Case No: QB/2011/0275

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IN THE HIGH COURTS OF JUSTICE
QUEEN'S BENCH DIVISION
INTERIM APPLICATIONS

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 8th July 2011

BEFORE:

MR JUSTICE BURNETT

BETWEEN:

KYNASTON

Applicant

- and –

CARROLL

Respondent

Litigant in Person

Approved Judgment

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MR JUSTICE BURNETT:

1. This is a renewed application for permission to appeal an order of Master O'Hare, dated 6th May 2011. Permission was refused by Griffith-Williams J on 23rd June 2011. His reasons were as follows:

> "The comments by other judges of the respondent's behaviour on other occasions are irrelevant. I have to determine whether there are arguable grounds for challenging the decisions of the Master. It is unnecessary to set out my reasons for concluding there are none and that the appeal is wholly without merit. All of the procedural points you made were considered by him in a reasoned judgment. His conclusions were neither, wrong in law or unreasonable. I do not understand your criticism of the Master not adjourning the hearing when you were taken ill. The transcript at page 29 indicates that he gave judgment in your presence, that there were then heated exchanges and a short adjournment, during which you returned to talk to the Master twice and said goodbye to him. He then proceeded to a summary assessment of the costs, as he was entitled to." (Quote unchecked)

2. The background to this case is extraordinarily complex in this sense; that it arises from litigation between the applicant and respondent that started, as I understand it, in 2001. There has been a really rather extraordinary litigation history involving dozens of applications. Be that as it may, Master O'Hare was involved in this matter in connection with the costs, which the applicant before me, Mrs Kynaston, has been ordered to pay to the respondent, Mr Carroll.

3. The order made by Master O'Hare was in connection with an application by the defendant, Mrs Kynaston, to vary an order for costs, which the Master had made on 21st February 2011. That order, that is to say the order made on 21st February and sealed on 23rd February, dealt with a number of procedural steps that needed to be taken to enable a detailed assessment to be completed. But paragraph 8 of that order ordered the defendant, Mrs Kynaston, to pay the claimant, Mr Carroll, the sum of £1,591.

4. At that hearing Mr Carroll had been represented by Mr Dominic Fynn, who is an employee of Compass Costs Consultants Limited, working under the supervision of Robert A Armstrong, who is a member of the relevant costs lawyers' professional body. The reason why Mrs Kynaston sought to vary the order for costs can, I hope without any disrespect to the arguments advanced, be reduced to a relatively simple proposition, it is this: that Mr Fynn was not authorised by legislation to conduct the costs proceedings or appear for Mr Carroll and thus, Master O'Hare should not have allowed any costs which arose from his involvement. The applicant, Mrs Kynaston, says that as a matter of law Mr Fynn should have been treated as a McKenzie Friend. If he was a McKenzie Friend then, applying well established principles, which are brought together in Practice Guidance published on 12th July 2010 by the Master of

the Rolls, any costs incurred in such representation are irrecoverable from the other side.

5. Master O'Hare dealt with all of the arguments that were advanced before him and have been repeated before me. Mrs Kynaston has suggested that Mr Fynn was a delegate of Mr Armstrong. The Master found, in my judgment correctly, that that was simply not so. Essentially he was working under his direction and control. The Master recognised that a schedule for costs that had been put in was signed: "Compass Costs" and indicated, at least arguably it should have been signed by Mr Armstrong. He rightly described that as unfortunate, but a technical problem, which did not go to the jurisdiction.

6. Master O'Hare went on to say that he considered this a straightforward case of a junior member of staff of an authorised person presenting the litigant's case to him in proceedings. He went on to say that this was:

> "Of a type which are commonly presented by junior staff to junior judges such as myself."

In that, Master O'Hare was being unnecessarily modest. Be that as it may, it seems to me that he was correct to conclude that the circumstances of Mr Fynn were amply covered by schedule 3 to the Legal Services Act 2007. The practice that Master O'Hare described is indeed commonplace and has always been understood as covered by that schedule.

7. Be that as it may, there is, as Master O'Hare recognised, a power in him to grant a right of audience if that were necessary and he would have done so. That is an entirely different matter from somebody attending a hearing as a McKenzie Friend. The guidance to which Mrs Kynaston has referred and with which I am sure she is more familiar than I, makes it plain that a McKenzie Friend may not act as an advocate for a litigant. A McKenzie Friend's role when attending court is a very much more limited one.

8. In all these circumstances I am quite satisfied that Master O'Hare's approach was correct. I share the view of Griffith-Williams J, that the arguments have no merit at all. I also share the view that the proposed appeal is wholly without merit and that the application before me is also wholly without merit. In those circumstances the renewed application is dismissed.