[2017] AACR 35

(MG v Cambridgeshire County Council (SEN)
[2017] UKUT 172 (AAC))

Judge Rowley **HS/3172/2016**
24 April 2017

Upper Tribunal procedure – costs – summary assessment – rule 10(1)(b) of the Tribunal Procedure (First-tier Tribunal) (HESC) Rules 2008 – whether *inter partes* costs payable to a party funded through the legal help scheme

The appellant had appealed against her child's Education, Health and Care Plan for which she had received public funding under the legal help scheme. Under the terms of the Contract awarded to them by the Legal Aid Agency her legal representatives' work fell within the definition of controlled work (not licensed work). Her representatives applied under rule 10 of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 for £19,113 for disbursements (expert fees) and profit costs assessed at *inter partes* rates from 9 June 2015, on the basis that the local authority had acted unreasonably in defending the proceedings from that date. A First-tier Tribunal judge (Judge B) ordered the local authority to pay 75 per cent of those costs. A second First-tier Tribunal judge (Judge C) set aside Judge B's decision on the grounds that there had been a procedural irregularity and determined that the local authority had acted unreasonably from 24 February 2016, assessing the costs as £1,636.85 on the basis that regulation 15 of the Community Legal Service (Costs) Regulations 2000 (for which read regulation 21 of the Civil Legal Aid (Costs) Regulations 2013) did not apply to work undertaken under the legal help scheme and accordingly the appropriate rate was less than the representative's assessment. The appellant appealed to the Upper Tribunal against that decision, arguing that Judge C had erred in law in holding that *inter partes* costs could not be awarded to a party funded through the legal help scheme.

Held, allowing the appeal, that:

1. in the event of a costs order being made in favour of a legally aided party, the amount of costs to be paid under that order should be determined as if that party were not legally aided, irrespective of whether the work claimed for was controlled or licensed work (paragraph 22);

2. First-tier Tribunals should apply considerable restraint when considering an application under rule 10 and orders should be the exception, not the rule, and made only in the most obvious cases, thereby ensuring that proceedings were as brief, straightforward and informal as possible and that parties were not deterred from bringing or defending appeals (paragraphs 26 to 27);

3. *(obiter)* the proper approach to be taken by a First-tier Tribunal when assessing the amount of costs under rule 10(1)(a) was to follow a three-stage process: (1) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings? (2) if it did, should the tribunal make an order for costs? and (3) if so, what is the quantum of those costs? The Judge provided detailed guidance for each stage of that process (paragraphs 28 to 42).

The Upper Tribunal set aside the F-tT's decision and re-made it, ordering the respondent local authority to pay the appellant the sum of £4,474.56 within 28 days of the date of its decision letter.

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Decision:

I allow the appeal. As the decision of the First-tier Tribunal (made on 25 July 2016 under reference EH873/15/00024) involved the making of an error in point of law, it is **set aside** under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Under section 12(2)(b)(ii) of that Act I re-make the decision. My decision is that the respondent acted unreasonably in defending the proceedings with effect from 24 February 2016, and that an order for costs should be made against it. I summarily assess those costs on the standard basis in the sum of £4,474.56 including VAT.

REASONS FOR DECISION

Terminology

1. In these reasons:

"*the child"* means the child whose Education, Health and Care (EHC) Plan was the subject of these proceedings;

"*the appellant"* means the mother of the child;

"*the respondent"* means the local authority which was the respondent to the appellant's appeal before the First-tier Tribunal;

"CCLC" means Coram Children's Legal Centre;

"*the 2007 Act"* means the Tribunals, Courts and Enforcement Act 2007;

"*the 2008 Rules*" means the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008 (SI 2008/2699);

"LAA" means Legal Aid Agency;

"*the Contract"* means the Civil Legal Advice 2013 Contract;

"*the 2013 Regulations"* means the Civil Legal Aid (Costs) Regulations 2013 (SI 2013/661);

"the Costs Guidance" means the Costs Assessment Guidance: for use with the 2013, 2014 and 2015 Standard Civil Contracts;

"CPR" means the Civil Procedure Rules 1998 (SI 1998/3132).

Introduction

2. This appeal concerns a case in which the First-tier Tribunal exercised the power given to it under rule 10(1)(b) of the 2008 Rules to award costs against a party on the basis that the party had acted unreasonably in defending the appeal. The general significance of my decision arises out of my consideration of the approach to be taken by First-tier Tribunals in assessing the amount of costs awarded under rule 10 following a finding of unreasonable conduct.

A preliminary matter

3. Before dealing with the substantive appeal, I must address a preliminary matter. On 7 November 2016 I gave permission to the appellant to appeal to the Upper Tribunal. I did so on the basis that the grounds of appeal were arguable. In addition, I raised some further questions upon which I directed the parties to make submissions. However, the respondent's response addressed only the grounds of appeal, and not the issues which I had identified. Accordingly, on 14 December 2016 I directed the respondent to file a further response dealing with the outstanding matters. Having heard nothing from the respondent within the time period set out in the directions, a clerk of the Upper Tribunal contacted the respondent's solicitor, to be told that she did not appear to have a copy of my direction of 14 December. A copy of that direction was duly despatched, but nothing further was heard from the respondent's solicitor. I decided to give to the respondent one further opportunity, and in a direction dated 8 March 2017 extended the time for the response to 22 March 2017. To date there has been no response.

4. In the meantime, in an email dated 27 March 2017 the appellant's solicitor, having made submissions on the questions which I had posed on 7 November 2016, invited me to determine the appeal on the papers. I consider that I am able to decide the matter without a hearing. In reaching that decision I have taken into account the following matters: the parties have made

written submissions on the substantive grounds of appeal; neither party has requested an oral hearing; the respondent was copied into the appellant's email of 27 March 2017; there has been no request from the respondent to extend the time for complying with the direction 8 March 2017; the respondent is represented by solicitors. In my judgment, the respondent's solicitor's silence implies that she has said all that she wants to say on this appeal. In the circumstances, bearing in mind the overriding objective to deal with the appeal fairly and justly, I consider that the respondent has had an opportunity to participate fully in the proceedings, and that it is proportionate for me to proceed with the matter on the papers, so avoiding any further delay.

The legal framework

5. The First-tier Tribunal's power to award costs comes from section 29 of the 2007 Act, the relevant provisions of which are:

> "(1) The costs of and incidental to –
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.
>
> (4) In any proceedings mentioned in subsection (1), the relevant Tribunal may –
>
> (a) disallow, or
>
> (b) (as the case may be) order the legal or other representative concerned to meet,
>
> the whole of any wasted costs or such part of them as may be determined in accordance with Tribunal Procedure Rules.
>
> (5) In subsection (4) 'wasted costs' means any costs incurred by a party –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay.
>
> (6) In this section 'legal or other representative', in relation to a party to proceedings, means any person exercising a right of audience or right to conduct the proceedings on his behalf.
>
> …"

6. It will be seen that the power to determine by whom and to what extent costs are to be paid, provided for by section 29(2), is subject to Tribunal Procedure Rules. The relevant

"Tribunal Procedure Rule" is rule 10 of the 2008 Rules, the effect of which is to restrict the making of costs orders to specific, limited circumstances. It provides as follows:

> "(1) Subject to paragraph (2), the Tribunal may make an order in respect of costs only –
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> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs; or
>
> (b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.
>
> (2) The Tribunal may not make an order under paragraph (1)(b) in mental health cases.
>
> (3) The Tribunal may make an order in respect of costs on an application or on its own initiative.
>
> (4) A person making an application for an order under this rule must –
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> (a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and
>
> (b) send or deliver a schedule of the costs claimed with the application.
>
> (5) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends –
>
> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
>
> (b) notice under rule 17(6) that a withdrawal which ends the proceedings has taken effect.
>
> (6) The Tribunal may not make an order under paragraph (1) against a person (the 'paying person') without first –
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> (a) giving that person an opportunity to make representations; and
>
> (b) if the paying person is an individual, considering that person's financial means.
>
> (7) The amount of costs to be paid under an order under paragraph (1) may be ascertained by –
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> (a) summary assessment by the Tribunal;
>
> (b) agreement of a specified sum by the paying person and the person entitled to receive the costs ('the receiving person'); or
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> (c) assessment of the whole or a specified part of the costs, including the costs of the assessment, incurred by the receiving person, if not agreed.
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> (8) Following an order for assessment under paragraph (7)(c), the paying person or the receiving person may apply to a county court for a detailed assessment of costs in

accordance with the Civil Procedure Rules 1998 on the standard basis or, if specified in the order, on the indemnity basis.

(9) Upon making an order under paragraph (5) or (7)(c), the Tribunal may order an amount to be paid on account before the costs or expenses are assessed."

7. It should, of course, be remembered that in exercising any power conferred by the 2008 Rules, the First-tier Tribunal must seek to give effect to the overriding objective, which is to enable the tribunal to deal with cases fairly and justly. That includes, pursuant to rule 2(2):

"(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues."

The funding of the appellant's legal costs

8. The nature of the appellant's funding is of some importance. She was in receipt of public funding. Under the terms of the Contract awarded to CCLC by the LAA, CCLC was able to provide legal services in respect of education law.

9. In this case, the work done under the Contract fell within the definition of "controlled work". This is often referred to as "work done under the legal help scheme". What is covered by the definition of "controlled work" is set out in regulation 21 of The Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098). For the purposes of this decision it is not necessary for me to consider the detail of the regulation. Suffice to say it does not include the issue and conduct of proceedings before a First-tier Tribunal in any area other than mental health or immigration. That is, presumably, why the appellant was represented at the hearing by a volunteer from IPSEA. I should also add that, in contrast to "licensed work," a public funding certificate is not required or provided for "controlled work".

10. In general terms, as I understand it, as between the provider of the legal services and the LAA, costs are assessed for controlled work done under the Contract for education law in the following way. The work undertaken is funded at a fixed rate. The amount of that rate is commercially sensitive, as it was set through a competitive tendering process. If, as in this case, the work is so extensive that it exceeds what is known as "the escape fee case threshold", then the file is sent to the LAA for assessment by it, applying a fixed hourly rate. Because the issue and conduct of legal proceedings are not permitted under controlled work there is no judicial input into any part of the assessment as between the provider and the LAA.

The procedural history of the case

11. No fewer than four First-tier Tribunal Judges have so far been involved in this case. It began as an appeal relating to Sections B, F and I of the child's Education, Health and Care Plan. The substantive appeal was heard by Judge A and specialist members on 23 March 2016, and a written decision was given on 4 April 2016.

12. After it had received the tribunal's decision, CCLC made an application for costs against the respondent, pursuant to rule 10(1)(b) of the 2008 Rules. It did so in the time prescribed by

rule 10(5). The costs sought were CCLC's profit costs and disbursements (experts' fees) from 9 June 2015, from which date it was said that the respondent had acted unreasonably in defending the appeal. The total amount sought was £19,113.00 including VAT.

13. In accordance with rule 10(6)(a) of the 2008 Rules, the respondent was directed to provide a written response to the application, and it did so. It opposed the application. The matter came before Judge B on the papers on 15 June 2016. The appellant's application succeeded in part. Judge B found that the respondent had acted unreasonably in defending the appeal from 9 June 2015 onwards. He estimated that the costs additionally incurred by the appellant because of the respondent's unreasonable conduct amounted to three quarters of the claimed costs. Accordingly, he ordered the respondent to pay three quarters of the appellant's costs at the rates claimed from 9 June 2015, in the sum of £14,334.75.

14. On the same day, the respondent's solicitors notified the First-tier Tribunal by email that they intended to appeal against the decision of Judge B. The papers went before Judge C, who treated the email of 15 June 2016 as an application to set aside the decision of Judge B on the basis that there had been a procedural irregularity (rule 45(3) of the 2008 Rules). Judge C set aside Judge B's decision, and gave some directions.

15. On 25 July 2016 Judge C considered the application for costs afresh. She concluded that the respondent had acted unreasonably in defending the proceedings, but only from 24 February 2016. Judge C proceeded to assess CCLC's costs from that date, in the sum of £1,636.85. The figure was considerably lower than that assessed by Judge A because the date from which costs were assessed was much later, and the rates allowed were significantly lower.

16. The appellant sought permission to appeal Judge C's decision of 25 July 2016. The grounds of appeal were limited to issues arising out of Judge C's assessment of the costs to be paid. They did not challenge her findings on "unreasonable conduct." Permission was refused by Judge D on 7 September 2016. As I have already said, on 7 November 2016 I gave the appellant permission to appeal to the Upper Tribunal.

Error of law

17. CCLC claimed costs at *inter partes* rates. The hourly rate claimed was in accordance with the Supreme Court Costs Office Solicitors' Guidance Hourly Rates 2010. The appellant relied upon regulation 15 of the Community Legal Service (Costs) Regulations 2000 (SI 2000/441). In fact, that regulation was repealed and replaced by regulation 21 of the 2013 Regulations, but for present purposes the effect of the regulation is the same. The relevant parts of regulation 21 are as follows:

> "**Amount of costs under a legally aided party's costs order or costs agreement**
>
> **21.–(1)** Subject to paragraphs (2) to (4), the amount of costs to be paid under a legally aided party's costs order or costs agreement must be determined as if that party were not legally aided.
>
> (2) …
>
> (3) Where this paragraph applies, the amount of costs to be paid under a legally aided party's costs order or costs agreement is not limited, by any rule of law which limits the costs recoverable by a party to proceedings to the amount the party is liable to pay their representatives, to the amount payable to the provider in accordance with the arrangements."

18. Judge C was not persuaded that regulation 15 of the 2000 Regulations (for which read regulation 21 of the 2013 Regulations) applied to work undertaken under the legal help scheme

in allowing a higher rate to be charged *inter partes*. Rather, she said, the ability to charge a higher *inter partes* rate applied to "licensed work" only. She determined that the hourly rate set out in the 2010 Standard Civil Contract Payment Annex was the correct hourly rate to apply. That rate was considerably lower than the one claimed.

19. The appellant submits that Judge C erred in law in holding that *inter partes* costs could not be awarded to a party whose case has been funded through the legal help scheme, and that she applied the wrong rates. The respondent's brief submission is that Judge C's approach was correct.

20. My interpretation of regulation 21 is that the fact that a person is in receipt of public funding makes no difference to their right to costs if they are successful, nor to the amount which should be awarded to them. There is nothing in the regulation to limit this principle to "licensed work" only.

21. My view is reinforced by clause 3.14 of the Contract:

> "This Paragraph represents our authority pursuant to section 28(2)(b) of the Act, for you to receive payment from another party under a Client's costs order or Client's costs agreement (as defined in Legal Aid Legislation) and to recover those costs at rates in excess of those provided for in this Contract or any other contract with us. <u>This applies in respect of both Licensed Work and Controlled Work …</u>" (emphasis added).

22. I conclude that, in the event of a costs order being made in favour of a legally aided party, the amount of costs to be paid under that order shall be determined as if that party were not legally aided, irrespective of whether the work claimed for was controlled or licensed work. It follows that Judge C erred in law in finding to the contrary.

23. For the sake of completeness I should add that, in any event, Judge C erred in incorrectly identifying the relevant rate for the work done by CCLC. The rate which she applied stems from the 2010 Standard Civil Contract Payment Annex, which did not, on any view, govern the work carried out by CCLC in this case. Rather, the work was undertaken under the provisions of the Contract, which had different rates. However, for the reasons given above, rates under the Contract govern only the Legal Aid costs payable by the LAA to CLCC. They do not apply to *inter partes* costs.

24. As Judge C's decision involved the making of an error in point of law I set it aside in its entirety, under the provisions of section 12(2)(a) of the 2007 Act.

25. This is sufficient to dispose of the substantive appeal. However, it may be helpful if I were to give some guidance on the approach to be taken by the First-tier Tribunal in assessing the amount of costs under rule 10 of the 2008 Rules.

Guidance

<u>The exception rather than the rule</u>

26. It is crucially important for me to begin by emphasising that nothing in this decision should be taken as encouraging applications for costs. The general rule in this jurisdiction is that there should be no order as to costs. There are good and obvious reasons for the rule. Tribunal proceedings should be as brief, straightforward and informal as possible. And it is crucial that parties should not be deterred from bringing or defending appeals through fear of an application for costs.

27. Furthermore, tribunals should apply considerable restraint when considering an application under rule 10, and should make an order only in the most obvious cases. In other words, an order for costs will be very much the exception rather than the rule. The observations

of Openshaw J in *In the matter of a Wasted Costs Order made against Joseph Hill and Company Solicitors* [2013] EWCA Crim 775, albeit made in the context of wasted costs orders in criminal proceedings, are no less relevant to applications for costs under rule 10:

> "We end with this footnote: there is an ever pressing need to ensure efficiency in the Courts: the judges, the parties and most particularly the practitioners all have a duty to reduce unnecessary delays. We do not doubt that the power to make a wasted costs order can be valuable but this case, and others recently before this Court, demonstrate that it should be reserved only for the clearest cases otherwise more time, effort and cost goes into making and challenging the order than was alleged to have been wasted in the first place."

Three-stage process

28. In considering an application for an order an order for costs on account of "unreasonable conduct" under rule 10(1)(b), a three-stage process should be followed:

> (1) did the party against whom an order for costs is sought act unreasonably in bringing, defending or conducting the proceedings?;
>
> (2) if it did, should the tribunal make an order for costs?;
>
> (3) if so, what is the quantum of those costs?

29. So, first the tribunal must determine whether there has been relevant unreasonable conduct. There is no element of discretion. Rather, appropriate findings must be made on an objective basis. Any further analysis of the first question is beyond the scope of this decision.

30. In contrast to the first, the second and third questions involve the exercise of a broad discretion. I must emphasise the crucial second question. It is all too easy for a tribunal to fall into the trap of, having found "unreasonable conduct", moving straight to considering the amount of costs which should be awarded, without giving any thought as to whether an order for costs should be made at all. In considering the second question the tribunal will have regard to all the circumstances. It will bear in mind, for example, the nature of the unreasonable conduct, how serious it was, and what the effect of it was. In appropriate cases the tribunal may consider the conduct of the parties more generally, and whether it is proportionate to make an order for costs. In addition, by rule 10(6) the tribunal may not make an order for costs against a party who is an individual without first considering that person's financial means.

Summary or detailed assessment?

31. By rule 10(7) the amount of costs to be paid under an order may be ascertained by summary assessment, agreement of the parties or detailed assessment. It will be a rare case indeed which necessitates a detailed assessment. A summary assessment will be more proportionate, and there will be far less delay. Naturally, a tribunal must clearly state whether the assessment is to be a summary or detailed one.

32. At first blush, it may appear that summary assessment is not available in relation to an *inter partes* order for costs where the receiving party is legally aided. PD 9.8 of rule 44.6 of the CPR provides as much. It is cited in paragraph 15.7 of the Costs Guidance. However, on closer analysis, I am of the view that this principle does not apply to the assessment of costs under an *inter partes* order where the receiving party's publicly funded work falls into the category of controlled work. I agree with the learned authors of *Cook on Costs* that the reason for the principle is that the relevant legal aid legislation requires publicly funded costs to be subject to detailed assessment. But this only applies to licensed work and not to controlled work. Support

for my analysis is provided by the fact that paragraph 15.7 of the Costs Guidance is contained in Section C which is headed "licensed work," and the principle is, therefore, limited to such work.

33. I conclude that summary assessment is possible in relation to an *inter partes* order for costs where the publicly funded receiving party's claimed work is controlled work.

The summary assessment

Relevance of the CPR

34. No particular procedure is set out in the 2008 Rules for the summary assessment of costs. I noted earlier that tribunal proceedings should be as brief, straightforward and informal as possible. The summary assessment process should be as simple as possible, yet fair. The same can be said of the summary assessment process in civil proceedings. Many of the basic principles governing assessments are set out in the CPR, and they are well-established. They provide a proportionate and straightforward process for carrying out a summary assessment. There is nothing in the 2008 Rules which displaces those basic principles. Indeed, rule 10(8) refers to them. Of course, tribunals are not bound by the same rules as the civil courts and the discretion on a summary assessment is a very broad one. That said, I can see no reason why, where a tribunal is to carry out a summary assessment, the assessment should not operate, in general, on the same principles as the CPR.

35. To be clear, I am not saying that it will inevitably be an error of law if a tribunal does not meticulously follow the provisions of the CPR when carrying out a summary assessment. Nevertheless, those provisions may serve as a helpful guide.

36. I will now summarise the main provisions of the CPR on summary assessment. Although what appears below may, at first sight, seem complicated for what is, after all, an informal jurisdiction, experience suggests that, in practice, the exercise is not complicated, nor is it time-consuming.

The schedule of costs

37. Rule 10(4)(b) of the 2008 Rules provides that a person making an application for an order under rule 10 must send or deliver a schedule of the costs claimed with the application. There is no provision for the form that that schedule should take.

38. Form N260 is used in the civil courts. A copy of the form may easily be obtained online[1]. The information contained in it allows the envisaged "broad brush" of summary assessment. The additional sheet that provides for a breakdown of the time claimed for documents gives a brief indication of what work has been done. However, it must not be thought that it provides an opportunity for a quasi-detailed assessment. It will not be necessary for the assessor to go through each individual item. Rather, the process is a summary one, and the breakdown simply informs at a glance how much time has been spent.

39. I suggest that best practice would be for the party seeking an order for costs to provide a costs schedule in the form of N260 or at least one which follows it as closely as possible. Without wishing to appear to be flippant, why re-invent the wheel?

Basis of assessment

40. The first issue to consider is whether the costs are to be assessed on a standard or indemnity basis. The distinction between the two is this. On the standard basis only costs which are proportionate[2] to the matters in issue will be allowed. So, costs which are disproportionate in

[1] https://hmctsformfinder.justice.gov.uk

[2] The theme of proportionality is, of course, found in the overriding objective. Costs may be proportionate if they bear a reasonable relationship to: (a) any sums in issue in the proceedings; (b) the value of any non-monetary relief

amount may be disallowed or reduced even if they were reasonably or necessarily incurred. On a practical level this means that, once the assessor has determined what was reasonably incurred and reasonable in amount, they should step back and determine whether the sum so assessed is proportionate. If it is not, they should reduce the costs further to what is proportionate. Any doubt is to be resolved in favour of the paying party (CPR 44.3(2)).

41. On the other hand, there is no such test of proportionality on the indemnity basis. Costs which have been reasonably incurred or are reasonable in amount will be allowed, and any doubt will be resolved in favour of the receiving party (CPR 44.3(3)).

42. I must stress that costs on the standard basis will very much be the usual order. Before an indemnity order can be made, there must be some conduct or circumstances which take the case out of the norm. It is beyond the scope of this decision to explore this issue further.

43. It may be worth pointing out that if an order as to costs is silent as to the basis, the general rule is that costs will be assessed on the standard basis (CPR 44.3(4)).

Assessing the amount - relevant factors

44. Under CPR 44.4, in deciding the amount of costs, all the circumstances must be taken into account. They include, in particular, the factors listed at 44.4(3). They have become known as the "Seven Pillars of Wisdom".[3] They are:

> "(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.."

45. The applicability of a different CPR checklist (CPR 3.9) to tribunal procedure was considered by the Court of Appeal, in the context of employment tribunals, in *The Governing Body of St Albans Girls' School and Hertfordshire County Council v Neary* [2009] EWCA Civ 1190. Smith LJ's words are pertinent and, in my judgment, apply as much to CPR 44.4(3) as they do to 3.9:

> "47… where Parliament has apparently decided not to incorporate into employment tribunal practice a set of requirements such as those in CPR 3.9, I do not think it proper for the courts to incorporate them by judicial decision. It is one thing to say that ETs should apply the same general principles as are applied in the civil courts and quite another to say that they are obliged to follow the letter of the CPR in all respects. It is one thing to say that ETs might find the list of CPR 3.9(1) factors useful as a checklist and

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in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as public importance. (CPR 44.3(5)).

[3] The eighth, which refers to costs budgets, was added after the "Jackson reforms" and is clearly irrelevant to tribunal proceedings.

> quite another to say that each factor must be explicitly considered in the employment judge's reasons…"

46. In a similar fashion, tribunals might find the factors in CPR 44.4 to be a useful checklist, but it will not be necessary in each case to consider all of them. Whilst the time spent will clearly be a primary consideration, which of the others may be relevant and what weight, if any, to attach to them, will be case-sensitive.

Hourly rates

47. I should briefly mention hourly rates. The Supreme Court Costs Office issues Guideline Hourly Rates as part of its Guide to the Summary Assessment of Costs. The last revision occurred in 2010. The guideline rates are generally accepted on a summary assessment and, indeed, it is extremely rare to see arguments about them.

How detailed should the reasons be on a summary assessment?

48. The very essence of a summary assessment is that it is a summary process. It follows that the reasons should not, and I would go so far as to say must not, be elaborate. They should be concise and focused. Provided they show that the tribunal has acted judicially, and briefly explain to the parties why they have won or lost (read against the background known to the parties), they will be sufficient.

Disposal of the appeal

49. I turn to consider how I should dispose of the appeal. For the reasons set out above, I have already determined that Judge C's decision dated 25 July 2016 should be set aside in its entirety. It will be recalled that by a previous order, dated 15 June 2016, Judge C had set aside Judge B's decision also dated 15 June 2016. There is no appeal against that decision of Judge C, and so Judge B's decision stands set aside.

50. It will, therefore, be necessary to consider the entire application for costs afresh. Section 12(2)(b)(ii) of the 2007 Act enables me to re-make the decision if I think it is appropriate to do so in the exercise of my discretion. I have given careful consideration as to whether I should do so, or whether I should remit the matter to be re-heard by the First-tier Tribunal. Given the not insignificant time which has elapsed in the meantime, together with the delay and expense which would be cause by remitting the matter, and the fact that I consider I have sufficient material before me to enable me to determine the application, in the exercise of my discretion I will deal with the matter.

51. Given the parties' knowledge of the background it is not necessary for me to give detailed reasons. My findings which are set out below are specific to this case, and are of no precedential value to any other cases.

52. The first issue is whether the respondent acted unreasonably in defending the proceedings. I note that the grounds of appeal do not challenge Judge C's findings on this matter. I have carefully considered all the information before me, including the First-tier Tribunal's file. I remind myself that the threshold is a high one. There is no need for me to make this decision any longer by discussing the respondent's conduct. Suffice to say, without reservation, I respectfully agree with the careful and considered decision and reasons of Judge C on this issue, and I adopt them. The respondent acted unreasonably in defending the proceedings from 24 February 2016 onwards.

53. Secondly, should I exercise my discretion to make an order for costs? I am of the view that the respondent's conduct was such as to justify making an order for costs. The effect of the conduct was that the appellant incurred significant, un-necessary costs, for the reasons given by

Judge C. No other conduct of either party is a relevant factor here, and there is nothing to suggest that it would be disproportionate to make an order. I should add that, given the respondent is a local authority, the provisions of rule 10(6) are not applicable.

54. I turn to the assessment of the costs. There is no reason in this case to suggest anything other than a summary assessment. Whilst I have found "unreasonable conduct" on the part of the respondent, in my judgment that conduct is not such as to justify an order on the indemnity basis, and my assessment will be on the standard basis. So, I must start by determining what costs were reasonably incurred and are reasonable in amount.

55. In doing so I will take into account all the circumstances, and any relevant factors of CPR 44.4(3). In fact, I find that in this case there are no relevant circumstances other than those set out in CPR 44.4(3). As to (a), in my judgment the only relevant conduct of either party is on the part of the respondent, in that the bundle was unduly large because of the amount of duplicate documents submitted by it, and it made repeated and sudden changes to its position on the working document in the days leading up to the hearing. As to (b) and (c), the matter was self-evidently important to both parties. Until shortly before the hearing a significant issue had been whether the placing of the child at a school in line with parental preference would constitute an unreasonable use of public expenditure. The difference in additional costs between the two schools was over £40,000 per annum. As to (d), there was nothing unduly complex, difficult or novel in the case. As to (e), whilst CCLC has specialised knowledge in this area, there is nothing in the case which caused it to bring to it any great skill and experience far in excess of the average solicitor in the field. There is nothing to suggest that 44.4(3)(g) (the place where and the circumstances in which the work was done) was an issue in this case.

56. The most significant factor in this matter is (f), the time spent on the case. I find that CCLC did actually spend the amount of time claimed. However, that is not the end of the matter. I must determine whether the time was reasonably spent. Was it reasonable for CCLC to do the work and, if so, was it done within a reasonable time and was it proportionate to the matters in issue? I remind myself that, as I am assessing the costs on the standard basis, any doubt should be resolved in favour of the respondent, the paying party.

57. All items of work done from 24 February 2016 were carried out by a Grade D fee earner. I am satisfied that that is the appropriate level of fee earner, and that it is right to apply the guideline rates referred to above. In this case that means that the appropriate hourly rate is £118 plus VAT. There is no real issue with the time spent on any item save for: (i) the amount of preparation for the final evidence, (ii) time spent on the bundle, (iii) time spent on the working document, (iv) time spent preparing the costs application. In each case I find that it was self-evidently reasonable for CCLC to do the work. The question is whether it was done within a reasonable time. I will briefly deal with each in turn.

58. As to (i), consideration of the documentation and further submissions of the respondent after 24 February 2016 amounted to over 13 hours. Bearing in mind the documents were not overly complex or unduly lengthy, in my view a reasonable time for doing the work would be five hours.

59. As to (ii), CCLC said that it took five hours to consider and check the 788 page bundle. I take into account the size of the bundle. However, I also take into account that it included a number of duplicated pages and a significant amount of documents which had been provided by CCLC and read by it beforehand. In my view, five hours is not a reasonable time for doing the work. Rather, a reasonable time for doing it would be three hours. I note that that figure is not disputed by the respondent.

60. As to (iii), over three hours was claimed for considering the respondent's repeated updates to the 27 page working document on four occasions in less than a week. I am of the view that this is not a reasonable time for doing the work. In the light of the short time span in which the work was done, and given the nature and scope of the amendments made by the respondent, two hours would be a reasonable time for doing it. This figure does not include the time spent taking the client's instructions on the working document, which I have allowed in full.

61. As to (iv), three hours was claimed for preparing the costs application and schedule. Even allowing for the length of the application, this is an unreasonable time. In my view two hours would be a reasonable time for doing it, particularly given that the grounds of the application were straightforward.

62. I note that my findings have allowed more time than that allowed by Judge C, and less time than that apparently allowed by the LAA which, I am informed, has recently carried out an assessment of CCLC's publicly funded costs. However, that simply illustrates the nature of the broad discretion and the fact that there is a permissible range of possible outcomes following the exercise of that discretion.

63. Bringing all matters together (including the items in respect of which I have found there was no real issue, and noting that no disbursements were incurred after 24 February 2016), my quantification of what costs were reasonably incurred and are reasonable in amount is:

Description	**Time (h:m)**	**Amount**	**VAT**	**Sub-total**
Attendances	5:54	£696.20	£139.24	£835.44
Preparation	14:30	£1711.00	£342.20	£2053.20
Routine telephone calls	1:00	£118.00	£23.60	£141.60
Routine correspondence out	10:12	£1203.60	£240.72	£1444.32
TOTAL		**£3728.80**	**£745.76**	**£4474.56**

64. As this is an assessment on the standard basis, I now must step back and ask whether the overall sum is proportionate. In my judgment it is. It bears a reasonable relationship to: the matters that were in issue, the relatively straightforward nature of the case and the additional work generated by the conduct of the respondent. Accordingly, I assess the costs payable by the respondent to be in the sum of £3,728.80 plus VAT of £745.76, giving a total of £4,474.56. I order that the respondent pays that sum to the appellant within 28 days of the date of the letter sending out my decision.