Neutral Citation Number: [2019] EWHC 1386 (Ch)

Claim No. CH-2018-000291

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
INSOLVENCY AND COMPANIES LIST

ON APPEAL FROM THE ORDER OF MASTER WHALAN DATED 11 OCTOBER 2018 IN THE HIGH COURT OF JUSTICE (SENIOR COURTS COSTS OFFICE)
SCCO CASE NUMBER: 1706 655

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 7 June 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH
(sitting with an assessor, Master Rowley)

- -

Between:

ERNST MALMSTEN

Appellant
(Paying Party/Defendant)

- and -

LARA BOHINC

Respondent
(Receiving Party/Claimant)

- -

- -

Mr Imran Benson (instructed directly by **Mr Malmsten**) for the **Appellant**
Mr Martyn Griffiths (instructed by **Emmerson Law Ltd**) for the **Respondent**

Hearing dates: 23 and 24 May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. THE FACTS

1. The Appellant, Mr Malmsten, and the Respondent, Ms Bohinc, were the shareholders in a small company which carried on business as an on-line jewellery business. Ms Bohinc was the majority shareholder, holding 60% of the shares, and Mr Malmsten held the remaining 40%. Both were directors of the company, and there were no other directors.

2. In time, the relationship between the parties broke down. The detail is immaterial, but they fundamentally disagreed about the future of the business, and Ms Bohinc considered that Mr Malmsten had acted in breach of his duties as director. She wanted him out of the company. To this end, Ms Bohinc sought to convene a meeting of the shareholders which, as majority shareholder, she would control. Mr Malmsten did not attend this meeting, thereby thwarting it.

3. Ms Bohinc went to solicitors, who instructed counsel. In his written submissions, Mr Benson, counsel for Mr Malmsten, described the conduct of Ms Bohinc's former legal advisers as follows:[1]

> "The solicitors do not appear to have been *au fait* with the principles involved (or, indeed, much of ordinary litigation – they had to learn (and billed for learning) how to use the online filing system and failed properly to assemble the pack to be served with a Part 8 claim form): they instructed experienced counsel not less than 26 times and spent some 230 hours of solicitor's time on it. Witness evidence was duly assembled, there was a bit of correspondence with [Mr Malmsten] and he failed to attend a meeting, the application was issued, further evidence was produced and the hearing led to the inevitable order. Counsel's skeleton argument for the hearing was, properly, pithy and short."

4. Although put with the forensic force of an advocate acting for Mr Malmsten, this was a factually accurate description of the conduct of the litigation. The application by Ms Bohinc was made under section 306 of the Companies Act 2006: Ms Bohinc sought an order for a shareholders' meeting with a quorum of one, so that even if Mr Malmsten failed to appear again, the meeting could go ahead. However, that was not the only remedy considered by Ms Bohinc's legal advisers: the documents show that other remedies under the Companies Act – notably section 168 (resolution to remove a director) and sections 292-293 (circulation of a written resolution) – were considered, in the context of advising Ms Bohinc generally as to her rights in relation to the conduct of the affairs of the company.

5. However, Ms Bohinc's application, when made, was *only* under section 306. The Part 8 claim form making the application indicated a time estimate of 30 minutes, and was supported by a witness statement of Ms Bohinc (running to some 16 pages, and setting out the background in considerable detail) and a far shorter statement from a Mr John Banks, Ms Bohinc's accountant.

6. The chronology, briefly, was as follows:

[1] Paragraph 4 of the written submissions on behalf of Mr Malmsten. I should make clear that the solicitors presently on the record for Ms Bohinc are not those who were acting for her at the time.

18 May 2017	Ms Bohinc instructs solicitors.
29 June 2017	At a conference with counsel, it was agreed that the best course of action was a section 306 application.
30 June 2017	Notice of a general meeting of shareholders, to be held on 1 August 2017, was given.
3 July 2017	Ms Bohinc gave Mr Malmsten notice that if he failed to sign an undertaking to attend the meeting, Ms Bohinc would issue a section 306 application.
6 July 2017	Mr Malmsten responded, stating that an undertaking was not appropriate, and suggesting mediation.
14 July 2017	The section 306 application is filed with the court, and a hearing date confirmed.
19 July 2017	Mr Malmsten is personally served with the Part 8 claim form and witness statements, but without the acknowledgement of service form and notes (which were subsequently provided).
1 August 2017	Mr Malmsten fails to attend the general meeting, having communicated this to Ms Bohinc beforehand.
2 August 2017	Mr Malmsten files an acknowledgement of service, indicating that he intended to contest the claim and seeking an adjournment of the hearing, which had been fixed for 3 August 2017.
3 August 2017	A hearing took place before Mr Registrar Briggs (as he then was).

7. Mr Malmsten, I should say, was unrepresented throughout this process.

8. At the hearing before Mr Registrar Briggs, the Registrar determined that a general meeting with a quorum of one would take place on 31 August 2017. Thus, Ms Bohinc's application was successful (albeit perhaps less so in terms of the timing of the proposed meeting, which Mr Malmsten successfully argued should be put off to 31 August 2017), and Ms Bohinc sought her costs.

9. A statement of costs for summary assessment pursuant to CPR PD 44 §9.5 had been prepared. The grand total was £74,328.90. When this figure was stated as the costs claimed by Ms Bohinc on a summary assessment, the following exchange took place:[2]

Mr Malmsten	And I would document that, I mean, I think it's quite excessive, £75,000, if this was just a simple matter and the witness statement was just background. So, I think there needs to be, what's called, assessment through an assessment, because I think it is totally unproportional. I mean, they had four or five lawyers working on this, plus barrister for today's meeting - £5,000. I mean, it's a lot of money for this kind of case where…
Mr Registrar Briggs	I tend to agree with this, Miss Roberts. I mean, the costs…
Ms Roberts	I can see, I am not going to push it…
Mr Registrar Briggs	It is a large sum to assess in a very short time…
Ms Roberts	It is a large sum to assess. I would just say this, and it is important that this is recorded. This whole application has been triggered by Mr Malmsten's unwillingness to cooperate in a proper way in running this company. This was wholly unnecessary. We asked for an undertaking. We have leant over backwards giving him opportunities so that these proceedings were not issued, and there has been – I regret to say, and I am going to say this – an effort on his part to delay this matter. He told my client we would never get a hearing until November, and I am glad that – I didn't interrupt you – I am glad

[2] The transcript is uncorrected. I have done my best to correct the most obvious errors.

	that there has been a robust reception to this application today. That's all I say.
Mr Registrar Briggs	Well, I will order then, that the respondent pay the applicant's costs, to be assessed if not agreed.
Ms Roberts	Sir, I will draft an order…

10. The order, as sealed by the court, provided (in paragraph 3) that "[t]he costs of and incidental to this application shall be paid by [Mr Malmsten], such costs to be assessed if not agreed". The words "and incidental to" in paragraph 3 of the order are important for two reasons:

(1) First, because Mr Malmsten contends (although not before me) that these words were improperly included in the order; and

(2) Secondly, because these words broaden the costs recoverable from Mr Malmsten by Ms Bohinc, the question being the *extent* to which they serve to do so. That is a question that I will have to deal with in the course of this appeal.

11. Costs were not agreed between Ms Bohinc and Mr Malmsten, and the matter proceeded to a detailed assessment before Master Whalan. As to this:

(1) A bill of costs was drawn on behalf of Ms Bohinc. Total profit costs, net of VAT, were £42,197.10. Counsel's fees, net of VAT, were £17,500. Other disbursements – notably the costs of personal service on Mr Malmsten, again net of VAT – were £2,823.00. The total bill, inclusive of VAT was £74,968.12. The total net of VAT was £62,520.10.

(2) Points of dispute were served by Mr Malmsten, which were replied to by Ms Bohinc, and provisionally ruled upon by Master Whalan in a series of handwritten annotations to the points of dispute dated 2 March 2018. There was then an oral hearing – at which Mr Malmsten appeared by Mr Benson – where various points were made in relation to Master Whalan's provisional rulings, and where the Master made a final ruling. That hearing took place on 11 October 2018.

(3) The final costs certificate was in the amount of £78,598.24, but this included £12,129.18 in respect of the costs of the detailed assessment itself. Thus, the costs of and incidental to the application were £66,469.06, of which £13,293.81 was VAT. The net figure was £53,175.25. However, this figure included various additional items arising out of the detailed assessment process. In terms of the costs of the section 306 application before the Registrar, the Master came to a final figure of £47,500 net of VAT.

B. THE GROUNDS OF APPEAL

12. Mr Malmsten sought permission to appeal, which was refused by Master Whalan. By an order dated 15 January 2019, Mr Justice Nugee gave permission to appeal on all grounds. Mr Malmsten appeals on seven grounds:

(1) *Ground 1*. The Master erred in permitting recovery of time and work relating to Mr Malmsten as a director, when he was only a party to the action as a shareholder, and in so doing the Master misunderstood the nature of the application and the

nature of the parties to it, and in so doing misapplied a fundamental principle of company law.

(2) *Ground 2.* The Master erred in permitting recovery of costs relating to work on matters not in issue on the basis that they were "incidental", in particular:

(a) Sections 168, 292 and 293 of the Companies Act 2006.

(b) The rights and wrongs of Mr Malmsten's actions as a director.

(c) The solvency of the business.

(3) *Ground 3.* The Master exceeded the discretion open to him in failing to sufficiently reduce the time sought by Ms Bohinc in respect of the evidence relied on by her for the hearing. It went into too much detail, covered irrelevant matters and was over-elaborate.

(4) *Ground 4.* The Master exceeded the discretion open to him in allowing Ms Bohinc to recover an excessive sum in respect of counsel's fees for 23 occasions.

(5) *Ground 5.* The Master exceeded the discretion open to him and/or went wrong in:

(a) Allowing Ms Bohinc to recover the costs of using a process server to serve numerous documents, when an address was readily available and postal service under the CPR would have sufficed.

(b) Permitting recovery of solicitor's time and counsel's fees connected to Ms Bohinc's solicitors' failure to properly assemble the response pack to accompany the claim form.

(6) *Ground 6*. The Master erred in law in finding that, when applying the proportionality test, it was appropriate to exclude VAT and the costs of drawing the bill.

(7) *Ground 7*. The Master exceeded the discretion properly open to him and/or went wrong and/or in light of Grounds 1-6 took into account irrelevant or wrong factors in finding that a proportionate sum was £60,426.46 (or approximately £47,500 + VAT + costs of drawing the bill) in a dispute about organising a shareholders meeting which was litigated for less than 3 weeks and was listed for and resolved in a 30 minute hearing.

C. A PRELIMINARY MATTER: THE PROPER FORM OF THE ORDER MADE BY MR REGISTRAR BRIGGS

13. At the hearing of this appeal, it was intimated to me, by counsel for Mr Malmsten, that Mr Malmsten might make an application to Mr Registrar Briggs to have the order he (Mr Registrar Briggs) made varied to delete the words "and incidental to" from the order on the grounds that these words were not properly included in the order made by Mr Registrar Briggs. Mr Malmsten's point, as I understand it, was as follows:

(1) The order that was sealed by the court provided that Mr Malmstem should pay "[t]he costs of and incidental to this application",[3] whereas Mr Registrar Briggs, at the hearing, ordered that Mr Malmsten pay Ms Bohinc's costs to be assessed if not agreed.[4] The order was sealed on the same day it was made, 3 August 2017.

(2) In a letter dated 28 April 2019, Mr Malmsten wrote to Chief Registrar Briggs, as he now is, stating his view that the words "and incidental to" had been included by error, and should be removed.

(3) The Chief Registrar responded on 30 April 2019, indicating that "[i]t looks as if the order was agreed by the parties. I cannot alter it without a hearing. An application will have to be made unless there is consent."

(4) Mr Malmsten sought Ms Bohinc's consent to vary the order, which was not forthcoming. Without informing Ms Bohinc, Mr Malmsten then filed an application notice dated 18 May 2019 seeking to have the order varied so as to delete the words "and incidental to".

14. Naturally, it will be a matter for Chief Registrar Briggs to determine whether his order should be varied in the manner contended for by Mr Malmsten. Clearly, this is a matter not before me and on which I cannot rule.

15. Nevertheless, I am conscious that, were such an application to be made and to succeed, it might very well have implications for this appeal.

16. In these circumstances, I was invited by Mr Griffiths, counsel for Ms Bohinc, to put Mr Malmsten to his election: namely, to adjourn the appeal (no doubt with Mr Malmsten paying the costs), unless Mr Malmsten agreed not to pursue any application of this sort before Chief Registrar Briggs.

17. I declined to take this course. Both parties were ready to proceed with the appeal, and it did not seem to me appropriate to force Mr Malmsten, on short notice, to abandon a point he has every right at least to *make*. I say nothing about the prospects of success. Accordingly, I made it clear I would hear the appeal, but would comment on this point as necessary in my judgment. That is the course I have taken, and I consider the implications of this application by Mr Malmsten in Section H below.

D. STRUCTURE OF THIS JUDGMENT

18. This judgment deals with the following points in the following order. Section E provides an overview of the applicable costs regime to the extent that this is relevant to the present appeal.

19. Section F sets out the proper approach, on an appeal, to a Master's detailed assessment of costs. An appeal from Master Whalan's decision is, most emphatically, not a re-hearing on the merits. The limits of what points can and what points cannot properly be traversed on an appeal are considered in Section F.

[3] See paragraph 10 above.

[4] See the transcript quoted at paragraph 9 above.

20. Section G considers the various grounds of appeal and my conclusions in relation to them. For convenience of analysis, I have considered Grounds 1 and 2, Grounds 3, 4 and 5 and Grounds 6 and 7 together. Thus, Section G(1) considers Grounds 1 and 2; Section G(2) considers Grounds 3, 4 and 5; and Section G(3) considers Grounds 6 and 7.

21. Finally, Section H states my conclusions, and sets out how this appeal is to be disposed of.

E. AN OVERVIEW OF THE APPLICABLE COSTS REGIME

22. CPR 44.2 describes the court's discretion as to costs. This is a wide-ranging discretion, which was exercised, in this case, by Mr Registrar Briggs, who ordered that Mr Malmsten should pay Ms Bohinc's costs of and incidental to the application on the standard basis. That decision is not on appeal before me, and the provisions of CPR 44.2 are relevant only as background.

23. Costs may be assessed on either the standard basis or on the indemnity basis.[5] In neither case may the court allow the recovery of costs "which have been unreasonably incurred or are unreasonable in amount".[6]

24. In this case, costs were ordered to be assessed on the standard basis. CPR 44.3(2) provides as follows:

> "Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

25. CPR 44.3(5) explains the meaning of "proportionate":

> "Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue to the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party;
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance."

[5] CPR 44.3(1).
[6] CPR 44.3(1).

26. CPR 44.3(2)(a) and (5) are relatively new to the CPR (if rules some 6 years old can be described as "relatively new"),[7] and do not apply in relation to cases commenced before 1 April 2013 or to costs incurred in respect of work done before 1 April 2013.[8] Although the "new" version of CPR 44 has been in place for around 6 years, neither counsel was able to point me to any authority of the High Court or above dealing with these provisions.

27. CPR 44.4 identifies the factors to be taken into account in deciding the amount of costs. CPR 44.4(1)(a) provides that, when assessing costs on the standard basis, the court will have regard to all the circumstances in deciding whether costs were proportionately and reasonably incurred or proportionate and reasonable in amount. The court will give effect to any orders that have already been made in the action.[9]

28. CPR 44.4(3) sets out a list of eight factors to which the court will also have regard, namely:

> "(a) the conduct of all the parties, including in particular –
>
> (i) conduct before, as well as during, the proceedings; and
>
> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
>
> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;
>
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (e) the skill, effort, specialised knowledge and responsibility involved;
>
> (f) the time spent on the case;
>
> (g) the place where and the circumstances in which work or any part of it was done; and
>
> (h) the receiving party's last approved or agreed budget."

29. Costs may be the subject of a "summary" assessment, defined by CPR 44.1(1) as the procedure whereby the costs are assessed by the judge who has heard the case or application. Alternatively, costs may be assessed by way of a "detailed" assessment. CPR 44.1(1) defines a detailed assessment as the procedure by which the amount of costs is decided by a costs officer in accordance with CPR 47. The principles to be applied in each type of assessment are the same. It is the level of examination and scrutiny that differs (as well as the person undertaking the assessment).

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[7] They were introduced in 2013 by the Civil Procedure (Amendment) Rules 2013, SI 2013/262. This was a substantial re-enactment of CPR 44.

[8] CPR 44.3(7).

[9] CPR 44.4(2).

F. THE PROPER APPROACH ON AN APPEAL

30. Appeals under CPR 52 are generally limited to a review of the decision of the lower court.[10] The general approach on appeals was described by Woolf LJ in *AEI Rediffusion Music Limited v. Phonographic Performance Ltd*:[11]

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or taken into account some feature that he should or should not have considered or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scales."

31. Because orders as to costs involve a substantial discretion vested in the judge making the order, and because appeals about costs inevitably inflate costs, appeals against costs orders are rare and the appellate court should discourage such appeals:[12]

> "This is an appeal brought with the leave of the single Lord Justice from the county court in relation to costs. As such it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him…For reasons of general policy, this court discourages such appeals by interpreting such discretion very widely.

32. This is an appeal not against the incidence of costs, but against their amount. As *Friston* notes, "[a]ppeals concerning the quantum of costs are notoriously challenging from the appellant's point of view".[13] In *Mealing-McLeod v. Common Professional Examination Board*, Buckley J said this about the approach in appeals concerning the quantum of costs:[14]

> "Broadly speaking, a Judge will allow an appeal such as this if satisfied that the decision of the Costs Judge was wrong…That is easy to apply to matters of principle or construction. However, where the appeal includes challenges to the details of the assessment, such as hours allowed in respect of a particular item, the task in hand is one of assessment or judgment rather than principle. There is no absolute answer. Notwithstanding that the Judge to whom the appeal is made may sit with Assessors, as I did here, the appeal is not a re-hearing and given the nature of the Costs Judge's task and his expertise I would, usually, regard it as undesirable for it to be so…
>
> I do not think it would [be] helpful or even legitimate for me to add phrases or adjectives to the approach I have identified. But since the appeal is not a re-hearing, I would regard it as inappropriate for the Judge on appeal to be drawn into an exercise calculated to add a little here or knock off a little there. If the Judge's attention is drawn to items which with the advice of his Assessors he feels should, in fairness, be altered, doubtless he will act. That is a matter for his good judgment. Permission to appeal should not be granted simply to allow yet another trawl through the Bill, in the absence of some sensible and significant complaint. If an appeal turns out to be no more than such an exercise the sanction of costs may be used."

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[10] See CPR 52.21(1). A re-hearing can be held if the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

[11] [1999] 1 WLR 1507 at 1523.

[12] *SCT Finance v. Bolton*, [2002] EWCA Civ 56 at [2] (*per* Wilson J).

[13] Friston (ed), *Friston on Costs*, 3rd edn (2018) ("*Friston*") at [45.23].

[14] [2002] 2 Costs LR 223 at 224.

G. THE VARIOUS GROUNDS OF APPEAL

(1) Grounds 1 and 2

(i) Introduction

33. As I have noted, it is convenient to consider the first and second grounds of appeal together. The costs order provided that "[t]he costs of and incidental to this application shall be paid by [Mr Malmsten] such costs to be assessed if not agreed".

34. It is incumbent upon a costs officer (and anyone else assessing costs) to give effect to any orders made by the court.[15] In my judgment, Master Whalan failed to do so when carrying out his detailed assessment. That is because he permitted recovery of costs that were not:

(1) The costs of the application; or

(2) Costs incidental to the application.

The words "costs of and incidental to" proceedings derive from section 51 of the Senior Courts Act 1981. It is well-established that the words "and incidental to" are words of *extension* rather than words of *restriction*.[16] I shall consider first why certain costs claimed by Ms Bohinc were not costs *of* the application. I then go on to consider why these costs were also not *incidental to* the application.

(ii) Costs of the application

35. The costs of an application can include costs incurred prior to the issue of proceedings.[17] The Master was perfectly entitled to consider whether Ms Bohinc's pre-issue costs were recoverable. The section 306 application was commenced on 14 July 2017,[18] which was just under two months after Ms Bohinc first instructed solicitors on 18 May 2017.[19] To the extent that, during this pre-issue period, costs in relation to the application were incurred, these would be recoverable.

36. However, it is very clear from the narrative in Ms Bohinc's bill of costs that Ms Bohinc's legal team was considering far more than *just* an application under section 306. The narrative begins as follows:

> "Instructions were received from [Ms Bohinc] to prepare and circulate to the directors of Lara Bohinc International Limited (hereinafter "the Company"), a written request pursuant to [section] 292 of the Companies Act 2006 to place the Company into administration and for [Mr Malmsten] call to step down as director.
>
> At all material times, [Ms Bohinc] was a 60% shareholder and director, and [Mr Malmsten] was a 40% shareholder and director of [the Company]. The claim arose due to a dispute between [Ms

[15] CPR 44.4(2). See paragraph 27 above.

[16] *Friston* at [49.147].

[17] *Société Anonyme Pêcheries Ostendaises v. Merchants Marine Insurance Co*, [1928] 1 KB 750 at 757 (*per* Lord Hanworth MR); *Friston* at [49.147].

[18] See the chronology at paragraph 6 above.

[19] See, again, the chronology at paragraph 6 above.

> Bohinc] and [Mr Malmsten] as to whether the Company should be placed into administration, in light of the Company's financial position."

In short, Ms Bohinc's legal team was considering and advising in relation the overall position of the company; and the section 306 application was something that arose out of that consideration. The narrative continues in that vein, although it is clear, as time goes by, that more and more time was being devoted specifically to the section 306 application. It is, however, difficult – simply from the bill of costs – to determine which costs are attributable to the section 306 application and which not.

37. In my judgment, subject to the question of "incidental" costs (to which I shall turn in due course), it is for Ms Bohinc and not for Mr Malmsten to bear the costs of the advice given and work done by Ms Bohinc's legal team in relation to matters *other than* work done in relation to the section 306 application itself. It is only to the costs of the section 306 application that the Registrar's order extends. The order makes no provision for the recovery of costs incurred in relation to *other* work done by Ms Bohinc's legal team, even if this work was done at the same time as a consideration of the section 306 application.

38. Of course, I accept that some work might well be attributable to the section 306 application *and* to other aspects of the work that was done for Ms Bohinc. I am certainly not suggesting that such work would be irrecoverable under Mr Registrar Briggs' costs order. But some effort needs to be made in differentiating between the section 306 application work and the non-section 306 application work: the Master, however, drew no such distinction, and in this I consider he erred.

(ii) Costs incidental to the application

39. Nor can it be said that these non-section 306 application costs were costs incidental to the section 306 application. In *Contractreal Ltd v. Davies*, Arden LJ considered whether the costs of other proceedings could be subordinate to incidental to proceedings in relation to which a party was obliged to pay costs. She stated:[20]

> "The expression "of and incidental to" is a time-hallowed phrase in the context of costs [which] has received a limited meaning, [in particular] the words "incidental to" have been treated as denoting some subordinate costs to the costs of the action. If [counsel for the receiving party] was right in this action it would mean that the costs of some very substantial proceedings would be treated as costs of and incidental to other proceedings."

40. I do not consider, for precisely this reason, that the non-section 306 application costs can be "incidental" to the section 306 application.

(iii) Conclusion

41. In his detailed assessment, the Master failed altogether to differentiate between section 306 costs and non-section 306 costs. He should, in my judgment have disallowed the latter. He clearly did not. Thus, for example, Part 1 of Ms Bohinc's bill of costs concerns "work undertaken under a private retainer to 31 May 2017 (Invoice No. 17537)". The invoice thus covers work for the period 18 to 31 May 2017, over a month before proceedings were commenced. The costs claimed were £7,487.00 (net of VAT), limited

[20] [2001] EWCA Civ 928 at [41].

to £6,000 (net of VAT) by reference to the interim bill. The Master allowed the vast majority of these costs, even though some clearly related to matters outside the scope of the costs order. The same is true of the other, later, parts of the bill of costs.

42. In these circumstances, Grounds 1 and 2 succeed. The Master has erred in principle by misapplying the scope of the costs order in Ms Bohinc's favour and to Mr Malmsten's detriment.

(3) Grounds 3, 4 and 5

43. Again, it is appropriate to consider these three grounds together. They all relate to specific items of cost allowed by the Master which, so Mr Malmsten contended, involved an inappropriate exercise of his discretion. Specifically, Mr Malmsten contended that:

(1) The evidence served on Ms Bohinc's behalf covered material in too much (sometimes irrelevant) detail (Ground 3);

(2) The Master permitted an excessive sum in respect of counsel's fees (counsel was consulted on no less than 26 occasions, and the costs of 23 of these occasions were allowed) (Ground 4);

(3) The Master permitted recovery of:

(a) The use of process servers when this was unnecessary;

(b) Costs relating to Ms Bohinc's solicitors' mistake in relation to the response pack (Ground 5).

44. I am reluctant to seek to second-guess the granular decisions of the Master in relation to these three Grounds. It may well be that certain cost lines (notably, the extensive consultation with counsel) would fall away because of my conclusion in relation to Grounds 1 and 2. But for the reasons given by Buckley J in *Mealing-McLeod*,[21] I am reluctant to engage in a line-by-line analysis of costs already considered by the Master. Although I had before me the original papers that were before the Master – including potentially privileged material between Ms Bohinc and her solicitors – I did not consider it appropriate to review or hear submissions in relation to this material, particularly when this was material that Mr Malmsten's team had *not* seen.[22]

45. More to the point, it seems to me that the requirement of proportionality – to which I turn next – also constitutes a means of controlling costs without engaging in the sort of granular analysis that I am here eschewing.

46. Accordingly, I dismiss Grounds 3, 4 and 5.

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[21] See paragraph 32 above.

[22] As I understand is the usual practice, queries by the Master were resolved informally by reference to potentially privileged material: see, further, *Friston* at [46.45] to [46.47]. As the Court of Appeal has noted, before the Master this is no doubt a sensible and time-saving process. But I doubt if it is appropriate on an appeal. Either the point in issue is too "granular" for the appellate court to wish to investigate or the matter is so fundamental that the receiving party should be put to its election as to whether to waive privilege.

(3) Grounds 6 and 7

47. Both of these grounds relate to the question of proportionality, and it is again convenient to take them together. It is necessary to begin with the concept of proportionality.

(i) Proportionality

48. As was explained in paragraph 26 above, the proportionality rules in the CPR are relatively new and certainly unconsidered by the higher courts. That these new rules were intended to effect a significant change to the CPR is clear from the fact that they do not apply in relation to cases commenced before 1 April 2013 nor to costs incurred in respect of work done before that date.[23]

49. It is worth considering the role of proportionality *before* the new rules were introduced. The approach that the courts took was described by Lord Woolf MR in *Lownds v. Home Office*:[24]

> "…what is required is a two-stage approach. There has to be a global approach and an item-by-item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which [CPR 44.4(3)] states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable. If, because of lack of planning or due to other causes, the global costs are disproportionately high, then the requirement that the costs should be proportionate means that no more should be payable than would have been payable if the litigation had been conducted in a proportionate manner. This is turn means that reasonable costs will only be recovered for the items which were necessary if the litigation had been conducted in a proportionate manner."

50. In other words, the proportionality of the overall bill claimed determined the *rigour* of the subsequent assessment of costs. If the costs were proportionate, then the costs judge would simply need to consider whether each individual item was reasonably incurred at a reasonable cost. If the costs were disproportionate, on the other hand, then a higher (necessity) standard was used. Only if that cost item was *necessary* would the reasonable costs of that item be allowed. If the incurring of a cost was necessary, and the amount itself reasonable, there was no further ability to reduce the overall costs bill by reference to proportionality or, indeed, any other measure. The final bill could remain disproportionate to the matter at issue.

51. The present rules are very different. It is quite clear, from the express wording of CPR 44.3(2)(a) that there may be a reduction in costs on grounds of disproprortionality *even if* those costs were reasonably or necessarily incurred.

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[23] See paragraph 26 above.

[24] [2002] EWCA Civ 365 at [31].

52. That, to my mind, inevitably indicates that under the new rules a proportionality assessment must occur at the *end* of the process, whereas under the old rules it occurred at the *beginning*. In *Lownds*, when considering the old rules, Lord Woolf MR said this:[25]

> "…In a case where proportionality is likely to be an issue, a preliminary judgment as to the proportionality of the costs as a whole must be made at the outset. This will ensure that the costs judge applies the correct approach to the detailed assessment…Once a decision is reached as to proportionality of costs as a whole, the judge will be able to proceed to consider the costs, item by item, applying the appropriate test to each item."

Self-evidently that must be right where proportionality determines the approach on a detailed assessment, but does not otherwise affect the outcome of that assessment.

53. It is already clear from Lord Woolf's analysis in *Lownds* that proportionality is essentially a tool that controls the *overall* bill of costs. That is confirmed by the definition of proportionate in CPR 43.3(5). The five factors listed there are only meaningful when considered in relation to the overall bill of costs, rather than in relation to a specific item of costs. What the new rules require is for the judge, having completed a detailed assessment of costs, to take a step back, look at the assessed bill, and ask whether a *further* reduction is required on grounds of proportionality.

54. Although I have reached this conclusion on the basis of the wording of the rules, my conclusion is consistent with the views expressed by others extra-judicially. I quote the following passage from *Friston*, which quotes a speech from Senior Master Gordon-Saker, himself quoting Jackson LJ:[26]

> "In the editor's view, the starting point is a keynote speech given in 2014, in which Senior Master Gordon Saker (speaking extrajudicially) said the following:
>
> > "It is said that we will need guidance on how to apply the new test. I disagree. The guidance is already there. It is likely that somebody will in some case or other seek to appeal the approach that has been taken. But I would suggest that there is no reason to suppose that the court hearing the appeal will do other than restate the guidance that has already been given by Jackson LJ in his final report.
> >
> > > "…I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. There is already a precedent for this approach in relation to the assessment of legal aid costs in criminal proceedings: see *R v. Supreme Court Taxing Office, ex parte John Singh and Co* [1997] 1 Costs LR 49."
> >
> > In the 15th implementation lecture on 29 May 2012 – the lecture entitled "Proportionate Costs" – Lord Neuberger, then MR, quoted that passage and said that it seems likely that the courts will develop the approach to proportionality "as Sir Rupert described it" in that paragraph."

[25] At [36].

[26] *Friston* at [25.53].

Thus, if Master Gordon-Saker is right, it would seem that proportionality will now revive "the *Singh* adjustment". This is noteworthy, because this was precisely the test that was urged upon the Court of Appeal by the paying party in *Lownds* more than 15 years ago."

55. My conclusion is also consistent with the notes in the 2019 edition of *Civil Procedure*, which says this at [44.3.3]:

"As yet no guidance has been provided by the Court of Appeal as to how the test of proportionality introduced on 1 April 2014 by [CPR 44.3(2) and (5)] should be applied. The general practice on detailed assessment is to consider the reasonableness of each item that has been challenged and then to consider whether the total sum that would be allowed on that basis is proportionate or not. If it is not proportionate, the court will then reduce the total figure to a sum which is proportionate."

56. The new rules accordingly replace the *ex ante Lownds* test, with a new *ex post* test. Costs are assessed according to a reasonableness standard (see CPR 44.3(1): "the court will not...allow costs which have been unreasonably incurred or are unreasonable in amount"), with the final costs assessment then being subject to the proportionality test.

57. It would seem that the distinction between "reasonable" costs and "necessary" costs – intrinsic to the *Lownds* test – has been eliminated, given that CPR 44.3(1) refers only to costs "unreasonably" incurred or "unreasonable" in amount. The reference, in CPR 44.3(2)(a), to costs "reasonably or necessarily incurred" does not preserve the *Lownds* distinction, but simply makes clear that even costs *necessarily* incurred are subject to the overriding criterion of proportionality.

58. The approach that I have described will work equally well in the case of a summary assessment, albeit that there is, in the case of such assessment, no item-by-item consideration of costs.

(ii) When considering proportionality, is it appropriate to exclude VAT and the costs of drawing the bill?

59. The Master's approach was to exclude from consideration VAT and the costs of drawing the bill of costs.[27] The substance of Ground 6 of this appeal was that this approach was wrong in law.

60. In my judgment, the Master was entirely right to leave both VAT and the costs of drawing the bill out of account when considering the question of proportionality. These are no more than distorting factors, when considering the overall proportionality of costs. The fact is that, when consideration proportionality, one is seeking to determine whether there is a proper – a proportionate – relationship between the overall costs and the action or the application giving rise to those costs. Self-evidently, the costs of any detailed assessment – which are costs entirely unrelated to the nature of the action or application whose costs are being assessed – must be left out of account. I do not consider the contrary to be seriously arguable, given the definition of "proportionality" in CPR 44.3(5).

61. Equally, the inclusion of VAT confuses rather than assists. The fact is that VAT is – when payable – not an option, but an inevitable cost to the receiving party. Sometimes,

[27] See p.42 of the transcript of the oral hearing before Master Whalan on 11 October 2018.

of course, a party will not be obliged to pay VAT; and sometimes, a party will be able to recover it. It seems to me to be entirely undesirable to include such a factor in any proportionality assessment, as it simply distorts and confuses any proportionality assessment. This conclusion is borne out by:

(1) The fact that, in CPR 44.1(1) "costs" is defined as "fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant in person under rule 46.5 and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track". VAT does not fall within this definition but is separately defined.

(2) The helpful *dictum* of Morland J in *Giambrone v. JMC Holidays Ltd*:[28]

> "In my judgment VAT should be excluded from the starting point figure because it is a percentage tax levied on the cost of the service provided. The impact of the tax has no bearing on the steps taken in the litigation or the cost of them."

62. Accordingly, I dismiss Ground 6.

(iii) The Master's approach to proportionality

63. The Master explicitly assessed the question of proportionality at the end of the hearing before him on 11 October 2018. He (rightly) left VAT and the costs of the detailed assessment out of account and began his proportionality assessment with the net figure of £47,500.[29] As to the question of proportionality:

(1) The Master correctly directed himself to CPR 44.3(5). Of the various factors there set out, he discounted, as irrelevant, factor *(a)* (the sums in issue in the proceedings) and factor *(e)* (any wider factors involved in the proceedings). I consider that he was right to do so.

(2) He regarded factors *(b)* (the value of any non-monetary relief), *(c)* (the complexity of the litigation) and *(d)* (any additional work generated by the conduct of the paying party) as relevant, "almost in ascending significance".[30]

(3) His judgment, given *ex tempore*, was as follows:[31]

> "This was an application for an order under the Companies Act for a meeting of shareholders with the purpose of putting the company into administration, straightforward relief in one sense, but nonetheless important, and of central importance to this particular claimant. Insofar as the litigation's complexity [is concerned], this was a Part 8 application for the order made by the learned Registrar. As the learned Registrar pointed out this was, or should have been, a relatively straightforward matter. Not a matter which the defendant should reasonably or realistically have objected to or opposed. So, although it is a significant matter to this claimant, it is a relatively straightforward application and should not ordinarily raise any particularly complex issues at law or litigation. But seeing this case effectively overlap, at least in part, with [factor (d)] (any additional work generated by the

[28] [2002] EWHC 2932 (QB) at [43].

[29] See p.42 of the transcript of the oral hearing before Master Whalan on 11 October 2018.

[30] See p.46 of the transcript of the oral hearing before Master Whalan on 11 October 2018.

[31] See pp.46-47 of the transcript of the oral hearing before Master Whalan on 11 October 2018. The transcript has been uncorrected. I have eliminated typographical and other obvious errors in the transcript.

> conduct of the paying party). And this, it seems to me, having seen not simply the file, but the transcript of the hearing before the learned Registrar, and the matters articulated in the bill and [the replies to the points of dispute], this it seems to me was the issue of central significance in this particular case. This was a matter that could have been dealt with in a straightforward manner by the cooperation of the defendant had he turned up to the meeting as convened, but notwithstanding the fact that he indicated he was planning to, he did not turn up. […][32] I have observed over the course of proceedings today, that in procedural terms, he is not a particularly co-operative litigant, in relation to service and other procedural matters. There is no doubt at all that that led to costs which could otherwise, and should otherwise, have reasonably been avoided. More particularly, his stance throughout, prior to, during and, to a degree, after the hearing was to try and frustrate the process to prevent the company being put into administration. His [submission] expressed during the course of the hearing was that there were sufficient assets or at least debts owed to the company to avoid this particular process, which he sought to do by reference to various different alternative […][33] proceedings, a section 994 application and the like. I have quoted already the intervention of the learned Registrar, who was persuaded at least in part by the defendant to delay the meeting by 28 days or so, because of his desire, valid or otherwise, to try and continue a substantive defence of the application. But the long and the short of it is that what should have been a relatively straightforward application in the Companies Court, turned out to be a more protracted and bitterly fought and undoubtedly therefore more expensive undertaking than it would otherwise have needed to be. In the light of all those factors, I have to decide on the discretion of the court whether this is a case where a proportionality test [in relation to] the primary assessment requires a further reduction. On the particular facts of this case, the costs of this application, I am of the conclusion that the primary assessment, it is proportionate, and I am not minded to make a further deduction on the basis of proportionality."

Accordingly, the final costs payable in respect of the section 306 application remained at £47,500.

64. Having well in mind the injunctions that I have set out in Section E above, I have nevertheless concluded that the Master's decision to entertain no further proportionality reduction is one that cannot be sustained:

(1) The Master attached too much weight to the fact that Mr Malmsten resisted Ms Bohinc's application. It may very well be right to say that Mr Malmsten should have attended the shareholders' meeting that had been called and so avoided the need for a section 306 application altogether. It may also be right to say that Mr Malmsten had no good grounds for resisting the application when it was made. I am quite prepared to consider the matter on that basis, for the fact is that (by themselves) these matters say *nothing* about the *quantum* of costs that it was appropriate for Mr Malmsten to pay in this case. Of course, these factors strongly point to the incidence of costs resting on Mr Malmsten. But that is precisely what the Registrar ordered. The question before the Master was not the incidence of costs, but their amount.

(2) What is more, the Registrar ordered costs on the standard basis. He clearly did not consider that there was anything, in Mr Malmsten's conduct, that made this a matter for assessment on the indemnity basis.

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[32] This is a statement in the transcript I cannot make sense of.

[33] The transcript says "injunctive", but that cannot be right.

(3) In these circumstances, faced with what was undoubtedly a narrow and straightforward application, if the Master was going to use factor *(d)* (any additional work generated by the conduct of the paying party) as the reason for effecting no proportionality deduction, he needed to identify *how* Mr Malmsten's conduct resulted in additional costs to Ms Bohinc.

(4) The point can be put in the following way: there can be no doubt that Ms Bohinc was entitled to her *proportionate* costs, both because Mr Malmsten should not have fought her application and because he lost. To that extent, there is a clear nexus between the Registrar's costs order and Mr Malmsten's conduct. *But*, as a starting point, given the narrowness and straightforwardness of the application – resulting in a clearly correct outcome after a hearing of half-an-hour (including a ruling and submissions on costs) – costs of £47,500 require some justification, and pretty cogent justification at that. The costs are – simply by reason of the narrowness and straightforwardness of the application in relation to which they were incurred – *prima facie* disproportionate.

(5) If it could have been shown that – for example – the frequent reference of questions to counsel by Ms Bohinc's solicitors was in some way caused by Mr Malmsten's conduct, that *would* be a matter to take into account. But the fact is that Mr Malmsten's acknowledgement of service (with an accompanying witness statement) occurred late in the day: on 2 August 2017, the day before the hearing. The frequent resort to counsel cannot be explained on this basis, nor indeed any of the disproportionate costs arising between instruction of Ms Bohinc's legal team and 2 August 2017. I conclude that the Master's reliance on factor *(d)* was not justified by the circumstances before him and that the Master's decision on proportionality is, for this reason, wrong in law.

(6) I do not consider that factor *(b)* is particularly relevant in the present case. Of course, the application was of importance to Ms Bohinc, as it affected the fate of the company she was very much interested in. As a result, no doubt, her solicitors instructed very experienced company law counsel, and I would not regard that as inappropriate. However, this cannot justify the considerable number of hours spent on what was, I reiterate, a narrow and straightforward application.

65. Accordingly, I find that Ground 7 succeeds. The Master's failure to make a deduction to reflect the disproportionality of the costs claimed by Ms Bohinc was a clear error of law, lying outwith the (very considerable) discretion afforded to him by the costs rules.

H. DISPOSITION

66. For the reasons I have given, Grounds 1, 2 and 7 succeed. Grounds 3, 4, 5 and 6 fail. Accordingly, Mr Malmsten's appeal succeeds.

67. I am reluctant, given the costs that have already been incurred, to remit the detailed assessment to another costs judge, unless that course is unavoidable. Had only Grounds 1 and 2 succeeded, then such remission would indeed have been unavoidable. I am not in a position to re-assess Ms Bohinc's bill of costs, extracting, on an item-by-item basis, matters unrelated to the section 306 application.

68. However, Mr Malmsten has also succeeded on Ground 7, and I *do* consider that I am in a position to effect a proportionality analysis without remitting the question of costs to another costs judge. This is because such an exercise does not involve, as I have explained, an item-by-item assessment, but rather taking a step back and asking whether, in light of the various factors that go to proportionality, the sum of £47,500 ought to be reduced on the grounds of proportionality. I consider that I can carry out such a proportionality assessment despite the presence, in the figure of £47,500, of costs that should not be recoverable *at all* by Ms Bohinc, provided that – when making such an assessment – I bear this fact in mind (as I do).

69. I consider that the sum of £47,500 should be reduced to a sum of £15,000 (plus, obviously, VAT). My reasons for reaching this figure or – to put it another way – for reducing the sum of £47,500 by some £32,500 are as follow:

(1) I consider that the approach a court must take when considering proportionality is well-put in *Friston*:[34]

> "What still remains a relative mystery, however, is how the adjustment ought to be made. Whilst no more than his own thoughts on the matter (which could well be wrong), the editor believes that it is no coincidence that those factors that are listed in CPR 44.3(5) are precisely those factors that would be of especial importance to clients of legal services providers. Clients do not care about reasonableness, necessity, time spent and other such niceties; indeed, they are often aghast at the so-called reasonable fees that their legal services providers charge. They care about more fundamental – usually commercial – matters, such as the amount at stake, how difficult the litigation is, how badly (or well) their opponents are behaving, etc. These are the factors that are listed in CPR 44.3(5) and are the factors that will tend to govern the extent to which clients are prepared to put their hands in their pockets. If this is right, then – by analogy with other tests that govern the amount of costs – the test could well be the amount that a hypothetical reasonable litigant of adequate but not extravagant means would, in all the relevant circumstances, regards as bearing a "reasonable relationship" to the factors in CPR 44.3(5). Conceptually, this is not a difficult test to apply because – whilst an oversimplification – it boils down to a very simple question: "Focusing on what really mattered to the litigants, what would a reasonable client have been prepared to pay in all of the relevant circumstances?""

(2) It is, however, necessary to sound a warning against too client-centric an approach to proportionality. The law is, unfortunately, both complex and complex to navigate: that is why clients need lawyers in the first place, and it is necessary to appreciate that the costs figure arising out of a detailed assessment or even in a summary assessment cannot simply be disregarded. The costs appearing in such an assessment have been professionally compiled and must be given due weight. The position is *a fortiori* when there is an approved or agreed costs budget in place.

(3) So, as it seems to me, the starting point for the proportionality assessment will be the figure put forward by the legal representative, after an item-by-item review if this has occurred. Thereafter, it is a question of the extent to which – knowing the way lawyers charge, and the fact that, to at least some extent, the client will have been informed of this – this figure fails the proportionality test. A judge assessing

[34] At [25.55].

such figures may have regard to "like" cases[35] and to what the other side has charged its client,[36] but at the end of the day the application of the proportionality criterion is intended not as a test for ensuring that the costs are indeed reasonable or even necessary, but as a separate and self-standing control.

(4) The costs for the section 306 application made by Ms Bohinc are, without any doubt, excessive. That is, no doubt, in part because the Master included as recoverable costs which, so I have found, fell outwith the costs order made by the Registrar. It may well be that such costs represent services to Ms Bohinc that were valuable to her in terms of general advice regarding the company of which she was majority shareholder, but these were certainly not costs that Mr Malmsten should pay, as I have found. Aside from that, I find that there is no justification for the *extent* to which counsel was consulted nor for the number of hours spent by Ms Bohinc's solicitors. These costs were entirely disproportionate given the nature and complexity of the application.

(5) I accept that these proceedings were of importance to Ms Bohinc and, to be clear, I am certainly not envisaging any discount because her solicitors went to experienced (and expensive) counsel versed in corporate law. I also accept that Mr Malmsten was not a co-operative litigant: partly, that may be due to his status as a litigant in person, but I am also quite prepared to accept the Master's finding that Mr Malmsten was trying to be awkward. Indeed, that conclusion is rather supported by the very late attempt by Mr Malmsten to re-open the Registrar's order, a matter I have described in Section C above. However, I consider that – perhaps more by luck than judgment – Mr Malmsten's conduct in this case did not actually have an effect on the level of costs, as I have already noted.

(6) In reaching a figure of £15,000, I have been cautious to err on the side of generosity to Ms Bohinc. My initial reaction to the costs for the section 306 application was that it would be difficult to justify costs in excess of £12,000 *inclusive* of VAT. But I am conscious that I am applying a broad-brush test at the end of a detailed assessment which I have not carried out, and have therefore concluded that the sum of £15,000 *plus* VAT is the appropriate figure to set.

70. That, therefore, is my conclusion in relation to this appeal:

(1) The appeal is allowed in relation to Grounds 1, 2 and 7. Grounds 3, 4 and 5 fail.

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[35] As happened in *Football Association Premier League Limited v. Houghton*, [2017] WHC 2567 (Ch). In this case, the court was faced with six similar applications for judgment in default, made by the same claimant against various defendants who had each committed the same infringement of the claimant's intellectual property rights. There was thus a substantial amount of common ground between the cases, which rendered the disparity in the costs claimed in the six cases harder to justify. The court took an approach that ensured a measure of consistency between similar cases brought by the same claimant.

[36] Where both clients are professionally represented, and have adopted the same approach as to costs, with similar outcomes, it may be that relatively little should be allowed by way of reduction on grounds of proportionality. Of course, the judge will have to bear in mind that *both* sets of costs may be disproportionate, but the comparison will nevertheless have some value.

(2) I do not remit the matter back to a costs judge for further detailed assessment, but order that Mr Malmsten pay Ms Bohinc the sum of £15,000 plus VAT in settlement of the costs of the application.

(3) That, of course, leaves the costs arising out of the detailed assessment itself, which I anticipate will require further consideration by counsel and, if necessary, further written submissions to me for me to resolve on the papers.

(4) I am conscious, also, that Mr Malmsten's challenge to the proper form of the order remains live. Until that matter has either been withdrawn by Mr Malmsten or otherwise disposed of by the Registrar, I will not make any final order on this appeal. It seems to me that the incidence of the costs of the detailed assessment, referred to above, may very well turn on whether Mr Malmsten's challenge to the order is or is not successful. Were it to be successful, then a certain amount of work, both in relation to the detailed assessment and this appeal, will have been thrown away: and (as presently advised) I fail to see why Ms Bohinc should bear such costs thrown away. Of course, if the application to the Chief Registrar is withdrawn, this matter does not arise.