

Case No: A3/2016/1593

Neutral Citation Number: [2017] EWCA Civ 1687

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

MR RICHARD SPEARMAN QC (sitting as a Deputy Judge of the High Court)

CH/2015/0478

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2017

Before:

LORD LLOYD-JONES
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

Between:

MOHINDER SINGH KHAIRA & Others

Appellants

- and -

DALJIT SINGH SHERGILL & Others

Respondents

P.J. Kirby QC and Rupert Cohen (instructed by Kain Knight Costs Lawyers for Sahota Solicitors) for the Appellants

Roger Mallalieu (instructed by Addlestone Keene) for the Respondents

Hearing date: 14 June 2017

Judgment

LORD JUSTICE DAVID RICHARDS :

Introduction

1. This appeal raises technical but important issues on the entitlement of a party who is awarded the costs of an interlocutory appeal to an immediate assessment of those costs. Two issues of general application arise. First, is the party entitled to an immediate assessment without the need for an express order to that effect? Secondly, if not and if the appellate court has not made an order for an immediate assessment, does a costs judge have jurisdiction to make such an order? A third issue is whether an order of the Supreme Court made in this case entitled the respondents to this appeal to an immediate assessment of their costs in the Court of Appeal.
2. The courts below (Master Simons sitting in the Senior Courts Costs Office and, on appeal, Mr Richard Spearman QC sitting in the Chancery Division as a Deputy Judge of the High Court) answered each of the first and second questions affirmatively. The third issue was not raised by the parties at either hearing but it was a point taken by the Deputy Judge and he held, as the primary ground for his decision, that the respondents were entitled to an immediate assessment of their costs in the Court of Appeal by virtue of the Supreme Court's order.
3. On account of the number of appeals in this case, it will be convenient to refer to the current appellants as the defendants and to the current respondents as the claimants.

Background

4. The background can be shortly stated. The underlying dispute between the parties relates to the trusteeship and governance of two Sikh Gurdwaras, and in particular whether the ninth claimant was the Third Holy Saint and the true successor of the First Holy Saint. If so, he had express power under the relevant trust deeds to appoint and remove trustees. The claimants issued proceedings in June 2008.
5. The defendants applied to stay or strike out the claim on the grounds that the issues raised by the claim were not justiciable. In September 2011, HH Judge Cooke, sitting in the Chancery Division, dismissed the application and ordered the costs, which he summarily assessed, to be paid by the defendants. On appeal, this court held that the issues were not justiciable and struck out the claim. On a further appeal, the Supreme Court reversed this court's decision and reinstated Judge Cooke's order, including his summary assessment of the claimants' costs and his order that they be paid by the defendants.
6. By an order dated 28 July 2014, the Supreme Court dealt with the costs in this court and in the Supreme Court. It ordered that "(1) The respondents pay the appellants' costs in the Supreme Court and the Court of Appeal, the amount of those costs to be assessed on the standard basis if not agreed between the parties, (2) The respondents pay the appellants £150,000 on account of their costs in the Supreme Court and the Court of Appeal."
7. Since the appeal before the Deputy Judge, the action has been tried and judgment entered for the claimants. The defendants accept that accordingly the claimants have since then been entitled to an immediate assessment of their costs in the Court of

Appeal save that a stay was ordered by Jackson LJ by an order dated 2 June 2017 pending the determination of the application for permission to appeal the substantive decision.

The Rules

8. The relevant provisions of the Supreme Court Rules 2009 and the Civil Procedure Rules, applicable to the assessment of costs in the Supreme Court and in this court respectively, are significantly different.
9. Rule 48(1) of the Supreme Court Rules provides that “Where the Court has made an order for costs, the claim for costs must be submitted to the Registrar within three months beginning with the date on which the costs order was made.” Rule 48 goes on to provide for the supply of information in support of the claim and for the service of points of dispute by the paying party and a response. Rule 49 makes provision for the assessment of the claimed costs.
10. The claimants submitted their claim for costs within three months after the Supreme Court’s order dated 28 July 2014. The defendants accept that they were entitled to do so and entitled, under the Supreme Court Rules, to an immediate assessment of their costs in the Supreme Court without any order to that effect. The assessment simply follows from the operation of the Rules.
11. This appeal concerns the assessment of the claimants’ costs in the Court of Appeal, which is governed by the CPR. The CPR do not contain separate provisions for the payment and assessment of costs at first instance and on appeal.
12. CPR 47.1, which is headed “Time when detailed assessment may be carried out”, provides:

“The general rule is that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the conclusion of the proceedings, but the court may order them to be assessed immediately. (Practice Direction 47 gives further guidance about when proceedings are concluded for the purpose of this rule).”
13. CPR 47.2 provides that “Detailed assessment is not stayed pending an appeal unless the court so orders.”
14. CPR 47.6 provides that detailed assessment proceedings are commenced by the receiving party serving on the paying party a notice of commencement and a copy of the bill of costs. CPR 47.7 sets out a table showing the period for commencing detailed assessment proceedings. One column of the table is headed “Source of right to detailed assessment” and the other column is headed “Time by which detailed assessment must be commenced”. The first entry in the table is relevant for present purposes, with the source of the right being “Judgment, direction, order, award or other determination” and the time being three months “after the judgment etc”, subject to any stay.

15. Paragraph 1 of Practice Direction 47 (47PD), to which CPR 47.1 refers and which is headed “Time when assessment may be carried out: rule 47.1”, states in para. 1.1: “For the purposes of rule 47.1, proceedings are concluded when the court has finally determined the matters in issue in the claim, whether or not there is an appeal, or made an award of provisional damages under Part 41.”
16. Under paragraph 1.3 of 47PD, a party served with a notice of commencement may apply to a costs judge to determine whether the party who served it is entitled to commence detailed assessment proceedings. It provides:

“A party who is served with a notice of commencement (see paragraph 5.2 below) may apply to a costs judge or a District Judge to determine whether the party who served it is entitled to commence detailed assessment proceedings. On hearing such an application the orders which the court may make include: an order allowing the detailed assessment proceedings to continue, or an order setting aside the notice of commencement.”
17. Paragraph 1.4 of 47PD provides that a costs judge may make an order allowing detailed assessment proceedings to be continued where there is no realistic prospect of the claim proceeding.

The proceedings below

18. In August 2015, the claimants served a notice to commence the detailed assessment of their costs in the Court of Appeal. Exercising the right conferred by paragraph 1.3 of 47PD, the defendants applied to set aside the notice on the grounds that the claimants were not as yet entitled to a detailed assessment of those costs. Their grounds, in short, were that by reason of CPR 47.1 there could be no detailed assessment of those costs until the conclusion of the proceedings (as defined in paragraph 1.1 of 47PD) without an order for a detailed assessment made by the Court of Appeal or, exercising the powers of the Court of Appeal, by the Supreme Court. It was common ground before Master Simons that there had been no such express order. If they were wrong on that issue, they submitted that in the particular circumstances of the case, the costs judge should stay the assessment until after the trial of the action and judgment.
19. Master Simons refused the defendants’ application. He held that, having regard to the judgments in this court in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 987; [2012] 1 WLR 3581, the appeal was a separate proceeding from the main action and that it had concluded with the order of the Supreme Court. The claimants were therefore entitled to proceed to a detailed assessment of their costs in the Court of Appeal without any express order to that effect. Further, as a matter of discretion, Master Simons rejected the submissions that a detailed assessment should wait until the conclusion of the action.
20. On appeal, the Deputy Judge affirmed the decision of the Master. He held that for the purposes of CPR 47.1 an appeal is a separate “proceeding” from the action and that in the present case the relevant “proceedings” were brought to a conclusion at the end of the appeal to the Supreme Court. Accordingly, the claimants did not need an order for

the immediate assessment of their costs in the Court of Appeal. He relied on the judgments in *Hawksford*.

21. The Deputy Judge further held that, if he was wrong on the first point, Master Simons had jurisdiction to order an assessment of the claimants' costs in the Court of Appeal. On this point, he relied on the decision of Hamblen J (as he then was) in *GB Gas Holdings Ltd v Accenture (UK) Ltd* [2010] EWHC 2928 (Comm); [2011] 1 Costs LO 64.
22. Thirdly, the Deputy Judge rejected the defendants' argument that Master Simons wrongly exercised his discretion in not ordering a stay of the detailed assessment proceedings until the conclusion of the claim. There is no appeal on this point.
23. The Deputy Judge also held that, irrespective of the position under the CPR, the effect of the Supreme Court's order for costs was that the claimants were entitled to an immediate assessment of their costs in the Court of Appeal. His reasoning was at [21] that "I do not consider that Order can have the effect that the receiving party is entitled to proceed with immediate assessment of one lot of costs but not the other". Accordingly, "the true meaning and effect of the Order....is that the Claimants are entitled to immediate detailed assessment of all of those costs". As I mentioned earlier, this was not a point raised by either party, but the claimants have on this appeal supported this ground for the decision, as well as the other grounds on which the Deputy Judge relied.

Issue 1: The effect of CPR 47.1

24. I propose to deal first with the issue as regards the effect of CPR 47.1 and the meaning of "proceedings" in that rule.
25. It is common ground between the parties, as has been emphasised in a number of authorities, that "proceedings" is not a term of art and that it can either encompass the entirety of a claim, including appeals, or it can carry a more restricted meaning, referring separately to first instance proceedings and appeals. The meaning that the word carries in any particular provision depends on the terms, context and purpose of the provision.
26. The defendants submit that the decision of the Deputy Judge was wrong for the following reasons.
27. First, he failed to have proper regard to the terms of CPR 47.1 when read with paragraph 1.1 of 47PD. The Practice Direction explains what is meant by "the conclusion of the proceedings" in 47.1. Proceedings are concluded "when the court has finally determined the matters in issue in the claim, whether or not there is an appeal". All parts of the proceedings up to and including final judgment at first instance are concluded only when final judgment is given. This is therefore a broad meaning of "proceedings" and the only relevant exception, as made clear by paragraph 1.1, is an appeal from the final judgment.
28. Second, the Deputy Judge was wrong to rely on *Hawksford* as providing guidance on the meaning of CPR 47.1, when read with 47PD. The references made in the judgments to those provisions did no more than repeat their terms, drawing a

distinction between a trial and an appeal against the final order. The judgments gave no consideration to the point at which proceedings are concluded for the purposes of CPR 47.1. *Hawksford* was not concerned with CPR 47.1 but with section 29 of the Access to Justice Act 1999, and the meaning to be given to “proceedings” was determined by reference to the context and purpose of that section.

29. Third, the Deputy Judge was wrong to distinguish decisions of Patten J and Hamblen J at first instance, to which I refer below.
30. The claimants support the decision of the Deputy Judge for the reasons that he gave. They emphasise that there are good reasons for treating the costs of first instance and appeal proceedings separately. Appeal proceedings are concluded once the appeal is decided. Interlocutory appeals usually raise discrete points of principle or practice. The outcome of the appeal will generally determine the incidence of costs. There will not be difficulties in identifying or disentangling the costs of the appeal, unlike the case of applications at first instance. Where an appeal lasts no more than a day, the costs are usually assessed summarily and there is no reason why other costs should await the conclusion of the first instance proceedings before being the subject of detailed assessment. In an appropriate case, the Court of Appeal can stay a detailed assessment under CPR 47.7.
31. The principal authority on which the courts below relied, and on which Mr Mallalieu for the claimants principally relied before us, is the decision of this court in *Hawksford*. That case concerned the recoverability as costs of part of the premium payable on an insurance policy against a potential costs liability, under section 29 of the Access to Justice Act 1999. The insurance policy was taken out in advance of an appeal and covered the respondent against the risk, if the appeal succeeded, of an order to pay the costs of both the first instance proceedings and the appeal. The appeal failed and the appellant accepted that it must pay that part of the premium that related to costs in the Court of Appeal, but it objected to payment of the part relating to the first instance costs on the ground that, for the purposes of section 29, the first instance proceedings and the appeal were separate “proceedings”. Section 29 provided that “Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability *in those proceedings*” (emphasis added), the recoverable costs include the premium on the policy.
32. The Court of Appeal, by a majority, held in favour of the appellants, on the grounds that in section 29 the first instance proceedings and the appeal were indeed separate “proceedings”. Giving the lead majority judgment, Rix LJ undertook a close analysis of earlier authorities on the meaning of “proceedings”: *Masson Templier & Co v De Fries* [1910] 1 KB 535 and *Wright v Bennett* [1948] 1 KB 601. He observed at [42] that “Although it would be perfectly natural to think of an appeal as arising from and being part of the same proceedings as the trial from which the appeal is taken, it is nevertheless clear that trial and appeal have been treated as separate proceedings for the purposes of costs”. He referred also to provisions of the CPR, including 47.1 and 47.2, as showing that this distinction “is still recognised and written into current rules”. Whether or not the distinction applied in the case of section 29 depended on its purpose and context. Rix LJ, and Etherton LJ, concluded that it did apply to section 29. At [58], Rix LJ referred to “a well-known distinction, made in the context of costs liability, between costs of trial and appeal where trial and appeal are spoken of as different proceedings” and said that “the word “proceedings” in section 29 should be

given its traditional meaning which distinguishes between proceedings at trial and on appeal”. Etherton LJ also referred at [62] to CPR 47.1 and 47.2 as making the distinction between first instance and appeal proceedings.

33. Having reviewed *Hawksford*, the Deputy Judge said at [34]:

“In my view, it is clear from these judgments (1) that cases which pre-dated the coming into force of the CPR treated, and were regarded by the Court of Appeal in that case as treating, the proceedings progressing towards trial on the one hand and an appeal on the other hand as separate proceedings for the purposes of costs and (2) that the Court of Appeal in that case considered that this separation or distinction between proceedings in different courts in the same litigation is still recognised and is written into the CPR, including and in particular in CPR 47.1 and in Practice Direction 47. Those conclusions are articulated most clearly, but not exclusively, in the passages in the judgment of Rix LJ which I have emphasised above.”

34. Since the hearing before the Deputy Judge, the Supreme Court has given judgment in *Plevin v Paragon Personal Finance Ltd* [2017] UKSC 23; [2017] 1 WLR 1249 (*Plevin*) on a review of a costs assessment in the Supreme Court. The principal issue related to the recoverability of an insurance premium under an order for costs, which turned on the meaning of “proceedings” in section 46(3) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Supreme Court, by a majority, held that, having regard to the purpose and context of section 46(3), “proceedings” had the broader meaning that included both first instance and appeal proceedings. In his judgment, Lord Sumption (with whom Baroness Hale, Lord Clarke and Lord Carnwath agreed), said at [19] that “‘proceedings’ is not a defined term in the legislation, nor is it a term of art under the general law” and that its meaning must depend on its statutory context and the underlying purpose of the provision, so far as it can be discerned.

35. Lord Sumption said at [18] that it was “clear that for some purposes the trial and successive appeals do constitute distinct proceedings. In particular, they are distinct proceedings for the purposes of awarding and assessing costs.” He referred to *Hawksford* and the authorities considered in it, and also to the Supreme Court’s decision in *Gabriel v BPE Solicitors* [2015] AC 1663 in which it had “applied the same principle when holding that a trustee in bankruptcy, by prosecuting an appeal to the Supreme Court, did not expose himself to liability for the costs of the distinct proceedings conducted by the bankrupt at trial or on appeal to the Court of Appeal”.

36. At [20] Lord Sumption said:

“The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim, and were not over until the courts had disposed of that claim one way or the other at whatever level of the judicial hierarchy. The word is synonymous with an action. In the cases cited above, relating to an awarding or assessment of

costs, the ordinary meaning is displaced because a distinct order for costs must be made in respect of the trial and each subsequent appeal, and a separate assessment made of the costs specifically relating to each stage. They therefore fall to be treated for those purposes as separate proceedings. The present issue, however, turns on a different point. The question posed by section 46(3) of LASPO is whether the fact of having had an ATE policy relating to the trial before the commencement date is enough to entitle the insured to continue to use the 1999 costs regime for subsequent stages of the proceedings under top-up amendments made after that date. The fact that costs are separately awarded and assessed in relation to each stage does not assist in answering that question.”

37. As both *Hawksford* and *Plevin* were concerned with statutory provisions unrelated to CPR 47, they can at most provide only general guidance. For present purposes, they establish that (i) “proceedings” is not a term of art, (ii) it can bear either a broad meaning that includes appeals or a narrow meaning that treats first instance and appeal proceedings as separate proceedings, (iii) the correct meaning in any particular provision depends on the terms, context and purpose of that provision, and (iv) in the context of costs, there exists a well-established, but not invariable, distinction drawn between the costs of a trial and the costs of an appeal against the final order.
38. As regards the fourth point and as appears from the citations above, the judgments in both *Hawksford* and *Plevin* do no more than reflect the express terms of CPR 47, which distinguish the *trial* and an appeal following the trial. The judgments, as I read them, are careful not to go outside those express terms and they do not in terms support a general distinction between first instance proceedings and interlocutory appeals. That is not to say that CPR 47 should not be read as making that general distinction but support for it is not found in those cases.
39. It is necessary to look carefully at the terms of CPR 47.1, read with paragraph 1.1 of 47PD which is expressly incorporated as “further guidance about when proceedings are concluded for the purpose of this rule”. Read together, they provide that “the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the court has finally determined the matters in issue in the claim, whether or not there is an appeal”. The matters in issue in the claim are not finally determined until the court at first instance has finally ruled on them, but once it has done so the proceedings are for these purposes concluded even if there is an appeal.
40. The claimants’ construction of CPR 47.1, read with paragraph 1.1 of 47PD, can work only if “proceedings” in CPR 47.1 refers only to first instance proceedings. If, by contrast, “proceedings” includes interlocutory appeals, they are “part of the proceedings” which are not concluded until the matters in issue in the claim are finally determined at first instance, with the result that a detailed assessment of the costs of such appeals is deferred until after that final determination, unless the court orders an earlier assessment. Equally, if “proceedings” in CPR 47.1 is read as referring separately to proceedings at first instance and to interlocutory appeals, the same result follows because the guidance as to the conclusion of proceedings is the same in both cases, namely the final determination at first instance of the matters in

issue in the claim. All the authorities to which we were referred that have been directed specifically to this issue have taken the position that an express order for an immediate assessment of the costs of an interlocutory appeal is required.

41. I did not understand Mr Mallalieu to develop a submission that “proceedings” in CPR 47.1 referred only to first instance proceedings, although it is fair to say that he stated in his skeleton argument that “CPR 47.1 does not apply here”. But, assuming that to be his submission, I do not consider that it is right.
42. First, there is no indication in the terms or context of CPR 47.1 to show that this is intended. It refers to “proceedings” without qualification, except that there is an exclusion of an appeal from a final order determining the matters in issue in the claim. If “proceedings” was not intended to refer to interlocutory appeals, one might expect an express provision to that effect or a separate provision dealing with the assessment of the costs of such appeals, all the more so given the express reference to an appeal from a final determination of the issues.
43. Secondly, it is contrary to the authorities that have directly considered the effect of CPR 47.1
44. *Civil Procedure* (2017) Vol 1 at 47.1.1 records that in *Morris v Bank of America National Trust* [2001] 1 All ER 954, counsel for the successful party on an interlocutory appeal applied for the immediate assessment and payment of its costs. Morritt LJ, giving the judgment of the court, said that “It is certainly the practice... in this court that, where the appeal is a discrete matter, the costs are ordered there and then and do not wait for the conclusion of the proceedings as a whole. That practice precedes the new rules.” The court made an order for an immediate assessment and payment of the successful party’s costs (Morritt LJ’s judgment on the costs of the appeal, and this passage from it, do not appear in the report in the All England Law Reports, but are in the transcript of the post-judgment proceedings which was available to the Deputy Judge in this case).
45. In *Hicks v Russell Jones & Walker* [2001] CP Rep 25, the hearing of an appeal to the Court of Appeal was adjourned pending the judgment of the House of Lords in a case raising the same issue. Once the House gave judgment, the respondents accepted that the appeal should be allowed with costs. The appellants applied for an immediate detailed assessment and payment of their costs. Robert Walker LJ refused the application. He recorded that there was no doubt that the court had power to make such an order, referring to CPR 47.1 and other provisions. In the light of the particular circumstances of the case, he concluded “that the overriding objective would be best served in this case by following the normal practice under Rule 47.1 of the Civil Procedure Rules and ordering detailed assessment but not assessment forthwith”.
46. These decisions of this court, and the notes in *Civil Procedure* Vol. 1 at 47.1.1 based on them, are inconsistent with the submission of the claimants that under CPR 47.1, an immediate assessment on the conclusion of an appeal is the default position, not requiring any express order.
47. The issue was directly addressed in detail by Patten J (as he then was) in *Crystal Decisions (UK) Ltd v Vedatech Corporation* [2007] EWHC 1062 (Ch) (*Crystal*). Among the issues before the court was an appeal against an order of Master Campbell

concerning the costs of the defendants' unsuccessful applications to the Court of Appeal for permission to appeal against orders made by Pumfrey J. The Court of Appeal ordered the defendants to pay the costs of the applications but did not order an immediate assessment. The claimants applied to Master Campbell for an immediate assessment of those costs. He held that they were entitled to it, either because the orders of Pumfrey J had directed an immediate assessment and the Court of Appeal had simply refused permission to appeal against those orders or because, if he was wrong on the first ground, he would himself make an order for an immediate assessment.

48. I will return to what Patten J said about the second of those grounds later in this judgment but, on the first, Patten J said at [77]:

“It seems to me that the correct starting point is to look at the terms of the costs order made by the Court of Appeal. That was not an order for the immediate assessment of costs and the fact that it dealt with an application for permission from an order which did include a direction for immediate assessment, does not alter the terms of the Court of Appeal’s own order. The Master approached the matter on the basis that the Court of Appeal’s order brought to an end one aspect of the proceedings: i.e. the issue about the grant of the anti-suit injunction. This is also correct, but the purpose of CPR 47.1 is to lay down a general rule that the costs of part of the proceedings are not to be assessed until the conclusion of the proceedings as a whole unless the Court orders them to be assessed immediately, which the Court of Appeal did not. The order made by the Court of Appeal is therefore governed by this general rule and although it would have been open to the Court of Appeal to order an immediate assessment (see *E.G. Morris v Bank of America* [2000] 1 AER 954) it did not do so. Master Campbell’s decision on this point effectively re-writes CPR 47.1 and cannot stand.”

49. A similar issue arose in *GB Gas Holdings Ltd v Accenture (UK) Ltd (GB Gas)*. Hamblen J was asked to direct an immediate assessment of the costs of an appeal which the Court of Appeal had ordered to be paid by the unsuccessful party. Again, I will come later to what the judge said about that application but, in the course of dealing with it, he observed that the Court of Appeal had made the costs order but did not order an immediate assessment, and it appeared that it was not asked to do so. He continued at [33]:

“I accept that the usual practice would be for a party to ask the Court of Appeal to order immediate assessment of costs if that is what it wishes to have done. I also accept that the claimants did not do so in this case and that, in those circumstances, the effect of the order is, in the light of CPR 47.1, that the costs as ordered by the Court of Appeal, as matters stand, will not be assessed until the conclusion of proceedings.”

50. This represents a significant body of authority on the precise issue before us that is contrary to the claimants' case on the effect of CPR 47.1 in the case of an interlocutory appeal. The answer given by Mr Mallalieu on their behalf is that these cases were decided before *Hawksford*, which, he submits, establishes, albeit on an *obiter* basis, that the effect of CPR 47.1 is to entitle them to an immediate assessment without any order to that effect.
51. I have already said why, in my view, none of the judges in *Hawksford* expressed this view of CPR 47.1. In almost every reference to CPR 47.1 in their judgments, and in the judgment of Lord Sumption in *Plevin*, the distinction made, between a *trial* and an appeal, simply repeated the distinction made expressly by CPR 47. They did not address the different question, that arises in this case, as to the position on an interlocutory appeal.
52. Both *Hawksford* and *Plevin* stress that the meaning of "proceedings" depends on the terms, context and purpose of the provision in which it appears. As I earlier noted, the critical provision for this purpose is paragraph 1.1 of 47PD. The issue of whether there is an automatic immediate assessment of costs depends on its meaning and effect. Unless CPR 47.1 has no application at all to appeals, the effect of paragraph 1.1 of 47PD is, in my judgment, that there is no automatic detailed assessment of the costs of an interlocutory appeal and that an order of the court is required, consistently with the views of the judges in this court and in the High Court who have previously considered this point.
53. I acknowledge the force of the policy reasons advanced by Mr Mallalieu to justify a reading of CPR 47.1 that would mean that the costs of interlocutory appeals were immediately assessed unless the court ordered otherwise. But it must be borne in mind that there will be an immediate assessment if the court so orders. All that need happen is for the receiving party to apply for an immediate assessment. Having said that, it may be that the Civil Procedure Rules Committee will feel it appropriate to consider what the default position should be.

Issue 2: Did the costs judge have jurisdiction to order an immediate assessment?

54. The second issue, also raising a point of general significance, is whether Master Simons as the costs judge had jurisdiction to order an immediate assessment of the claimants' costs in the Court of Appeal, assuming that the claimants are wrong in their submission that no order was required.
55. The Deputy Judge dealt with this in his judgment at [51] – [60]. He referred to Hamblen J's decision in *GB Gas* that he had jurisdiction to order the immediate assessment of costs in the Court of Appeal where no order had been made by this court. He also referred to the view expressed by Patten J in *Crystal* that it would be surprising if a costs judge had the jurisdiction to do so. He rightly observed that, unlike Patten J's expression of view in *Crystal*, Hamblen J's view formed an essential part of the reasoning for his decision in *GB Gas*. He therefore concluded that he "ought to follow the decision of Hamblen J" and held that Master Simons had jurisdiction to make an order for an immediate assessment.
56. There was some confusion in Mr Mallalieu's submission before us as to whether, in supporting the Deputy Judge's decision on this issue, he was relying on CPR 47.1 or

paragraph 1.3 of 47PD. CPR 47.1 provides that “the court may order them to be assessed immediately”. This was the provision on which Hamblen J relied, holding that he could constitute “the court” for these purposes.

57. By expressly following Hamblen J’s decision, the Deputy Judge must, I think, have based his decision on CPR 47.1, whereas the main thrust of Mr Mallalieu’s submission before us (and also, it would appear, before the Deputy Judge: see his judgment at [51]) was based on paragraph 1.3 of 47PD. I shall consider both provisions.
58. I have already cited that part of Hamblen J’s judgment in *GB Gas* where he held that an order for immediate assessment of the costs of an interlocutory appeal was required. He went on to say at [33]:

“But the court may order them to be assessed immediately. In my judgment, that is an order which this court can make. This court has the conduct of the proceedings generally. It has before it a specific issue of whether it is appropriate for there to be an immediate assessment of costs. Those costs include as part of the costs of the proceedings the appeal costs. I am therefore satisfied that I do have jurisdiction to order immediate assessment of those costs and, because they are discrete costs and because they involve no great issue of disentanglement, I accept that it would be appropriate to order immediate assessment of the appeal costs.”

59. In *Crystal*, Patten J took the view that the reference to “the court” in CPR 47.1 was to the court that made the costs order. The submission before him, as before us, is that a costs judge had the power to make an order for an immediate assessment. He dealt with this submission at [78]:

“His alternative basis for allowing the detailed assessment to proceed is also in my judgment flawed. He gives no reasons at all for exercising his discretion in favour of the Claimants and ignores the fact that the Court of Appeal either was not asked to or did not choose to order an immediate assessment. That seems to me to be a strong factor against exercising the discretion in the way that Master Campbell did and his order will be set aside: I should also add (although this is not strictly necessary for my decision) that I am far from persuaded that s.28.1(4) in fact gives to the costs judge power to order the continuation of a detailed assessment in circumstances where the Court making the original order for costs has not done so. The power contained in s.28.1(4)(b) to allow the assessment to continue seems to me to be consequential and contingent upon the power contained in s.28.1(4)(a) for the costs judge to decide whether the party serving a notice of commencement is entitled to do so. The reference to being entitled to do so must be a reference to the terms of CPR 47.1 and calls for a judicial determination of whether under that rule the party in question is entitled to proceed. It would be odd for the costs judge to be

entitled to allow the assessment to continue notwithstanding a ruling that CPR 47.1 did not justify an immediate assessment and I do not consider that s.28.1(4)(b) conferred on the costs judge any such dispensing power. The only Court entitled to permit a deviation from the general rule is the Court making the costs order. If that power is not exercised, the costs judge must apply the general rule.”

60. I prefer the view of Patten J. The court that made the relevant costs order was the Court of Appeal and it is a different court from the High Court in which Master Simons and the Deputy Judge were sitting. There is nothing in the Rules or elsewhere that suggests the High Court can exercise a power that was clearly vested in the Court of Appeal. CPR 2.4 provides:

“Where these Rules provide for the court to perform any act then, except where an enactment rule or practice direction provides otherwise, that act may be performed-

- (a) in relation to proceedings in the High Court, by any judge, Master, Registrar in Bankruptcy or District Judge of that Court: and
- (b) in relation to proceedings in the County Court, by any judge of the County Court.”

61. A High Court judge will have power, by virtue of CPR 2.4(a), to perform any act which, under the CPR, is to be performed by the court “in relation to proceedings in the High Court” but the appeal was not proceeding in the High Court but in the Court of Appeal. Moreover, in my view, the natural reading of CPR 47.1 is, as Patten J said, that “the court” refers to the court that made the costs order.
62. In any event, even if I am wrong on this point, the judgment of Hamblen J does not support a conclusion that a costs judge can make an order for immediate assessment. The basis of his decision, as stated at [33], was that “this court” (i.e. Hamblen J as a judge of the Commercial Court) could make the order because “this court has the conduct of the proceedings generally”. Clearly that could not be said of Master Simons or any other costs judge. The primary function of costs judges is to assess costs when an assessment is due, not to decide whether there should be an assessment.
63. The claimants rely on paragraph 1.3 of 47PD, which I have earlier quoted. They submit that it confers jurisdiction on a costs judge to make an order for assessment. The terms of paragraph 1.3 make clear that it is not a general jurisdiction, but arises (if at all) only where a paying party served with a notice of commencement applies to the costs judge to determine whether the other party is entitled to commence detailed assessment proceedings. The wording of paragraph 1.3 makes clear that the entitlement should pre-date the commencement of the assessment proceedings and that the costs judge’s function is to determine whether the entitlement exists. The second sentence does not, in my judgment, envisage that the costs judge has a discretion to order an assessment where none exists but is, as Patten J said of the predecessor provision in *Crystal* at [78] “consequential and contingent upon the power for the costs judge to decide whether the party serving a notice of

commencement is entitled to do so". If the costs judge holds that the receiving party was entitled to commence an assessment, he or she may make an order allowing it to continue. Alternatively, the costs judge could stay the proceedings until a more appropriate time in the future. Mr Mallalieu submitted that a power to stay the assessment proceedings carried with it the power to order an immediate assessment as a natural corollary. I reject that submission. A power to order a stay is quite different from a power to confer a right to an immediate assessment where such right does not otherwise exist.

64. Paragraph 1.4 is, in my view, important in determining the effect of paragraph 1.3. It confers a very limited power to order the commencement of assessment proceedings, only where there is no realistic prospect of the claim continuing. In my judgment, such a circumscribed power is inconsistent with the general discretion which the claimants submit exists under paragraph 1.3.
65. I therefore conclude that Master Simons had no power to order an immediate assessment of the costs in the Court of Appeal, and that the Deputy Judge was wrong to uphold his decision on this ground.

Issue 3: The effect of the Order of the Supreme Court

66. The third and final ground on which the Deputy Judge upheld the decision of Master Simons turns on the meaning and effect of the costs order made by the Supreme Court.
67. The Deputy Judge recognised that the Supreme Court has its own regime for costs in appeals before it and that the Supreme Court Rules do not have the effect that costs below should be assessed in the Supreme Court. But, he went on to say at [21]:

“However, where, as has happened in the present case, the Supreme Court has made a single Order in relation to the costs in the Court of Appeal and the costs in the Supreme Court, I do not consider that Order can have the effect that the receiving party is entitled to proceed with immediate assessment of one lot of costs but not the other. Accordingly, in my judgment, the true meaning and effect of the Order made by the Supreme Court dated 28 July 2014 is that the Claimants are entitled to immediate detailed assessment of all of those costs.”

68. The Supreme Court’s order does not expressly deal with assessment. As regards costs in the Supreme Court, it did not need to, given the effect of the Supreme Court Rules discussed above. Mr Mallalieu submitted that it was implicit in the Order that the Supreme Court was ordering an immediate assessment of the costs in the Court of Appeal. In making such an order, Mr Mallalieu accepted that the Supreme Court would be exercising the power of the Court of Appeal to order an immediate assessment of those costs.
69. The obvious difficulty is that there is nothing to suggest that the Supreme Court ever turned its mind to the assessment of the costs in the Court of Appeal. It was not raised with the Supreme Court and the defendants had no opportunity to address any submissions on that question. While it may seem likely that the Court would have

made an order for an immediate assessment, if asked, particularly given that the costs at first instance had been summarily assessed and the costs in the Supreme Court would be assessed without any order, it would involve an exercise of discretion by the Court, taking account of submissions made by both parties, and it cannot be assumed that an immediate assessment of the costs in the Court of Appeal would certainly have been ordered.

70. An immediate assessment of the costs in the Court of Appeal can be read into the order only if it is necessary to give effect to its express terms. In this respect, reliance is placed on, first, the order in paragraph 1 that the costs in both the Court of Appeal and the Supreme Court be assessed on the standard basis and, secondly, the order in paragraph 2 that the defendants pay £150,000 on account of their costs in both courts. However, an immediate assessment is not necessary to give effect to these orders. Paragraph 1 does no more than state the basis of assessment, as any order for costs will do, and the payment of a sum on account of costs is effective without an order for an immediate assessment.
71. For these reasons, I am unable to agree with the Deputy Judge that the effect of the Supreme Court's order is that there is to be an immediate assessment of the costs in the Court of Appeal.

Conclusion

72. I would therefore allow the appeal.

LORD JUSTICE MOYLAN:

73. I agree.

LORD LLOYD-JONES:

74. I also agree.