COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Appeals Division
2021/PUB/jrv/00003

IN THE MATTER of an appeal pursuant to s. 21 of the Medical Act, 2014 (**the Act**) **AND IN THE** MATTER of an appeal against the Decision of The Bahamas Medical Council given on the 17th day of February 2023, by letter dated the 17th day of February 2023 (***the Decision***)

BETWEEN:

DR. GAURI SHIRODKAR

Applicant

and

THE BAHAMAS MEDICAL COUNCIL

Respondent

Before:	The Hon. Mr. Justice Loren Klein
Appearances:	Mr. Kahlil Parker KC, Ms. Roberta Quant for the Applicant Ms. Gail Lockhart-Charles KC for the Respondent
Hearing Dates:	Written submissions 24 July 2024; Bill of Costs 17 January 2025, Supplemental Submissions 27 January 2025

RULING

Klein, J.

Costs—Summary Assessment—Reasonable and proportionate costs—CPR 77.11—Practice and Procedure—Proportionality Assessment—Approach—Issue-based costs order—Appellant overall successful in matter—Respondent succeeding on some issues—Hourly Rates—Guideline Hourly Rates

INTRODUCTION

1. This is my Ruling summarily assessing costs awarded to the appellant in my judgment handed down 8 July 2024 ("the judgment"). In that judgment, I dismissed a preliminary objection by the respondent Medical Council that the Medical Act 2014 ("the Act") did not provide for a right of appeal by a practitioner denied registration as a specialist, and the argument that the appellant was estopped by a prior judicial review claim made in this matter from pursuing an appeal.

2. The appellant, Dr. Shirodkar, has launched both an application for judicial review and an appeal as part of what I described in the judgment as "*the appellant's long and acrimonious fight with the Council over her application to be registered as a radiology specialist*". The factual background to those applications may be found in the judicial review ruling dated 13 July 2021 ("the Judicial Review Ruling") and the judgment, and there is no need to rehearse the details here.

3. By way of recap, it is sufficient to note the following. Dr. Shirodkar applied for judicial review of the Council's decision in January of 2021 refusing to register her as a radiology specialist. I quashed that decision and mandated the Council to reconsider it according to law. The Council reconsidered its decision and, by a decision made February 2023, again refused to register her, against which she has now appealed and which has given rise to the judgment.

The Principles

4. The general principles applicable to the payment of costs are not in dispute, but a few novel issues arise here because of the provisions of the CPR 2022 ("CPR" or "Rules"). In particular, these have to do with the issue of summary assessment, proportionality and issue-based costs.

5. The statutory foundation for the award of costs is s. 30 of the Supreme Court Act, which provides that costs are in the discretion of the Court, which has "…*full power to determine by whom and to what extent costs are to be paid…* ". Guidance on how this discretion is to be exercised is supplied by the Rules (formerly Order 59 of the RSC, and now the CPR). The latter reiterates the cardinal principle that the court has a discretion as to whether costs are payable, when to assess them, the amount of costs, and when they are to be paid (CPR 71.9). Secondly, when the court makes an order about the costs of any proceedings, the general rule is that the successful party is entitled to costs (CPR 71.6(2)) (i.e., "costs follow the event"), although the Court may make a different order, including make no order as to costs or in exceptional cases order the successful party to pay (CPR 71.6(2)).

6. In exercising its discretion to order costs, the court is mandated to consider a wide variety of factors, which are dispersed over many provisions of the Rules, and some of which are overlapping. For example, under CPR 71.9 (4), dealing with the court's general discretion to award costs, the Court must have regard (among other things) to:

> "(a) the conduct of the parties both before and during the proceedings;
> (b) whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;
> (c) the manner in which a party has pursued—
> (i) a particular allegation;
> (ii) a particular issue;
> (iii) the case;
> (d) whether the manner in which the party has pursued a particular allegation, issue or the case, has increased the cost of the proceedings;
> (e) whether it was reasonable for a party to—
> (i) pursue a particular allegation; or
> (ii) raise a particular issue; and
> (iii) whether the successful party increased the costs of the proceedings by the unreasonable pursuit of the issues;
> (f) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application."

7. CPR 71.10 ("*Circumstances to be taken into account when exercising its discretion as to cost"*) elaborates on several of the factors already signposted in 71.9, but provides additionally

that the Court may make an order that a party pay "(3)(a) *a proportion of another party's costs*; …(e) *costs relating to particular steps taken in the proceedings*;… (f) *costs relating only to a distinct issue in or part of the proceedings*…".

8. CPR 71.11 ("*Factors to be taken into account in deciding the amount of costs*") provides as follows:

> "(1) The Court is to have regard to all the circumstances in deciding whether costs were—
> (a) proportionately and reasonably incurred; or
> (b) were proportionate and reasonable in amount.
> (2) In particular, the Court must give effect to any orders which have already been made.
> (3) The Court must also have regard to—
> (a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
> (b) the amount of value of any money or property involved;
> (c) the importance of the matter to all parties;
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
> (e) the skill, effort, specialized 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;
> (h) the care, speed, and economy with which the case was prepared; and
> (i) [deals with client/attorney costs]."

9. CPR 72.21 deals with the "*Basis of quantification*" and provides in material part as follows:

> "(1) Where the Court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed—
> (a) Is the amount that the court deems to be reasonable were the work to be carried out by an attorney of reasonable competence; and
> (b) which appears to be fair both to the person paying and the person receiving such costs. […]
>
> (3) In deciding what would be reasonable, the Court must take into account all the circumstances, including—
> (a) any order that has already been made;
> (b) the care, speed and economy with which the case was prepared;
> (c) the conduct of the parties before as well as during the proceedings;
> (d) the degree of responsibility accepted by the attorney;
> (e) the importance of the matter to the parties;'
> (f) the novelty, weight and complexity of the case;
> (g) the time reasonably spent on the case;…".

10. The portion of the Rules specifically engaged by these proceedings is CPR 71.12, which provides for summary assessment as follows:

> "(1) As a general rule, a judge hearing an application will summarily assess the costs of that application immediately or as soon as possible after the same is disposed of.

(2) As a general rule, a judge conducting the trial will summarily assess the costs of the entire claim immediately after he has delivered judgment in respect of the same or as soon as practicable thereafter.
(3) A judge may, instead of summarily assessing the costs under paragraphs (1) or (2), direct that the whole or any part of the costs payable shall be subject to a detailed assessment and he may, when making such direction, indicate which particular matters the Registrar may or shall take into account or exclude in relation to such detailed assessment."

11. Further, the overriding objective at CPR 1.1 requires the Court "*to deal with cases justly and at proportionate cost*."

Proposed Costs Orders

12. Following the delivery of my reserved ruling, I deferred the assessment of costs pending receipt of written submissions from counsel. My directions to counsel were to address me both on principles and quantum, and while both sides lodged short written submissions, counsel claiming costs did not initially provide a Bill or Statement of Costs ("Bill"). The appellant claimed costs of $29,786.50, and counsel for the respondent countered that a suitable cost order was 25% of the costs of preparing submissions, to be assessed at one-quarter of a day of the approved rate for the appellant's counsel.

13. Faced with no material on which to conduct an assessment, I invited the claiming party to lodge a Bill and afforded the respondent an opportunity to provide any objections to the Bill, to which both complied. This was, admittedly at the point of preparing the Ruling, but in the circumstances I do not think it would have been in accordance with the interest of justice to have refused to conduct an assessment due to lack of material that could easily be requested from counsel.

14. In this regard, I had in mind the observations of the Hon. Chief Justice in **Robert Forbes v Ministry of Tourism** [2021/COM/lab/00038], where he said [11]:

"While the CPR is silent on the details of the summary assessment procedure, and this is not an appropriate occasion on which to attempt to elaborate such details, there must be at least two minimum requirements:

(i) firstly, the Court ought to obtain a bill or statement of costs from the receiving party before it can proceed to summarily assess costs. The detailed provisions of the CPR on costs indicate that the Rules Committee did not intend for the summary assessment of costs to be done on an arbitrary or random basis. The procedure is not intended to be a vehicle for judges to pluck cost awards "out of thin air".
(ii) secondly, the Court must permit the parties a reasonable opportunity to be heard on the assessment. In the absence of any clear words in the CPR compelling a different conclusion, the Rules Committee must be presumed to have intended a fair procedure in providing for the summary assessment of costs. That opportunity to be heard may, in appropriate cases, take the form of a paper hearing."

15. By comparison, the UK CPR Practice Direction 44.7 (13.5), provides as follows:

"(1) It is the duty of the parties and their legal representatives to assist the judge in making a summary assessment of costs in any case to which paragraph 13.2 [Summary Assessment] above applies, in accordance with the following paragraphs.

(2) Each party who intends to claim costs must prepare a written statement of the costs he intends to claim showing separately in the form of a schedule:
(a) the number of hours to be claimed;
(b) the hourly rate to be claimed;
(c) the grade of fee earner;
(d) the amount and nature of any disbursement to be claimed, other that counsel's fees for appearing at the hearing;
(e) the amount of solicitors' costs to be claimed for attending or appearing at the hearing;
(f) the fees of counsel to be claimed in respect of the hearing, and
(g) any value added tax (VAT) to be claimed on these amounts."

16. In the absence of a Bill, it would have been perilous to attempt to assess the costs claimed, with no details showing fee earners and their rates, time spent, and disbursements. Further, it is a notorious fact that in this jurisdiction there is no current "*approved rate*" for counsel (an issue to which we will return), and therefore to suggest that counsel's fees be assessed by reference to an approved rate is to beg the question. The last suggested rates promulgated by the Bahamas Bar Association was the 1984 Scale Rates, and the unofficial fee scale circulated by private counsel that is currently pressed into service is *circa* 2006!

17. The Bill from the appellant segregated costs as follows: $873.00 in disbursements; $26,285.00 in professional fees; and $2,628.50 in VAT. It was calculated in respect of two fee earners: Mr. Parker KC ("KDP"), who submitted an hourly rate of $1,100.00; and Ms. Roberta Quant ("RWQ"), who submitted an hourly rate of $350.00. The Bill did not specify the years of call of each fee earner, but this information is publicly available on the Bar Association's website, which revealed that Mr. Parker was called on 30 September 2005 (19+ years) and Ms. Quant on 11 December 2015 (9+ years).

Counsel's submissions

18. The view of counsel for the appellant is that the appellant is *prima facie* entitled to her costs as the overall successful party under the "costs follows the event" principle. He also submitted the matter was of some importance, as it involved an issue of interpretation that was not only fundamental to the appellant's ability to pursue her appeal, but also of significance to the wider medical profession. Further, it was suggested that the respondent had been unreasonable in taking the preliminary point, and that the Council could have "*erred on the side of justice*". In other words, as I read this argument, the respondent could have allowed the substantive hearing to proceed on the basis that there was a right of appeal, and deal with any issues on the merits. Thus, it was submitted that the claimed costs "*accurately and fairly reflect the time and effort expended by Counsel in this matter as well as the seriousness of this matter not only for the Appellant, but for the wider medical profession*."

19. Counsel for the respondent made two key arguments in her main submissions: (i) that the Court should adopt an issue-based approach, and make a proportionate deduction to reflect the fact that the respondent succeeded on a few issues (in line with the requirement to deal with costs

proportionately); and (ii) that the issue of statutory interpretation was a matter of public interest, and therefore the respondent should not be penalized for seeking to have the matter adjudicated.

20. Counsel referred to several cases in support of the principle that courts should be prepared to make proportionate costs orders that reflect not merely the overall outcome of the proceedings, but also the loss on particular issues (**Aspin v Metric Group Limited** [2007] EWCA Civ 922; **R (Viridor Waste Management Ltd.) v Commissioners for HM Revenue and Customs** [2016] EWHC 2502 (Admin]; **Grupo Hotelero Urvasco SA v Carey Value Added SL** [2013] EWHC 17323 (Comm); and **Sycamore Bidco Ltd v Breslin** [2013] EWHC 583 (Ch).

21. It is not necessary to refer to very many of these, but in **Aspin** Chadwick LJ held, following a review of the authorities, that:

> "22. In deciding what order to make on an issue-based approach, the court may decide that in relation to an issue which the successful overall party has lost, that party should be deprived of his costs of that issue; or even, in a suitable case, that that party should pay the costs of the otherwise unsuccessful party on that issue."

22. Furthermore, although many of these cases were decided under the English CPR, it is clear that the courts always had the discretion to apportion costs based on issues (see the decision of Nourse LJ, in **In re Elgindata (No. 2)** [1993] 1 WLR 1207, which this court applied in the costs decision consequential to the Judicial Review claim in this matter (23 April 2023).

23. Counsel for the respondent identified two main issues on which it is said the appellant lost and for which appropriate deductions should be made: (i) the assertion that the Act does not differentiate between specialists and medical practitioners for the purpose of registration; and (ii) the claim that discrimination between medical practitioners and specialists under s. 21 would be unconstitutional.

DISCUSSION AND ANALYSIS

Issue-based approach

24. There is no dispute in principle about an issue-based approach to costs which, as indicated, has always been available under the judge's wide discretion to deal with costs, although the CPR now makes specific provisions for this. But I think the respondent has fallen far short of discharging the burden (which it has) to satisfy me that costs should be disallowed to reflect the issues the appellant fought and arguably lost. Firstly, it is clear that an issue-based cost order is not justified merely because the successful party has lost on some issues. In **Budgen v Andrew Gardner Partnership** [2002] EWCA Civ 1125 [at 35], Simon Brown LJ observed that "*the court can properly have regard to the fact that in almost every case even the winner is likely to fail on some issues*".

25. With regard to issue-based costs, I have found quite instructive the summary of principles by Stephen Jourdan QC, sitting as a deputy High Court Judge, in *Pigot v The Environment Agency* [2020] EWCH 1444 [at 6], where he said:

> "(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order…
>
> (2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
>
> (3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party…
>
> (4) Where an issue-based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
>
> (5) An issue-based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.
>
> (6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CRP44.2, it is in all the circumstances of the case the right result. The aim must always be make an order that reflects the overall justice of the case".

26. Secondly, neither of the points that the respondent argues justifies a disallowance was an essential point, to warrant any separate treatment for the purposes of costs. The appellant's submission that the term medical practitioner encompassed both general medical practitioners and specialists was extraneous to her main case that the Act ought to be construed as providing for a right of appeal for a specialist, on which she succeeded. That added nothing extra to the argument and did not detain the court any longer than would have been necessary to deal with the main issue.

27. The constitutional point said to justify a further reduction was the mere assertion by the appellant that "….*the respondent's interpretation would be productive of rank discrimination between a medical practitioner and specialists*"…which would also "*likely be repugnant to constitutional principles*". This point was not developed in argument and in any event the respondent did not address it in its submissions. I dismissed it in short shrift as follows:

> "I was not addressed on the constitutional point in any detail, and (as the Court noted at paras. 93-94 of the Judicial Review ruling) "discrimination" is a term of art defined in the Constitution and can only be invoked on the basis of any of the grounds enumerated in article 26(3). I doubt this case would come within any of the defined categories—i.e., race, place of origin, political opinions, colour or creed"—but I am satisfied that it leads to an unjust and absurd result."

Approach to proportionality

28. In its main submissions, the respondent's arguments on proportionality were made in the context of what was said to be a "proportionate" reduction to reflect the issue-based approach,

which unfortunately may have elided the concept of proportionality in the assessment of costs with a reduction based on the parties' relative success. But they did advert to the requirement for costs generally to be "proportionate" based on the overriding objective. However, in supplemental submissions, counsel stated that "*the total amount charged is excessive and disproportionate to the work undertaken, considering the complexity of the case and the time reasonably required to complete the task*." It was further submitted that an appropriate costs assessment should produce no more than $3,200.00, clearly signaling that the costs claimed were considered to be way out of proportion to the proceedings.

29. However, even without any reference to proportionality by counsel, the Court is mandated (as has been noted) to give consideration under 71.11 to whether costs were (a) proportionately and reasonably incurred; or (b) were proportionate and reasonable in amount. The requirement of reasonableness adds no new requirement to the law, but the concept of proportionality is an advent of the CPR.

30. In the UK context, the current or 'new' test of proportionality is based on the guidance given by the UK Court of Appeal in **West & Demouloid v Stockport NHS Foundation Trust** [2019] EWCA Civ 1220. The test is set out in detail between paragraphs 88-93 of that case, but it may be summarized as follows:

(i) Costs must first be considered line-by-line to ensure they are reasonable, then assessed by reference to CPR 44.3(5) and, if relevant, the wider circumstances under CPR 44.4. The court may also consider the proportionality of a particular item during its assessment for reasonableness. At the end, if the court considers the total proportionate, then no further assessment is necessary.

(ii) If the figure is disproportionate, the judge then undertakes a further assessment, looking at each category of costs claimed (such as disclosure or expert reports) and should make such further reductions as appropriate. In doing so, the judge should ignore unavoidable items such as court fees and VAT. Once this is done, "…*the resulting figure will be the final amount of the cost assessment. There would be no further standing back and if necessary, undertaking a yet further review by reference to proportionality*" [93].

31. The **West** guidance was described as 'new' because prior to that case, the test of proportionality was governed by the judgment in **Lownds v Home Office** [2002] EWCA 2450, where the UK Court of Appeal indicated a two-stage test as follows:

(i) At the first stage the Court should consider whether the costs incurred are globally disproportionate, having regard to Pt. 44.5(3). If the costs as a whole are not disproportionate, then all that is required is that each item should have been reasonably incurred and that the cost for that item should be reasonable.

(ii) If costs as a whole appear disproportionate, the second stage is to consider every item to ensure that it was both reasonable and necessary [31]: "*The requirement that costs are proportionate means that no more should be payable that would have*

been payable if the litigation had been conducted in a proportionate manner. This in 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."

32. Thus, in **Lownds**, the proportionality of the total sum was to be considered *before* the item-by-item assessment. On that latter assessment, if the costs were reasonable and necessary, they were considered proportionate. Under the new proportionality test, there is first an item-by-item assessment to determine reasonableness, with the judge in his discretion able to contemporaneously consider the proportionality of each item, and then at the end to cross-check the total for proportionality.

33. It should be noted that the decision in **West** was made having regard to specific provisions in the English CPR that came into force during April 2013, and which have no corresponding provisions in the Bahamian CPR: UK CPR 44.3(5) and CPR 44.3(2)(a). CPR 44.3(5) provides a definition of proportionality by stipulating that costs are proportionate if they bear a reasonable relationship to:

"(a) the sums in issue in 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; and
(e) any wider factors involved in the proceedings, such as reputation or public importance."

34. The UK CPR 44.3(2) provides that costs will be reduced if they are disproportionate, even if they were reasonably and necessarily incurred. This amendment had the effect of reversing **Lownds**, which decided that costs that were reasonable and necessary were therefore proportionate. In this regard, is notable that the factors in UK 44.4(5) roughly correspond to those in CPR 71.11, but there is no corresponding provision in the Bahamian CPR either to the UK 44.3(2)(a) or 44.3(5).

35. There is little guidance on the interpretation and application of the principle of proportionality under the CPR 2022, and it appears that some Caribbean jurisdictions have followed the UK approach. For example, this comment is found in the Caribbean Civil Court Practice (3rd edn.) at note 29.5 [pg. 433]:

"…in England, the *Lownds* test has been reversed on the basis that it was found to be ineffective and having regard to Lord Jackson's recommendation in his Final Report on the Review of Civil Litigation Costs in 2010. See *West v Stockport NHS Trust* [2019] EWCA Civ 1220 for the new approach. Since the procedure and test for assessing costs are the same in TT as in England, TT will be bound by the new approach…".

35. In the absence of any specific practical guidance as to how the concept of proportionality is to be applied, it will be up to the Courts to develop an approach, and in particular to decide whether to follow the UK approach and if so which test to follow.

35. The Bahamian CPR rules regarding summary assessment of costs are closer to the UK rules as they stood at the time of the decision in **Lownds,** and logic might suggest that the method outlined in the earlier decision ought to be of higher persuasive value. But I do not think that this factor alone is any reason to favour the decision in **Lownds**. That decision was criticized on the basis that it too narrowly interpreted the proportionality requirements, and conflated proportionate with reasonable and necessary. The Report of Sir Rupert Jackson on the Review of Civil Litigation Costs in 2010 ("The Jackson Report") which led to the 2013 reforms specifically highlighted the point that costs could be disproportionate, even if reasonably or necessarily incurred. An example given was that while it may be necessary and reasonable to have an expert, it may be disproportionate to the matter involved to have more than one.

37. There are also potential pitfalls in applying the new test of proportionality. In **May v Wavell Group and Anor.** (Claim No. A02CL398), the County Court on an appeal from a detailed assessment of costs, disagreed with the Master for using the check on proportionality at the end of the exercise to make a substantial but subjective reduction to the reasonable costs, all in an effort to achieve proportionality. In a passage that bears repeating, the Court said [58]:

> "The rules do not specifically state that the assessment has to be undertaken in two stages but they do require the costs judge to apply two tests, namely reasonableness and proportionality, and it is open to the costs judge to have an eye on both as he or she undertakes and item by item assessment having in mind a figure or range of figures which would be proportionate but it is equally open to the judge to apply the tests sequentially. I suspect that in practice a costs judge will have both in mind when undertaking an item-by-item assessment but he or she will undertake a form of cross-checking when the total is ascertained to see whether it falls within the range of proportionate totals and then undertake an adjustment if it does not. I respectfully disagree with the learned Master insofar if it is right that he used his description of the new proportionality test as a blunt instrument as a reason to make a substantial reduction in the reasonable costs to bring them down to a rough and ready but proportionate amount. The rules, difficult to apply in practice, require the specific factors in CPR 44.3(5) to be focused on and a determination to be made as to whether there is a reasonable relationship between them. I doubt that the rules committee intended that a cost judge could or should bypass an item by item assessment and simply impose what he or she believed to be a globally proportionate global figure. In my judgment, the test of reasonableness and proportionality are intended to work together, each with their specified role, but with the intention of achieving what is fair having regard to the policy objectives which I have identified above."

38. Neither approach is binding on these courts, although they may be instructive. For example, while the CPR 2022 does not contain the specific equivalent of 44.3(5), it is notable that several of the factors listed at 71.11 that the court is required to consider in dealing with costs proportionately also correspond to factors in the UK CPR 44.3(5), as follows:

(i) 71.11(3)(b): the amount or value of any property involved; *cf.* UK 44.(3)5(a): the sums in issue in the proceedings;

(ii) 71.11(3)(c): the importance of the matter to all the parties; *cf.* UK 44.3(5) (e): any wider factors involved in the proceedings, such as reputation or public importance;

(iii) 71.11(3)(d): the particular complexity of the matter or the difficult or novelty of the questions raised; *cf.* UK 44.3(5)(c) the complexity of the litigation;

39. Thus, the court is mandated to consider some of the same yardsticks the UK Courts use to determine the proportionality of costs, although in the case of the CPR 2022 the factors relating to reasonableness and proportionality are comingled. Further, it is notable that the Bahamian rules on assessment of costs hew even closer to the English CPR than those of Trinidad & Tobago (and Barbados and the OECS States for that matter), which incorporated the proportionality test and followed UK authority based on the overriding objective to deal with costs "proportionately". Their rules do not specifically mention proportionality as a factor for assessment or quantification, as do the Bahamian and UK CPR.

40. As noted in **May**, the rules themselves do not require that the assessment has to be done in two stages, and it is also open to the judge to assess for reasonableness and proportionality sequentially. In my view, it makes far better sense and logic to start with an assessment based on the well-known criteria for reasonableness and then conduct an assessment for proportionality with reference to the factors mandated by the rules (including any wider factors that may be considered under 71.11(1), which requires the court to have regard to "*all the circumstances*"). I say this because while it is accepted that costs that are reasonable and necessary may not always be proportionate, it cannot be gainsaid that costs that have been assessed as having been reasonably incurred or reasonable in amount are likely to get the court closer to a figure that is proportionate to the matters in issue. For example, if there were multiple experts in a matter where a joint expert might have been sufficient, a court may disallow or reduce those costs on an item-by-item assessment for reasonableness, although such deductions could also be made on the global analysis for proportionality at the end.

41. Further, as a matter of definition, the concept of proportionality necessarily means that the thing (in this case cost) is being measured to ensure that it has a commensurate relationship to something else. The 2013 reforms to the English CPR accomplish this by stating that costs are proportionate if they bear a "*reasonable relationship*" to the five factors in the UK CPR 44.3(5). Thus, it is not unusual to find this relationship expressed in the phrase "*proportionate to the matters in issue*". Thus, it is conceptually difficult, if not impossible, to assess proportionality without starting with some realistic and reasonable amount arrived at after a forensic judicial scrutiny.

42. It should be apparent that this approach aligns with the "new proportionality" test applied by the UK Courts and in particular the guidance given in **West**. This is not to suggest that the Courts here must follow **West,** but there is a sufficient overlap of rules and principles to commend that approach here. However, in my view, a judge conducting a summary assessment or a registrar conducting a detailed assessment would have properly discharged their function if he or she applied the twin tests of reasonableness and proportionality, paying due regard to the factors at 71.11(3) or any wider factors considered appropriate under 71.11(1). He or she need not follow any particular formula or methodology in doing so, although, as has been stated, it seems only logical and sensible that the starting point should be an assessment of the bill on the traditional basis of reasonableness, before any global adjustment is made for proportionality.

Assessment having regard to principles

43. What does all of this mean to the application before me? It means that I should first assess the bill for reasonableness. The yardstick for assessing reasonable costs is set out at 72.21 (above),

and most are replicated in 71.11. The provisions draw on principles from a number of common law cases—see in particular the judgement of Sachs J in **Francis v Francis and Dickerson** [1955] 3 All ER 836, where the court said:

> "When considering whether or not an item in a bill is "proper" the correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interest of his lay client…";

and the case of **Simpsons Motor Sales v Hendon Borough Council [1965] 1 WLR 112,** where Penncycuick J said the work is assumed to have been carried out by an attorney of reasonable competence. See also, the very useful observations of Charles J., as she then was, in **Lyford Holdings NV v. Vernes Holding Ltd.** [20198/CLE/gen/1050, unrept'd.) where she said that "**the Court must award to the successful party such costs that are reasonable**."

44. In assessing the reasonableness of the claimed costs, I first have to consider two preliminary matters: (i) the reasonableness of the hourly rates claimed by the fee earners; and (ii) whether it is reasonable that costs should be claimed in respect of two fee earners, in this case a KC and a junior.

45. The first is a matter of some difficulty and delicacy in this jurisdiction, as there are no current official guidelines or scales for hourly rates approved by the Bar Association. The "scale" for remuneration of counsel and attorneys circulated by private counsel in 2006 (which reflects inflation uplifts from the 1984 Bar Association scale rates) is often used as a rule-of-thumb, but it is now woefully out of date, although it may be useful for comparative purposes.

46. I will say at once that the promulgation of guideline hourly rates is a matter that the Bar Association and the appropriate judicial officers may wish to take up as a matter of urgency, as these will go a long way in assisting judges (in a jurisdiction where there are no specialists costs judges) with the summary assessments that are now obligatory under the CPR 2022. A judge faced with competing arguments from counsel as to professional fees should have some benchmark to work from, as experience demonstrates that in this jurisdiction there can be a wide disparity between years of call and fees claimed, as well as inconsistency in awards by taxing masters. I hardly need mention that this will also perhaps be of some comfort to the many hundreds of litigants, who will have some official and transparent marker of what counsel and attorneys might be expected to charge for their fees.

47. As indicated, Mr. Parker KC (19+ years) claims a rate of $1,100, and Ms. Quant (a rate of $350. By contrast, the 2006 schedule provides for an attorney of between 12-20 years' post qualification experience to claim $404.90, and of over 9 years to claim $303.70. Ms. Quant's claimed hourly rates only represent a modest increase over the suggested 2006 fees, and I do not think any issues can be raised in this regard. Indeed none was. So I think $350.00 is a reasonable rate for counsel with roughly 10 years call.

48. However, Mr. Parker's rate is nearly triple the 2006 suggestion. The respondent submitted that Mr. Parker's billing rate of $1,100 is excessive, having regard to the rates usually applied to counsel of Mr. Parker's years of call and admission to the Inner Bar. It was suggested that $800 was a more appropriate rate. As I have indicated, there is very little to go on to benchmark these

fees, and I have seen fees claimed from between $600-$1,200 for very senior attorneys and silks, and these have been taxed by Registrars at various gradations in between.

49. The 2006 guideline rates are dated, but one way of trying to give some currency to them is to add an uplift for inflation. For example, if one applied the CPI inflation calculator used by the US Department of Statistics to the suggested rate of $404.90 in 2006, it would be $629.67 in 2024. But CPI alone is a blunt instrument on which to revise fees. In **Lyford Holding v Vernes**, decided in 2021, Charles J. accepted that an hourly rate of $700 was commensurate with the experience of counsel who had 23+ years at the Bar, and was a QC at the time (although not at the time of billing). In that case, the conversion from the 2006 Bar Scale to 2018, when the fees were incurred, would have yielded $624.32.

50. By way of comparison, the UK Solicitors guideline hourly rates (effective 1 January 2025) for solicitors and legal executives with over 8 years' experience in Band 1 (very heavy commercial and corporate work by centrally based London firms) is £566, which converts to $703.82. I have also come across a Registrar's Practice Direction from Bermuda (2016), for Filing and Serving Bills of Costs for Taxation, with the following guideline figures for hourly rates: 1-3 years post qualification experience, $300-400 per hour; 4-9 years, $350-500; 10+ years, $500 per hour and upwards. I am not suggesting that these are comparators, as the socio-economic conditions are different in these countries, but they provide useful benchmarks.

51. In all the circumstances of this case, I accept that the hourly rate of $1,100 is at the high end of what counsel of just under 20 years' call and several years as a silk should be entitled to charge. I would reduce this to $900.00 per hour, which I think is more commensurate with counsel's years of call and post-qualification experience.

52. As to the second point, costs are being claimed in respect of two fee earners and although no formal request was made to the court to certify costs fit for two counsel, I apprehend that to be implicit in the Bill. I do not understand counsel for the respondent to be taking issue any issue in principle to costs claimed by the junior, although it was contended in supplemental submissions that some of these were duplicative.

53. However, for completeness (and in any event), I set out a few principles relating to costs where both leading and junior counsel are instructed. These principles were set out by the Court of Appeal in **Sterling Asset Management Ltd. v Sunset Equities Ltd.** [2021] 1 BHS J. No. 223, endorsing the ruling of Moore J. in **Nassau Cruise Ltd. v Bahamas Hotel Catering Allied Worker's Union** [2000] BHS J. No 248. In that case, Moore J. stated [87-88] that the test of whether two counsel should be instructed is that of reasonableness. He adverted to the Code of Conduct of the Bar of England and Wales which provides that a QC (KC) in independent practice is entitled to engage a junior in respect of work that would normally be done with the assistance of a junior and if the interest of the lay client required it. In the latter regard, factors to be taken into consideration were as follows:

> "(a) to assist with the court proceedings either by taking an active party or by keeping a full note of the evidence, editing transcripts, etc.
> (b) dealing with documents generally, particularly when the same junior counsel has taken part in discovery;

> (c) to carry out legal or other research, e.g. on matters on which expert evidence is given; (d) to assist leading counsel in negotiations with the other party, particularly, where, as in many accident cases, junior counsel has already advised the injured person and has become know to him. The lay client might well fail to understand why the junior who has dealt with his case up to trial should no longer be present when his claim is settled by negotiation or dealt with by judgment."

54. Further, Moore J. stated that "*the question was not whether the case was within the capabilities of junior counsel, but rather whether or not it was reasonable to instruct leading counsel*" [90]. In my view, applying the principles stated in the cases and considering the circumstances of this case, it was not unreasonable to instruct junior counsel. It is to be noted that junior counsel has billed in respect of precisely those tasks which it is expected that leading counsel may wish to be assisted on, such as advising the client, finalizing documents and attending court proceedings. Further, it was highlighted that the case raised a novel issue of statutory interpretation, which was important not only to the client but had wider public interest in that it sought to clarify whether Parliament intend to provide rights of appeal to a category of medical professionals, in this case specialists. Additionally, I note that counsel representing the respondent is also leading counsel, who was assisted by a junior during the matter. So I would allow costs in respect of two counsel for this matter.

Reasonableness of costs.

55. I come now to look at the categories of costs claimed. It is perhaps easier to first dispose of disbursements, which total $873. There was nothing vaguely unreasonable about disbursements of this order for proceedings such as these, where both parties submitted supplemental written submissions. The next category that can easily be disposed of is VAT, which is fixed at 12% of the Bill Total, and nothing needs to be said of this.

56. That leaves only the professional fees claimed by counsel, which amounted to $26,285. This is apportioned as 22.10 hrs. by Mr. Parker ($24,310.00) and 8.50 hrs. for Ms. Quant ($2,975.00) for a total of $27,285. I should indicate that there were a few arithmetical errors in the bill, which I should correct at the outset. For example, at item 18 is a claim by KDP for 1 hr., but only billed at $275 (a shortfall of $825) and a claim at item 23 for RWQ for 0.5 hrs. at $550, an overcharge of $375. But these have been reconciled in the figure of $27,285.00.

57. Counsel for the respondent contended that the total amount charged was excessive and disproportionate to the work undertaken, and specific objection was taken to several items in the bill. It was first contended that items 1-3, which deal with reviewing the Medical Council's decision and meeting with the client by Zoom to discuss it should properly be claimed on a bill for the substantive appeal, and not a preliminary issue. I disagree. The preliminary issue was not raised until the directions hearing for the substantive appeal, and at that point counsel for the appellant would have been reviewing the case with the view to a general appeal. Next, it is said that there is some duplication of work between Mr. Parker and his junior. The only common work was attending the Zoom meeting with the client, attending court on 25 June 2023, and the junior reviewing the supplemental skeleton submissions. I find that these duties are consistent with the work that a junior would ordinarily do, and would therefore not deduct anything from them.

58. With respect to excessive charges, the only items that piqued my interest were items 4, 5, 6, which respectively record charges for KDP of 5.6 hours (1.33 hrs. on 8 June, 1.77 hrs. on 7 June and 2.5 hours on 14 June 2023) spent considering the respondent's submissions dated the 7 June 2023. The submissions ran to 8 pages, and only three authorities were mentioned. I do think that 5.6 hours is a bit excessive and duplicative for the consideration of rather short submissions. I think 3 hours is reasonable, and will deduct 2.6 hours ($2,340.00) from this amount. The other professional charges are for drafting and reviewing submissions, including supplemental submissions, appearing before the Court on the 26 June 2023, legal research and reading, reviewing an extract from Hansard, reviewing the Court's decision, consulting with the client and preparing the costs submissions and Bill of Costs. Other than the global deduction to be made from Mr. Parker's hourly rate, I would not deduct anything further.

59. The only further matter I would comment on for these items is a claim of 2 hrs. for legal research and reading cases claimed by KDP on 30 June 2023. This is because it is not usual to allow costs for legal research, as counsel is presumed to be fully up-to-date on the law in the field in which they hold themselves out as practicing and they are not paid for researching the law, unless the case is unusual or infrequent (**Perry v Lord Chancellor** (1994, The Times, 26 May QBD). A fortiori where the fee earner is silk and or experienced. I am not inclined to disallow these costs, however, as the matter did involve a point of statutory construction, which necessitated having recourse to Hansard to assist in interpretation.

60. In the circumstances, I am left with professional charges of $27,285.00, of which $24,310.00 was charged by Mr. Parker, before any deductions for Mr. Parker's reduced hourly rate and the 2.6 hrs. disallowed for items 4-6. If Mr. Parker's 22.10 hours were charged at $900 per hour, that would be $19,890.00, a difference of $4,420.00, and 2.6 hrs. @ $900 is $2,340.00, for a total deduction of $6,760.00 That renders a total of $20,525.00 in professional fees, to which is to be added disbursements of $873.00 ($21,398.00) and VAT at 12% ($ 2,567.76), for a round total of $23,965.70.

Proportionality assessment

60. Having conducted my assessment of the bill for reasonableness, I now come to decide whether my assessed or reduced amount is proportionate. If I decide that it is, no further assessment or skimming exercise is required. I have assessed costs at $23,965.70. The respondent says it should be $3,200.00, an amount that may seem derisible, considering that no specific points of dispute with corresponding deductions were argued to reduce costs to anything remotely near that region.

61. I will only mention a few factors that I think are relevant to the proportionality exercise in this matter. They include (from the list at 71.11(3)) the amount of money or value of any property involved (b), the importance of the matter to the parties (c) and the complexity or novelty of the matters or the questions raised (d). With respect to (b), the claim was not a direct monetary claim or one involving property, but some value is obviously to be ascribed to the appellant's ability to work as a specialist in this jurisdiction, and I think the assessed costs bear a commensurate relationship to the value of that claim.

62. As to the importance of the matter ("c"), and as has been mentioned, whether the appellant had a right of appeal against the refusal of her registration as a specialist is of fundamental importance to her and has significance for the wider medical profession, and therefore this fact is also relevant in gauging the proportionality of the assessed costs. Lastly, the statutory issues raised were novel issues and of moderate complexity, and the parties had recourse to Hansard to assist with the interpretation of the statute ("d"). Having regard to all the factors mentioned in 77.11, and the ones that I have mentioned in particular, I do not find anything that suggests that the costs which I have assessed are disproportionate to the matters in issue. There is therefore no reason to make any further deduction.

CONCLUSION & DISPOSITION

63. In my judgment, the amount of $21,398.00 is a reasonable and proportionate amount of costs in this matter, and I order that costs in that amount plus VAT at 12% ($2,567.76) be paid to the appellant by the respondent, amounting to total costs of $23,965.76.

Klein J.

6 February 2025