £250,000, which raised the new query on the CFA, Mr Lyons for the Receiving Party submitted that there was no way that the costs recovery would in fact be any less than £250,000 in any event. The Paying Party had had two attempts to get their house in order already and they reminded the Master of the context of the costs' assessment namely that it had been Jefford J's finding that the award of the arbitrator had been obtained by fraud and this was not irrelevant to the Court's approach.

30. The Receiving Party reminded the Court that an appeal may only be allowed where :

(a) The decision was wrong;

(b) The decision was unjust because of a serious procedural irregularity,

and the Appellant had to show that the decision of the Master had exceeded the generous ambit within which a reasonable disagreement is possible and referred to the well-known authority of *Tanfern Ltd v Cameron MacDonald* [2001] 1 WLR 1311. To the extent that the reasons were considered to be sparse, attention was also drawn to what Lord Hoffman said regarding *ex tempore* judgments in *Piglowska v Piglowski* [1999] 1 WLR 1360 at 1372 (HL):

> "*The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the District Judge.*
> *These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.*"

31. Mr Lyons emphasised that at the hearing, no adequate explanation was given as to why it took over two months from Counsel's advice to serve the third Points of

Defence which raised the issues of concerning the retainer. He also submitted that in his view the arguments before the Master were far less elaborate than those now put to this Court. He emphasised the breadth of the discretion under PD 47 and submitted there was a danger of over complicating a decision of this nature because of its specialist jurisdiction character.

32. He submitted that the overriding objective, whilst shortly stated by the Master was properly considered by him. Applications to amend pleadings are considered every day by courts and there is no difference to the Master's approach by reference to the overriding objective. The so called "delay" of the Receiving Party is relevant in this context: namely that they are the losers by any delay. It does not condition the nature of the response from the Paying Party, the entitlement to costs is not lost. The common-sense approach here shows that far more detail was known in January 2019 than any costs rule provides for. The Paying Party, however, appears to have overlooked that information for a year.

Consideration

33. Although detailed and well expressed, I am wholly unpersuaded by the arguments made on behalf of the Paying Party. It is in my judgement clear from the transcript of the argument before the Master that he considered all the arguments raised and his decision evinces no error of principle nor mistake that could found a successful appeal.

34. It is not therefore the case that the Master failed to take relevant points into account but rather that he rejected the case advanced by Dr Friston. It is informative to read the submissions and discussion in the transcript before the short ruling given by the Master.

35. I do not accept, as was sought to be said at one point by the Paying Party that there is a presumption under the rules that documents will be accepted, no matter how late nor how many new points they raise. The rules, understandably, give a wide discretion to the costs judge to decide, in all the circumstances of the case, whether it is in furtherance of the overriding objective, namely, to decide cases justly, that the particular document ought to be received. It cannot be gainsaid that there will come a time when it is using the words of the Master, "just too late". It cannot be characterised as perverse or otherwise unlawful for the Master to have come to that conclusion in this case for the reasons he gave in his judgment.

36. The analysis of the Master's decision in terms of a consideration of irrelevancies does not assist Dr Friston. It is not irrelevant that the Receiving Party vigorously opposed reliance on the third iteration of the Points of Defence. They indicated that they may need to prepare further witness evidence to deal with the new matter raised. This further loss of time (even if, as it appears, the hearing later had to adjourn part heard in any event) was properly taken into account by the Master. The arguments as to safeguards which arise where sufficient knowledge is imparted concerning potential issues cannot assist in the current context.

37. It is no answer to the points concerning the delay to say that the reference to the CFA was obscure. As the Master stated:

> "*But that is the point, that you could have asked. I mean if the Bill had been silent as to the way the matter had been financed, then it would be a point, but it states in terms work was undertaken in compliance with a conditional fee agreement, so when the costs lawyer was reading papers and working out the case in September 2019, surely a bell should have rung if he was concerned about it.*"

38. The most telling point in my judgement is that the information was contained in a solicitor's statement in early January 2019. It was a year later that eventually a third Points of Dispute was produced for which, inevitably, permission was necessary. The Respondent makes the pertinent point that the second Points of Dispute was served in October, even if not complete, the material was available both from the original schedule when it might have been requested, and in developed form, from the solicitor's statement in January 2019.

39. The present case is in essence a simple one: the advisers to the Paying Party overlooked the striking detail contained in the January 2019 communication – which itself referred to costs. It had been presented in a long-running dispute between the parties, many strands of which were concerned with the payment of costs, and it cannot possibly be said the material was in some way obscurely presented, concealed or unavailable. It is nothing to the point that the narrative information did not descend to detail many months later. As the exchanges with the Master reveal, it was put to the Paying Party that it was always open to them to raise a point on it if they wished, since the CFA was mentioned in the narrative. The phrase used by Dr Friston to suggest that there was no fault in forgetting what the solicitor had said in January 2019, was it imposed on his clients an "unrealistic expectation of vigilance". This is not a fair reflection of the Master's interpretation of the facts. To him it was clear that the point was always available to be taken. Further, there was no evidence of what materials the costs draftsman had, nor at what point the solicitors had appreciated there was a point to be taken had drawn it to their attention.

40. In the particular circumstances it is not open to the Paying Party to seek to lay blame on the draftsman of the narrative information: it was always open to the Paying Party to ask a question, as the Master stated. However, the real point is, all the detail necessary to raise an issue, if thought appropriate, was there on the face of a statement from a solicitor which itself was dealing with the basis upon which the costs were to be paid; that statement was to hand from January 2019. It was plainly with the solicitors and could and should have been given to the costs draftsman to take into account. As already stated, there is no clear evidence as to who had what documentation and when they had it. Evidently, the importance of its contents was overlooked, and overlooked successively as other iterations of the Points of Dispute were drafted. Even when Counsel was instructed and brought the matter, necessarily, to the attention of the solicitors, there was a period of about two months until late January 2020 before anything was done. Application to admit the third document was also made only at the hearing.

41. It was suggested that the Master had not taken into account the points made to him on behalf the Paying Party, in all their complexity, and they were not canvassed in the

judgment he gave. He confined his reasons purely to the overriding objective and resources, it was said, and that the assessment took three days so additional time would not have added much to the hearing.

42. I reject this criticism. Firstly, to an extent it was argued that there had been a failure to give adequate reasons by the Master. I disagree. He dealt proportionately with what, in essence was an uncomplicated point.

43. The submission made by the Receiving Party concerning the exigencies of an *ex tempore* judgment in the course of a case, is well made. It is trite that in the circumstances of an *ex tempore* judgment, and in indeed in any event, reasons may well not deal with every point made or every particular issue arising: the obligation is to make sure that the losing litigant understands the reasons for not wining; that objective was plainly fulfilled. This was a preliminary point taken and decided in the course a detailed assessment. The Master properly referred himself to the overriding objective in the course of his discussions with Counsel, and in his judgment, the points that were raised were considered in light of it.

44. It is not possible to raise a reasons challenge to the Master's preliminary point in my judgement, and as I have said, the rational foundation for the decision is much illuminated by reading the submissions made to him and the exchanges which he had with Counsel before giving his judgment.

45. Further, the matter was set down for one day and the submission of the Receiving Party was that they wished to consider whether further evidence would be needed if the new point were allowed to be taken. In my judgement the Master was correct to place weight on the obvious inconvenience and further expenditure of costs. He was entitled to conclude, in the context of the initial oversight of the materials potentially supporting a new point, the further iteration of the Points of Defence without mentioning it, and thereafter, the considerable delay even once Counsel was instructed, on balance, that the document was too late.

46. Although before us much emphasis was put on what might be an available point of some depth and interest, namely the effect of possible circularity of the CFA, it seems to us that the Master was entitled to look at the course of dealing and conclude the Paying Party had not placed so much importance on the issue until a month before the hearing when it drafted a further addition to its Points of Dispute. In any event, as Mr Lyons pointed out, the fact that the point may be a good one is one element in the balance, it does not compel an adjournment and mandate the opportunity to argue the point on another day.

47. My attention was drawn to the case of *Edinburgh v Fieldfisher LLP* Case 34 [2020] Costs LR 549, an application for permission to appeal the Master's refusal to allow a variation to Points of Dispute in which an issue arose on the sister rule in 46PD. Chamberlain J said at paragraph 11:

> "*The sole question was whether this court should interfere with her decision not to allow Mr Edinburgh to amend his points of dispute in terms of the supplemental points provided just before the start of the hearing on 2 December 2019. As to that, Mr Blackburn drew attention to the provisions of CPR 46PD, para 6.15:*

> "*If a party wishes to vary that party's breakdown of costs, points of dispute or reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties. Permission is not required to vary a breakdown of costs, points costs caused or wasted by the variation.*"

And at paragraph 18:

> " *... the default position under that paragraph is that parties may vary points of dispute if they so wish. That default position is, however, subject to a general discretion to disallow the variation or to allow it upon conditions. This is an important discretion, without which it would be possible for parties to ambush their opponents by waiting to the last minute to file supplemental points of dispute raising points not previously heralded. This would be productive of unfairness. Paragraph 6.15 does not prescribe how the discretion to disallow supplemental points of dispute should be exercised, but the overriding objective (enabling the court to deal with disputes of this kind) "justly and at proportionate cost" should be borne in mind ...*"

48. Dr Friston before us accepted on questioning, that the ambush mischief was not the sole rationale for the discretion to exclude variations. The overarching objective requires regard, as the Master so regarded, to the issues of proportionate cost and overall justice.

49. The answers to this appeal given by Mr Lyons as set out above have force, and as he submitted orally, the wide terms in which the discretion to exclude is cast reflect that this a matter for the judgment of the Master "on the ground" in all the circumstances of the case before him.

50. I conclude therefore that this was unimpeachable as an application of the CPR both PD 47 and CPR 1(2) in exercise of the Master's discretion to dismiss the application. He had regard to the relevant points and the interests in play, there is no broader principle in issue here and I can discern no appealable error in his decision.

51. I have had the benefit of a transcript of the hearing below and are clear that there is no procedural error of this nature, nor otherwise. The Master has shown the principles on which he acted and the reasoning which led him to the decision, which need not be elaborated (see also *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605) and there is absolutely no duty to deal with every argument presented by Counsel. It is not without relevance that, as observed on more than one occasion by the Respondent to the Appeal, the Master is a highly experienced expert in the field of costs.

52. The reason the Master gave on the transcript for refusing permission to appeal is, in essence, the reason I refuse this substantive appeal:

> "*I've read the overriding objective and it says at para 1.12 that dealing with a case justly and at proportionate cost etc etc appropriate share of courts resources. It seems to me if I had given permission to widen its*

PODS yet again this would not have been dealing with the case expeditiously and fairly. Had the paying party complied with rules in first place there would have been no point. The indemnity principle was there for the taking from the beginning." (Agreed Note of Application for Permission to Appeal Before DMC on Day 3 of Assessment.)