Neutral Citation Number: [2026] EWCA Civ 816

Case No: CA-2025-001819

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MRS JUSTICE HILL
[2025] EWHC 1681 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2026

Before:

LADY JUSTICE FALK
LORD JUSTICE JEREMY BAKER
and
LORD JUSTICE FOXTON

- -

Between:

PAUL WARD	**Claimant/ Respondent**
- and –	
GAGANDEEP RAI	**Defendant/ Appellant**

- -
- -

Andrew Lyons (instructed by **Kennedys Law LLP**) for the **Appellant**
Erica Bedford and Thomas Mason (instructed by **Ralli Solicitors LLP**) for the **Respondent**

Hearing date: 17 June 2026

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Approved Judgment

This judgment was handed down remotely at 10.00am on 2 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Falk:

Introduction

1. This is an appeal against an order of Hill J (the "Judge"), in which she set aside decisions made by Deputy Costs Judge Friston (the "Costs Judge") during the course of a detailed assessment hearing. The decisions in issue were to refuse to strike out a point of dispute which challenged the work on documents section of the claimant's bill of costs and to allow the defendant to rely on a late-filed schedule setting out details of the challenges to that section. The appeal is therefore a second appeal, and against a case management decision of the Costs Judge.

2. Permission to appeal was granted by Lewison LJ, who commented on the unusual nature of the case. He observed that the appeal to the Judge had been allowed notwithstanding her rejection of the individual criticisms reflected in the grounds of appeal to her, and added that it was well arguable that, despite reminding herself of the limited bases on which a case management decision can be disturbed on appeal, the Judge had simply disagreed with the Costs Judge.

3. I will first summarise the background and proceedings below, before considering the relevant procedural rules and judgments below in more detail.

The background facts and proceedings below

4. The dispute relates to proceedings brought by Mr Paul Ward against Mr Gagandeep Rai in relation to a road traffic accident that occurred on 18 September 2019. Mr Rai admitted liability, subject to issues of causation and quantum. Proceedings were issued by Mr Ward, and settlement was achieved in January 2023 by acceptance of a Part 36 offer in the amount of £546,984.

5. In this court Mr Ward is the respondent and Mr Rai is the appellant. However, given their different appellate roles in the High Court I will refer to them as, respectively, claimant and defendant for the sake of clarity.

6. The claimant commenced detailed assessment proceedings on 3 August 2023. Item 39 of his bill of costs claimed 134.1 hours for work done on documents, details of which were supplied in a 24 page schedule, at a cost of £38,819.50 plus VAT. This included 126.7 hours of Grade A fee earner time, with the balance at Grade D. Work on documents comprised around half of the total profit costs. The total bill including Counsel's fees and disbursements was £129,196.50 including VAT.

7. The defendant served points of dispute on 30 August 2023. Point 23 of the 25 points raised ("Point 23") took issue with item 39, stating:

> "134.1 hours of document time is claimed spanning 24 pages. D refers to criticisms made at Point 1-3 as to the approach taken in costs proceedings and the aggressive nature of time recording throughout the proceedings. D will rely on an annotated documents schedule of objections in support of [sic] however the following general points are made:
> - Extensive, unnecessary time is claimed by the Grade A fee earner considering medical records even before expert evidence had been obtained

> - Time is claimed throughout for consideration of incoming correspondence which is not recoverable generally and forms part of the time take to action or respond
> - In addition to the above time is claimed 'noting receipt' of various documents which again is not properly progressive or recoverable
> - Multiple administrative entries are included, e.g. 'dealing with interim payment' and/or making payments, considering fees etc
> - Numerous extensive, excessive and unnecessary entries deal with consideration of the 'loan agreement' the claimant alleged but remained unevidenced and unsubstantiated throughout
> - Extensive time is claimed 'collating' various documents, including multiple excessive and duplicative entries 'checking' and 'collating' radiology records (by both Grade A and D fee earners)
> - There are multiple entries of varying lengths preparing non-routine file notes.
> - various entries are plainly duplicated with reviews of the same documents throughout.
> In D's submission, documents / preparation time should be limited to 68 hours 12 minutes." (Emphasis supplied.)

8. The claimant replied to the points of dispute on 4 January 2024. He sought dismissal of the dispute in respect of item 39, stating:

> "The Claimant does not accept reductions made by the Defendant and would again refer to their arbitrary approach. There are no specific challenges, no bill entries are identified, and neither the nature nor grounds of the dispute are present. A declaration that something is excessive does not make it so. If "excessive" is the "nature" of the dispute as required by PD47 8.2(b), the mandatory grounds of dispute are entirely absent.
>
> While the Claimant appreciates the Defendant's broad brush approach is for the sake of expedition, the Claimant considers that in the absence of any specific areas of reductions identified at this juncture, the Claimant is unable to provide a meaningful response. The Claimant refers to the decision in *Ainsworth v Stewarts Law LLP* [2020] EWCA Civ 178 [an extract from which was set out]
>
> In any event, the time claimed for documents is reflective of the Claimant's file of papers and constitutes the reasonable and proportionate costs that the Claimant is entitled to recover pursuant to previous submissions made. The Court will note some of the work on documents was delegated to a Grade D fee earner in an effort to ensure proportionality."

The claimant nonetheless responded to the general points raised, and indicated that he would be willing to accept a total of 130 hours, including 118 hours at the Grade A rate.

9. A 2 day detailed assessment hearing was requested by the claimant on 26 March 2024. A notice of hearing was sent on 28 May, listing the hearing for 5 and 6 August 2024.

10. At around 4.45pm on Wednesday 31 July 2024 (so after hours in service terms) the defendant filed and served the annotated documents schedule referred to in the points of

dispute, which identified for the first time the individual items in dispute. Objections were divided into eight categories, which were not the same as the eight points listed in Point 23. The annotated schedule offered 58.5 hours (comprising 50.3 Grade A and 8.2 Grade D) by way of primary case, and 58.8 hours (comprising 54.6 Grade A and 4.2 Grade D) as a fallback.

11. At the hearing, Point 23 was not addressed until the latter part of the second day. Mr Thomas Mason, for the claimant, invited the Costs Judge to strike out Point 23 as not being compliant with *Ainsworth v Stewarts Law LLP* [2020] EWCA Civ 178, [2020] 1 WLR 2664 ("*Ainsworth*"), and to refuse permission to rely on the annotated schedule. In an *ex tempore* judgment the Costs Judge declined to do so and adjourned the detailed assessment to a third day.

12. The adjourned hearing took place on 8 November 2024. The judge conducted a "line-by-line" assessment of around 10% of the entries in the documents schedule and the remainder on a more broadbrush basis suggested by the Costs Judge and accepted by the parties. The overall outcome was that the bill of costs was assessed in the sum of £89,032.62 plus interest. Costs of the assessment itself were affected by a Part 36 offer made by the defendant which the claimant had not beaten. The effect of that was that the defendant was ordered to pay the claimant's costs of detailed assessment up to 3 July 2024. The claimant was required to pay the defendant's costs thereafter, but with a caveat that those costs should exclude time spent on 6 August 2024 dealing with the annotated documents schedule. This was on the basis that part of the afternoon on that date (as the judge put it, the "tail end of the hearing") was wasted.

13. In a little more detail, what emerged at the 8 November hearing about the most recent Part 36 offers were that the claimant had previously offered to settle costs at £105,000 and the defendant had offered £100,000. The effect of the Costs Judge's decision was that the claimant had failed to beat the defendant's offer. The consequences of that under Part 36, and the narrow gap between the offers, may provide some explanation for what might otherwise seem an uneconomic appeal.

14. The claimant appealed to the High Court on five grounds. As described in more detail below, the Judge rejected individual complaints but allowed the appeal based on the claimant's overarching argument that the approach of the Costs Judge was wrong. The Judge set aside the order made at the adjourned hearing, struck out Point 23 of the points of dispute and refused permission to rely on the annotated documents schedule. In a separate order, the case was remitted to the Costs Judge to determine issues consequential on the appeal, including proportionality.

CPR rule 47, Practice Direction 47 (PD 47) and *Ainsworth*

15. Under CPR rule 47.6, detailed assessment proceedings are commenced by serving a notice of commencement and a copy of a bill of costs in the form specified in PD 47. Rule 47.9 permits the service of points of dispute in response within 21 days (subject to extension by agreement, see paragraph 8.1 of PD 47), failing which a default costs certificate may be obtained. Rule 47.13 allows the receiving party to serve a reply to the points in dispute within 21 days. The court becomes actively involved only when a detailed assessment hearing is sought pursuant to rule 47.14. The obvious aim is to allow the parties an opportunity to reach agreement without the need for the court's intervention.

16. Paragraph 8 of PD 47 deals with points of dispute. Paragraph 8.2 provides:

> "Points of dispute must be short and to the point… They must:
> (a) identify any general points or matters of principle which require decision before the individual items in the bill are addressed; and
> (b) identify specific points, stating concisely the nature and grounds of dispute…"

17. Paragraph 13 of PD 47 addresses the detailed assessment hearing. Paragraph 13.10 provides:

> "(1) If a party wishes to vary that party's bill of costs, points of dispute or a reply, an amended or supplementary document must be filed with the court and copies of it must be served on all other relevant parties.
> (2) Permission is not required to vary a bill of costs, points of dispute or a reply but the court may disallow the variation or permit it only upon conditions, including conditions as to the payment of any costs caused or wasted by the variation."

18. It is also worth noting that CPR rule 47.14(6) provides that only points specified in the points of dispute may be raised at the hearing, unless the court gives permission.

19. *Ainsworth* concerned a solicitor and own client assessment, but the court had regard to Part 47 in determining the form that points of dispute should take. Asplin LJ, with whom Lewison and Peter Jackson LJJ agreed, said this about paragraph 8.2 of PD 47:

> "37. … [Paragraph 8.2] makes it absolutely clear that points of dispute should be short and to the point and, therefore, focused. Furthermore, sub-paragraphs (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* (December 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."

20. At [44] Asplin LJ also referred to the court's wide discretion to dismiss one of the points of dispute under the strike-out power in CPR rule 3.4(2)(b) or (c) (abuse of process or failure to comply with rules etc).

The decisions below in more detail

The Costs Judge's ruling on 6 August 2024

21. The Costs Judge recorded the relevant history, noting that he had been informed that the parties had been in negotiations around the time that the notice of hearing had been sent in May 2024, such that there was a real likelihood of settlement. He referred to a confusion about bundles, in which Mr Mason did not appreciate that what was described as Bundle 1 contained all the relevant documents, and noted that Bundle 2 had been structured by reference to the general points raised in the points of dispute. The Costs Judge also observed that the annotated schedule went beyond those general points, or at least provided significantly greater detail.

22. The Costs Judge summarised the test approved in *Ainsworth* as being whether there was sufficient particularity in the points of dispute for the proceedings to proceed fairly, and gave two reasons not to accede to Mr Mason's strike-out request in relation to Point 23. First, the original points of dispute "would have allowed there to have been a fairly broad-brush assessment in any event; they would have allowed the claimant (the receiving party) to have known the case that was being made against him and to have responded to it". Secondly, and "perhaps more importantly", both parties knew that there should have been a further document. The defendant had taken no steps to provide it until very close to the hearing, but the claimant had also done nothing to chase it. Thus both parties were "significantly at fault for having failed to comply with the overriding objective and to assist the court by essentially 'getting their act together' earlier".

23. The Costs Judge then turned to whether to permit reliance on the annotated schedule, a question that he said he had not found easy. While unacceptably late, it was not an ambush: it had been mentioned at the start and both parties were at fault for not ensuring that it was available on a timely basis, such as in time to prepare bundles. There was merit in the argument that the types of points raised would be fairly obvious to a costs practitioner, and indeed many of the points had been anticipated by the claimant. However, the assessment had also been unusual in considering items on a line-by-line basis, which gave rise to concern as to the impact of the delay.

24. The Costs Judge considered that paragraph 13.10 of PD 47 gave him very wide powers. He took the view that an adjournment was inevitable. It would be unfair to require Mr Mason to proceed on the basis that he had to respond to the annotated schedule, and even without it he anticipated that Mr Mason would still be in difficulty, without at least a breakdown from the defendant of which items were referred to in the categories in the points of dispute. While the Costs Judge was "mildly critical" of Mr Mason's instructing solicitors for not pointing out that all relevant documents were in Bundle 1, that was insignificant compared to the criticism that the parties should have got their act together a great deal earlier.

25. Given the inevitability of an adjournment, the Costs Judge concluded that, on balance, the court would be assisted by having the annotated schedule available. Thus, and "very reluctantly", the defendant would be permitted to rely on it, and an adjournment would be ordered subject to costs sanctions which would be imposed at the end of the process. The Costs Judge observed that he had taken into account the point that it was not enough that the judge was able to "come up with a figure"; rather, there had to be a fair process.

The Judge's judgment

26. The Judge sat with Costs Judge Leonard. There were five grounds of appeal considered by them, namely that the Costs Judge 1) did not give proper effect to paragraph 8.2(b) of PD 47 and wrongly applied *Ainsworth*; 2) wrongly concluded that a broad brush assessment was possible without the annotated schedule; 3) failed to give proper effect to CPR 1.3 (the duty of parties to help the court to further the overriding objective), misapplying *Barton v Wright Hassall LLP* [2018] UKSC 12, [2018] 1 WLR 1119; 4) wrongly allowed reliance on the annotated schedule; and 5) failed to give proper effect to paragraph 13.10 of PD 47. As the Judge noted in her judgment, the first three grounds relate to the refusal to strike out Point 23 and the last two relate to permission to rely on the annotated schedule.

27. The Judge reminded herself of the basis on which an exercise of discretion may be disturbed on appeal. On ground 1), she concluded that Point 23 did not comply with paragraph 8.2(b) of PD 47 or *Ainsworth* at [37]-[38]. It made general assertions and failed to identify specific items in dispute or why they were disputed. However, that was insufficient because the Costs Judge had not found that Point 23 was compliant, and the question whether to strike out was a discretionary one linked to the question of whether reliance on the annotated schedule should be allowed, to which the Judge would return ([71]-[77]).

28. Ground 2) related to the Costs Judge's comment that a "fairly broad-brush assessment" would have been possible without the annotated schedule (see [22] above). The Judge rejected the challenge to that point, noting that the Costs Judge had recognised that it was the parties' right to descend into further detail. Rather, the Costs Judge was saying that there was enough in Point 23 to gain a broad understanding of the challenge. This was clear from the content of the reply, the preparation of Bundle 2 and the broadbrush approach ultimately taken at the final hearing on 8 November 2024 (see [12] above). Ground 2) was therefore dismissed ([80]-[84]).

29. The Judge also dismissed ground 3), which challenged the Costs Judge's criticism of the claimant for not chasing the annotated schedule, on the basis that the challenge related to an argument that had not been raised with the Costs Judge at the relevant time. Ground 4) was dismissed for the same reason ([112]-[113]).

30. As to ground 5), the authorities did not support the criticism made of the Costs Judge's comment that his powers under paragraph 13.10 were very wide, such that "[t]his aspect" of ground 5) failed ([103]-[107]).

31. The Judge then went on to consider what she described as the "residual, overarching argument" from grounds 1) and 5), to the effect that the Costs Judge's approach was wrong and failed to give effect to paragraphs 8.2(b) and 13.10(2) of PD 47. She accepted the argument by the claimant that the adjournment was necessitated by the defendant's conduct with regard to Point 23 and the late annotated schedule. If Point 23 had been struck out then the assessment would have concluded on 6 August 2024, without the need for an adjournment. Any issues with the bundles also related to Point 23. The defendant had been on notice since January 2024 that Point 23 was not compliant and had taken no steps to remedy that until two working days before the hearing. The reason given for not serving the schedule, namely a hope to achieve settlement, was circular because a detailed understanding would facilitate settlement. The costs and delay caused by a third

day were not consistent with the overriding objective, and the unfairness to the defendant resulting from striking out was of his own making. The Judge stated that she was very conscious of the limited role of an appellant court considering an appeal against a discretionary case management decision, but nonetheless concluded that the decision not to strike out Point 23 and to allow reliance on the annotated schedule was wrong. The Costs Judge had erred in principle by failing to give sufficient weight to the requirements of paragraph 8.2(b) and *Ainsworth*, and failing to ensure that the power in paragraph 13.10(2) was exercised in accordance with the overriding objective ([114]-[135]).

Grounds of appeal

32. The grounds of appeal to this court, as amended to reflect the basis on which permission was granted, can be summarised as follows:

Ground 1: the Judge adopted an incorrect test in deciding whether to set aside the decision of the Costs Judge.

Ground 2: the Judge wrongly allowed the appeal in circumstances where all the individual grounds were dismissed.

Ground 3: the Judge substituted her own decision rather than being able safely to conclude that the decision of the Costs Judge was outside the generous ambit of his discretion.

Ground 4: the Judge failed properly to evaluate whether a lesser sanction than striking out would have enabled the case to be dealt with justly.

33. There is a Respondent's notice that contends that, in deciding whether to admit variations to points of dispute, the court should first categorise whether the variation was curative of non-compliance or augmentative.

Discussion

34. This is a second appeal against a case management decision. It is well-established that appellate courts should not interfere with such decisions simply because they disagree with them or otherwise consider that they would have taken a different course. Rather, as Lewison LJ reiterated in *Broughton v Kop Football (Cayman) Ltd* [2012] EWCA Civ 1743 at [51]:

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

35. Thus, as Lord Neuberger indicated when approving this passage in *Global Torch Ltd v Apex Global Management Ltd (No 2)* [2014] UKSC 64, [2014] 1 WLR 4495 at [13], the essential question is whether the decision could properly have been made. I would add by way of emphasis that the question is not whether the appellate court considers – however strongly – that it would have made a different decision.

36. The Judge carefully directed herself as to these principles at [62]-[65] of her judgment, and reminded herself of them again at [132]. However, I have reluctantly concluded that her decision nonetheless strayed beyond the limits set by them, such that the appeal must be allowed. Despite the efforts of Ms Bedford, leading Mr Mason, to persuade us otherwise, the Costs Judge's decision disclosed no error of principle or failure to take relevant matters into account, and did not otherwise fall outside the ambit of his discretion. It should therefore not have been set aside.

37. Some preliminary observations are appropriate.

38. First, one of the reasons why appellate courts must exercise caution when reviewing case management decisions is that it is impossible to recreate the situation before the judge. There is an analogy with an appeal on facts, where an appellate court will be island-hopping whereas the judge will have reviewed the sea of evidence (*FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]). On an appeal against a case management decision an appellate court is simply not in the same position as the judge. It will not have the same perspective of the circumstances as they appeared to the judge "on the ground" at the time, it risks being influenced by hindsight, and (as the submissions in this case have also illustrated) it also risks being influenced by arguments that were simply not made or at least were not developed before the judge, and which have benefited from a lengthy period of gestation.

39. The second, related, point is that case management decisions are frequently made under significant pressure. This case provides an excellent example. The Costs Judge had little option but to make an immediate decision at the end of the second day, with an unreserved judgment, because he had to decide whether to complete the assessment on that day or to adjourn.

40. This leads to the third point. It should not be forgotten that an *ex tempore* judgment is just that, unreserved and lacking in the preparation that would go into a reserved judgment. It should be read as a whole, with those points – and the circumstances in which it was delivered – in mind, rather than picked apart in minute detail. An uncontroversial example of this is that both parties proceeded in this court on the basis that striking out Point 23 and permitting reliance on the annotated schedule really stood or fell together, despite them being considered sequentially by the Costs Judge. In the pressured circumstances he was under, the quality of the Costs Judge's judgment is to be commended.

41. The fourth point is this. The points that have arisen in this case have included an alleged lack of reasoning on the part of the Costs Judge, as well as some confusion caused by what appears to have been a mis-recollection on his part at the adjourned hearing as to precisely what his reasoning had been at the earlier hearing. Mr Lyons, for the defendant, reminded us of what Munby LJ said in *In re A (Children)* [2011] EWCA Civ 1205, [2012] 1 WLR 595 at [16]:

> "… it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

42. In this case the claimant's failure to do so is all the more marked by the fact that, by the date of the adjourned hearing on 8 November, his legal team had obtained a transcript of the judgment under appeal, but had neither shared it with the defendant nor provided a final version to the Costs Judge. Further, no permission to appeal against the decision on 6 August was sought at any stage from the Costs Judge, which might also have provided an opportunity for clarification, and (relying on CPR 47.14(7)) no appeal was filed in the High Court until after the November hearing.

43. This brings me to my final preliminary point, costs and court resources. It does no credit to the justice system for there to be appeals on case management issues which do not, on analysis, raise material points of principle and the cost implications of which must risk outweighing the sums at stake. This reinforces the importance of parties seeking clarification, and where appropriate, reconsideration by the first instance judge. An appeal should be a last resort. This is quite apart from the fact that the very narrow gap between the final Part 36 offers should have given serious pause for thought before embarking on the hearing in the first place.

44. Turning to the arguments on appeal, I will focus on grounds 1, 3 and 4. Ground 2 was appropriately not pressed before us and I will say no more about it.

45. The focus must be on the judgment of the Costs Judge, because the question is whether he was entitled to make the decision that he did.

46. Ms Bedford submitted that the Costs Judge had erred in principle by treating the decision-making process as a singular exercise of discretion. What he should have done was, first, decide whether the original points of dispute were *Ainsworth* compliant, such that they met the requirements of paragraph 8.2 of PD 47. That was a binary question, as demonstrated by *O'Sullivan v Holmes and Hills LLP* [2023] EWHC 508 (KB), [2023] Costs LR 331 at [36] (a case on which we heard submissions from Mr Mason). The correct answer to that was that they were not compliant, such that the annotated schedule – which was served very late – was curative rather than augmentative. Secondly, if they were not compliant, the Costs Judge had to decide what to do, both in relation to the points of dispute and the annotated schedule. That second stage was a discretionary decision but, importantly, the fact that the points of dispute had been found to be non-compliant informed how the discretion should be exercised, as did the reasons for the breach, the length of time that had elapsed before an attempt was made to cure it and the proximity of that attempt to the hearing.

47. I do not accept that the Costs Judge erred in principle. Although Ms Bedford sought to argue that he did not conclude that Point 23 was non-compliant, it is sufficiently clear that he proceeded on that basis, as indeed the Judge also concluded. Most obviously, no question of strike-out would have arisen if Point 23 was compliant. Point 23 was obviously incomplete because it referred to a non-existent annotated schedule. The Costs Judge agreed that *Ainsworth* applied despite it being a solicitor and client case, and while he observed that the original points of dispute would have allowed for a fairly broad-

brush assessment, he made it clear elsewhere in his judgment that it was up to the parties whether they wished to proceed on a more detailed basis (as, I would add, the cross-reference to a schedule indicated that the defendant wished to do). The Costs Judge proceeded to give reasons why he should not strike out Point 23, clearly implying that he considered that he had power to do so.

48. Further, it is unrealistic to suggest that the Costs Judge did not have the non-compliance in mind, together with the other factors relied on by Ms Bedford, in making his decisions in respect of Point 23 and the annotated schedule. He referred to the schedule being served at "an extremely late stage", leading to "not a happy state of affairs", the claimant having already prepared and put together bundles on a different basis. During the course of argument (of which only a partial transcript is available from the hearing on 6 August, rather underlining the point at [38] above), the Costs Judge asked for an explanation for the delay, and was provided with one by Mr Lyons, namely that the parties were in discussion and it was hoped that a hearing could be avoided.

49. The Costs Judge must be taken to have had that explanation in mind – an explanation which it is not suggested that Mr Mason challenged – when he made his decision very shortly afterwards. Its absence from the judgment was a point that should most appropriately have been raised with the judge at the time: see [41] and [42] above. Further, although Ms Bedford criticised that explanation by arguing that the negotiations referred to were negotiations at a later stage, once the hearing date was fixed, that is far from obvious from what is available to us. Rather, the available chronology is consistent with a more continual process of discussion, as one would expect. And an attempt to rely on an indication in the first appeal hearing that the schedule may also have been overlooked by the defendant's solicitor suffers from the defect that there is no indication that that point was made to the Costs Judge. In any event, that would not exonerate the claimant from blame for failure to chase it.

50. The Judge suggested that the explanation given to the Costs Judge was circular, because settlement would have been much more likely if the annotated schedule was available, such that the claimant understood the case against him in detail. I am not convinced by that. If it was likely to make a real difference to the discussions, it would surely have been chased for or supplied much earlier. The Costs Judge's observations referred to at [23] above about both parties being at fault and the nature of the points raised are relevant in this context.

51. I should clarify that what I have said about the explanation for the delay should not be read as endorsing it as an acceptable excuse for non-compliance. It is not a good excuse, but it is a relevant part of the circumstances that the explanation was not of an egregious nature. There is no indication of, for example, a tactical move designed to wrongfoot the claimant, which would be a strong factor against allowing relief.

52. Ms Bedford further submitted that the Costs Judge had failed to have regard to the overriding objective, including the changes made to it in 2013 when proportionality of expense and the importance of compliance with rules were prioritised. She relied on two cases relating to late amendments to statements of case under Part 17, *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38], particularly at (e) and (g) (per Carr J) and *CIP Properties (AIPT) Ltd v Galliford Try* [2015] EWHC 1345 (TCC) at [19] (per Coulson J). Ms Bedford pointed out that these paragraphs recognise the significance of the new, much stricter, approach, such that it is now more readily

recognised that costs sanctions for late amendments may not be adequate, and indulgence of failures to comply with procedural obligations can no longer be expected.

53. Ms Bedford submitted that the same principles should be applied to Part 47. Compliance with paragraph 8.2 of PD 47 was of manifest importance. The points of dispute inform the receiving party of the challenges being made and allow a reply to them. This enables the parties and the court to understand the full scope of the dispute, affecting both listing and preparation for the hearing, as well as the parties' ability properly to make and assess offers.

54. I agree with all of this, but it does not mean that the decision of the Costs Judge was one that he was not entitled to make. The Costs Judge must be taken both to have been aware and to have taken into account the now well-embedded change of culture that followed the 2013 reforms. It is both unrealistic and inappropriate to expect judges to spell out aspects of the overriding objective, in the form that has now been in place for some 13 years, when they make case management decisions, not least because that would lead to a wholly disproportionate exercise in box-ticking.

55. The gravamen of Ms Bedford's complaint is that the Costs Judge failed to identify that it was the defendant's default that had the effect of the hearing going to a third day, which among other things undermined what was intended to be a streamlined process of detailed assessment. As the Judge had observed, that would have been unnecessary if Point 23 had been struck out. But with respect, that starts from the wrong place. It is uncontroversial that Point 23 would have been compliant if it had been accompanied by the annotated schedule when the points of dispute were first served. It is also apparent that, in that case, a three day hearing would have been required: there was simply insufficient time to deal with all the other matters and a detailed dispute about work on documents in two days. Indeed, the transcript of the hearing on 8 November clearly shows that this was undisputed by Mr Mason. So the real question was not whether a third day was required because of the default (because it would have been needed without a default), but what other costs or difficulties arose from the default. Those would have included the fact that the claimant did not have the benefit of the annotated schedule when replying to the points of dispute or when preparing for the hearing (subject of course to the point that it did not chase for the schedule, as it could have done), as well as the inconvenience and some inevitable increase in costs in having a hearing split by an adjournment, rather than being completed over consecutive days.

56. Potentially, the claimant was also put to a disadvantage in making or assessing offers under Part 36. However, there is more than one answer to that. Most obviously, it would have been a very good reason to chase for the annotated schedule. Alternatively, the claimant could have sought to protect its position in other ways, including through the terms of any Part 36 offer that it made thereafter.

57. The claimant is not assisted in relation to paragraph 13.10 by the decision of Foster J in *Celtic Bioenergy Ltd v Knowles Ltd* [2022] EWHC 1223 (QB), [2022] Costs LR 837. In that case the lower court had refused an application made around a month before the hearing to rely on a supplemental point of dispute in relation to whether the claimant's conditional fee agreement complied with the indemnity principle. In the course of her judgment dismissing the defendant's appeal against the decision of Master Campbell, Foster J rejected the proposition that there was any presumption that documents will be accepted however late they are and however many new points they raise, observing that

the rules confer a wide discretion to make a decision in accordance with the overriding objective and it cannot be gainsaid that there will come a time when a document will be "just too late" (at [35]). I agree, but nothing here indicates a restriction on the scope of the discretion, rather the reverse. The point being made was that the Master was entitled to decide as he had, not that he was obliged to do so.

58. While it would clearly have been open to the Costs Judge to strike out Point 23 and not permit reliance on the annotated schedule, and another judge might have taken that course, he was not obliged to do so. It was open to him to impose a costs sanction instead, as he made clear that he would. As it turned out, the costs sanction actually imposed at the 8 November hearing was very limited, but there is no appeal against that decision.

59. The Judge's criticisms of the Costs Judge's decision proceed on the basis that the adjournment was necessitated by the late schedule. I have already addressed that. Beyond that, the primary objections were that insufficient weight was attributed to the importance of compliance with paragraph 8.2(b) and *Ainsworth*, and that the Costs Judge failed to exercise the power in paragraph 13.10(2) in accordance with the overriding objective (see in particular at [143]). However, questions of weight are pre-eminently ones for the first instance judge, and for the reasons already given I am not persuaded that the Costs Judge failed to have proper regard to the overriding objective.

Concluding remarks

60. In conclusion, I would allow the appeal and restore the decision of the Costs Judge. I should emphasise, however, that this is on the basis that this was a decision that the Costs Judge was entitled to make within the generous ambit of his discretion. It was neither the only decision he could make, nor was it one with which other judges would necessarily agree.

61. Paying parties should be under no illusion that paragraph 8.2 of PD 47 requires an *Ainsworth* compliant approach. They should not assume that a lenient approach will be taken if they take a similar approach to the defendant in this case. Those who do not comply on a timely basis risk non-compliant elements of their points of dispute being struck out or, as a minimum, cost sanctions. Similarly, late variations by either party under paragraph 13.10 of PD 47 risk being disallowed or permitted only on conditions, including as to costs.

Lord Justice Jeremy Baker:

62. I agree.

Lord Justice Foxton:

63. I also agree.