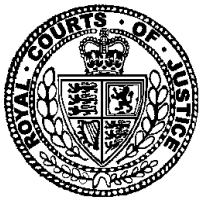

Neutral Citation Number: [2018] EWHC 1716 (QB)

Case No: QB/2017/0193

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM DEPUTY MASTER WHITE
IN THE SENIOR COURTS COSTS OFFICE

Royal Courts of Justice
London, EC4A 1DQ

Date: 05/07/2018

Before :

THE HONOURABLE MRS JUSTICE SLADE DBE
SITTING WITH AN ASSESSOR

- -

Between :

COMMISIONERS FOR HM REVENUE & CUSTOMS	**Appellants**
- and -	
1. Mr Ryan Gardiner	
2. Mrs Anne Gardiner	
3. Mr Michael Gardiner	**Respondents**

- -
- -

Mr William Irwin (instructed by **HMRC**) for the **Appellants**
Mr Keith M Gordon (instructed by **Sharpe Pritchard LLP**) for the **Respondents**
Hearing date: 25 January 2018

- -

Approved Judgment

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

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THE HONOURABLE MRS JUSTICE SLADE DBE

MRS JUSTICE SLADE DBE:

1. The Commissioners for Her Majesty's Revenue and Customs ('HMRC') appeal with permission of Mr Justice Spencer from the judgment and order of Deputy Master White seal date 11 September 2017 ordering them to pay Mr Ryan Gardiner, Mrs Anne Gardiner and Mr Michael Gardiner ('the Gardiners') costs in the sum of £19,825 which included £2000 in respect of the oral hearing of the detailed assessment.

2. HMRC appeal from the making of the award against them as they contend that it infringes the indemnity principle. They also appeal from the amount of the award as being disproportionate and excessive.

3. The Gardiners were successful appellants in tax appeal proceedings in the First Tier Tribunal (Tax Chamber). They were amongst several tax payers challenging penalties imposed by HMRC for negligent filling out of tax returns. Their then tax advisors, EDF Tax Defence Ltd ('EDF') had given advice not just to the Gardiners but to other clients who were or were likely to be affected by the imposition of penalties. Mr Macleod of EDF was at the forefront of work carried out for the Gardiners in connection with their appeal from the penalty.

4. Originally the Gardiners were going to represent themselves at the appeal before the judge of the First Tier Tribunal. However in circumstances which are material to the appeal before this court Mr Gordon of counsel conducted the appeal which was attended by Mr Michael Gardiner. Tribunal Judge Cannan heard the appeal on 29 April 2014. On their success an application for costs was made at a subsequent hearing.

5. Ordinarily each party bears their own costs of proceedings before the First Tier Tribunal (Tax Chamber). The application for costs on behalf of the Gardiners was made under an exception to the costs free regime on the basis that the '[paying] party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.' (First-Tier Tribunal (Tax) Procedure Rules Rule 10 (1) (b)).

6. A costs hearing took place before Judge Cannan in December 2014. In the course of his judgment on costs Judge Cannan quoted from his decision on the appeal. The quotation at paragraph 2 included the following:

> "9…On 10 June 2013 the respondents [HMRC] provided listing information and stated 'the respondents do not intend to call any witnesses'."

The parties were informed on 4 February 2014 that the appeals would be heard on 29 April 2014.

> "10…In early March 2014 the respondents confirmed to the appellants' representative (EDF Tax) that they were not intending to call witnesses."

EDF wrote on 27 March 2014

> "11…we have been advised that the appeal should be summarily allowed as there is no evidence or statement of agreed facts on which HMRC's case can rest."

> "17…The appellants sought a summary assessment of the costs. By the time of the costs hearing before me the appellants only sought to recover the costs of instructing Mr Gordon. His fees in connection with the appeal were incurred in the period after 1 March 2014 when he was first instructed."

7. When making the application for costs it was explained that fees of counsel had been met by EDF. HMRC raised the indemnity principle in resisting an order for costs if they were otherwise held to be liable for them. Judge Cannan made a direction that the respondent pay the appellants' costs of the appeal on the standard basis to be the subject of a detailed assessment if not agreed.

8. In light of the raising of the indemnity principle defence the application for costs was referred to the Senior Courts Costs Office. An assessment on the papers was made by Deputy Master White in May 2016. The Deputy Master reached the provisional conclusion that the indemnity principle was breached and therefore HMRC was not ordered to pay costs to the Gardiners.

9. The Gardiners requested an oral hearing. This took place on 20 July 2017 before Deputy Master White. Mr Macleod formerly of EDF gave evidence on behalf of the Gardiners who were again represented by EDF and Mr Gordon of counsel. Mr Irwin of counsel represented HMRC.

10. The issues before Deputy Master White were identified by him in paragraphs 38 and 40 of his judgment. First whether EDF were acting on behalf of the Gardiners when they instructed counsel, Mr Gordon, to appear before the First Tier Tribunal (Tax Chamber). Second whether the Gardiners had a liability to pay the fees of counsel. Deputy Master White concluded in answer to the first question that EDF were acting on behalf of the Gardiners when they instructed Mr Gordon. Deputy Master White held:

> "38…Obviously I have to be satisfied they were acting on his behalf and on the balance of probabilities they were and indeed must have been, looking at the history of it, and indeed they were undertaking work on his behalf for which they are not pursuing costs for other reasons but it is clear to me that they instructed counsel on behalf of the receiving party and that has been made clear."

11. In answer to the second question, Deputy Master White recorded at paragraph 38:

> "…I have seen the correspondence wherein there is an email from the EDF to the receiving party about instructing counsel, about the fees, about how it is going to be paid which is not the same thing as liability to pay, and I have seen terms and

> conditions that were sent so they were clearly acting on his behalf".

The Deputy Master held of Mr Gardiner:

> "40. …There was no agreement he would never be liable for counsel's fees. They were acting on his behalf and with his knowledge. They instructed counsel. Counsel was there effectively on record…he was there as a representative, not of EDF but as a representative in reality of the receiving parties, the Gardiners…".

12. As for the amount of the costs to be paid by the HMRC to the Gardiners the receiving party sought counsel's fees of £25,000 and £650 for bill preparation costs. The transcript of proceedings records that Deputy Master White took into account that 'the total that was at stake' in the appeal from the penalty imposed by the HMRC was less or similar to the amount of costs. The Deputy Master stated that the courts can look at other factors such as the novelty of the point, the importance to the client 'and all the other factors that are set out in what used to be called the Seven Pillars of Wisdom.' The Deputy Master recognised that

> "the fee is on the high side but it was an unusual case with important consequences…."

Deputy Master White considered that £25,000 was an excessive fee. He allowed £16,500 with £650 for preparation of the bill of costs.

Grounds of Appeal

Challenge to the order that the paying party pay the receiving party a sum in respect of counsel's fees

13. Ground (a):

> "The Deputy Master erred in finding that there was any liability upon the Respondents to make payment of fees for Counsel."

Ground (b):

> "The Deputy Master was not entitled to arrive at the conclusion that the Appellants were liable for the fees of Counsel based upon the evidence."

Challenge to the amount of the costs order

Ground (c):

> "The fee awarded for Respondents' Counsel's fees was not reasonable as between the parties on a standard basis."

Grounds (a) and (b)

14. It has been established since the judgment in **Harold v Smith** [1860] 5 H. & N. 381 that:

> "Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the indemnification can be found out the extent to which costs ought to be allowed is also ascertained."

This has become known as the indemnity principle.

15. Mr Irwin, counsel for the HMRC rightly stated that at the heart of this appeal is the indemnity principle. He submitted that in applying that principle the Deputy Master should have considered two questions. First, what counsel described as 'the threshold question': whether the receiving party had established the contractual basis for a retainer between the receiving party and EDF or between that party and counsel. Second, if there was such a retainer whether it was a term of such a retainer that in fact in no circumstances would the receiving party have a liability to pay counsel's fees.

16. There is little difference between Mr Irwin for the paying party and Mr Gordon for the receiving party as to the legal principles to be applied in deciding whether the Deputy Master erred in holding that the receiving party was entitled to costs from the receiving party in respect of counsel's fees.

17. It was not in dispute that on the first question, the receiving party bears the burden of proving that there was a contractual retainer between the receiving party and EDF in respect of the instruction of counsel. It was not suggested that there was a direct contractual relationship between the receiving party and counsel. Once the receiving party has established the existence of such a retainer, a presumption arises that the paying party is liable for their costs. The presumption can be rebutted if there is an express or implied agreement that the receiving party would not have to pay the costs at issue in any circumstances.

18. Mr Irwin contended that Deputy Master White erred in law in proceeding on the basis that there was a contractual retainer between the receiving party and EDF without properly considering the issue.

The Authorities

19. Mr Irwin relied upon **Gundry v Sainsbury** [1910] 1 KB 645 in which the Master of the Rolls, Cozens-Hardy, on the second ground for dismissing an appeal by a plaintiff who failed in obtaining a costs order in his favour, held that there had been no evidence before the county court of a verbal agreement between solicitor and client. There was some difference between the judges as to whether by reason of the **Solicitors Act 1870** that agreement had in any event to be in writing. It was said that as in **Gundry** in this case there was no evidence of a retainer.

20. Counsel then referred to **Adams v London Improved Motor Coach Builders Limited** [1921] 1 KB 495, in which the claimant member of a trade union recovered costs of solicitors notwithstanding that it was his union who instructed solicitors. Mr Irwin referred to the judgment of Bankes LJ at page 500 in which he held that on the facts only one conclusion was possible – that the solicitors were engaged to act as solicitors for the plaintiff. Reference was also made to the judgment of Atkin LJ at page 502 in which he held that an agreement between the plaintiff and the solicitors could be inferred. Mr Irwin pointed out that the whole of the analysis in **Adams** was directed to the question of whether the plaintiff was entitled to recover solicitors' fees from the paying party. In this case the issue was whether there was an agreement that the receiving parties pay counsel's fees. The burden is on them. It was submitted that the question is whether there is a direct liability on the receiving party to pay counsel, Mr Gordon. It was submitted that there was no such evidence in this case.

21. Mr Irwin referred to **Lewis v Averay (No 2)** [1973] 1 WLR 510 in which the successful unassisted defendant applied for costs from the Legal Aid Fund. The application was refused on the basis that he had been supported by the AA. The Court of Appeal granted the application on the basis that costs were incurred by the defendant. Lord Denning MR held at page 513 that

> "The truth is that the costs were incurred by Mr Averay, but the Automobile Association indemnify him against the costs."

If he recovered the costs he could then reimburse the AA.

22. Reference was then made to **R v Miller** [1983] 1 WLR 1056 in which Lloyd J sitting with assessors considered the burden of proof in costs applications in criminal cases. Notwithstanding that the applications arose in criminal cases both counsel considered the case relevant to the current appeal, Lloyd J at p 1061 F-G explained that the burden of proof on the receiving party to establish a retainer could be discharged by showing that the receiving party was a party to the proceedings and that the solicitors whose costs were claimed were solicitors on the record and the party was their client. A presumption arose that he was personally liable for their costs. That presumption could be rebutted if it were established that there was an express or implied agreement that the party would not have to pay their costs in any circumstances.

23. Mr Irwin referred to the judgment of the Court of Appeal in **Thornley v Lang** [2004] 1 WLR 378. The claimant bus driver claimed damages for personal injuries. His trade union instructed solicitors to act for him under a collective conditional fee agreement. The successful claimant claimed costs. The defendant's insurers argued that as the requirements for insurers CFAs had not been complied with the claimant had no liability to pay a success fee and they therefore should not be ordered to pay costs. The court held that the CFA Regulations did not apply and the claimant was liable to pay the solicitors' costs. A costs order in his favour was therefore to be made.

24. Counsel drew attention to the observations of Lord Phillips MR in **Thornley v Lang** at paragraph 6 in which he said of litigants funded by third parties:

> "When defeated by such a litigant, unsuccessful parties have, on occasion, invoked the indemnity principle in an attempt to

> avoid paying costs. The argument advanced has been that the successful litigant is not liable for his costs and therefore, has no right to recover them. The courts have had no truck with such arguments. They have defeated them by finding that, in the circumstances under consideration, the litigant comes under an independent obligation, albeit one that is unlikely to be enforced, to pay the fees of the solicitor who is acting for him."

25. As did Mr Gordon, Mr Irwin referred to the important passage in the judgment of Bankes LJ in **Adams** cited in **Thornley** in which he held at paragraph 501:

> "When once it is established that the solicitors were acting for the plaintiff with his knowledge and assent, it seems to me that he became liable to the solicitors for costs, and that liability would not be excluded merely because the union also undertook to pay the costs. It is necessary to go a step further and prove that there was a bargain, either between the union and the solicitors, or between the plaintiff and the solicitors, that under no circumstances was the plaintiff to be liable for costs. In my opinion the evidence falls short of establishing that necessary fact, without which the defendants are not entitled to succeed."

26. Relying on **Adams** cited in **Thornley** Mr Irwin emphasised that a receiving party needs to demonstrate that there was a direct contractual relationship between, in that case, the solicitor and the client. It was submitted that in this case there was no such contractual liability by the paying party to EDF. Nor was it asserted that the receiving party entered into an agreement with Mr Gordon under Direct Professional Access arrangements.

27. Mr Irwin also referred to **Edwin Coe LLP & Anr v Popat** [2013] EWHC 4524 in which Mr Justice Vos, as he then was, held in a case in which a third party paid the solicitors' costs of the successful claimant that once it is accepted as it was, that Ms Popat would have to pay the fees if the third party had not paid them, the indemnity principle was not infringed. Ms Popat was entitled to recover costs from the losing side. Their appeal from the Master was dismissed. Mr Irwin sought to distinguish **Popat** from the current appeal as in that case the judge held it clear, as did the Master, that Ms Popat was liable to pay the costs at all stages up to the time when the third party discharged the liability. Counsel submitted that unlike Ms Popat it had not been established in this case that the receiving parties had at any stage been liable to pay the fees of counsel.

28. The final authority referred to by Mr Irwin was **Fitzpatrick v Allan Associates Architects Ltd** [2015] NI QB 41 although no additional principle was said to be derived from that case.

29. The thorough exposition of the relevant authorities by Mr Irwin was most helpful. Mr Gordon did not seek to add to those authorities.

30. The authorities establish the following relevant principles applicable to the making of a costs order in favour of a successful party in circumstances in which another body

or individual has undertaken to meet those costs. The indemnity principle will not be infringed if:

1. The putative receiving party establishes a contract with solicitors or representatives to act on their behalf;
2. The contract derives from a retainer or agreement which may be express or implied;
3. The receiving party may have sole liability for costs or dual liability with a solicitor or other representative or by reason of the solicitor or representative acting as their agent;
4. Absent an express term to that effect it is likely to be an implied term of such a contract that the client will be liable for costs incurred on his behalf;
5. If the receiving party establishes a contractual liability to pay the costs at issue, it matters not that it is highly or vanishingly unlikely that the receiving party will in fact be called upon to pay those costs. It is liability to pay rather than who makes payment which is material.
6. The presumption that a client instructing a solicitor or representative to represent them will be liable for costs incurred for such representation may be rebutted by the paying party proving that there was a bargain between the client and the representative that under no circumstances was the client to be liable for costs.

31. Insofar it was suggested by Mr Irwin that even after a contract was established under which liability for the costs at issue arose, the burden remained on the putative receiving party to prove that there were no circumstances in which he would not be liable for costs such a submission is contrary to the dictum of Bankes LJ in Adams at page 501. Such a submission, if it was maintained, would represent the only difference between counsel on the principles of law to be applied to the issue before the court.

Grounds of Appeal (a)

32. Mr Irwin contended that on the facts Deputy Master White erred in holding that there was any liability on the Gardiners to pay counsel. He pointed out that it was not asserted on behalf of the Gardiners that there was any direct retainer in place between them and counsel. Further, counsel contended that in contrast to the authorities referred to on the application of the indemnity principle where the receiving party did not bear the sole liability for meeting costs, in this case EDF did not act as agent for the Gardiners in instructing counsel. Accordingly it was said that the Deputy Master failed in paragraphs 38 and 40 of his judgment to address 'the threshold question' of whether the Gardiners had established a contractual liability to pay counsel's fees.

33. Mr Gordon submitted that Deputy Master White did not fail to address the threshold question of whether the Gardiners had established a contractual liability to pay counsel's fees. Deputy Master White had before him the Order of Tribunal Judge Cannan pursuant to which he was to assess costs. The order shows that counsel, Mr Gordon, was instructed by EDF Tax Limited and appeared for the Gardiners.

34. Mr Gordon referred to the **Tribunal Procedure (First-Tier Tribunal) etc Rules 2009** which by Rule 11 (3) provides that

> "Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by a representative of that party, except signing a witness statement."

Mr Gordon submitted that it cannot be right that there is a distinction in the application of Rule 11 to solicitors and to tax advisors. Solicitors can instruct counsel on behalf of and as an agent for their client. So too can a tax advisor such as EDF. A tax advisor can instruct counsel. It cannot be right that for a client to recover counsel's fees in an application for costs they have to enter into a separate Direct Professional Access agreement with counsel. In this case EDF were on the record. They instructed counsel. Mr Gordon referred to the costs judgment of Tribunal Judge Cannan in which he was referred to as acting on behalf of the Gardiners and to the order which recorded that he was instructed by EDF on behalf of the Appellants, the Gardiners. It was submitted that Deputy Master White considered and decided the issue of whether there was a contractual retainer between the Gardiners and EDF pursuant to which EDF were to conduct litigation on their behalf before the First-Tier Tribunal. Further, his consideration included the issue of whether that contractual retainer applied to the instruction of counsel.

35. At paragraph 38 the Deputy Master fully recognised that the litigation was to be funded by EDF. The Deputy Master said:

> "Obviously I have to be satisfied they were acting on his behalf and on the balance of probabilities they were and must have been, looking at the history of it, and indeed they were undertaking work on his behalf for which they are not pursuing costs for other reasons but it is clear to me that they instructed counsel on behalf of the receiving party and that has been made clear."

EDF were not pursuing their own costs. Deputy Master White considered whether pursuant to their agreement with EDF counsel was instructed to appear on behalf of the Gardiners. At paragraph 28 the Deputy Master set out his reasons why he concluded that EDF were acting on behalf of the Gardiners when instructing counsel. The Deputy Master held:

> "38. …I have seen the correspondence wherein there is an email from the EDF to the receiving party about instructing counsel, about the fees, about how it is going to be paid for which is not the same thing as liability to pay, and I have seen terms and conditions that were sent so they were clearly acting on his behalf."

At the hearing before me Mr Irwin stated that this email was sent after the success of the appeal before the First-Tier Tribunal. The substantive hearing took place on 29 April 2014. The email was dated 19 November 2014. It was therefore written before the success of the application for costs under Rule 10 (1) (b) of the Tribunal Rules before Judge Cannan on 2 December 2014.

36. At paragraph 40 Deputy Master White held of EDF:

> "They were acting on his behalf and with his knowledge they instructed counsel."

The Deputy Master held that counsel appeared as a representative not of EDF but in reality of the receiving parties, the, Gardiners.

37. In my judgment Deputy Master White did not err in failing to consider and decide the threshold question of whether the Gardiners had established a contract under which they had a liability to pay counsel's fees. Deputy Master White heard evidence from Mr Macleod of EDF who he found to be an entirely honest witness. Mr Macleod was frank about the possible or probable benefit to EDF in funding the case. However EDF were acting for the Gardiners. The Deputy Master did not err in so finding.

38. Deputy Master White made the following findings of fact regarding liability to pay counsel's fees:

> "16. The other significant evidence that Mr Macleod dealt with was in what conversations, discussions, emails there were with Mr Gardiner about the liability to pay counsel's fees and what he said in previous evidence in writing that he had never informed Mr Gardiner or the receiving party that they would never or not be liable for counsel's fees, in those terms. Also in his witness statement he said that he was not aware of any agreement between counsel's clerk and receiving party that the receiving party would not be liable for counsel's fees.
>
> 17. From the facts it was clear from the email that was specifically referred to, that EDF, (Mr Macleod), said that they would pick up the tab, be responsible for, and would pay for counsel.
>
> 18. I am also persuaded that there was no agreement at any stage with Mr Gardiner or receiving parties that under no circumstances would there be any liability for payment of counsel's fees."

Those findings of fact are not challenged.

39. Applying the authorities and in particular having regard to the dicta of Bankes LJ in **Adams** and Lord Phillips in **Thornley,** Deputy Master White did not err as asserted in Ground (a). He did decide that there was a contract between the Gardiners and EDF for provision of representation before the First-Tier Tribunal. That representation included instructing counsel. EDF acted as agent for the Gardiners in instructing counsel. The Deputy Master did not err in deciding that such instruction was on behalf of EDF. Neither did he err in proceeding on the basis that EDF acted as agents for the Gardiners in instructing counsel. The present case is materially indistinguishable in this respect from other cases in which claimants are funded by third parties such as trade unions. Frequently, as in this case, litigation is funded by the third party to further their own interests as well as those of the funded party. However that does not negate the liability of the funded successful claimant to pay for legal fees incurred albeit met by a third party acting as his agent in giving instructions.

40. Ground of Appeal (a) does not succeed.

Ground of Appeal (b)

41. Mr Irwin submitted that on the evidence before him Deputy Master White was not entitled to conclude that the Gardiners were liable for the fees of counsel.

42. In his oral submissions Mr Irwin submitted that an email shown to the Deputy Master, page 548 of the bundle before him from EDF to the Gardiners which referred to counsel's fees was not enough on its own to give rise to a liability to pay fees. It was said that the email was written after the success of the appeal hearing before the First-Tier Tribunal. Accordingly it was said that Mr Macleod writing:

> "If we did win but the Tribunal said that the money had to go to you rather than EDF am I right in assuming you would reimburse us"

was insufficient to show that the Gardiners had a liability for counsel's fees.

43. Mr Irwin relied also on the finding by the Deputy Master at paragraph 17:

> "From the facts it was clear from the email that was specifically referred to that EDF (Mr Macleod), said that they would pick up the tab, be responsible for, and would pay for counsel."

44. Mr Gordon submitted that on the evidence the Deputy Master was entitled to conclude that there was no agreement that the Gardiners would never be liable for counsel's fees.

45. Deputy Master White made a finding of fact at paragraph 40 that:

> "There was no agreement he [Mr Gardiner] would never be liable for counsels fees".

The Deputy Master had found that EDF were acting for the Gardiners with their knowledge and assent in instructing counsel. Applying the judgment of Bankes LJ in **Adams** the Gardiners became liable for his costs. The Deputy Master applied the approach of Bankes LJ in holding that unless the paying party proved that there was a bargain in this case between the Gardiners and EDF that under no circumstances was the plaintiff to be liable for costs. The indemnity principle was not infringed by an award of costs.

46. Deputy Master White recorded in paragraph 16 the written evidence of Mr Macleod which supported his finding of fact in paragraph 40:

> "he had never informed Mr Gardiner or the receiving party that they would never or not be liable for counsel's fees, in those terms."

The Deputy Master said:

> "18 I am also persuaded that there was no agreement at any stage with Mr Gardiner or receiving parties that under no circumstances would there be any liability for payment of counsel's fees."

In my judgment this evidence supports the conclusion of the Deputy Master in paragraph 40 that:

> "There was no agreement he would never be liable for counsel's fees."

47. Ground of Appeal (b) does not succeed.

Ground of Appeal (c)

48. HMRC appeals from the amount of the costs they have been ordered to pay. These are in the sum of £16,500 for counsel's fee and £650 for drafting the bill of costs. Mr Irwin submitted that counsel's fees were disproportionate. It was said that the Deputy Master had before him emails which showed that alternative counsel would have undertaken the same work for a fee of £10-15,000. Further, it was said that there was no need to instruct London counsel. The case was to be heard in Manchester. Manchester counsel could have been instructed with a saving of fees and travel costs. From the time when it was clear that HMRC would not put in evidence it was apparent that the Gardiners would succeed in the First-Tier Tribunal.

49. Mr Gordon submitted that the case was of general importance. It was reasonable and proportionate to instruct experienced tax counsel. It was said that although the case was won on a preliminary point counsel was required to prepare for a full day's trial. The hearing had originally been listed for two days.

50. As can be seen from page 74 of the transcript of the proceedings before him Deputy Master White was of the view that counsel's fees of £25,000 claimed was on the high side but this was an

> "unusual case with important consequences."

The Deputy Master reminded himself of the need to consider proportionality and that the amount at stake, the penalty at issue being similar to the amount of costs, but also the importance of the case. Accordingly the Deputy Master reduced the amount allowed in respect of counsel's fees to £16,500.

51. The sum awarded may well have been appropriate for preparation and a hearing which was going to be strongly contested by HMRC. The justification for supporting an award of this level advanced by Mr Gordon in paragraph 31 of his skeleton argument was that there was a risk that HMRC

> "would have belatedly seen the need to adduce live witness evidence…"

Counsel submitted that this necessitated some anticipatory preparatory work to ensure that any such witness could be effectively cross-examined. In my judgment this does not support maintaining fees at a level which would be justified for a fully contested

hearing with witnesses. A paying party should not have to meet costs incurred for work which is not necessary but is carried out of an abundance of caution.

52. In deciding whether counsel's fee for the preparatory work for and the hearing in Manchester on 29 April 2014 the Deputy Master was not informed of the date in which EDF were told by HMRC that they were not going to adduce any evidence. That step would have substantially reduced the amount of work necessary to prepare for the hearing. It is for the party seeking costs to show that such costs are reasonably incurred and are proportionate. The judgment of Judge Cannan shows that at about the same time as Mr Gordon was instructed, at the beginning of March 2014, EDF were informed by HMRC that they were not going to call any evidence. EDF stated that they had been advised that the appeal should be summarily allowed. In my judgment the sum of £16,500 which may well have been appropriate for a fully contested hearing was too high for the appeal which was known well in advance would not to be vigorously resisted. The sum of costs awarded in respect of counsel's fee is reduced to £12,000.

53. Ground of Appeal (c) succeeds. The final costs certificate of Deputy Master White is reduced by £4500 to £15,325.

Disposal

54. The appeal from the making of an order that HMRC pay costs to the Gardiners is dismissed.

55. The appeal from the amount of the costs order succeeds to the extent that it is reduced by £4,500 to £15,325.

56. I have been assisted by the practical expertise of Master Haworth sitting as Assessor however the decisions reached are mine alone.