Neutral Citation Number: [2020] EWHC 1366 (Ch)

Case No: D30BS912

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 01/06/2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

(1) Carmela De Sena	**Claimants**
(2) Meltor Developments Limited	
- and -	
(1) Joseph Notaro	**Defendants**
(2) S Notaro Group Limited	
(3) Bishop Fleming (a firm)	
(4) Davies and Partners Solicitors (a firm)	

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John Blackmore (instructed by **Tozers LLP**) for the **Claimants**
Dov Ohrenstein (instructed by **Ashfords LLP**) for the **First and Second Defendants**
Clare Dixon and Hannah Daly (instructed by **Kennedys Law LLP**) for the **Third Defendant**
Imran Benson (instructed by **DAC Beachcroft LLP**) for the **Fourth Defendant**

Consequential matters dealt with on paper

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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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii on the date shown at 10:30 am.

HHJ Paul Matthews :

INTRODUCTION

1. On 1 May 2020 I handed down judgment after the trial of this claim, dismissing the claimant's claims in their entirety. In view of the coronavirus pandemic, I invited written submissions on consequential matters. The first round of such submissions was lodged on or before 12 May 2020, and submissions in reply were lodged on or before 21 May 2020, with one final short submission (for which in fact I had not given permission) lodged by the first and second defendants on 22 May 2020, and a short submission in reply to this (to which the same point applies) by the claimants on 27 May 2020. I have taken them all into account.

2. The claimants accept that costs should follow the event, and that they should be ordered to pay the defendants' costs (with one exception), and on the standard basis. They also accept that the defendants are entitled to reasonable payments on account pending detailed assessment of their costs. The one exception is that the claimants say that they should not have to pay the costs of and associated with the expert evidence put forward on behalf of the third defendant by Mr Plaha and Mr Pooler, because I held that this evidence was inadmissible, the witnesses not having sufficient expertise in the subject matter, as well as the fact that most of the evidence was directed to matters of fact or law which were for the court rather than the witnesses. I will return to this.

3. The claimants accept that they should pay interest on the costs awards to the first and second defendants, but at the rate of 1% above base rate from the date of payment of their solicitors' invoices. They do not accept that they should pay interest on the costs awards to the third and fourth defendants, because these costs have been paid by those defendants' insurers. As to the payments on account of costs, the claimants offer 50% of the first and second defendants' and (it would seem) fourth defendant's prebudget costs and 80% of their budgeted costs. It is not clear what the claimants are offering in relation to the third defendant, as they take issue with the claim to a payment on account as being in excess of its budgeted costs. Finally, the claimants seek 28 days from the date of the order in which to pay the sums ordered. It appears that they have 'after the event' insurance to cover their adverse costs exposure, and need time for their application for payment to be processed and drawn down.

4. The defendants however all seek an order that costs be paid to them on the indemnity basis. They also seek pre-judgment interest on costs from the dates on which they paid their costs at 2% over base rate. The first and second defendants and the fourth defendant seek a payment on account of 70% of their prebudget costs and 90% of their budgeted costs. The third defendant seeks a payment on account based on a starting point of its *actual* costs (rather than budgeted costs) on the basis that an award of indemnity costs means that the budget can be exceeded. The first and second defendants and the fourth defendant seek an order that the payments on account be paid within 14 days of the court's order. So far as I can see, the third defendant makes no express submission about the timing of the payment.

COSTS GENERALLY

5. In line with the submissions of the parties, I will order the claimants jointly and severally to pay the defendants' several costs. As is well-known, costs are in the discretion of the court (CPR rule 44.2(1)), but, if the court decides to make an order, then CPR rule 44.2(2)(a) provides that

> "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party".

In my judgment it is appropriate to make a costs order in the present case. There can be no doubt that the defendants are the successful parties, and the claimants the unsuccessful. Subject to the point immediately following, there is no reason not to apply the general rule.

Inadmissible opinion evidence

6. So far as concerns the question of the costs of the expert evidence of Mr Plaha and Mr Pooler, in my judgment I said this:

> "163. Overall, therefore, in relation to the evidence on accountants' liability, I have disregarded both sides' reports. I deprecate the (undoubtedly significant) expense which has been wasted on this aspect of the case, but it behoves the parties and their lawyers, when permission is given for such evidence to be obtained and adduced, in implementing that permission to pay close attention to the rules regarding the admissibility of expert evidence. Permission to adduce expert evidence on a topic by calling an accountant (or anyone else), is not a licence to ignore the rules as to what expert evidence is, and who can give it, or the conditions under which it is admissible in legal proceedings."

7. The claimants invite me expressly to disallow the costs (which I understand to be significant) of providing this inadmissible evidence, rather than leaving the issue to a detailed assessment. The basis for my disallowing them is argued to be that the costs were not reasonably incurred. Whether costs are assessed on the indemnity or the standard basis, "costs which have been unreasonably incurred" will not be allowed: CPR rule 44.3(1). In response to this, the third defendant points out (correctly) that the terms in which permission to adduce "expert evidence from an accountant" were given referred to "the issue of scope and breach of duty so far as the claimant's case against the Third and Fourth Defendants is concerned…" It is also said, again correctly, that though Mr Plaha did not have direct experience of demerger transactions, he did have the experience of acting as an expert in a professional negligence claim arising out of the demerger of a solicitor's practice. Finally, the two partners at the third defendant who were involved in the demerger had different specialisms, but the third defendant only had permission for one liability expert. The third defendant submits that it "needed to strike a balance to ensure its expert was able to comment on the areas of expertise of these two partners and form an opinion of each of their actions".

8. Having considered these points, I have concluded that the costs of providing this evidence were not reasonably incurred, and therefore should be disallowed at this stage. A reference to the 'scope and breach of duty' in the order giving permission

does not, as I said in my judgment, turn that which is inadmissible opinion evidence into admissible expert evidence. Nor is Mr Plaha's single experience of acting as an expert in a professional negligence action about a solicitors' practice demerger sufficient to make him an expert in corporate demergers. (And, in any case, most of the evidence proffered was still inadmissible.) I accept that, where there are multiple specialisms to be covered in a claim of this kind, it becomes difficult to find a single person with the expertise in all the specialisms concerned. But in my judgment that goes to the question how many experts are needed. If a clinical negligence case involves allegations against both a gynaecologist and an intensivist, you probably need two experts, not one.

BASIS OF ASSESSMENT

9. Next I will deal with the basis of assessment of costs. In *Hosking v APAX Partners LLP* [2019] 1 WLR 3347, [37]-[42], after the claimants discontinued their claim, based on allegations of commercial impropriety, the defendant sought costs on the indemnity basis because (they said) the claim was hopeless. So far as is most relevant to this case, the judge said this:

> "37. The standard basis of costs is, as its description denotes, the norm. Only if the case is 'out of the norm' may the indemnity basis be justified.
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> […]
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> 39. … Morgan J [in *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2010] 5 Costs LR 709, [9]] asked whether the 'conduct of the paying party was at a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to order indemnity costs'.
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> 40. More recently, the Court of Appeal said the following on the subject in *Excalibur Ventures LLC v Texas Keystone Inc (No 2)* [2017] 1 WLR 2221, para 21:
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> > " … To award costs on an indemnity scale is a departure from the norm and one therefore looks for something, whether it be the conduct of the relevant party or parties, or the circumstances of the case, which takes the case outside the norm … "
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> 41. In the passage from her judgment in *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Comm) … Gloster J said the following:
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> > " … Fourth, to demonstrate that a case has gone outside the norm of behaviour, it is not necessary to show that the paying party's conduct lacked moral probity or deserved moral condemnation in order to attract recovery of costs on an indemnity basis … "
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> 42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.

> 43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are: (1) the making of serious allegations which are unwarranted and calculated to tarnish commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."

10. The claimants also refer me to an earlier judgment in *Excalibur Ventures*, at [2013] EWHC 4278 (Comm), where Christopher Clarke LJ said:

> "7. The fact that a claimant loses a massive claim and does so badly is not of itself a reason for ordering indemnity costs. Cases involving very large sums which founder on sharp juridical rocks are not automatically outwith the norms of this court. But all depends on the circumstances. This case was in my judgment out of the norm for a considerable number of reasons."

11. A similar point was made by Roderick Evans J in *Williams v Jervis* [2009] EWHC 1837 (QB):

> "13. It is, therefore, important to bear in mind, firstly, that an order for indemnity costs should not be made simply because the paying party has been found to be wrong or his evidence has been rejected in preference to that of the receiving party and, secondly, that when assessing the reasonableness of the conduct of the paying party to see whether it is outside the norm for such cases, one must avoid an assessment based on hindsight *ie* assessing the conduct with the knowledge of the outcome of the case and with knowledge of how a particular issue was ultimately resolved.

12. I was also referred to the more recent decision of the Court of Appeal in *Lejonvarn v Burgess* [2020] 4 WLR 43. This was a claim brought by Mr and Mrs B against their neighbour and former friend L in respect of a landscaping project in Mr and Mrs B's garden, in which L was involved. Mr and Mrs B alleged breaches of contract and breaches of duty in tort against L. After trial (and an appeal) on a preliminary issue and then on the substance of the case, Mr and Mrs B failed entirely in their claims. L's costs of successfully defending the claim were said to amount to £724,265 (against an approved budget of £415,000), and she sought an order for assessment of her costs on the indemnity basis. The judge ordered Mr and Mrs B to pay her costs on the standard basis. She appealed to the Court of Appeal.

13. The Court of Appeal allowed her appeal in part, awarding her indemnity costs from one month after the appeal of the preliminary issue had been decided. Coulson LJ (with whom Rose LJ and Sir Jack Beatson agreed) said:

> "30. As to the conduct of the litigation, dealt with in the costs judgment from [17] – [22], the judge addressed various specific matters such as the confused nature of the pleadings, the making of allegations without expert evidence, the shambolic nature of the disclosure, and the 'haphazard and spray gun manner' of the case on defects. Those were specific points which had been raised at the costs hearing. The judge

went through each of them and explained how and why he did not consider that those matters were grounds for ordering indemnity costs.

31. As to the unmeritorious nature of the claims, at [20] the judge said in relation to the global claim that it was 'not a claim that was hopeless from the beginning; it was a claim which had to be considered at trial and dealt with at trial.' Similarly, at [23], the judge said that, although he had been critical in the main judgment of elements of the respondents' case, he considered that the case had been won at trial and was not a foregone conclusion. The judge's analysis was to the effect that, because there needed to be a trial in order conclusively to determine the dispute, indemnity costs were not appropriate. At [28] he reiterated that 'this was never an obviously hopeless case'. I return to these comments in my analysis in Section 6 below.

32. The judge dealt with the appellant's Part 36 offer from [25] onwards. He noted that, in contrast with the position of a claimant who makes a Part 36 offer and then subsequently beats it, a defendant in the same position was not automatically entitled under the CPR to indemnity costs. At [26] he correctly noted that, as part of his general discretion, the fact that the appellant had beaten her own offer was an important matter which he should take into account in considering whether or not the appellant was entitled to indemnity costs. But he did not appear to consider that issue further because, in the very next paragraph at [27], the judge concluded that this was a case in which costs should be assessed on the standard basis.

[…]

37. The general approach to applications for indemnity costs, made by a successful defendant who has beaten his or her own offer, can be discerned from three cases: *Reid Minty (A Firm) v Taylor* [2001] EWCA Civ 1723; *Kiam II v MGN (No 2)* [2002] EWCA Civ 66; and *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ 879.

[…]

43. In short, therefore, taking the CPR and these authorities together, the position is that, in contrast to the position of a claimant, a defendant (such as the appellant in the present case) who beats his or her own Part 36 offer, is not automatically entitled to indemnity costs. But a defendant can seek an order for indemnity costs if he or she can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be 'out of the norm'. Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made. That is what happened in *Excelsior*.

44. There is a separate strand of authority concerned with speculative, weak, opportunistic or thin claims. It has long been the position that a defendant's eventual defeat of such claims can give rise to an order for indemnity costs. In *Three Rivers District Council v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm), at paragraph 25, Tomlinson J (as he then was) summarised the position:

> '(5) where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.'

45. There are a number of cases where costs have been awarded on an indemnity basis because of the weakness of the claimant's underlying claims: see by way of example *Wates Construction Limited v HGP Greentree Alchurch Evans Limited* [2006] BLR 45. In my summary of these principles in *Elvanite Full Circle Limited v AMEC Earth and Environmental (UK) Limited* [2012] EWHC 1643 (TCC), I referred to *Wates* as an example of a 'hopeless' claim, because on the facts of the case, that is what it was. I did not intend by that shorthand to indicate any sort of gloss on the conventional description of claims which were 'speculative, weak, opportunistic or thin' giving rise to the possibility of indemnity costs.

[…]

51. As I have already said, there can be no issue with the judge's conclusions that the respondents' conduct both in relation to the pre-action period and in relation to the non-compliance with the pre-action protocol does not amount to conduct which is out of the norm. I take the same view in relation to the specific matters that were raised by the appellant in relation to the conduct of the litigation itself, summarised at paragraph 30 above. These events were all a product of the way in which this litigation was fought on both sides, and the judge's refusal to apportion particular blame one way or the other for those matters was a matter for his discretion. No error of principle in the judge's approach is disclosed.

52. There is, however, much more force in the appellant's over-arching point about the judge's failure to address the speculative/weak nature of these claims. As noted above, at [20] and [23] of the costs judgment, the judge seemed to approach the merits issue on the basis that, because there had had to be a trial in order for the lack of merit in these claims to be finally determined, there was no entitlement to indemnity costs. He appeared to consider that an order for indemnity costs was only appropriate where it could be shown with hindsight that costs had been unnecessarily incurred. I do not accept that this was the right approach as a matter of principle. Indemnity costs are, for example, routinely ordered in favour of a vindicated defendant when allegations of fraud are dismissed at trial. Obviously, there are many cases in which the strength of one side's position, or the flaws in the other side's case, only become apparent at trial: *Bank of Ireland v Watts* [2017] EWHC 2472 (TCC), to which the judge referred, was just such a case. But that is a different point: in that case, the claims themselves could not be described as prospectively weak or speculative.

53. In addition, although the judge was referred in the written submissions to *Excelsior* and *Three Rivers*, during oral argument it appears that he was asked to focus primarily on whether the claims could be said in hindsight to be 'hopeless', rather than whether they should have been seen by the respondents at any time prior to the trial as speculative or weak. Contrary to Mr Oram's post-hearing note, I consider that there is a substantive difference between the two formulations.

54. None of that should be regarded as a criticism of the judge. It is quite clear that the essential focus of Mr Flannery's submissions was to ask the judge to conclude that, in hindsight, the claims were hopeless because they were all dismissed at trial, and to order indemnity costs in consequence. That may have been because Mr Oram was arguing the converse. But however that focus came about, it was misplaced: the judge should instead have been asked to consider whether, at any time following the commencement of the proceedings, a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued.

> I note that this approach was suggested for the first time in the appellant's supplemental skeleton argument provided a few days before the appeal, which was doubtless the result of Mr Cohen's industry and knowledge of the authorities.
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> 55. It seems to me that, although this point of principle was raised late, it was undoubtedly the right question, and the judge erred in not addressing it. He was also led into error by both counsel's focus on whether or not the respondents' claims were hopeless. That too was not the right test. For these reasons, it is necessary for this court to consider the question posed in the preceding paragraph.
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> 56. In my view, for the reasons set out below, the answer to the question is plain. No later than one month after the handing down of the judgment by the Court of Appeal on 7 April 2017 (*ie* by 7 May 2017) the respondents, having had time to consider the implications of the Court of Appeal judgment, should have realised that the remaining claims were so speculative/weak that they were very likely to fail, and should not be pursued any further."

14. So although it is clear that the over-arching principle is that indemnity costs may be awarded where the case is "out of the norm", this case deals in particular with two situations. One is the case where a defendant seeks an order for indemnity costs on the basis that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "out of the norm". The other is the case of an application for indemnity costs on the basis of a defendant's defeat of a speculative, weak, opportunistic or thin claim.

The first and second defendants' application

15. As I have said, all the defendants seek an order for indemnity basis costs. The first and second defendants seek this on six grounds, which I summarise as follows:

> 1. The claim against the first and second defendants was obviously hopeless;
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> 2. The nature of the claimant's allegations against the first and second defendants included unfounded allegations of dishonesty;
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> 3. It also included unfounded allegations of serious misconduct other than dishonesty, such as bullying, harassment and intimidation.
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> 4. The claimants unreasonably failed to accept any of the first and second defendants' offers;
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> 5. The manner in which the claimants conducted the litigation was out of the norm, unreasonable and caused unnecessary expense to the first and second defendants;
>
> 6. If indemnity costs should be ordered in favour of the third and fourth defendants, then they should also be ordered in favour of the first and second defendants.

Indemnity costs against other defendants

16. I can deal with the last point very quickly. In my judgment I must deal with the position of the three sets of defendants separately, because the claims against them and their defences were different from each other. It is perfectly possible that the conditions for an award of indemnity costs might be met as against one or more and

yet not as against the others or other. I do not consider that the fact that indemnity costs may be awarded in favour of one defendant can in itself be an argument in favour of indemnity costs for another defendant, unless at all events the claims and defences are identical, the same offers have been made, and the same behaviour from the claimants applies to the other defendant or defendants. That is not this case. Assuming that indemnity costs were to be awarded in favour of the third and fourth defendants, and assuming that the relevant conduct increased the length of the trial (and its preparation) and therefore the costs incurred by the first and second defendants, in my judgment that does not strengthen the case for indemnity costs in favour of the first and second defendants.

"Hopeless" claims

17. As to the first ground, the first and second defendants say that the outcome of the trial was "entirely unsurprising". The claimants failed "on every disputed issue of fact and on every disputed legal issue", not only as against the first and second defendants, but also as against the third and fourth. The first claimant was an experienced businesswoman and had personal knowledge of all the relevant history. So the claimants should have recognised the weaknesses of their position, at least by the time when the defence of the first and second defendants was filed.

18. As to this point, the claimants say that a party's conduct should not be assessed retrospectively, with the benefit of hindsight at trial. I accept this. Next, they submit that, in the absence of ulterior motives, they "should only be penalised in indemnity costs if the court thought they had acted dishonestly". Obviously that is not the correct legal test, though it is correct to say that I did not find they had acted dishonestly. Nevertheless, I do not accept that the court cannot make an award of indemnity costs unless it finds that the paying party has acted dishonestly.

19. They also say they did not know that they knew their claim was bound to fail. After all, the defendants did not seek to strike out the claim or apply for summary judgment in respect of it. That is true, but in my judgment irrelevant. It was the claimants' decision, rather than the defendants', to take the case to trial. It was not the defendants' duty to apply for summary judgment or apply to strike out the claim. Moreover, there are risks in making such an application, and not every hopeless case is amenable to a summary judgment or strike-out application. In my judgment the court should not encourage prophylactic applications for summary judgment or to strike out for fear of a later application for indemnity costs being refused.

20. They also say it was not a straightforward case. Although the claimants lost on all points dealt with, these (they say) followed on one from another. If the court had found differently on some of the earlier disputes, then "other findings would have fallen differently". I disagree. Many of the later findings would have been exactly the same. The fact that the expert evidence was held to be irrelevant in their view simply shows that it was indeed a complex case. Again, I do not agree. Putting forward inadmissible opinion evidence does not reveal the complexity of a case.

21. In my judgment this was always a difficult, even speculative case to make. Standing back from the details, it was a claim to set aside an apparently consensual demerger transaction six years earlier, in which the first claimant, not wishing to embark on more risky ventures, had received saleable properties (to the value of several million

pounds) and a significant cash sum, in exchange for illiquid private company shares which could not have been sold on the open market, the first claimant having been advised to obtain independent professional advice, having the experience of having done so in the past, and the means to do so now, but having nonetheless declined to obtain any. There was no solid documentary evidence to support the claim, which therefore depended almost entirely on the evidence of the first claimant, who was unwilling publicly to criticise the first defendant, her brother. Both of these things would have been obvious from the outset to her legal advisers.

22. The first claimant was not a poor and ignorant housewife, but an experienced businesswoman, and well aware of what she was doing. Undue influence (the primary claim) was not to be presumed, but had to be proved. As I said in my substantive judgment, *actual* undue influence involves pleading and proving "overt acts of improper pressure or coercion such as unlawful threats". But the case advanced on behalf of the claimants, in the re-amended particulars of claim, did not include any such allegations. Even if it had, the reality was (as I also said) that this was a case of a hard negotiation by experienced business people in a commercial transaction, and nothing more. This really was a weak case with very little substance to it. At least once the defence was served, and even more so when disclosure was given, it should have been obvious that the claim would fail, both on the facts, but also on the law.

Unfounded allegations of dishonesty

23. The second point made by the first and second defendants was that the claim included unfounded allegations of dishonesty. They refer to allegations against the first claimant that (*inter alia*) he gave false information to the third defendant in order to obtain clearance from HMRC (although in cross-examination the first claimant accepted that the contents of the letter to HMRC were in fact accurate), and that the minutes of a company meeting of 15 December 2010 included a statement known by the first defendant to be false that the first claimant had agreed to the demerger (although the first claimant was present at that meeting, and neither she nor anyone else expressed any dissent). They also say that these allegations (and others, such as secret manipulation of the values of the properties awarded to the first claimant) were persisted with until the end of the trial.

24. The claimants say that they never said that any of the defendants had acted dishonestly. I agree. They did not use that word. But the allegations referred to above are plainly allegations that the first defendant behaved in a dishonest way, and those allegations failed at trial. They also say that accountants "manipulate figures as a matter of course in promoting their client's interests". Even were that true, it would still not be the allegation against the first defendant which is complained of. This is that the *first defendant* secretly manipulated the property values. Whilst I do not regard these as the most serious allegations of dishonesty against a non-professional that I have ever seen, nevertheless in my judgment that is what they amount to. This is properly to be weighed in the scales in considering an award of indemnity costs.

Unfounded allegations of serious misconduct

25. The third point made by the first and second defendants was that the claim included unfounded allegations of serious misconduct, *ie* bullying, harassment and intimidation against the first defendant. The claimants say (correctly) that I found that the first

claimant in giving evidence was reluctant to criticise her brother. The problem is that her legal team advanced the case against the first defendant which included these allegations. That the first claimant found it personally difficult to give evidence supporting those allegations is irrelevant. Claims of this nature which cannot be supported by clear evidence should not be made.

Unreasonable failure to accept offers

26. The fourth point made is that the claimants unreasonably failed to accept any of the first and second defendants' offers. They rely on three offers. The first was a CPR Part 36 offer made on 23 October 2017, about two weeks after the claimants' replies to the defences. It would have entitled the claimants to £20,000 plus their costs. The second was without prejudice save as to costs, made on 1 October 2019, about two weeks after the PTR and a month before the trial (*ie* before briefs were delivered). By now the claimants would have had all the disclosure, all the witness statements and the experts' reports. It would have entitled the claimants to £400,000 plus waiving the defendants' right to payment of £28,280.89 costs ordered at the PTR. The third was also without prejudice save as to costs, made on 14 November 2019, after the conclusion of the first claimant's evidence (normally the high point of a claimant's claim). It would have required the claimants to pay the first and second defendants' costs on the standard basis, but protected them from an application for indemnity basis costs.

27. The claimants first of all say that there is no rule that a failure to accept an offer of settlement should result in an award of indemnity costs: see *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2013] 1 WLR 458, CA, at [70], per Davis LJ. I accept that. But a refusal to accept a reasonable offer of settlement is nevertheless a factor which, added to other factors, *may* take the case out of the norm, and thus justify an award of indemnity costs. It is therefore necessary to consider such offers, and the circumstances in which they came to be made and refused.

28. They go on to say that in any event the first offer was not a serious offer to settle, when assessed against the value put on the claim by them (£1.7 million), and did not reflect the litigation risks at that time. Curiously, they also say that accepting this would have committed *the claimants* to paying the defendants' costs, which would have exceeded £20,000. As the first and second defendants point out, however, this is not correct. As it was a Part 36 offer, if the claimants had accepted it in time, the first and second defendants would have been liable for all the claimants' costs up to the end of the "relevant period". This must have been of considerable value. As to the second offer, the claimants describe this as for "£400,000 less £28,280.89" and was "again very low in light of the value of the claim and the costs incurred to that date". In fact, the offer was for £400,000 *plus* £28,280.89. This is about 25% of £1.7 million. As to the third offer, they say that it was simply an invitation to withdraw. It certainly was that, but it came with protection against a claim for indemnity costs, which at that stage of the proceedings must have been of some value.

29. There can be no doubt that the first and second defendants beat their own offers of 23 October 2017 and 1 October 2019. And, if the claimants had accepted the third offer, we would not be now debating an application by the first and second defendants for indemnity costs. As Coulson LJ said in *Lejonvarn* at [43],

> "a defendant can seek an order for indemnity costs if he or she can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be 'out of the norm'. Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made."

30. In my judgment, against the backdrop of a weak case with very little substance to it, it was indeed completely 'out of the norm' for the claimants not to accept the Part 36 offer of 23 October 2017, at a time when the weaknesses of the claim were already apparent in the statements of case. It was even more so by the time of the offer of 1 October 2019, by which time the claimants had all the disclosure, all the witness statements and the experts' reports. The third offer, in my judgment, just goes to show how, even when the evidence of the first claimant had simply not supported the unrealistic claims put forward, the first and second defendants were trying to give the claimants an incentive to get themselves out of the terrible position they had put themselves in. But even then the claimants did not take it.

Conduct of the litigation

31. The fifth point was that the manner in which the claimants conducted the litigation was out of the norm, unreasonable and caused unnecessary expense to the first and second defendants. The examples given are the length of the first claimant's witness statement (185 pages, with 1348 pages of exhibits), said to be repetitive and full of irrelevant material, the "totally shambolic" preparation of the trial bundle, the insistence on a mediation without the attendance of the third and fourth defendants, the instruction of Mr Gladwin, the claimant's property valuation expert, the unreasonable approach to share valuation, and the launch of the claim without any compliance with a pre-action protocol.

32. The claimants respond by saying that the judgment did not criticise the length of the first claimant's statement, and the first claimant was simply explaining to the court why she acted as she did and what she understood to have occurred. As for the trial bundle, the claimants tried very hard to cooperate with the three firms of solicitors representing the defendants. As for the mediations, they all failed, and it "cannot be suggested that an earlier mediation with all parties would have led to a resolution of the claim". The claimant defended their choice of Mr Gladwin as a property expert by referring to the court's description of him. As for the share valuation, the claimants defend their approach by saying that the fact of a demerger required that no bulk discount be applicable, even if that were found wrong by the court (as indeed it was). As for the pre-action protocol point, the claimants say they did comply with it.

33. In my judgment, even though the court did not criticise the length or the irrelevance of much of the first claimant's witness statement, the fact is that it was very long and it was very discursive. I did not consider it necessary in the substantive judgment to discuss it in detail, but it *was* repetitive, often irrelevant, and in large part unhelpful. It was not necessary for the first claimant to comment on most of the documents. As for the trial bundle, I understand the problem of dealing with three firms of solicitors, but I have to say that I found the way that the trial bundle was organised was bizarre, unhelpful, and wasteful of time. For an example, I may mention the way in which the expert reports were organised, with the joint statements included twice, and preceding the defendants' own expert reports. For a further example, I draw attention to the

order in which the statements of case were arranged, so that they were not in chronological order, but instead with the claimants' replies *preceding* the statement of case of the defendants that was being replied to. These were not organised in the normal way, and they wasted time. When I asked for explanations, I was given no satisfactory answer. There was a core bundle prepared by the claimants' solicitors, which was entirely pointless. As for the question of a bulk discount, this should have been obvious. It is not necessary for me to deal now with the pre-action protocol point, though I return to it later.

Conclusion

34. Overall, taking all these points together, I am entirely satisfied that this is an appropriate case to award indemnity costs in favour of the first and second defendants. The case was weak and thin to start with, it was met with reasonable – indeed, generous – offers that should have been accepted, and the litigation was poorly prepared, including the botched expert evidence. In my judgment, if her lawyers did not do this, this is a case where they should have stood up to the client and said "You have no case; it is a waste of time and money to go on." Although I have no doubt that she would have been very unhappy, it would have been, objectively speaking, a kindness to her to do so.

Third defendant

35. I turn now to the position in relation to the third defendant. The third defendant also seeks its costs on the indemnity basis, relying on four factors as having taken the case "out of the norm". These are as follows:

    1. Allegations against the third defendant tantamount to allegations of fraud;

    2. Hopeless allegations maintained despite ample evidence to the contrary;

    3. The manner in which the litigation was conducted;

    4. The settlement position.

Allegations against the third defendant tantamount to fraud

36. I deal first with the nature of the allegations made against the third defendant. These included submitting information to HMRC in the clearance letters in February and April 2011 which the third defendant "knew to be false", "devising a scheme to cheat the Revenue", knowing that the shares received by the second defendant "represented assets to which the second defendant was not entitled", and manipulating the values of assets which the first claimant was "forced to take in the demerger". All of these allegations failed at trial.

37. The claimants make similar points in general in response to this application as they did in respect of the application by the first and second defendants. I dealt with these above, and need not repeat the discussion. On the specific points, the claimants do not persuade me that these were not allegations tantamount to fraud, nor that they were in fact true.

Hopeless allegations maintained despite ample evidence

38. The third defendant says that "allegations were pursued for which there was no logical or proper evidential basis". These concerned the so-called "second capital reduction" and the "alleged manipulation of asset values". The claimants say that they never complained that the second capital reduction *caused* a loss, merely that it *evidenced* the claimants' loss. This is not how I read the re-amended particulars of claim at paragraphs 12.1 to 12.3 and 13.1. In particular, the claimants allege that the second capital reduction was in breach of the third defendant's fiduciary duty to the first claimant, and that as a consequence of the breach of fiduciary duty the first claimant had received assets worth less than the value of her shareholding in Holdings.

39. As for the "alleged manipulation of asset values", this was based on documents put to the first claimant in cross-examination which had actually been the basis of an application by the claimants at the pre-trial review to amend the claim to include express allegations of conspiracy to injure and fraudulent misrepresentation. In cross-examination, however, the first claimant accepted that they did not in fact evidence the manipulation of values. The claimants submit that the first claimant was "understandably unable to answer the questions put to her by counsel" because she is not an accountant. This is not an answer to the point. The allegations were maintained at trial, but had no evidential support, and therefore were doomed to failure.

The manner in which the litigation was conducted

40. This point is in substance identical to the fifth point made by the first and second defendants, and the claimants repeat their responses. In my judgment, this point is again made out.

The settlement position

41. On 6 June 2019, the third defendant made a Part 36 offer to the claimants for £100,000. It has of course beaten that offer. As Coulson LJ said in *Lejonvarn* (at [78]), that is "a matter of importance in the exercise of the court's discretion under CPR part 44".

Conclusion

42. I am quite satisfied that it is appropriate to award the third defendant its costs on the indemnity rather than standard basis, and for much the same reasons as in the case of the first and second defendants.

The fourth defendant

43. The fourth defendant also applies for its costs against the claimants on the indemnity basis. It puts forward four points:

    1. This was a weak claim which should never have been brought;

    2. The claimants did not comply with the pre-action protocol;

    3. Delays in mediation by the claimants.

    4. Offer of settlement.

A weak claim which should never have been brought

44. The fourth defendant points out that the first claimant never informed Mr Brennan of the fourth defendant that the first defendant "was forcing her out or otherwise acting inappropriately about the demerger". She herself dealt with the fourth defendant's retainer letter which stated that it acted only for the company and not for her. The fourth defendant was carrying out an "execution only" role, and it was never within their remit to consider the underlying merits. And the first claimant accepted that she was told by Mr Brennan that he was only acting for the company.

45. The claimants make the same point that they have made in relation to the other defendants, namely that this question must be decided without applying the benefit of hindsight. I accept this. They also say that it was up to the fourth defendant to apply for summary judgment, or for the trial of a preliminary issue. I do not accept this, for the reasons already given. The claimants then say that the first claimant thought that the fourth defendant was acting for everyone, shareholders as well as company. They also say that their case was that there was an actual or potential conflict of interest. These two statements do not sit well together. It might be possible to argue that a poor and ignorant person considered that a law firm was acting for everyone in a transaction and thus owed him or her a duty, but the first claimant was an experienced businesswoman and could not have believed this. The fourth defendant made clear that it was acting only for the company, and the first claimant accepted this in cross-examination.

Non-compliance with pre-action protocol

46. The fourth defendant complains that the claimant did not comply with the pre-action protocol on professional negligence claims. They sent a letter of claim on 6 March 2017, and served proceedings on 25 April 2017, to avoid limitation problems. The fourth defendant suggested to the claimants on 8 May 2017 that there be a stay of proceedings pending the provision of a letter of response and the protocol. But this was rejected by the claimants on the basis that they wished to see the fourth defendant's defence. The claimants say that this is pure formalism, and that it makes "little practical difference whether a defendant responds to the letter of claim or the particulars of claim". I do not accept this. If this were true, there would be no point in the pre-action protocols at all. A letter of response is nothing like as formal or as precise or as expensive as a defence filed at court. The point of such a response is to narrow the issues, and prevent time being spent on things which do not matter. This the claimants prevented from happening in this case.

Delays in mediation by the claimants

47. The fourth defendant was prepared to mediate the dispute in October 2017 but the claimants declined to do so at the time, because they preferred to mediate at that stage with the first and second defendants, and in the end mediation with the fourth defendant did not take place until May 2019, which did not succeed. In all the circumstances, I do not think that the claimants can be criticised for taking this approach.

Offer to settle

48. On 20 November 2017 the fourth defendant offered to accept £10,000 towards its costs (then in the region of £18,000) in order to enable the claimants to walk away from the claim against it. The claimants say that the fourth defendant's offer was "effectively meaningless", and that their rejection of it was not unreasonable in the circumstances. I do not agree that the offer was "effectively meaningless". This was (as I have already said) a weak claim. The offer was made after all the statements of case had been served, and the claimants would by then (if not before) have known that they were facing an uphill struggle. To accept less than your actual costs as an incentive to the other party to discontinue the claim in my judgment is meaningful, if not especially generous. I think I can and should take it into account overall.

Conclusion

49. In relation to the fourth defendant, I do not think the issue of the basis of assessment of costs is so clear-cut. Nevertheless, taking everything into account, I still consider that this is a case where the fourth defendant's costs should be assessed on the indemnity basis. The claim itself against the fourth defendant was always very weak, the claimant did not comply with the pre-action protocol, and the fourth defendant did offer the claimants a way out at modest cost once the pleadings were closed. The most important point is the weakness of the claim. But the combination of these matters, in my judgment, takes this case "out of the norm" and in my judgment the court should mark that by awarding indemnity costs.

PAYMENTS ON ACCOUNT OF COSTS

50. Each of the defendants seeks a payment on account of costs. CPR rule 44.2(8) provides as follows:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

In *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB), Langley J referred to this rule and said:

> "4. … The salutary object of the rule is to enable a party to recover at least a substantial part of his expenditure on costs before (and to an extent in the hope of avoiding) what can be a protracted and expensive process in carrying out a detailed assessment. It also is intended to provide a useful sanction and discipline generally in the context of the costs of litigation."

51. In the present case, I see no good reason not to order a payment on account of costs, and the claimants do not urge any upon me as a matter of principle. Instead, they concentrate on the question of quantification. In a recent decision of my own, *Brake and others v Lowe and others* [2020] EWHC 1324 (Ch), I said:

> "33. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ disagreed with the statement of Birss J in *Hospira UK Ltd v Genentech Inc* [2014 EWHC 1688, that 'the task of the court is to ensure that it finds the irreducible minimum, which could be recovered'. He said:

> '22. It is clear that the question, at any rate now, is what is a "reasonable sum on account of costs"…
>
> 23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.'

In that case, the judge regarded 80% of the sum claimed as a reasonable figure to take in the case. It was litigation on a large scale which required a lot of work and where the judge had awarded costs on the indemnity basis.

> 34. It is therefore clear that I am not to carry out even a summary assessment of the costs. I am instead to find what is 'a reasonable sum on account of costs', which will inevitably be an estimate, potentially formulated in one of several possible ways."

The first and second defendants

52. The first and second defendants seek a payment on account equivalent to 70% of their prebudget costs and 90% of their budgeted costs. The claimants have offered 50% and 80% respectively. The first and second defendants refer to CPR rule 3.18, which provides that

> "In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –
>
> […]
>
> (b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and
>
> […]"

In the present case, however, costs will be assessed on the indemnity basis, which is more generous, because there is no requirement of proportionality, and the benefit of any doubt as to whether costs were reasonably incurred or reasonable in amount is given to the receiving party. In addition, the court may more easily find good reason for the costs as assessed to exceed the budget.

53. In the present case, I agree with the first and second defendants that it would be appropriate to award 90% of the budgeted costs and 70% of the prebudget costs by way of payment on account. However, the claimants make the point that the first and second defendants' budgeted costs included an allowance of £20,000 for a taxation

expert, but no such expert was instructed. The budgeted costs therefore fall to be reduced by £20,000 before the 90% figure is applied.

The third defendant

54. The third defendant seeks an interim payment on account of costs. It also refers to CPR rule 44.2(8) and CPR rule 3.18. However, it further refers to *Kellie v Wheatley and Lloyd Architects* [2014] EWHC 2886 (TCC), where HHJ Keyser QC said:

> "17. … It is no objection to an order for costs on the indemnity basis that it is likely to permit the recovery of significantly larger costs than would be recoverable on an assessment on the standard basis having regard to the approved costs budget; that possibility is inherent in the different bases of assessment, and costs on the indemnity basis are intended to provide more nearly complete compensation for the costs of litigation. I accept, of course, that a party seeking to recover disproportionate costs on an assessment on the indemnity basis is required to show that those costs were reasonably incurred; though that requirement is subject to the provisions of r. 44.3(3)."

These comments were approved by Coulson LJ in *Lejonvarn* at [93], where he said:

> "In principle, the assessment of costs on an indemnity basis is not constrained by the approved cost budget…"

55. Accordingly, the third defendant submits that an interim payment on account of costs assessed on the indemnity basis should not be calculated by reference to the *budgeted* figure, and that the more appropriate starting point will be the *actual costs* figure. It says that this was £660,688.29 as at 11 May 2020. The claimants say that there is no satisfactory evidence of the third defendant's actual costs before the court. Moreover, even if costs are allowed on the indemnity basis, the court will still not allow costs that were unreasonably incurred or unreasonable in amount (CPR rule 44.3(1)). Since the cost budget of the third defendant was much less than this (the third defendant says £357,721.19, and the claimants say it was £320,000 odd) the court should err on the side of caution.

56. In my judgment, where the court has ordered assessment of costs on the indemnity basis, it does not follow that the starting point for an award of costs on account should be the actual costs incurred. An award of indemnity costs does not make the assessment at large. It is still necessary to show that the costs were reasonably incurred and reasonable in amount. This is not something which the court can decide at this stage of ordering a payment on account. The only investigation (and possible adjudication) so far made into the costs of the parties will have been at the costs budgeting stage. The parties will have made an effort to estimate their costs and the court will have considered the reasonableness of those costs budgets, looking at the case as it then was. The case at trial may be different, longer or shorter, more or less difficult, but, unless the court has been invited to approve a modified budget for either party, the court will not have been able to take any of this into account. In my judgment, therefore, the safe starting point is the costs budget as approved, together with such information as may be available as to changes in the case subsequently, and in particular in the knowledge of what happened at trial.

57. I remind myself that Christopher Clarke LJ, in the *Excalibur* case, said:

> "What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment."

And, in that case, the judge awarded costs on the indemnity basis to the successful party, but quantified the payment on account as at 80% of the budget.

58. I have no reason to doubt the summary of actual costs attached to Kennedys' letter of 12 May 2020, and therefore accept that the third defendant has spent a lot more than its budget. But I do not think I should stray beyond that budget for the purposes of quantifying payment on account of costs, except to the extent that I am satisfied by evidence (i) how much has been spent, (ii) on what, and (iii) that there is at least a *prima facie* case that it has been spent reasonably and in reasonable sums. In the present case, whilst there is at least some evidence as to (i) and (ii), such evidence is lacking in relation to (iii). Accordingly, I will order payment of 90% of the budgeted costs (including the sums already incurred at the time of budgeting) on account of the indemnity costs award less the incurred and budgeted fees for inadmissible evidence referred to in paragraph 8 above.

The fourth defendant

59. The fourth defendant seeks a payment on account of 90% of the budgeted costs and 70% of the difference between the budgeted costs (£180,575) and the total costs said to have been incurred (£258,000). The claimants simply repeat the submissions they have made in relation to the other defendants. In my judgment, a payment on account of 90% of the budgeted costs (including sums already incurred at the time of budgeting) is appropriate. As with the third defendant, in the absence of appropriate evidence of the further sums spent and in particular their reasonableness, I do not think I can properly make any award in respect of sums exceeding the budget.

TIME FOR PAYMENT

60. CPR rule 44.7 provides:

> "(1) A party must comply with an order for the payment of costs within 14 days of –
> (a) the date of the judgment or order if it states the amount of those costs;
> (b) if the amount of those costs (or part of them) is decided later in accordance with Part 47, the date of the certificate which states the amount; or
> (c) in either case, such other date as the court may specify."

All the defendants ask for an order for payment within the usual 14 days.

61. The claimants accept that 14 days is the normal period for payment, but ask for 28 days. The explanation for this is that the claimants have "after the event" insurance to cover their adverse costs exposure. They therefore need time for their application for payment to be processed and drawn down. Whilst they say it should be capable of being done in 14 days, they seek leeway in case this is delayed. I am afraid that I do

not accept that this is a sufficient reason for departing from the normal 14 day rule. First of all, the fact that the claimants are insured should not make a difference so far as the defendants are concerned. If they would be entitled to a 14 day order if the claimants were uninsured, they should not have to be satisfied with a 28 day order merely because the claimants are insured.

62. Secondly, judgment in this matter was handed down on 1 May 2020, and, as the claimants accept in paragraph 1 of their submissions on consequential matters, "costs should follow the event". At the very least, there would have been an order for costs on the standard basis, accompanied by an application for a payment on account by each of the defendants. The insurers must have known that they were looking at a substantial payment to be made on account of costs, and so it will not come as any surprise to them. There is no reason why this cannot be paid within the usual 14 days. If it cannot, then that is a matter between the claimants and their insurer. It should not affect the defendants. Indeed, if (as would have been the normal course) judgment were handed down with attendance by the parties and argument heard on costs, an order for a payment on account of costs would have been made on 1 May 2020. In effect, therefore, by the time the order for costs is made, the claimants will have already had 28 days, and the 14 days in the order in which to make the payments on account is simply a bonus.

INTEREST ON COSTS

63. The final matter which I must consider is the question of interest on costs. There are two relevant rules. First of all, CPR rule 36.17(1), (3) provides:

> "(1) Subject to rule 36.21, this rule applies where upon judgment being entered—
> (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer;
>
> […]
>
> (3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—
> (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and
> (b) interest on those costs."

64. Secondly, CPR rule 44.2(6)(g) provides:

> "(6) The orders which the court may make under this rule include an order that a party must pay –
>
> […]
>
> (g) interest on costs from or until a certain date, including a date before judgment."

65. In *Jones v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 363, Sharp LJ (with whom Gloster and Patten LJJ agreed) said:

> "17. The power to order interest on costs, including pre-judgment interest on costs is derived from CPR 44.2(6)(g). […] The rule provides that the court may order "*interest on costs from or until a certain date, including a date before judgment*". The purpose of such an award is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs. The relevant principles do not materially differ from those applicable to the award of interest on damages under section 35A of the Senior Courts Act 1981. The discretion conferred by the rule in respect of pre-judgment interest is not fettered by the statutory rate of interest, under the Judgments Act 1838, but is at large. Ultimately, the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and the receiving parties. This normally involves an assessment of what is reasonable having regard to the class of litigant to which the relevant party belongs, rather than a minute assessment which it would be inconvenient and disproportionate to undertake. In commercial cases the rate of interest is usually set by reference to the short-term cost of unsecured borrowing for the relevant class of litigant, though it is always possible for a party to displace a 'rule of thumb' by adducing evidence, and the rate charged to a recipient who has actually borrowed money may be relevant but is not determinative."

The first and second defendants

66. The first and second defendants ask for interest on their costs, running from the dates on which the invoices for costs were paid, at the rate of 2% over base rate. This application is supported by the third witness statement (dated 12 May 2020) of Andrew Perkins, giving evidence that, in March 2018, S Notaro Ltd arranged with a clearing bank a secured loan facility repayable over five years at 1.9% over base rate with an arrangement fee of £35,000 (deducted from the loan, so taking the effective rate over 2% above base rate). These defendants made a Part 36 offer on 23 October 2017, which they have beaten.

67. The claimants accept that the first and second defendants are entitled to claim interest on costs from the date of satisfaction of their solicitors' invoices, and that the only issue is as to the rate of that interest. They object to Mr Perkins' evidence of borrowing costs as hearsay. I accept that it is not the best evidence possible, but I see no reason not to accept it, especially at a time of pandemic and restrictions on movement. Another objection is that there is no statement on behalf of the first and second defendants that they had to borrow funds in order to pay their legal costs, rather than (for example) using cash which they happened to have available at the time (and which may not have been earning any interest at all). In the circumstances they say that 1% over base rate would be appropriate.

68. In my judgment, it is clear from the statement of Sharp LJ in the *Jones* case to which I referred above that it is not necessary in setting a rate of interest to consider the precise circumstances and minute details applicable to the *particular* litigant. Instead, the court assesses what is reasonable "having regard to the class of litigant to which the relevant party belongs". The consequence is that in "commercial cases the rate of interest is usually set by reference to the short-term cost of unsecured borrowing for the relevant class of litigant, though it is always possible for a party to displace a 'rule of thumb'." The evidence of Mr Perkins shows what the short-term cost of unsecured borrowing is for at least the second defendant (the first defendant being an individual

may be in a worse position). I see no reason not to accept that evidence, and will therefore order interest at the rate of 2% above base rate from the several dates of payment of solicitors' invoices.

The third defendant

69. The third defendant also asks for interest from the date on which the invoices for costs were paid, and also at the rate of 2% above base rate. In addition, the third defendant made a Part 36 offer to the claimants on 6 June 2019, which it has also beaten. In relation to the third defendant, the claimants say that its costs have been paid by insurers and so there is nothing for the third defendant to be compensated for interest. But, if the court were minded to allow interest, and the claimants say that the appropriate rate would be 1% above base rate.

70. In my judgment, it is not right to refuse an award of interest on costs on the basis that the third defendant is insured, and therefore the third defendant has lost nothing. If that were right, then the logical consequence would also be that the third defendant is not entitled to an award of costs at all, because the insurer would have paid them. The true position, however, is that the existence of insurance for the third defendant is irrelevant as between the claimants and the third defendant. The third defendant's insurer will be entitled to stand in the shoes of the third defendant, and an award of costs to the third defendant will go to repay the money which the insurer has laid out under its contract of insurance. The same will be true of any interest paid. There is nothing in this point. As for the rate of interest itself, the third defendant did not put forward any evidence on interest rates, so I do not know at what rate the third defendant would expect to borrow in the short term. In these circumstances, I do not think I would be justified in awarding more than 1% over base rate.

The fourth defendant

71. Finally, the fourth defendant seeks interest on costs from the date that invoices were paid, but at the rate of 1% above base rate. So far as concerns the fourth defendant, the claimants simply repeat the submissions they have made in relation to the other defendants. In the light of my conclusions in relation to the other defendants, I will order interest to be paid at the rate of 1% above base rate.

JUDGMENT RATE INTEREST

72. The claimants make a point about the date from which judgment rate interest (at 8%) runs under the Judgments Act 1838, section 17. They say that such interest does not run from the date of judgment but only runs on a "judgment debt". I agree. There is no such debt until the date on which an order is made. Judgment in the main action was handed down in this matter on 1 May 2020, but the *order* will be made only following the hand down of this additional costs judgment. Judgment rate interest will therefore run from that date.

CONCLUSION

73. I hope that this deals with all of the outstanding points relating to costs. I would be grateful if counsel could agree a minute of order to give effect to my judgment of 1

May 2020 and this costs judgment. I am grateful to all counsel and solicitors for their hard work in preparing for and carrying on the trial of this claim.