Neutral Citation Number: [2019] EWHC 715 (Ch)

Case No: BL-2018-002348

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London EC4A 1NL

Date: 25 March 2019

Before :

John Kimbell QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

CATHAY PACIFIC AIRLINES LIMITED	**Claimant**
- and -	
LUFTHANSA TECHNIK AG	**Defendant**

- -
- -

Steven Thompson QC (instructed by **Bird & Bird LLP**) for the **Claimant**
Richard Blakeley (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for the **Defendant**

- -

APPROVED JUDGMENT

John Kimbell QC (sitting as a Deputy Judge of the High Court):

Introduction

1. In my judgment of 6 March 2019 [2019] EWHC 484 (Ch) I held that these proceedings should continue as if they had been commenced under CPR Part 7 (rather than CPR Part 8) and I declined to enter judgment for the Claimant ('**Cathay**'). I have subsequently received submissions in writing on three consequential matters:

    a. Case management directions
    b. The incidence of costs
    c. Whether any of the costs claimed by the Defendant ('**LHT**') should be awarded in a foreign currency.

(a) Case management directions

2. At the hearing on 14 February 2019, Mr Thompson QC submitted, on behalf of Cathay, that the whole dispute could be resolved in one day without any further evidence. Mr Blakeley, for LHT, submitted that the trial ought to take no more than two to three days (allowing for the further factual evidence he says is relevant). Nevertheless, in their written submissions neither party expressed any enthusiasm for the idea of an immediate transfer of these proceedings into the Shorter Trials Scheme. The reasons for the reluctance to take advantages of the scheme set out in Practice Direction 57AB, which is specifically designed for trials of up to 4 days in length, have not been made clear to me. However, having regard to both parties' wishes, as I must under paragraph 2.14 of Practice Direction 57AB, I am content to defer the issue of whether to transfer these proceedings into the Shorter Trials Scheme until the case management conference.

3. Both parties have also asked me to reconsider whether to order the parties to identify in their pleadings the extent to which they propose to rely on witness evidence.

4. The rules governing the preparation and service of witness evidence for trials in the Business and Property Courts is currently under review. A survey issued by the working party which is conducting the review received nearly one thousand responses. Among the options being considered is a more rigorous enforcement of the current rules. However, there is no reason why the courts should not take steps to enforce the existing rules more vigorously now in appropriate circumstances.

5. One of the reasons why reforms are under consideration at all is because experience has shown that witness statements in the Business and Property Courts often stray into argument and commentary on documents. An extreme case of this type came before the Chancellor in J D Wetherspoon plc v Jason Harris [2013] EWHC 1088 (Ch). Dealing with an application to strike out a witness statement which contained a large amount of inadmissible material, the Chancellor said this (in paragraph 33 of his Judgment):

> "The vast majority of Mr Goldberger's witness statement contained a recitation of facts based on documents, commentary on those documents, argument, submissions and expressions of opinion, particularly on aspects of the commercial property market. In all those respects Mr Goldberger's witness statement is an abuse. The abusive parts should be struck out."

6. The danger of long witness statements being served which contain a large amount of commentary on documents appears to be particularly acute when (i) the sums at stake a large (ii) the events in issue lie some considerable time in the past and/or are spread out over a lengthy period of time (iii) and there is a lot of documentation. In these circumstances, the temptation to argue the case through the witness statements by providing a running commentary on the contemporaneous documents often seems to be irresistible.

7. Given that the relationship between the parties in this case lasted ten years, the large sums at stake and the likely volume of documentation evidencing meetings and decisions over that period, there is, in my judgment, a real risk of witness statements being served which contain a large amount of commentary on documents.

8. The practice of requiring parties to state in their pleadings what, if any, facts they intend to prove by means of witness evidence found favour with Lord Justice Jackson when carrying out his review into the costs of civil litigation. In paragraph 2.6 of Chapter 38 of his Final Report[1], referring to the practice by its German name ("Relationsmethode"), he said this:

> "The aspect of the "Relationsmethode" which I believe can and should be adopted in civil litigation in England and Wales is the identification of proposed witnesses by reference to the pleadings. If in any given case the court so directs, each party should identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses will prove. This is a task which the parties will be doing internally anyway so hopefully it will not add unduly to costs. The filing

[1] Review of Civil Litigation Costs: Final Report (December 2009) p.377.

> of such a document which might possibly be a copy of the pleadings with annotations or footnotes or an extra column will be necessary groundwork for any case management conference at which the judge is going to give effective case management directions for the purpose of limiting and focussing factual evidence, in order to save costs."

9. It is implicit in this passage, that Jackson LJ considered that the power to make such orders in appropriate cases already exists in the courts broad case management powers. The two most obvious sources of the power to make such a direction are: CPR 3.1(2)(m) and CPR 32.1(1). In a case such as the present one where the parties have already exchanged a significant volume of documents and evidence under CPR Part 8 and have made submissions as to the extent to which the case of either party can be proved by documents alone, it ought to be all the more straightforward to identify the areas in which oral witness evidence will really be needed.

10. For all of these reasons and notwithstanding the parties' apparent lack of enthusiasm for an order in these terms, I have concluded that it is appropriate for the court under its duty of active case management to require the parties in this case to identify in their pleadings the facts which they intend to prove by means of witness evidence pursuant to CPR 3.1(2)(m) and CPR 32.1(1). This will assist the court at the case management conference when it comes to making directions for trial and provide a helpful structure for any witness statements served in due course.

(b) The incidence of costs

11. LHT's submission on costs is that it has succeeded on its own application under CPR 8.1(3) and has successfully resisted having judgment entered against it on the basis of the evidence presently available. LHT also refers to those passages in my judgment in which the pre-action conduct of Cathay was criticised.

12. Cathay' submits that whilst LHT has been permitted to argue its case by means of a different procedural route and to serve further evidence, Cathay may yet at the end of the day be vindicated. The trial judge may hold that none of the factual matrix evidence which LHT wishes to put before the court in fact assists in the construction of the Agreement and may hold that no good faith term can be implied into the Agreement.

13. In my judgment, LHT was the successful party at the hearing on 14 February 2019 and Cathay the unsuccessful party within the meaning of those terms in CPR 44.2(2). Since

November last year Cathay has taken the stance that (a) it was appropriate to commence as it did under CPR Part 8 and (b) the claim could be disposed of without the need for further factual evidence. LHT has taken a diametrically opposite stance on both issues and, following a day of argument, LHT's submissions prevailed. The costs ought in principle to follow that event.

14. However, I recognise the force of Mr Thompson's argument that Cathay may yet succeed at trial and to the extent that costs and time have been invested in addressing and clarifying the substance of the dispute, those costs ought to be 'costs in the case'. To do justice to this point requires an assessment to be made of the extent to which costs have been expended on the procedural Part 7/Part 8 dispute, on the one hand, and on grappling with the underlying merits of the dispute on the other. This is to a large extent a matter of impression rather than precise calculation. It is also necessary to have regard to the overall circumstances of the case, including, in particular, those matters listed in CPR 44.2(4).

15. In the case of LHT, the overwhelming preponderance of time and costs would appear to have been expended in relation to their procedural objection to the way Cathay chose to advance its case under CPR Part 8. However, some of the costs e.g. in drafting a Part 20 claim and engaging in correspondence in relation to the Schedule 4 Charges were relevant to the substance of the underlying merits of the case. Taking account of what I have seen of the exchanges in correspondence between the parties, the evidence filed and the arguments made at the hearing, I estimate that the rough division between time spent on procedural aspects and on the substance of dispute from LHT's perspective was 2/3; 1/3. I therefore award LHT 2/3 of its costs claimed in its schedule, which (subject to the jurisdictional point dealt with below) I would summarily assess in the sum of €25,000. The remaining one third of the costs claimed will be costs in the case.

16. As to Cathay, it is less easy to distinguish between substance and procedure. Cathay's stance was to be rather dismissive of LHT's procedural points and instead to seek to argue the substance of the case at every opportunity. Nevertheless, underlying the application for judgment and the arguments at the hearing was the submission that Part 8 was the appropriate approach and that no further evidence was needed. Cathay thus spent a lot of time and money in correspondence, in its evidence and in submissions seeking to 'clear the decks' leaving only their case for immediate judgment standing. I must also take account of the fact that I have found that Cathay acted in breach of the CPR rules on pre-action conduct. Taking all these matters into account, in my judgment

the fair division is that Cathay forfeit's half of the costs it has claimed leaving the remaining half as costs in the case.

(c) The foreign currency issue

17. LHT seeks a summarily assessed costs award expressed in euros. The total claimed is €37,633. The N620 costs schedule served by LHT refers to the hourly rates charged by LHT's solicitors ('**WCP**') for the various grades engaged on the case in euros. The invoices generated by the combination of the time spent on the case and these hourly rated led to invoices being submitted to LHT in euros. The hourly rates were not the result of a currency conversion from another currency. WCP thus both accounted for its time engaged directly in euro and invoiced LHT directly in euros. Counsel's fees of £13,375 are accounted for in sterling. In the N620 schedule, they have been converted into euro at a market rate derived from xe.com on the day the schedule was filed.

18. Cathay submits that any order in LT's favour ought to be made in sterling. Cathay has doubted that it is possible for the Court to take the course of issuing a costs award in a foreign currency (even if it wished to). Cathay have referred me to CPR 16 PD§9 which stipulates that when damages or debts are claimed in a foreign currency the claimant must say why the claim is in that currency and identify the sterling equivalent of the sum claimed and the source of the exchange rate used.

19. In response to Cathay's stance, LHT has referred me to Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France SA [2016] EWHC 3421 (Pat), a judgment of Mr Justice Arnold. In that case, the following submission of principle was made on behalf of the paying party:

> "An order for costs is designed to compensate a party for costs incurred in litigating in this jurisdiction, and therefore, as a matter of principle … a costs order should be expressed in sterling regardless of the source of the funds from which the costs are to be paid"

20. Although the application in that case was not for a costs order expressed in a foreign currency but for an additional payment in sterling to compensate the receiving party for a currency exchange loss, the same general proposition that is advanced by Cathay in this case, namely that any costs order ought to be in sterling, was rejected by Arnold J. in the following terms:

> "… It seems to me that the proposition that an order for costs must be expressed in sterling is contrary to the principle which underlies the decision in *Miliangos* [i.e. *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443]. Moreover, if one accepts, as I do, that in principle the court has power to make an order for damages or costs expressed in a foreign currency, then it seems to me to follow as matter of logic that the court ought to have power, if it decides to make an order in sterling, to compensate for any exchange rate loss."

I will return to the impact of Miliangos below.

21. I have not been referred to and am not aware of any case in which costs have summarily assessed and an order for payment of those costs in a foreign currency. *Cook on Costs 2019* does not discuss whether costs can be summarily assessed or awarded in a foreign currency and *Friston on Costs* 3rd edition (2019) mentions the point only tangentially at para. 56.46 in the context of interest on costs. It is necessary therefore to approach the matter from first principle.

22. The court derives its jurisdiction to award costs from s. 51 of the Senior Courts Act 1981. This provides:

> "(1) Subject to the provisions of this or any other enactments and to rules of court, the costs of and incidental to all proceedings in –
> …
>
> (b) The High Court
> …
> Shall be in the discretion of the court.
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid"

23. Section 51 contains a very wide discretion, a point which was emphasised by the House of Lords in Aiden Shipping Co. Ltd. V Interbulk Ltd [1986] A.C. 965. Referring to subsection (3), Lord Goff said in his speech with which the other Law Lords agreed, this at p. 975G:

> "Such a provision is consistent with a policy under which the jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so)

> by the making of rules of court, and to the appellate courts to establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible."

In that case, the House of Lords rejected the suggestion that there was an implied limitation to the section 51 discretionary power such that it might only be used to order costs to be paid by the parties to the litigation.

24. As to the present rules, CPR 44.2 (1) states:

"The court has discretion as to –
(a) Whether costs are payable by one party to another;
(b) The amount of those costs; and
(c) When they are to be paid

25. CPR 44.2(6) states:

"The orders which the court may make under this rule include an order that a party must pay …
(d) a stated amount in respect of another's party's costs"…"

26. There is thus no express limitation on the power of the court to order costs in either the statute or in the rules which requires it to make costs order only in sterling. The issue is whether such a limitation on its discretion under section 51 and CPR 44.2 ought to be implied.

27. In the absence of any binding authority or guidance from the specialist practitioner texts, CPR 1.2 is a necessary point of reference. It requires the court to give effect to the overriding objective whenever it exercises any power under the CPR or interprets any rule.

28. If a party domiciled outside of the jurisdiction has incurred substantial costs in a foreign currency in connection with proceedings in England and an order is made requiring a

person to pay those costs, an order that those costs be paid in that foreign currency appears to be consistent with the overriding objective in three respects:

a. It would be consistent with ensuring the parties are on an equal footing within the meaning of CPR 1.1(2)(a) because foreign parties would be able to claim costs in the same way that domestic parties have always done i.e. directly in the currency in which the costs were in fact incurred.
b. It would be expeditious within the meaning of CPR 1.1(2)(d) and save costs within the meaning of CPR 1.1(2)(b) because making a costs award directly in the currency in which they have been incurred avoids the need for any currency conversion calculation to be carried out by the court or approved by the court.
c. It would appear to be fair within the meaning of CPR 1.1(2)(d) for the risk of any currency fluctuation in the period between the making of a costs order and the date of actual payment to be borne by the paying party rather than the receiving party. The paying party has it within its power to eliminate the risk by paying the costs awarded quickly.

29. For those reasons and in the absence of any binding authority to the contrary, I would be willing, pursuant to CPR 1.2, to interpret the word "amount" as it appears in CPR 44.2(1)(b) and 44.2(6)(b) as including a sum expressed in a foreign currency and I would decline to imply a restriction on the court's power under s.51 or CPR Part 44 precluding costs awards being made in a foreign currency.

Case law

30. The issue of whether an English court can make a costs order in a foreign currency appears to have been discussed in only three previous decisions.

31. The first is Schlumberger Holdings Limited v Electromagnetic Geoservices AS [2009] EWHC 775 (Pat), a decision of Mr Justice Mann. In that case, the Claimant, ('**SHL**'), a company incorporated in the British Virgin Islands, had succeeded substantively at trial and had been awarded 82.5% of its costs. The judge noted that SHL's solicitors had calculated its costs in sterling and they then periodically invoiced SHL in euros using a variable rate of exchange. SHL sought a direction from Mann J to the cost judge dealing with the detailed assessment that the costs ought to be assessed in euros. Against this factual background, Mann J. recorded the submission made by counsel for SHL in the following terms:

> "Mr. Silverleaf urges upon me that his clients have paid in a foreign currency (in Euros) and that, unless it is reimbursed in Euros, then as a result of the currency movement that has taken place since those bills were paid (and of which anyone who has read the newspapers will by now be painfully aware), his clients will suffer a significant loss and, more significantly, will not be indemnified. In other words, there will be a contravention of the indemnity principle. It is only by being paid in Euros that his clients can be adequately recompensed and a windfall to EMGS otherwise avoided."

32. The judge continued:

> "At one stage in the debate, and as a result of an enquiry by me, I was told that the terms of the retainer of Freshfields by Schlumberger provided for payment in Euros. Having taken further instructions in due course, Mr. Silverleaf withdrew that indication and invited me to approach this matter purely on the footing that Schlumberger was invoiced in Euros and paid in Euros."

33. Mann J then went on to consider the dearth of authority on the point and decided the application against SHL in the following terms:

> 28. As I have indicated, neither I nor counsel are aware of any authority which deals with this point. There is of course now a wealth of authority dealing with judgments in foreign currencies, and they are to be found set out in the White Book at paragraph 40.2.2. I have been referred to that paragraph and I have read it. I was not, however, and I confess somewhat to my surprise, taken to any of the authorities. If this point needs to be argued in due course, it seems to me that the court would have to start from an understanding of what the position is in relation to the award of judgments in foreign currency in order that it can understand at least the basis of the discretion that the court has there, before it can then decide whether it is appropriate that the court should consider it has a discretion to order costs to be paid in a foreign currency. But, as I have said, I was not taken to any of those authorities. Since both parties invite me to deal with the point today, and since frankly the position on the evidence now seems to me to be clear enough, I am content to deal with the matter without reference to that authority.
>
> 29. What has happened here on the evidence that I have is simply that solicitors have run up costs in sterling and by means of a collateral arrangement (and Mr. Silverleaf accepted that characterization) there was an arrangement at the time for the sums due to be translated into Euros and paid in Euros. That was a matter of convenience to one or other of the parties to the arrangement and, if I had to guess, I would guess it was a matter of convenience to Schlumberger; but I do not need to guess or find that. The fact is that there was merely a collateral arrangement to pay what was in substance a sterling bill.

> 30. In those circumstances I can see no basis at all on which I should give a direction to the costs judge that the costs, when assessed, should be assessed and ordered to be paid in Euros"

34. Mann J's decision thus turned on the particular circumstances of that case which involved an English solicitor calculating its fees in sterling by reference to sterling hourly rates, thus generating what the judge referred to as "in substance a sterling bill". The present case is different because WCP accounted directly to LHT in euros by reference to hourly rates set in euros. The currency of account between them was therefore the euro as was the agreed currency of payment.

35. The second case is Actavis UK Ltd. v Novartis AG [2009] EWHC 502 (Ch). Actavis had succeeded in its claim but had lost on two issues. Warren J. accordingly ordered Novartis to pay Actavis 45% of its costs of the trial. Actavis had been billed by its solicitors in euro and sought a direction that the assessment by the costs judge be carried out in and an award made in euro. Warren J referred to Actavis's application as a "novel suggestion" because, as he put it at [29], "Conventionally, as I understand it, the Costs Judges make only sterling awards…".

36. Warren J was referred to Miliangos v George Frank (Textiles) Ltd [1976] AC 443 but noted the narrow scope of the decision which was to permit a judgment to be expressed in a foreign currency where a fixed sum was being claimed under a contract governed by a foreign law and where the money of account under that contract was a foreign currency. Warren J noted that the proceedings before him did not have any of the features which led the House of Lords to sanction an award in a foreign currency. Notwithstanding, his evident scepticism that an award of costs ought to be expressed in a foreign currency, his ultimate conclusion was that it was a matter for the costs judge who conducted the assessment to determine how euro bills ought to be dealt with: "I do not think that it is appropriate for me to direct the Costs Judge how to carry out this task" [34].

37. The decisions of Warren J and Mann J in the two cases I have referred to from 2009 do not provide me with any assistance in the decision which I am required to reach in this case. They both refused to give a direction to a costs judge to carry out a detailed assessment in a foreign currency. However, I am asked to summarily assess LHT's costs now (in euro). I cannot defer the issue of whether to do so in euro or sterling to another judge at a later stage of the proceedings. I need to decide whether I have jurisdiction to do so and whether I should exercise that jurisdiction.

38. The third and most recent case is Elkamet Kunststofftechnik GmbH v Saint-Gorbain France S.A. [2016] EWHC 3421 (Pat). Following the trial of a patent infringement claim in the Shorter Trials Scheme, in which Elkamet was successful, Elkamet was awarded 93.5% of its costs on the indemnity basis. Elkamet submitted a costs schedule totalling £520,951. The judge reduced this by way of summary assessment to £458,000.

39. Elkamet then produced a schedule showing how and when they had converted euros into sterling to pay their lawyer's bills during the course of the proceedings. The schedule appears to have demonstrated how it had become progressively more expensive for Elkamet to pay its sterling bill (by converting euros). Elkamet therefore sought a compensatory payment of £25,193. In the event, the judge was persuaded to make an order for the payment in the sum of £20,000.

40. The basis for the order was expressed as being the following:

> "[An] order for costs is designed to compensate the successful party for its expenditure. If it is a foreign company which has had to exchange its local currency into sterling in order to pay costs as the litigation has gone on, then it seems to me in principle the successful party is entitled to be compensated for any additional expenditure it has had to incur as a result of exchange rate losses in the same way as it is entitled to be compensated by way of interest for being kept out of the money."

41. I have already quoted the section of the judgment which touches upon on the issue that arises for decision in this case in paragraph 20 above. However, that observation was not a necessary step in the reasoning by which the court reached its decision. It was the analogy between the award of interest on costs and the order sought by Elkamet which appeared to persuade Arnold J to make the compensatory sterling costs order.

42. Awards to compensate for currency exchange losses are controversial. They raise issues of principle, foreseeability, causation and mitigation.[2] If the currency markets had moved in the other direction making Elkamet's legal bills progressively cheaper, the paying party would not have been able to seek any reduction in its costs liability. Nor is there any obvious justification for taking an exchange rate at the beginning of litigation and using that as a peg for a claim to compensation because sterling subsequently rose in value against the currency in which the (sterling) bills were paid. However, I do agree

[2] See the discussion in Black, *Foreign Currency Claims in the Conflict of Law*s (2010) p 83 – 87 and the majority and dissenting views in chapter 13 of Howard, Knott and Kimbell, *Foreign Currency: Claims, Judgments and Damages* (2016).

with Arnold J's observation that to interpret s.51 and CPR 44.2 as containing an implied restriction to the effect that costs judgments can only be expressed in sterling would be contrary to the principle which found expression in Miliangos v George Frank (Textiles) Ltd [1976] AC 443 and subsequent cases. It is that issue rather than whether compensatory payments in sterling ought to be ordered in certain circumstances which I have to decide in this case.

Miliangos

43. An order for the payment of costs is a judgment like any other – Nyekredit Mortgage Bank plc v Edward Erdman Group Ltd (No. 2) [1997] 1 WLR 1627 at 1635. The ordinary rules therefore apply.

44. Until 1976, one of the rules which applied to all judgments issued in England and Wales was that they could only be given in sterling – see In re United Railways of Havana and Regla Warehouses Ltd [1961] AC 1007 (HL). That rule was departed from 15 years later in Miliangos v George Frank (Textiles) Ltd [1976] AC 443.

45. Since the prohibition on judgments being given in a foreign currency was removed by the House of Lords decision in Miliangos, it has, to quote Prof. Black, "become completely routine" for English courts (in particular the Business and Property courts) to give judgment in foreign currencies.[3] The courts have done so in a wide variety of cases including claims for damages for breach of contract,[4] for claims in tort[5] and indemnity claims[6]. To the extent that an overarching principle has emerged, it is that a court ought to give judgment in the currency which most truly expresses the claimant's loss. This is the phrase originally used by Lord Denning in The Folias [1979] QB 491 at 514. It was expressly approved of by Lord Wilberforce in the House of Lords[7] in the same case and been repeated since then in many cases.

The indemnity principle

46. It has been recognised since at least 1860 that costs awarded by the courts are awards of a statutory indemnity:

[3] Op cit. p. 57 and fn. 161.
[4] Foreign Currency: *Claims, Judgments and Damages Informa* (2016), chapter 6, in particular, the overview at para. 6.120.
[5] Ibid. chap. 7.
[6] Ibid. Para 6.132
[7] [1979] AC 685 at 701

> "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 damnification can be found out, the extent to which costs ought to be allowed is also ascertained" per Bramwell B. in Harold v Smith (1860) 5 H&N 381 at 385.

47. This basic principle of indemnity has remained intact. In Brawley v Marczynski (No. 2) [2002] EWCA Civ 1453, Longmore LJ said at [12]:

> "All cost awards are intended to be compensatory in the sense that the litigant is compensated for the liability he has incurred to his own lawyers"

48. Given that cost award is intended to be compensatory and in the form of a statutory indemnity, there ought to be no difficulty in principle in the court applying The Folias in this context. The question is: in which currency is it most appropriate to compensate the receiving party for its expenditure on the litigation.

49. This approach has already been adopted in the context of contractual indemnities. In The Dione [1980] 2 Lloyd's Rep 577, a shipowner paid overtime to the stevedores in Buenos Aires. Under the terms of the charterparty, the owner was entitled to a 50% contribution from the charterers. Owners paid 100% of the costs in Argentinian pesos using US$ dollars to acquire the pesos to do so. Owners subsequently claimed half of the cost in US dollars (at the rate of conversion prevailing at the time the sum required to buy the pesos to pay the stevedores was remitted to the local agents). The claim in US dollars was upheld. Lloyd J held that for claims for an indemnity (arising under a contract) the principle of The Folias ought to apply. The court should identify the currency in which the loss is actually felt or borne. The Claimant's loss was suffered in US dollars and therefore the arbitrators were right to issue an award in that currency.

50. In my judgment, there is no reason why the same approach as was taken in The Dione should not be taken in the context of a statutory indemnity for the award of costs. The fact that the source of the right to the indemnity in the one case is a contract and in the other statute makes no difference. In both cases, it is appropriate to enquire as to the currency which most truly reflects the loss which the claimant has suffered.

51. The application of the The Folias and The Dione to the present case is straightforward. In respect of the solicitor's costs, the currency of account and the currency of payment were the euro. It is therefore the euro which is self-evidently the currency which most accurately expresses LHT's loss and the currency in which it ought to be compensated.

52. In respect of counsel's fees the currency of account is sterling but the currency of payment is the euro. In my judgment, the most appropriate currency for these costs too is the euro. The appropriate date of conversion is the date on which the overall costs schedule is filed.

53. It would of course be possible to divide the costs into two awards one in sterling and one in euro. Howver, counsel's fees represent only fraction of a relatively modest total bill and, in my judgment, it would not be in keeping with the overriding objective to split the costs award into fragments on a summary assessment in those circumstances.

Procedural requirements

54. Cathay has helpfully referred me to paragraph 9.1 of the Practice Direction to CPR Part 16. This sets out certain information required to be included in a Particulars of Claim in the following terms:

> "Where a claim is for a sum of money expressed in a foreign currency, it must expressly state:
> (1) That the claim is for payment in a specified foreign currency,
> (2) Why it is for payment in that currency
> (3) The Sterling equivalent of the sum at the date of the claim, and
> (4) The source of the exchange rate relied upon to calculate the Sterling equivalent"

55. These requirements do not apply expressly when a party to an existing set of proceedings seeks an award of costs. However, a party seeking a summary assessment of costs in a foreign currency ought to provide the first two items of information as part of the ordinary course of persuading the court to exercise its discretion. There is no need to be prescriptive about the form in which the information ought to be provided but in most cases it will be by a combination of the form N620, submissions in writing and in appropriate cases a witness statement.

56. This information concerning sterling equivalents is important in the context of a Particulars of Claim because track allocation and other case management consequences

will depend on the court understanding the value of the claim. This does not apply to the same extent in the context of an award of costs in existing litigation. Nevertheless, in my judgment, it would usually be helpful to provide a sterling equivalent for the sums claimed particularly if the currency is an unusual one. This information will assist the court in the assessment of reasonableness of the sums claimed.

57. In this case, LHT has provided all the necessary information in its N620 and its written submissions. The currency in which the award is sought is not unusual and I have had no difficulty in making an assessment of the reasonableness of the hourly rates claimed.

Conclusion

58. My conclusions therefore are as follows:

a. The court has jurisdiction under section 51 of the Senior Courts Act 1981 and CPR 44.2 to make an order for costs in a foreign currency on a summary assessment.
b. There is no basis for reading into the court's wide discretionary powers to award costs a restriction that a costs award must be in sterling. To imply such a restriction would be contrary to the case law on foreign currency judgments as it has developed in the forty-two years since the decision in Miliangos v George Frank (Textiles) Ltd [1976] AC 443.
c. The court must determine which currency most truly reflects the claimant's loss and therefore the currency in which it is most appropriate to compensate the receiving party for the costs which it has incurred. This approach is in accordance with principles set out The Folias [1979] AC 685 and The Dione [1980] 2 Lloyd's Rep 577. It is also consistent with the indemnity principle which underlies awards of costs in England.
d. Any party seeking a costs award in a foreign currency should give proper notice of its intention to do so, explain the factual basis for seeking such an award in that currency and provide the court with a sterling equivalent of the sums claimed.
e. In the particular circumstances of this case I am satisfied that the appropriate currency in which to make a costs award is the euro, that being both the currency of account and the currency of payment as between LHT and its solicitor.
f. The sum which I order Cathay to pay LHT is summarily assessed at €25,000.