

# Appeal Judgment

Hearing date: 20<sup>th</sup> July 2015

Before His Honour Judge Graham Wood QC  
(sitting with the Regional Costs Judge, District Judge Jenkinson as Assessor)  
Mr Andrew McGee (instructed by Compass Law) Solicitors for the Appellant  
Ms M McDonald (instructed by Horwich Fareilly Solicitors) for the Respondent

**Respondent**

**MR RICHARD PINCHER**

and

**Appellant**

**NIRJALMIT MEHMI**

**BETWEEN**

**APPEAL NO 91/2014**

**In the County Court at Liverpool**  
**Case number: 3YK61991**



**Introduction**

1. This is another case in a series of appeals which I directed should be heard by myself sitting with the regional costs judge as an assessor, arising out of the CPR 47.15 provisional assessment procedure, which is yet in its infancy and on which little guidance has been given.

2. It may be that only limited such guidance can be given as clearly each case is fact specific, but in the course of dealing with a number of applications for permission on paper, it became apparent that a common issue arising on several occasions was whether or not the review of a provisional assessment was akin to an appeal review, where there are restrictions on the admission of fresh evidence, or whether it amounted to a *de novo* hearing.

3. The more refined issue which arises in the context of this case is whether a decision on the papers to assess the costs at nil for failing to provide the necessary documentation on the form N258 is a sanction which prevents any progress with a review hearing unless and until an application for relief from sanction is made.

4. Further, since these appeals were set down, this court has provided its judgment in the case of **Evans v Enterprise Group Holdings Ltd**. Although that case does not deal with provisional assessments, it addresses an issue which may well be relevant in the event that this appeal is allowed, and that is the approach to be taken in respect of the production of documents where a **Hollins v Russell** issue (challenge to the retainer) is raised in the points of dispute.

5. In an earlier decision of this court (1<sup>st</sup> September 2014 – **Ion v Ahmed**) a case which was based on not dissimilar facts to the present one, I gave an *ex tempore* judgment on an appeal from the district judge, which touched, in particular, on the nature of the documents to be filed with the form N258 when commencing the detailed assessment procedure. This present judgment should be taken as providing fuller and more informed reasoning, particularly in respect of the disparity between the wording of the form and the practice direction.

**Background**

6. The claim arose out of a modest road traffic accident in March 2012 in which damages were claimed for personal injuries. The Claimant's solicitors acted under a conditional fee agreement. After proceedings have been commenced the claim settled in the sum of £2756. The Claimant became entitled to his costs to be subject to a detailed assessment if not agreed. Unsurprisingly, in the experience of this court, where substantial costs are sought in relatively straightforward matters, often up to three or four times the value of the claim, those costs could not be agreed.

7. Thus the costs pleading commenced with the Claimant, as the receiving party, lodging notice of commencement and his bill of costs in September 2013. It was responded to with points of dispute on 10<sup>th</sup> October 2013. One of the points pursued by the Defendant / paying party raised a **Hollins v Russell** issue, that is putting the Claimant to proof over the existence of a valid retainer with the production of the CFA agreement if necessary. This is a very common point taken in these low value CFA claims almost as a matter of routine, as this court pointed out in **Evans v Enterprise**.

8. The matter remained unresolved, and therefore the next stage for the Claimant involved requesting a detailed assessment hearing pursuant to **CPR 47.14** and practice direction **47 PD.13** paragraph **13.2**. Here the form N258 is critical and which required to be accompanied by the documents set out in the practice direction. The relevant document for the purposes of this appeal is that described at (i):

"Where there is a dispute as to the receiving party's liability to pay costs to the legal representative who acted for the receiving party, any agreement, letter or other written information provided by the legal representative to the client explaining how the legal representatives charges are to be calculated."

9. It is agreed that this paragraph, where the claim is funded by a CFA agreement, requires a copy of the CFA to be filed (although not at that stage seen by the paying party) to establish the validity of the retainer. Unfortunately, the form N258 which is obtained from the court or online, whilst adopting substantially the same wording, refers to "ability" rather than liability. (It is said that a number of practitioners were misled by the wording on the form, and indeed in **Ion v Ahmed I** expressed surprise that this could be a typographical error. Since that judgment was handed down, I have been made aware that it was a typographical error, and that the forms will be amended. However this is yet to take place.)

10. Whether or not the Claimant's solicitor was misled into believing that the CFA was not required to be filed because of the wording of the N258, or because she was confusing the requirement for disclosure and the *Pamplin* election procedure with simple filing (where it is only seen by the court in the first instance) is not entirely clear from the statement of Donna Collins. Nevertheless it was not filed. It is agreed that it should have been. All other documents were filed.

11. Thus when the matter came before District Judge Woodburn on the provisional assessment paper "hearing" in April 2014, he was faced with a **Hollins** dispute on the validity of the retainer, revealed on the points of dispute and the points of reply. District Judge Woodburn, an extremely experienced regional costs judge, made the following observation:

"The decision of the Court of Appeal in **Hollins v Russell** in 2003 trumps that of the High Court in **Bailey v IBC** in 1998. Although the costs practice direction [particularly 47 PD.5,

32.5 [d] adopts the views of the Court of Appeal in **Hollins v Russell**, there is no obligation on the receiving party to disclose the retainer to the paying party. However, in assessments which commenced after 31/03/13 where a dispute arises in relation to the receiving party's retainer, CPR part 47n.15[4] & 47nPD.14 paragraphs 14.3 [b] (sic) as well as 13.2 [1] specifically require the receiving party to lodge with the court documents evidencing the retainer. The rule and practice direction have not been followed. Decision: Bill assessed at nil"

12. Even though this court has subsequently disagreed with the view that **Hollins v Russell** trumps **Bailey v IBC**, this was an approach which District Judge Woodburn was perfectly entitled to take, that is to regard the requirement of lodging the retainer as not having been fulfilled. He was also entitled to make a nil assessment, (although this is an approach which is no longer taken in such circumstances in this region, and I shall refer to the preferred approach later in this judgment).

13. When the judge's decision was made known, the solicitor for the Claimant/receiving party, Donna Collins, did two things on 25<sup>th</sup> April 2014. First of all, she made a request pursuant to CPR 47.15 (7) for an oral review, as the Claimant was entitled, of the provisional assessment hearing. Second, at the same time, she made an application for relief from sanctions pursuant to CPR 3.9, accompanying this with a witness statement and a substantial number of supporting documents (although many of these were the seminal relief from sanction authorities).

14. On 14<sup>th</sup> July 2014, just over a year ago, the combined application for relief and oral review came before District Judge Baker. A transcript of the exchanges is available as well as his judgment. At the outset of the hearing, Miss Collins accepted that the application for relief from sanctions should be heard first of all, and the matter should proceed to assessment if she was granted relief. It is noteworthy, because there is discussion dealing with this, that between the decision of District Judge Woodburn and the hearing in July, the Court of Appeal had provided its judgment in **Denton v White [2014] EWCA 906**, qualifying the earlier harsher and restrictive approach to relief from sanctions in **Mitchell v News Group Newspapers [2013] EWCA Civ 1537**. Having heard argument, and dealing with this as a relief from sanctions case, District Judge Baker declined to grant relief from sanction and accordingly upheld the nil assessment.

15. In the circumstances the matter has been pursued before this court on appeal. Although there was no objection raised before District Judge Baker as to the approach to the hearing, one of the substantial grounds of appeal before me and my assessor colleague, the regional costs judge, has been that the district judge was wrong to deal with the relief from sanction application first, or at all, and should have regarded this as a review only, allowing the Claimant receiving party to correct any default when the papers were lodged, albeit with appropriate costs penalty.

**The legal context**

16. As a result of the civil justice reforms, and a drive towards greater cost efficiency and curtailment of disproportionate expense in costs litigation, provisional assessments were introduced into the detailed assessment procedure by CPR 47.15. There is an accompanying practice direction. The intention of the Rules Committee was that any detailed assessment where the costs claimed were less than £75,000 should be dealt with as a paper determination first, without the need for attendance by the parties or the extent of scrutiny which is usually applied in lengthy detailed assessment hearings. That provisional assessment becomes binding on the parties if there is no application for an oral review within 21 days after being sent out. The pilot scheme had demonstrated that the majority of provisional assessments were not reviewed.

17. The salient rule provides as follows:

**Provisional Assessment**

**47.15**

(1) This rule applies to any detailed assessment proceedings commenced in the High Court or the County Court on or after 1 April 2013 in which the costs claimed are the amount set out in paragraph 14.1 of the practice direction supplementing this Part, or less.

(2) In proceedings to which this rule applies, the parties must comply with the procedure set out in Part 47 as modified by paragraph 14 Practice Direction 47.

(3) The court will undertake a provisional assessment of the receiving party's costs on receipt of Form N258 and the relevant supporting documents specified in Practice Direction 47.

(4) The provisional assessment will be based on the information contained in the bill and any supporting papers and the contentions set out in Precedent G (the points of dispute and any reply).

(5) In proceedings which do not go beyond provisional assessment, the maximum amount the court will award to any party as costs of the assessment (other than the costs of drafting the bill of costs) is £1,500 together with any VAT thereon and any court fees paid by that party.

(6) The court may at any time decide that the matter is unsuitable for a provisional assessment and may give directions for the matter to be listed for hearing. The matter will then proceed under rule 47.14 without modification.

(7) When a provisional assessment has been carried out, the court will send a copy of the bill, as provisionally assessed, to each party with a notice stating that any party who wishes to challenge any aspect of the provisional assessment must, within 21 days of the receipt of the notice, file and serve on all other parties a written request for an oral hearing. If no such request is filed and served within that period, the provisional assessment shall be binding upon the parties, save in exceptional circumstances.

(8) The written request referred to in paragraph (7) must –

- (a) identify the item or items in the court's provisional assessment which are sought to be reviewed at the hearing; and
- (b) provide a time estimate for the hearing.

18. To enable provisional assessment, there must still be the lodgement of documents which would be required for a detailed assessment hearing, and this is provided for by the practice direction at **47 PD.13**, paragraph **13.1** and **13.2** (the form N258 with accompanying documents). I have already made reference to this but the relevant parts are:

**13.1** The time for requesting a detailed assessment hearing is within 3 months of the expiry of the period for commencing detailed assessment proceedings.

**13.2** The request for a detailed assessment hearing must be in Form N258. The request must be accompanied by—

(a) a copy of the notice of commencement of detailed assessment proceedings;

(b) a copy of the bill of costs;

(c) the document giving the right to detailed assessment (see paragraph 13.3 below);

(d) a copy of the points of dispute, annotated as necessary in order to show which items have been agreed and their value and to show which items remain in dispute and their value;

(e) as many copies of the points of dispute so annotated as there are persons who have served points of dispute;

(f) a copy of any replies served;

(g) copies of all orders made by the court relating to the costs which are to be assessed;

(h) copies of the fee notes and other written evidence as served on the paying party in accordance with paragraph 5.2 above;

(i) where there is a dispute as to the receiving party's liability to pay costs to the legal representatives who acted for the receiving party, any agreement, letter or other written information provided by the legal representative to the client explaining how the legal representative's charges are to be calculated;

(j) a statement signed by the receiving party or the legal representative giving the name, address for service, reference and telephone number and fax number, if any, of—

(i) the receiving party;

(ii) the paying party;

(iii) any other person who has served points of dispute or who has given notice to the receiving party under paragraph 5.5(1)(b) above;

and giving an estimate of the length of time the detailed assessment hearing will take;

(l) .....

(k) .....

19. If the matter is to proceed by way of provisional assessment 47 PD.14 also applies, requiring additional documents to be filed and setting out the manner in which the matter will proceed to such provisional assessment. The important ones are indicated:

14.3 In cases falling within rule 47.15, when the receiving party files a request for a detailed assessment hearing, that party must file—

(a) the request in Form N258;

(b) the documents set out at paragraphs 8.3 and 13.2 of this Practice Direction;

(c) an additional copy of the bill, including a statement of the costs claimed in respect of the detailed assessment drawn on the assumption that there will not be an oral hearing following the provisional assessment;

(d) the offers made (those marked 'without prejudice save as to costs' or made under Part 36 must be contained in a sealed envelope, marked 'Part 36 or similar offers', but not indicating which party or parties have made them);

(e) completed Precedent G (points of dispute and any reply).

14.4

(1) On receipt of the request for detailed assessment and the supporting papers, the court will use its best endeavours to undertake a provisional assessment within 6 weeks. No party will be permitted to attend the provisional assessment.

(2) Once the provisional assessment has been carried out the court will return Precedent G (the points of dispute and any reply) with the court's decisions noted upon it. Within 14 days of receipt of Precedent G the parties must agree the total sum due to the receiving party on the basis of the court's decisions. If the parties are unable to agree the arithmetic, they must refer the dispute back to the court for a decision on the basis of written submissions.

14.5 .....

14.6 .....

20. Essentially, therefore, the judge before whom the provisional assessment is listed will have most of the material which would normally be before him or her for the detailed assessment hearing; the only difference is that there is no supplemented oral argument or submission.

21. There is another important provision in the practice direction which applies across the spectrum of detailed assessment at 47PD.13, paragraph 13.13:

13.13 The court may direct the receiving party to produce any document which in the opinion of the court is necessary to enable it to reach its decision. These documents will in the first instance be produced to the court, but the court may ask the receiving party to elect whether to disclose the particular document to the paying party in order to rely on the contents of the document, or whether to decline disclosure and instead rely on other evidence.

22. I avoid the temptation of setting out details of the substantive law in relation to application for relief from sanction, for reasons which will become apparent. It is sufficient to note that the Court of Appeal gave extensive guidance, as I have indicated, initially in *Mitchell v News Group Newspapers*, *supra*, and subsequently in *Denton v White*, *supra* providing a softer approach to those who breach the rules, practice directions, and court orders.

The respective arguments

23. Mr McGee, counsel on behalf of the Appellant/receiving party pursues this appeal on the simple premise that the learned district judge was wrong to go down the route of dealing with this as an application for relief from sanction, even though invited so to do. He submits that the procedure which allows for an oral review on any decision made on the provisional assessment is sufficient to enable either party to attempt to correct any deficiencies which may have led to the nil assessment without the need to apply for relief from sanction.

24. Furthermore, the court has a power under the practice direction paragraph 13.13 to direct the receiving party to produce documentation, and this is a power which is not only limited to anticipation of any detailed assessment hearing, but is in fact ideally adapted to the situation whereby a costs judge is dealing with a paper hearing on provisional assessment. If there has been a failure to file a particular document which prevents the judge reaching a decision, particularly as to whether or not the indemnity principle has been breached, paragraph 13.13 is the vehicle, says Mr McGee, for addressing that failure. It is not an indulgence as such, because it is bound to carry with it a costs penalty, particularly where the costs judge has not been able to deal with the provisional assessment within the timescale, and where there has been a wasting of court resources.

25. However, fundamental to his appeal is the submission that a nil assessment is not a sanction but a determination. It is a determination based upon the fact that the receiving party has not been able to prove his retainer and that he should be able to attempt to again on an oral representation at the review hearing, to establish that the indemnity principle has not been breached. Whether he has to do this by production of



additional documents, or simply by relying upon general principles (for instance sufficiency of narrative in the bill of costs) is a matter for the receiving party. There is nothing in the rules which prevents additional material being provided for an oral hearing, although this could carry with it a significant costs penalty. The review is not an appeal, but an opportunity to make representations as an oral hearing, which would have been the entitlement of the receiving party if there had been no provisional assessment (either because it had been directed or because the costs bill exceeded £75,000).

26. Accordingly it is unnecessary to deal with additional material on a "fresh evidence" basis. Any party proceeding to a detailed assessment hearing on review will always do so at peril of not doing better than a 20% increase or decrease as the case may be, submits Mr McGee.

27. For the Respondent, Ms MacDonald places heavy reliance upon the fact that this is an appeal in relation to costs, with which an appellate court should be slow to interfere, because of the generous ambit of discretion open to the first instance judge (District Judge Baker)). She refers to the fact that there was a specific requirement in the practice direction to lodge documents when the application for a detailed assessment hearing was made and this requirement was not complied with. There is a heavy duty upon litigants to comply with rules, practice directions and orders, and those who fail cannot complain if a sanction follows. She does not agree that a nil assessment, as provided for by District Judge Woodburn does not equate to a sanction: it is precisely because there had been non-compliance that he came to such a conclusion. He had no alternative.

28. Insofar as it is suggested that District Judge Baker was wrong to deal with this as an application for relief from sanctions, before proceeding to the oral review, that is precisely what the receiving party's solicitor invited the judge to do at the hearing, and it ill-behoves the Appellant to make complaint now about that.

29. If previous decisions of this court in **Ion v Ahmed and Evans v Enterprise** can be interpreted as favouring the Appellant, in her submission they can be distinguished on their facts.

30. Ms MacDonald also refers to the fact that in its points of reply, the receiving party abandoned any claim to recovery of the insurance premium which raises a serious question about the *bona fides* of the retainer in any event.

31. The court is therefore invited to say that this appeal is no more than a challenge to a refusal by District Judge Baker to grant relief from sanction, a matter which was clearly within his discretion, and is unimpeachable.

**Discussion**

32. It seems to me that the simple issue for this appeal is whether or not District Judge Baker was wrong, even though he was encouraged to pursue such a course, to deal with the procedural failure on the basis that it could only be corrected by granting relief from sanction. If he was, there was a procedural irregularity, which would permit this court to approach the matter afresh, or to remit for a rehearing.

33. In my judgment, if the learned district judge was correct, and the nil assessment amounted to a sanction, his reasoning is clear and concise, and carefully applies the law as it was adapted following the **Denton** appeal decision. Quite properly he dismissed the suggestion that there had been substantial compliance, regarding the retainer as a crucial document which in most cases would disable any provisional assessment. The decision, if appropriate, was within the generous ambit of his discretion.

34. It is axiomatic, on reading the practice direction at paragraph 13.2, as well as its adjunct in paragraph 14.3, that no sanction is specifically provided for non-compliance, unlike other rules where failure will lead to a certain consequence (unless the court "otherwise orders"). Therefore it is necessary to ask whether or not a sanction can be implied.

37. When one considers the purpose of the practice direction and the rationale behind the process, which is to enable a costs judge to address costs issues without the need for an expensive detailed assessment hearing, but applying the same principles, I have no hesitation in concluding that there is no *implied* sanction. Furthermore, whilst it would have been open to the learned district judge at first instance (District Judge Woodburn) to refuse to deal with the matter on papers without sight of the retainer, or to call for the same from the receiving party exercising his power under paragraph 13.13 of the practice direction, by making a *nil assessment* determination where he cannot be satisfied that there is a valid retainer, this decision does not in itself amount to a sanction, but an assessment that the entitlement to costs has not been proved. Whilst the power to do so may be questionable, if he had purported to strike out the bill for non-compliance, his decision may have been more at akin to a sanction, subject of course to the fact that he was making a decision on the papers without hearing any oral representation.

38. It seems to me that the process involved in the provisional assessment must mirror, albeit without oral representations, that which would ensue in a detailed assessment hearing. If the costs judge had parties in front of him or her in such circumstances, but could not be satisfied as to the validity of the retainer, either because the documents had not been provided, or because the receiving party elected not to disclose the retainer, would that amount to a sanction, or a judicial determination? I am quite satisfied that it would be the latter, and therefore I see no difference with the paper decision.

39. There are two further reasons, in my judgment, why the nil assessment for non-compliance cannot have the procedural consequences contended for by the Respondent. The first is that there is a built-in entitlement to an oral review on *any aspect* of the provisional assessment. The provisional assessment is not binding if there is such a review, and therefore its effect is nullified, with the matter proceeding for detailed assessment in the old-fashioned way on the identified aspects, save that there is a costs disincentive in the 20% adjustment required.

40. The second is that a costs judge has the power which can be exercised under paragraph 13.13 if a failure to provide documentation prevents the detailed assessment on the papers (effectively the provisional assessment) from taking place. In my judgment, this presupposes that non-compliance will lead at worst to the adjournment or postponement of the paper exercise, because the receiving party has not provided sufficient information to enable the exercise to take place, with obvious costs consequences. That is not to say that a judge on the papers cannot make a nil assessment: clearly each case turns on its own merits, but by so doing there is the more cumbersome process of the inevitable oral review, which could be avoided if the provisional assessment is postponed because there are missing documents.

41. Be that as it may, because I have come to the clear and unequivocal conclusion that there was no sanction imposed by the order of District Judge Woodburn which had to be the subject of any application for relief, the decision of District Judge Baker was based upon a procedural irregularity and can be set aside.

42. At this point it is necessary to address, if I am to substitute my own decision, (and to consider whether it would not be a proportionate response to remit this matter for further consideration), what steps are open to a receiving party where a bill of costs has been provisionally determined in this way. I acknowledge the concern of Ms MacDonald of counsel that giving receiving parties a "second bite of the cherry" with an oral review would lead to a proliferation of unscrupulous costs solicitors who want to maximise their profit and deliberately frustrate the provisional process by failing to file documents. Whilst each case must be decided on its merits, and it is not inconceivable that this may occur, in my judgment is highly unlikely when one considers the costs consequences of disabling a provisional assessment in this manner. It is highly unlikely that the costs of the assessment process will be recovered in full, or even substantially in part, which would defeat the purpose of such a tactic. It seems to me that the failures which are occurring to date arise more out of a genuine misunderstanding in respect of arguments about retainer validity, rather than a policy to costs build, or a lackadaisical approach to compliance with a procedure which is in its relative infancy.

43. In this respect in Liverpool, the regional costs judges, faced with an increasing number of cases where the practice direction was misunderstood and receiving parties were withholding the conditional fee agreement or other retainer fearing it would be

disclosed when filing the N258, with my approval, have drawn up a specimen direction to deal with such a situation in these terms:

On xxx 2015 below

District Judge XXX sitting at Liverpool Civil and Family Court, 35 Vernon Street, Liverpool, L2 2BX considered the papers in the case for the purposes of provisional assessment.

And upon considering the Defendant's points of dispute

*(And upon noting that notwithstanding the Claimant's specific reply, no further documentation as to the retainer point has been filed)*

And upon the court taking the view that where a dispute arises in relation to the Receiving Party's liability to pay costs to his legal representatives, CPR Parts 47.15(4) and 47PD.14, paragraphs 14.3(b), and 47PD.13.2(i) specifically require the Receiving Party to lodge with the court information provided by the legal representatives to the client explaining how the legal representative's charges are to be calculated, and that [ *by reference to -- list insufficiencies* ] accordingly the Rule and Practice direction have not been complied with.

ordered that:

1) The provisional assessment is adjourned to *(NAD after 28 days)* ELH 1 Hour.

2) Unless by 4pm on *(14 days)* the Receiving Party files at court full information provided by the legal representatives to the client explaining how the legal representative's charges are to be calculated, the Receiving Party's costs are assessed at nil, and the Receiving Party shall pay the Paying Party's costs of the provisional assessment, to be subject to summary assessment at the above adjourned provisional assessment if not agreed.

3) In the event that the Receiving Party complies with paragraph 2 of this order, any award to the Receiving party of its profit costs of the provisional assessment shall in any event be reduced by 50% to reflect non compliance with the above rule and practice direction.

4) Because this Order has been made without a hearing, the parties have the right to apply to have the order set aside, varied or stayed. A party making such an application must send or deliver the application to the court (together with any appropriate fee) to arrive within seven days of service of this Order.

44. Because the point has been raised, as it was in the **Ion v Ahmed** case, that judges dealing with the oral hearing believe that they have no power to admit any material which was not before the judge who dealt with the provisional assessment on the papers, in other words they were treating the oral review process as if it were an appeal, whereby the admission of evidence could only arise if it satisfied the **Ladd v Marshall** test, this point must be addressed. With respect, it seems to me that such an approach is incorrect. It is inconsistent with paragraph **13.13** of practice direction **47** already referred to which can be utilised at any stage. Furthermore, the reviewing

judge on the oral review can come to any decision which is considered appropriate, and is not restricted to a finding that the provisional assessment judge made an error of law or is otherwise wrong in approach, as will be necessary in the event of an appeal.

45. Insofar as the provisional assessment procedure had been devised to be a component part of detailed assessment and was introduced by amendments to the rules and practice directions as a proportionate means of dealing with expensive hearings where bills were challenged, and was not intended to be a substitute for the detailed assessment procedure, as opposed to an alternative modified version, in my judgment the power of the judge under paragraph 13.13 has not been curtailed, and when an oral hearing is requested under CPR 47.15 (7), although the hearing is limited to those items in the bill which are challenged under subparagraph (8) and thus is circumscribed, it is another respect a detailed assessment, in which the judge must surely have the power to direct the receiving party to produce documents to enable it to "reach its decision". Having said that, a party who deliberately or carelessly fails to provide the necessary documentation to enable a decision to be reached will face significant costs consequences, a factor which is likely to act as a deterrent and to prevent oral reviews proceeding with material which was not previously available.

### Conclusion

46. As indicated, there was no sanction, and therefore this matter is considered afresh on this appeal. In my judgment the matter can be allowed to proceed to a final assessment on the oral review requested if the costs can still not be agreed. Inevitably the case will have to be remitted to proceed to the next stage. It seems to me that this is more proportionate than recommending the provisional assessment. The fact remains that at present no indication has been provided that the CFA has been filed with the court. It is a matter for the receiving party as to whether he seeks to establish the validity of his retainer without this document, although I can think of no good reason why he should want to do that. The review can be remitted for hearing before the regional costs judge, District Judge Jenkinson who is now familiar with this case, and who can decide whether or not the nil assessment remains a valid one.

47. As indicated in the course of argument, the receiving party has to a large extent brought the consequences of this appeal upon himself in two respects; first of all, in not filing a document when it is obvious that this would have established the retainer, and second in advancing, through his solicitor, the suggestion that relief from sanctions should be considered first and foremost by the district judge on the review. Whilst a belt and braces approach of considering relief from sanctions as an alternative cannot be criticised, in my judgment there should be a reflection of these matters in the costs consequences relating to this appeal. I invite the parties to provide further written submissions if those consequential orders cannot be agreed.