IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2013] EWHC 759 (QB)

No.QB/2013/0057

Royal Courts of Justice

Wednesday, 27th March 2013

Before:

SIR RAYMOND JACK

B E T W E E N :

BAKER TILLY (a firm) — Claimant

- and -

MIRA MAKAR — Defendant

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Transcribed by ***BEVERLEY F. NUNNERY & CO***
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

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MISS Z. LEVENTHAL (instructed by Reynolds Porter Chamberlain) appeared on behalf of the Claimant.

MR. D REES (instructed by the Official Solicitor) appeared on behalf of the Defendant.

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J U D G M E N T

(Approved)

SIR RAYMOND JACK:

1 This is an appeal against the order Master Leonard made in the Senior Courts Costs Office on 4th January 2013. The Master had stayed an assessment of costs proceeding before him pending the appointment of a litigation friend for the defendant, Mira Makar. Having heard submissions on 22nd March, I stated that the appeal would be allowed and that I would give my reasons subsequently.

2 The claimants are a firm of accountants who carried on business in the name of Baker Tilly. They were instructed by the defendant, Miss Mira Makar, in connection with a claim against her former employees, Triad Group Plc. She had been the company's chief executive officer and was also a substantial shareholder. On 26th June 2007 Baker Tilly commenced proceedings against Miss Makar to recover their fees. By a judgment given on 17th July 2009 Miss Makar was ordered to pay Baker Tilly £35,250 together with interest, and £100,000 on account of costs. An order was made for detailed assessment of costs. Interim charging orders were made on 11th September 2009 which were eventually made final on 21st April 2011. However, they have not been executed. Meanwhile, Miss Makar had sought to appeal the judgment, but failed to obtain permission. A further order for costs was made against Miss Makar in respect of the costs of the appeal.

3 The process of detailed assessment in the Senior Courts Costs Office of Baker Tilly's costs began on 28th October 2009. The sum claimed is £520,340. The assigned costs judge was Master Leonard. After many delays the hearing eventually began on 17th July 2012. That day appears to have passed without particular incident. But the next day, following her complaint that Master Leonard had refused to accept documents by email, Miss Makar became tearful. The Master suggested a break so she could compose herself. She went into the corridor and became very much distressed. She lay rolling on the floor of the corridor screaming. After a little, she calmed down. Her conduct gave the Master concerns as to her capacity to conduct the assessment proceedings. He sought to involve the Official Solicitor but Miss Makar would not co-operate by allowing access to her medical records. He later made an unless order requiring her to do so or be barred from taking further part in the assessment which would then proceed on the basis of her written points of dispute. He subsequently became concerned that this stay was not a proper procedure and convened a further hearing on 3rd December to consider what should be done. His order providing for that attendance required the parties to attend and show cause why the unless order should not be revoked and replaced with an order that Baker Tilly be directed to nominate an independent litigation friend to be appointed to represent Miss Makar, or that an interim costs certificate be issued and directions be given for the relisting of the final assessment hearing. At that hearing on 3rd December, Miss Makar confirmed that she was not prepared to co-operate in assessing her capacity.

4 On 4th January 2013 Master Leonard delivered a judgment of 53 paragraphs in which he considered in detail the facts, the law and what he should do. He

concluded that Miss Makar did not have capacity to manage the assessment and that the assessment must therefore be stayed pending the appointment of a litigation friend. He set aside the unless order, having concluded that it should not have been made. He pointed out that it was open to Baker Tilly to apply under r.21.6(ii) for the appointment of a litigation friend and that it might be necessary for Baker Tilly to indemnify the litigation friend against liability for costs and to meet the litigation friend's charges. He refused Baker Tilly permission to appeal against the order for a stay but permission was granted by Eady J. on 4th February. Mr. Justice Eady also ordered that the hearing of the appeal be expedited. That was, no doubt, because Master Leonard had set aside the three days, 10th to 12th April to continue with the assessment should the stay be lifted.

5 Part 21 of the Civil Procedure Rules deals with children and protected parties. By r.21(1)(ii)(d) a protected party means a party or intended party who lacks capacity to conduct the proceedings. By r.21(1)(ii)(c) lacks capacity mean lacks capacity within the meaning of the Mental Capacity Act 2005. Rule 21(2)(i) provides that a protected party must have a litigation friend to conduct proceedings on his behalf. Rule 21(3)(iii) provides that if during proceedings a party lacks capacity to continue to conduct proceedings, no party may take any further step in the proceedings without the permission of the court until the protected party has a litigation friend. Rule 21(3)(iv) provides that any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise. So if a party to litigation becomes lacking in capacity no further progress can be made until a litigation friend is appointed. This is subject to the exception provided by r.21(3)(iii) that the court may give permission for a step or steps to be taken in the proceedings, nonetheless. The second exception provided by r.21(3)(iv) that the court may order that a .(?). shall nonetheless have effect. The latter provision may be directed at steps which have been taken before the need for a litigation friend was realised.

6 I turn to the Mental Capacity Act 2005 for its definition of lacking capacity. Section 2 of the Act is headed: "People who lack capacity". Sub-sections (1) to (4), read 2.1:

> "For the purposes of this Act a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain;
>
> "(ii) It does not matter whether the impairment or disturbance is permanent or temporary;
>
> "(iii) a lack of capacity cannot be established merely by reference to (a) a person's age of appearance or (b) a condition of his or an aspect of his

behaviour which might lead others to make unjustified assumptions about his capacity.

"(iv) In proceedings under this Act or any other enactment any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Thus the Act ties capacity to the ability to make decisions in relation to the matter in question at the time to which the issue of capacity arises, but this must arise from, to summarise, a disturbance of the mind. Section 3 is headed: "Inability to make decisions" and it makes provision as to where a person is to be treated as unable to make decisions for himself.

7 (1) of the Act sets out six principles which "apply for the purposes of this Act". (2), (3) and (4) are particularly relevant here:

"(2) a person must be assumed to have capacity until it is established that he lacks capacity;

"(3) a person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success;

"(4) a person is not to be treated as unable to make a decision merely because he makes an unwise decision."

It was suggested on behalf of the Official Solicitor that these might not apply because r.21(1)(ii)(c) defines lacking capacity as lacking capacity within the meaning of the 2005 Act which would bring into play s.2 of the Act but not s.1. However, it seems to me that s.1 is to be applied in the operation of s.2 and so has to be taken into account when a question of capacity arises under the CPR. The most important ... in s.1 for present purposes is the assumption that a person has capacity unless it is established that he lacks capacity. That is also the position at common law.

8 The matter with which the court is concerned here for the purpose of s.2.1 is the costs assessment. Miss Makar lacks capacity in relation to it if she is unable to make decisions about it for herself because of an impairment of or a disturbance in the functioning of her mind or brain. In most cases where a question of capacity has arisen the person whose capacity is in question has co-operated with the court and the court has been provided with the assistance of appropriate medical experts as the court has to be satisfied that the lack of capacity involves an impairment of the mind to compress the definition. It is but commonsense that this should be so. But I refer to the judgment of Kennedy L.J. and *Masterman-Lister v. Brutton &*

Co. [2003] 1 WLR at 1511 and to the dictum of Rimer L.J. in *Carmarthenshire County Court v. Lewis* [2010] EWCA Civ.1567 where he said:

> "I cannot think that the court can ordinarily, by its own impression of the litigant, safely form its own view of that."

But counsel have not found any case where the court has had to resolve a situation as has arisen here where the litigant has refused to co-operate in an assessment of their capacity. One reason why it may be particularly difficult for a court to determine the capacity of a litigant who is appearing in person before the court and is the kind of litigant who attracts a civil restraint order is this, when the litigant wants something from the court, that is the claimant, or is making an application, the litigant may conduct themselves in one way, but where they are in the position of a defendant or an equivalent position they may see it as in their interest to conduct themselves quite differently with the object, put bluntly, of obstructing the proceedings. Further, in this connection it is important to have in mind s.2(3)(b) of the Act which I have already quoted.

9 In his judgment, Master Leonard summarised the evidence available to him. In particular in paragraph 24 he said:

> "I understand that M. continues to represent herself in other proceedings including complex multi-party proceedings in the Commercial Court. Presumably she has not conducted herself in those proceedings in any way that might give a judge cause for concern about her capacity. I can only deal with the proceedings and the evidence before me."

I will then attempt to summarise. Paragraph 25: he could not reach a conclusion simply based on an impression of her which is of a courteous, intelligent litigant, albeit one who does not know when not to speak and when she is not to the point. Paragraph 26:

> "Her conduct on 18th July exceeded distress attributable to the stress of litigation and having witnessed her behaviour, there is no doubt in my mind that M's distress was entirely genuine and her apparent mental breakdown entirely spontaneous and unfeigned."

He had described the events of 18th July in paragraphs 2 and 3 of his judgment. He had said:

> "At the beginning of the second day, 18th July, M. became extremely distressed. She told me that her distress was brought about by being in a hurry to get to the hearing and so being unable to help a person who was I believe seeking directions. My own impression is that the incident was

> precipitated when I referred to M.'s attempts to make submissions by email. In any event M.'s distress on 18th July was so acute that she lay on the floor of the corridor close to my room screaming as such volume and at such length as to attract a number of enquiries from other floors of the building it was necessary to summon medical and security assistance."

In paragraph 27 the Master stated:

> "The events of 18th July lead me to the conclusion that M. has been suffering from a disturbance of the mind. For reasons I shall set out, I have no reason to believe that her state of mind has improved since 18th July."

This was a crucial finding and is at the heart of the matter.

10 In paragraphs 28 and to 44 he reviewed her conduct as a litigant in person. Much of it was typical of a vexatious litigant. Thus, taking the first three of these paragraphs, paragraph 28:

> "In the assessment she had vigorously and repeatedly pursued points of no merit.
>
> "29. She referred to irrelevant material and was repetitive.
>
> "30. She asserted that the Senior Court Costs Office had no jurisdiction to assess costs because the Baker Tilly partnership no longer existed having been dissolved and the proceedings were void."

I should refer to paragraph 23 where he stated that on 3rd December he saw no improvement in her state of mind and he was struck by her recollecting the events of 18th July, but had no understanding that her behaviour was inappropriate. He then came to his conclusions. He said that he had already concluded that she suffered from a disturbance of mind. That is a reference to paragraph 27 which I have read. He said that she did not understand the information relevant to the decisions she was called upon to make relevant to the assessment. There was no doubt that there was sufficient reason to doubt her capacity to justify a stay pending the resolution of the capacity issue, otherwise she might be deprived of a fair hearing. The question was whether he could make that finding now. He approached it with caution because of the lack of medical evidence because all the indications were that Miss Makar would not permit medical evidence to be obtained. Adjournment pending receipt of medical evidence might be permanent which would be unfair to the claimant. If he was to do justice to both parties he should reach a conclusion on the evidence. He had. It was that she lacked capacity to manage the litigation. In reaching that conclusion he was aware of the danger of depriving her of the right to represent herself. The Official Solicitor stood ready to

assist her at no cost to her. It was open to Baker Tilly to apply under CPR 21.6(2) for the appointment of a litigation friend, though Baker Tilly might have to provide an indemnity against costs and to meet professional charges. That could be claimed in the assessment of the Master's statement.

11 The hearing of the appeal against Master Leonard's order was listed before me on 15th March. The Official Solicitor had agreed to represent Miss Makar for the purpose of the appeal having been provided with an indemnity against costs by Baker Tilly. The Official Solicitor had written a letter to Miss Makar which had, unfortunately, referred to the hearing as being on 15th April rather than 15th March. Miss Makar was not present and I felt bound to adjourn the hearing to 22nd March. I made an order to ensure that Miss Makar was aware of the new date. I also made an order formalising the position of the Official Solicitor by appointing the Official Solicitor as Miss Makar's litigation friend for the purpose of the appeal. That was as far as the Official Solicitor was prepared to be involved at least at this stage. Miss Makar subsequently sent a letter to the Official Solicitor which showed that she had received the notification. She gave no instructions nor did she indicate her attitude to the appeal and she did not attend the hearing on 22nd March. She had, however, on 28th February sent a long email to the court. Paragraph 7 shows that she considered that she did have capacity. Because the Official Solicitor had not been able to consider the appeal with Miss Makar, Mr. David Rees, appearing for the Official Solicitor, was not in a position to take a line supporting or resisting the appeal provided such help to the court as he could. On 15th March following the abortive hearing, Baker Tilly issued an application that the court should make an interim costs certificate with an order for payment. It will be remembered that this was the alternative posed by Master Leonard in his order directing attendance on 3rd February 2012.

12 I come to the merits of the appeal. When he made his decision the Master had only his own impression of the incident on 18th July. It was that on which he based his conclusion that Miss Makar suffered from "an impairment of or a disturbance in the functioning of the mind or brain". He had heard but had not seen the incident outside his room, and he had no evidence about it apart from his own impression. I have had the advantage of a witness statement from Miss Penrose Foss, general counsel for the Baker Tilly Group. She attended the hearing before Master Leonard. She was collecting her papers in the Master's room after Miss Makar had gone out when she heard Miss Makar talking very loudly in the corridor. She went out and heard Miss Makar talking to two people. Miss Makar started to scream. Miss Foss then saw Miss Makar on the floor rolling from side to side, screaming. Miss Foss went back into the Master's room and suggested he call security and an ambulance. She took some water to Miss Makar. Miss Makar got up onto her knees but continued to scream. Miss Foss moved away. She heard Miss Makar become quieter. Miss Makar was ushered by a security officer into a consulting room. Miss Foss heard Miss Makar asking in a calm voice what the security

officer's name was saying that she wanted to make a note of it. She could then hear through the closed door that Miss Makar was speaking and that on occasion her voice rose. She was apparently talking about the Master's refusal to accept documents electronically.

13 This incident was plainly serious and distressing and it did involve a complete loss of self-control by Miss Makar. It was, however, over quite quickly and Miss Makar then became calm. It is not wholly clear what caused her loss of control. It may have been her frustration at the Master's refusal to accept documents from her electronically. The Master referred in his judgment to Miss Makar's other litigation saying he would only deal with the proceedings in evidence before him. In my view he should have taken into account what was known as to Miss Makar's ability to conduct other proceedings without the judges involved becoming concerned as to her capacity, in particular as to whether she was suffering from a disturbance of her mind. On 23rd October 2012, Master Leslie gave a judgment dismissing an application made by Miss Makar in the Baker Tilly action itself as being misconceived and ill-founded. He referred to Master Leonard's concern as to Miss Makar's capacity and his directions as to the Official Solicitor. He said: "So that remains live but not before me". In short, he felt able to proceed on the basis that she lacked capacity.

14 In November 2012 Miss Makar appeared before Mr. Justice Andrew Smith over several days. On 19th November 2012 he delivered a judgment in Miss Makar's action against Russell Jones & Walker Solicitors who had acted for her in her litigation against the Triad Group and 62 other defendants. The judge struck out the claims against the great majority of the defendants, I think against all of those who were involved in the strike out application. He considered subsequently whether a civil restraint order should be made against Miss Makar and on 5th December 2012 deliver the judgment concluding that it should be. At the start of paragraph 23 he said:

> "23. At least five of the judges who have had involvement with the litigation to which I referred in my judgment clearly considered that the claims or applications made by Miss Makar were totally without merit whether or not they used precisely that expression."

He then went on to refer to a number of other hearings naming the judge's involved. Paragraph 24 he said:

> "I do not question the sincerity with which Miss Makar seeks to pursue litigation against persons involved with the employment tribunal proceedings and proceedings consequent upon them. However, she has involved many people, including some who have had little, if anything, to do with the matters about which she complains, in the expense and some

> anxiety of proceedings, which were not justifiable on any proper legal basis and which could never have been justified. The intensity of her feelings about this matter is clear. This is confirmed by further communications that I have received from her since 19th November 2012. It is clear that unless restrained she will continue to bring further proceedings and applications."

15 He also at some point in the matters which are before him said the following, which I take from Miss Makar's email to the court of 28th February which I have mentioned. Miss Makar is plainly quoting from a transcript. The passages of the eleven pages of the email it reads:

> "Firstly, no-one can doubt Miss Makar's sincerity. Secondly, I have already commented how carefully she observed the time limits that I requested of her; thirdly, in the case of the issue of the default judgment she was entitled to enter judgment and no complaint can be made about that; fourthly, she put forward documents before the court. They were extensive but she did not labour them; fifthly, throughout she has addressed the court with courtesy."

It is apparent from Master Leonard's judgment, holding that lack of capacity was established, that he based his finding and that it arose "because of an impairment of or a disturbance in the functioning of the mind" on the incident of 18th July. That involved a serious loss of control but a brief loss of control from which Miss Makar quickly recovered enough to be asking a security officer for his name. That incident has to be considered against the background of Miss Makar's appearances before other judges in the same period where no question as to capacity had arisen. The absence of medical evidence cannot be a bar to a finding of lack of capacity but where most unusually circumstances arise in which medical evidence cannot be obtained, the court should be most cautious before concluding that the probability is that there is a disturbance of the mind. The Master recognised that. Such a finding is a serious step for both parties. It takes away the protected party's right to conduct their litigation. It may constitute, and here would constitute, a serious disadvantage to the other party.

16 I have concluded that the Master put more weight on the incident of 18th July than it could bear and that he should have taken into account Miss Makar's appearances before other judges. I also bear in mind that I have a more complete description of the incident than was before the Master. In all the circumstances he should not have concluded that it was established that Miss Makar lacked capacity and he should not have stayed the assessment pending the appointment of a litigation friend for Miss Makar. There is then no bar to Baker Tilly's application for an interim costs certificate proceeding before Master Leonard on 10th April. I declined to hear it myself because I considered that the Master with his experience

would be in a much better position to assess how vulnerable to attack Baker Tilly's bills of costs, which were before him, were and in what figure he could safely grant an interim certificate. I record my impression that it is the intention of Baker Tilly then to ask the Master to stay the assessment while they seek to enforce the judgments and orders which they will then have against Miss Makar.

17 If I had concluded that the appeal against the Master's finding of lack of capacity should be dismissed and that his finding of lack of capacity should stand, I would have had to consider whether it was appropriate in all the circumstances that had arisen to give Baker Tilly permission pursuant to r.21(3)(iii) to apply for an interim certificate. I would have had to have taken into account the evidence filed by Baker Tilly as to its attempts to find a costs draughtsman who was prepared to act as a litigation friend for Miss Makar in the assessment, and I would have had to consider fairness between the parties, in particular what unfairness might result to Miss Makar if the court proceeded to make an order for an interim certificate. That, however, does not now arise.

SIR RAYMOND JACK: Yes, is there anything to be said?

MISS LEVENTHAL: My Lord, I appear on behalf of Baker Tilly. Mr. Forsdick said he intends no disrespect and was not able to attend today.

SIR RAYMOND JACK: Yes, I had an email from him. Thank you for attending.

MISS LEVENTHAL: My Lord, there are two matters to raise with your Lordship.

SIR RAYMOND JACK: Yes, just give me a moment will you? (After a short pause) Yes, Miss Leventhal?

MISS LEVENTHAL: My Lord, the first is a procedural one and that is as to the form of the order, namely that the stay should be lifted and proceedings should be heard on 10th April as your Lordship has indicated. There is one other small procedural matter and that is that the application ----

SIR RAYMOND JACK: The order will say, I am rather thinking out loud, that the appeal allowed, stay set aside or whatever, application interim certificate, referred to Master Leonard.

MISS LEVENTHAL: Indeed, my Lord.

MR. REES: Would your Lordship also provide that the appointment of the Official Solicitor as litigation friend comes to an end? I think the rules require for a formal order to that effect.

SIR RAYMOND JACK: Certainly. Does one discharge an appointment?

MR. REES: Yes, the rules to the appointment coming to an end.

SIR RAYMOND JACK: If that is what the rules say we will say come to end.

MR. REES: And is thereby discharged as litigation friend.

SIR RAYMOND JACK: Yes. You can work out a wording with Miss Leventhal. Are you going to draw up this order? I think you are.

MISS LEVENTHAL: Yes, of course. I can do so, my Lord. There is one other matter, my Lord ----

SIR RAYMOND JACK: So you two will agree an order and then you submit to the associate.

MISS LEVENTHAL: There is one other matter which is the question of costs.

SIR RAYMOND JACK: Yes.

MISS LEVENTHAL: We ask that the costs of the appeal be costs in the assessment proceedings.

SIR RAYMOND JACK: I think you are still in the saddle for that one. Are you happy with that?

MR. REES: No, my Lord, I was going to make a submission that there should be no order for costs on the appeal.

MISS LEVENTHAL: My Lord, before my learned friend does so might it be appropriate for me to say why it should?

SIR RAYMOND JACK: Yes.

MISS LEVENTHAL: My Lord, as your Lordship's judgment has indicated, the reasons for these proceedings and the appeal have been unfortunately the obstructive conduct of Miss Makar. That is why we found ourselves in the position we have and that is why Master Leonard found himself in the position that he did. As your Lordship has indicated in the judgment, it was Miss Makar's failure to co-operate with the Official Solicitor and to breach the court orders which led Master Leonard to find he had no choice but to make the orders. We obviously have submitted that those orders were wrong and your Lordship has agreed, but our position is that it was the obstructive conduct of Miss Makar which has had as its consequence these

proceedings and it is only fair that my clients are not penalised by that and therefore are entitled to recover their costs of the appeal in which we have been successful. In the light of the terms of your judgment, my Lord, I do not think I need to go through the background...

SIR RAYMOND JACK: No.

MISS LEVENTHAL: Thank you. Yes?

MR. REES: My Lord, I should just mention that accommodation has been breached between the Official Solicitor and Baker Tilly in respect of the costs that were thrown away by the hearing on 15th March. I do not understand that any further application is intended to be made by my learned friend in respect of those costs.

SIR RAYMOND JACK: Right.

MR. REES: Nor do I understand them to be seeking to recover those costs as part of the costs order that my learned friend is currently making. So my Lord, my submissions relate to the cost of the appeal save for those costs that were thrown away, and in my submission the appropriate order in this case is one of no order for costs. This appeal grows entirely because of the decision that was made by the Master on the hearing of 3rd December.

Your Lordship will appreciate and it is set out at paragraph 1 of Mr. Forsdick's skeleton argument, that Miss Makar resisted the making of the order. She did not, it appears, seek a finding of incapacity, nor has she ever asserted, as far as one can see from the documents, that she is suffering from incapacity.

Once the Master had made his decision, certain procedural consequences under the CPR kicked in. The first of which was a litigation friend was required both in respect of the appeal and also in respect of the further proceedings. Now, the decision to proceed with the appeal was the choice of the applicant. Now, I appreciate in your Lordship's judgment your Lordship indicated there may well have been prejudice to the applicant of the finding of incapacity, but your Lordship will recall that last Friday I took your Lordship to the case of *Folks v. Faizey* and in particular to the dicta of Lord Justice Pill. I will take your Lordship to that very briefly. It is paragraph 19 behind tab 2 of my authorities bundle.

SIR RAYMOND JACK: Yes.

MR. REES: And it is simply the second sentence in paragraph 2 when he refers to the appointment of a litigation friend giving protection to them. That is for the other party as well as the appellant and his advisers. Indeed, Lord Justice Keene at paragraph 25. He also says at the end of paragraph 26:

" I can see no basis on which it can properly be contended that the defendant to this claim was at risk of suffering any prejudice from the appointment of a litigation friend; the reverse is in fact the case. It provides him with a degree of protection."

So the appointment of litigation friend, whilst it may have had a procedural disadvantage to the applicant in that there doubtless would have been a delay of the assessment proceedings it may, nonetheless, ultimately have provided protection. In any event, once the Master had made his decision, the appeal had to proceed. This is not a case where the appeal could have been allowed by consent. There are two reasons for that. Firstly, the Official Solicitor certainly was not in position to allow the appeal. Secondly, if I can take your Lordship to paragraph 13.1 of the Practice Direction, Part 52? Your Lordship will find that at p.1774 in the 2012 **White Book**. I understand the 2013 one was published today but I am hoping it has not reached the bench yet.

SIR RAYMOND JACK: Sorry, page again?

MR. REES: 1774, paragraph 13.1, "Allowing unopposed appeals or applications on paper", and your Lordship ----

SIR RAYMOND JACK: Can I just read it? (After a short pause) Yes, I see that is inappropriate, yes. I take your point that this appeal had to go ahead.

MR. REES: Yes, and because this appeal arises from the course of action which I would submit, my Lord, was imposed on the parties by the Master, the fairest result in the present case is there should be no order as to the costs of the appeal.

My learned friend argues that this was all caused by M. and her failure to consent to a medical examination, but your Lordship will appreciate that the court has no power to compel her to undergo such an examination -- or any individual to undergo such an examination, and there are, in my submission, my Lord, considerable dangers in the route of indirect compulsion. These are the dangers that Lord Justice Rimer essentially warned against in the *Carmarthenshire* case and the reason why, in my submission, the Master stepped back from the unless order that he had made in October was because unless orders, and in my submission costs orders as well, are essentially sticks that can be used to beat a party into undergoing a medical examination and, in my submission, my Lord, it would be inappropriate to visit costs consequences on M. in this particular case. Unless I can assist your Lordship on principle, I have a number of comments on the quantum of the costs that are sought.

SIR RAYMOND JACK: On the?

MR. REES: On the quantum of the costs that should be sought. I understand my learned friend is seeking summary assessment today. On principle those are my submissions that the appropriate order here is that there should be no order.

SIR RAYMOND JACK: I need not trouble you to reply, Miss Leventhal. The way that I view this is that this was, as it were, an incident that arose during the assessment. Certainly it was not the fault of the claimants, Baker Tilly, and I am going to proceed on the basis that neither was it the fault of Miss Makar, but to say that there should be no order as to costs would mean that Baker Tilly would inevitably have to pay these costs. If I treat the Master's finding and the appeal against it, as I put it, as an incident of the assessment then it is appropriate to treat the costs as in the assessment. So that will then depend upon what order is made as to the assessment. So I do not think in those circumstances I should be assessing the costs because I am not going to order that anything should be paid I am afraid.

MISS LEVENTHAL: Thank you.

SIR RAYMOND JACK: You may feel confident that at the end of the day that you will pick up these costs, but there is a possibility that you may not. Does that deal with everything?

MR. REES: Yes, my Lord.
