Neutral Citation Number: [2025] EWHC 36 (Ch)

Case Nos: : BL-2024-000559 and CR-2024-003936

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
AND INSOLVENCY AND COMPANIES LIST

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

Date: 15/01/2025

Before :

THE HONOURABLE MR JUSTICE TROWER

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Between :

(1) PETER WADDELL HOLDCO LIMITED
(2) PETER WADDELL

Claimants

- and –

(1) BLUEBELL CARS HOLDING LIMITED
(2) BLUEBELL CARS TOPCO LIMITED
(12) BLUEBELL CARS MIDCO LIMITED
(13) BLUEBELL CARS BIDCO LIMITED
(14) BAPCHILD MOTORING WORLD (KENT) LIMITED

Defendants

AND

IN THE MATTER OF BLUEBELL CARS TOPCO LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

PETER WADDELL HOLDCO LIMITED

Petitioner

- and –

(1) BLUEBELL CARS HOLDING LIMITED
(2) BLUEBELL CARS TOPCO LIMITED
(3) REZA FARDAD
(4) LAURENCE VAUGHAN

Respondents

Mr DANIEL OUDKERK KC, Mr DANIEL LIGHTMAN KC, Mr THOMAS ELIAS and **Mr WEI JIAN CHAN** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for **Peter Waddell Holdco Limited and Mr Peter Waddell**
Mr GEORGE SPALTON KC and **Mr MARK WRAITH** (instructed by **Wilkie Farr & Gallagher UK LLP**) for **Bluebell Cars Holding Limited** and **Mr Reza Fardad**
Mr EDWARD DAVIES KC and **Mr BEN GRIFFITHS** (instructed by **Stephenson Harwood LLP**) for **Bluebell Cars TopCo Limited, Bluebell Cars MidCo Limited, Bluebell Cars BidCo Limited, Bapchild Motoring World (Kent) Limited** and **Mr Laurence Vaughan**

Written Submissions filed on: **16 and 20 December 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE TROWER

Mr Justice Trower:

1. This judgment is concerned with the costs of the applications determined by a judgment I handed down on 28 November 2024 ([2024] EWHC 3040 (Ch)) (the "November Judgment"). I shall use the same abbreviations I used in the November Judgment. It is not necessary for me to describe the underlying dispute, or the course which the Part 7 claim and the petition have taken in any detail because these matters are described in the November Judgment.

2. In light of the way in which TopCo, MidCo, BidCo and BMW (the "BIG Parties"), Investor, Mr Vaughan and Mr Fardad have presented their submissions, I shall deal both with the basis (standard or indemnity) on which costs should be awarded and the question of whether I should make a summary assessment later in this judgment. The remaining costs disputes can most conveniently be determined separately in relation to each of the applications determined at the November hearing. I shall do so in the order in which they are dealt with in the version of the draft order prepared by PWHL and Mr Waddell. They are as follows:

    i) The application by PWHL as part of the Petition Application for permission to amend the petition and points of claim, with consequential directions for the service of amended points of defence and replies (the "Petition Amendment Application"), which was contested in part at the November hearing by TopCo, Mr Fardad and Mr Vaughan.

    ii) The application by PWHL as part of the Petition Application for a direction that TopCo be prevented from filing and serving points of defence in the petition (the "Debarring Application"), which was contested at the November hearing by Topco.

    iii) The application by PWHL and Mr Waddell as part of the Part 7 Application for permission to amend the claim form and to file and serve re-amended particulars of claim, with consequential directions for the service of amended defences and replies (the "Part 7 Amendment Application"), which was not contested at the November hearing.

    iv) The application by PWHL and Mr Waddell as part of the Part 7 Application for a stay of the Part 7 claim until after resolution of the petition (the "Stay Application"), which was contested at the November hearing by the BIG Parties and Investor.

3. It is unnecessary for me to address the costs of the application relating to expedition because the parties are agreed that these be Investor's costs in the petition. It is also unnecessary for me to deal with the costs of PWHL's application for permission to join Mr Fardad and Mr Vaughan as respondents to the petition (the "Joinder Application"). PWHL's initial position in relation to the costs of the Joinder Application was that the right order was costs in the petition, while TopCo, Mr Vaughan and Mr Fardad said that there should be no order for costs. There is no longer an issue because, in its reply submissions on costs, PWHL accepted that the right order was for there to be no order

as to costs. I also understand it to be common ground that general case management costs be costs in the petition and the Part 7 claim as the case may be.

The Petition Amendment Application

4. The parties' positions in relation to the costs of the Petition Amendment Application are as follows:

   i) TopCo and Mr Vaughan seek an order that PWHL pay their costs of contesting the amendments which were not allowed, to be summarily assessed on the indemnity basis. TopCo also seeks an order that PWHL pay its costs of and occasioned by the amendments to the petition on the standard basis.

   ii) Investor was neutral on the Petition Amendment Application and seeks no order as to costs, while Mr Fardad seeks an order that PWHL pay his costs to be summarily assessed on the standard basis. Investor also seeks an order that PWHL pay its costs of and occasioned by the amendments to the petition on the standard basis.

   iii) PWHL's primary position is that the costs should be reserved to the further CMC to be listed on the first convenient date after 7 April 2025. Its alternative position is that the costs of contesting the amendments should be costs in the case as between PWHL and TopCo and that PWHL should pay 75% of Investor's and TopCo's costs consequent on the amendments.

5. The first issue is whether I should decide any questions of costs at all at this stage. PWHL says that it would be appropriate for both the costs of contesting amendments to the petition and the costs consequential on those amendments to be reserved to the next CMC on the grounds that TopCo's response (when it comes) will be relevant. It is said that, if the case pleaded in TopCo's defence were to be amended in a manner which demonstrated that PWHL's original criticisms of TopCo's partiality in favour of Investor might have been well-founded, this would show that a proportion of the costs of the contested amendments should be paid by TopCo. It was also said that TopCo might plead matters in its amended points of defence which should have been pleaded earlier, which might result in wasted costs.

6. In my view, none of these reasons provides a proper justification for reserving costs to a future CMC after the stage at which the parties' pleaded cases have crystalised. The Petition Amendment Application was concerned with drafts of an amended petition and amended points of claim which PWHL sought permission to file and serve. No alternative version was advanced before or at the November hearing and I refused permission on the grounds that the case as formulated either raised allegations which were not arguable or, to the extent that they alluded to arguable allegations, they were not in a form for which permission to amend could properly be granted. As to this latter point, I agree with TopCo's submission that it was not for TopCo to reformulate PWHL's draft amendments into an appropriate form for it to pursue.

7. I also think that this latter point is an answer to PWHL's alternative position, which gives rise to the second issue. It seeks by way of alternative an order that the costs of

contesting the amendments should be costs in the case because it was successful in the element of its proposed amendments which were concerned with the manner in which the points of defence were pleaded. It relies on [58] of the November Judgment in which I concluded that "PWHL has a prospect which is more than fanciful of establishing that TopCo's approach to the form of its defence to the petition is capable of being stigmatised as conduct amounting to unfairness or breach of duty by its directors". However, I went on to explain in [59] that the existing form of PWHL's petition was inadequate and refused the relief sought on those grounds. In these circumstances, it is not to the point that, if the case had been appropriately pleaded in the first place, permission might have been granted.

8. It follows that the costs in relation to the Petition Amendment Application, which were incurred at and in preparation for the November hearing, ought to be determined at this stage. It also follows that, because TopCo was the successful party on those aspects of the application which were opposed and because it is not suggested that TopCo delayed in consenting to those amendment which were not disputed, TopCo's costs of the Petition Amendment Application should be paid by PWHL as the unsuccessful party.

9. The next question is whether Mr Fardad and Mr Vaughan should also be entitled to their costs. PWHL submitted that it would be wrong in principle for such an order to be made because Mr Fardad and Mr Vaughan were not yet parties to the petition, even though they had consented to being joined. It was also said that Mr Edward Davies KC (acting for TopCo and Mr Vaughan) had emphasised that fact when explaining why it was proper for TopCo itself (rather than Mr Vaughan) to be disputing the TopCo Defence Allegations, while Mr George Spalton KC (for Investor and Mr Fardad) made no submissions on the Petition Amendment Application at the November hearing.

10. Mr Fardad submitted that it would be absurd to deny him his costs because, if he had not opposed the Petition Amendment Application, it would have been possible for PWHL to serve the amended petition and points of claim on him, even if permission had been refused as against TopCo. Once formally joined, Mr Fardad could then have applied for summary judgment, which he would have been granted because the court would already have held (as against TopCo) that amendments in that form had no real prospect of success. It was also said that it would be particularly absurd because the TopCo Defence Allegations, which were the principal subject of the opposition to the Petition Amendment Application, were concerned with breaches of duty by him and Mr Vaughan who were therefore the most obvious parties to argue that they lacked a real prospect of success.

11. I agree that the fact that Mr Fardad and Mr Vaughan had not been joined to the petition at the time of the November hearing is not of itself an answer to the application. This is not just because the Joinder Application was unopposed. It was also because they were accused of misfeasance and because part of the relief sought by PWHL was an order that they be required to file and serve points of defence to whatever form the points of claim took as a result of the hearing, an aspect of the dispute on which they had a legitimate position to advance. It was obviously appropriate from a case management perspective for all of the heads of relief sought in the Petition Application to be considered in conjunction with each other. In my judgment, it would be wrong in principle to conclude that no costs should be awarded to Mr Fardad and Mr Vaughan for that reason, even though there are other aspects of their positions which were not identical to each other.

12. Mr Fardad was represented jointly with Investor, which did not oppose the Petition Amendment Application (it consented to those which concerned it and was neutral on those amendments which were opposed by TopCo). As only a minimal amount of Investor's costs is attributable to the Petition Amendment Application, it and Mr Fardad contend that such costs as were incurred by either of them and are attributable to the Petition Amendment Application were incurred on behalf of Mr Fardad, who was successful in his opposition.

13. PWHL submitted that Mr Spalton made no oral submissions on the Petition Amendment Application at the November hearing, and that the evidence adduced from Mr Fardad was short and did not address the partiality point at all. That submission only tells part of the story, because, in circumstances in which Mr Davies had already made the points which required to be made in relation to the contested aspects of the Petition Amendment Application, it was the right course for Mr Spalton to take, while in his evidence Mr Fardad adopted much of what had already been said in writing on behalf of TopCo. In my view, none of this affects the fact that PWHL made Mr Fardad a party to the application in which the amendments were sought, that Mr Fardad had his own personal interest in the outcome and that he (amongst others) was successful in his opposition. I therefore think that as a matter of principle, he, as one of the successful parties, is entitled to his costs against PWHL as the unsuccessful party.

14. The position of Mr Vaughan is different to this extent. Unlike Mr Fardad, Mr Vaughan had chosen joint representation with TopCo which (unlike Investor which does not seek its costs of the Petition Amendment Application) engaged in active opposition. In those circumstances, there is more of an argument that a separate costs order is only justified to the extent that the costs were necessarily increased by separate submissions which had to be made on behalf of Mr Vaughan. However, as will become apparent when I explain my conclusions on assessment, it seems to me that this goes to the question of the appropriate attribution of costs as between Mr Vaughan and the BIG Parties, having regard to the reasonableness of the totality of the costs which were incurred on their behalf. It does not affect the fact that, as with Mr Fardad, PWHL made Mr Vaughan a party to the Petition Amendment Application, that Mr Vaughan had his own personal interest in the outcome and that he (amongst others) was successful in his opposition. I therefore think that as a matter of principle, he, as one of the successful parties, is entitled to his costs against PWHL as the unsuccessful party.

15. The next question is the costs consequential to the amendments, which both Investor and TopCo say should be paid by PWHL. The usual rule is that the costs of and occasioned by amendments are borne by the party seeking permission to amend, in this case PWHL (*Taylor v Burton* [2014] EWCA Civ 21 at [30]). This will include the costs to be incurred by Investor and TopCo in preparing, filing and serving its amended points of defence.

16. However, PWHL submits that, anyway in part, the usual rule should not apply in this case because certain of the amendments could not have been made at the time of the original petition. In support of this submission it relies on the principles discussed by Joanna Smith J in *Lendlease Construction (Europe) Ltd v Aecom Ltd* [2022] EWHC 2855 (TCC) at [5], i.e., that "whilst the usual order would be appropriate in a case where there had been a change of tack by the amending party, such that duplicative work was caused to the other party, nonetheless that reasoning would not necessarily apply when new information has come to light which could not have been pleaded previously".

This cites and relies on the earlier decision of Mann J in *Various Claimants v MGN Ltd* [2021] 4 WLR 55 at [31] to [36].

17. On the face of it, I am only concerned with the costs consequential to the amendments which were before the court at the time of the November hearing and for which permission was granted. This does not therefore include the costs consequential to the TopCo Defence Allegations for which permission was not then granted. However, as I understand the position, Investor and TopCo have now consented to a new pleading of a pared-down version of the TopCo Defence Allegations and each of TopCo, Investor and PWHL made their costs submissions on the basis that the form of amended points of claim with which I am now concerned is that which was served on 13 December 2024.

18. I have considered the version of the amendments for which permission is to be granted and have reached the view that, although a substantial majority of the re-amendments could have been made at the time of the petition, the usual rule described in *Taylor v Burto*n does not necessarily apply on the grounds that they could not have been expected to plead some of the allegations at the outset in large part because they had not yet occurred. This is either because they relate to wholly new events (such as those relied on in making the current form of the TopCo Defence Allegations) or because they were a continuation of what was said to be existing unfairly prejudicial conduct.

19. Although, having regard to the amendments as a whole, the matters which fall into this category come close to being insufficient to justify separate treatment from the usual rule, a conclusion which was urged on me by both TopCo and Investor, I think that PWHL has established that the consequential costs of a small proportion of the amendments ought to be costs in the case. As nobody suggests that it would be right to reflect this in an issue-based costs order, I agree that a small percentage reduction is appropriate. However, I do not agree that 25% is the right percentage to exclude from the usual rule. In my view the right order is that 85% of the costs consequential to the amendments should be paid by PWHL in any event, and 15% should be costs in the case.

The Debarring Application

20. The parties' positions in relation to the costs of the Debarring Application were as follows:

    i) TopCo seeks an order that PWHL pay its costs to be summarily assessed on the indemnity basis.

    ii) PWHL accepts that it should pay TopCo's costs of the Debarring Application but only on the standard basis; it seeks a detailed assessment and suggests an interim payment of £15,000.

21. The differences between the parties therefore relate only to (a) the basis for an award of costs, (b) whether the court should make an order for summary assessment or should direct a detailed assessment with an interim payment on account and (c) the amounts which PWHL should pay at this stage in the relevant eventuality. It follows that there

are no other costs disputes relating specifically to the Debarring Application which need to be determined separately.

The Part 7 Amendment Application

22. The parties' positions in relation to the costs of the Part 7 Amendment Application were as follows:

    i) The BIG Parties and Investor seek an order that PWHL and Mr Waddell pay their costs of and occasioned by the re-amendments to the particulars of claim on the standard basis.

    ii) PWHL and Mr Waddell accept that they should pay the BIG Parties' and Investor's costs of the Part 7 Amendment Application but contend that they should only pay 75% of their costs of and occasioned by the re-amendments to the particulars of claim, to be subject to detailed assessment on the standard basis if not agreed.

23. As all of the amendments were consented to, it is accepted that PWHL and Mr Waddell should pay the BIG Parties' and Investor's costs of the Part 7 Amendment Application on the standard basis. What is not agreed is whether PWHL and Mr Waddell should be relieved from the usual rule of paying all of the costs of and occasioned by the amendments (as per *Taylor v Burton* at [30]) on the grounds explained in *Lendlease Construction* – see paragraph 16 above.

24. It is submitted that a proportional order (75% / 25%) should be made of the same type as the order sought in relation to the costs of and occasioned by the amendments to the petition. I do not agree. From the way in which the principle described in *Lendlease* is articulated, it has always been recognised that it does not give rise to an invariable rule. In my view, it may not be appropriate to depart from the usual order on those grounds where only a very small proportion of the costs which will be incurred in responding to amendments relate to allegations which could not have been pleaded at the outset.

25. In the present case PWHL and Mr Waddell only rely on a very minimal number of re-amendments to the particulars of claim which fall into this category, and it is difficult to see how even some of those (e.g., paragraphs 101A and 101B) in fact do so. In any event they are materially less significant than those amendments to the petition which could be so described. In my judgment, the usual *Taylor v Burton* order is the just order to make. The consequence is that the BIG Parties' and Investor's costs of and occasioned by the re-amendments to the particulars of claim are to be paid by PWHL on the standard basis.

The Stay Application

26. The parties' positions in relation to the costs of the Stay Application were as follows:

i) The BIG Parties seek an order that PWHL and Mr Waddell pay their costs to be summarily assessed on the indemnity basis.

ii) Investor seeks an order that PWHL and Mr Waddell pay its costs to be summarily assessed on the indemnity basis.

iii) PWHL and Mr Waddell accept that they should pay the costs of the BIG Parties on the standard basis, but they seek a detailed assessment and suggest an interim payment of £40,000.

iv) PWHL and Mr Waddell accept that they should pay 50% of Investor's costs on the standard basis, but they seek a detailed assessment and suggest an interim payment of £10,000.

27. The first issue relates to the application of CPR 44.2, which provides that, although the court may make a different order, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Although, PWHL and Mr Waddell accept that in principle they (as the unsuccessful party) must pay the BIG Parties' assessed costs of the Stay Application, they do not accept that they should pay all of Investor's costs.

28. The basis on which they do so is that the Stay Application was a case management proposal to remove the need for TopCo to participate at the trial and, in reflection of that, Investor contributed little to the November hearing, either in oral submissions or its skeleton argument. They also ask me to infer that there was an agreement between the BIG Parties and Investor that counsel for TopCo could use the time available, a circumstance which was said to be relevant, presumably in support of a submission that Investor was content to have its own interests protected by the submissions made on behalf of TopCo. They also point out that I did not accept Investor's reliance on a test of rare and compelling circumstances (*Jefferies International v Cantor Fitzgerald* [2020] EWHC 1381 (QB)) in the current case: see [77] to [80] of the November Judgment.

29. I do not accept these submissions. PWHL and Mr Waddell chose to sue both the BIG Parties and Investor in the Part 7 claim, in circumstances in which they had separate and distinct interests to protect. The fact that in the event Mr Spalton only addressed the court on the Stay Application very briefly is explained by the fact that in the event the points on which he was ready to address the court were largely dealt with by Mr Davies. He therefore adopted the sensible and proportionate approach of not seeking to repeat them; all the more important given the timing constraints for the hearing.

30. This does not detract from the fact that it was appropriate for Investor to make detailed written submissions (which were of assistance to the court) and to be fully prepared to deal with the Stay Application by instructing leading and junior counsel for that purpose. The Stay Application was of very considerable significance to the future conduct of the dispute. While there may be applications in the future in respect of which it will be clear from the outset that it would be proportionate for one or other of the BIG Defendants or Investor to take a back seat and temper their representation accordingly, this was not one of them.

31. As to the argument in relation to rare and compelling circumstances, I do not consider that it can properly be said that, as a result of making a legal argument on the precise nature of the test for a stay which I did not accept, Investor was no longer the successful party, nor did it mean that PWHL and Mr Waddell won on a specific issue. The point took up very little of the court's time (it was addressed briefly by Mr Daniel Oudkerk KC in his oral submissions) but was not in my judgment the kind of point which justifies a separate issue-based costs order or a proportionate reduction in the amount of Investor's costs for which PWHL and Mr Waddell should be liable to pay.

Indemnity Costs

32. The next question is whether the BIG Parties' and Investor's costs of the Stay Application should be paid by PWHL and Mr Waddell on the indemnity basis. Much of what was said to justify such an order also related to the applications by TopCo and Mr Vaughan for indemnity costs in relation to the Petition Amendment Application and by TopCo for indemnity costs in relation to the Debarring Application. I shall therefore deal with these applications together.

33. It was common ground that an order for indemnity costs may be appropriate where the conduct of the relevant parties or the particular circumstances of the case take the situation "out of the norm" in a way which justifies such an order (*Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879 at [31] – [32] and [39]. The phrase "out of the norm" means "something outside the ordinary and reasonable conduct of proceedings" (*Esure Service Ltd v Quarco* [2009] EWCA Civ 595 at [25]).

34. PWHL and Mr Waddell submitted, in reliance on *Suez Fortune Investments Ltd v Talbot Underwriting Ltd* [2019] EWHC 3300 (Comm) at [2], that it was important to remember that, whereas costs on the standard basis must be proportionate and any doubt as to whether the costs were reasonably and proportionately incurred must be resolved in favour of the paying party, costs on the indemnity basis are not subject to the requirement of proportionality (with consequences that may well be financially significant) and any doubts must be resolved in favour of the receiving party. They also reminded me that Teare J in *Suez Fortune* adopted what Morgan J said in *Digicel (St Lucia) Ltd v Cable and Wireless Plc* [2010] 5 Costs LR 709 at [19] to the effect that these differences are important for the court to bear in mind when considering whether the conduct of the paying party is sufficiently unreasonable or inappropriate to justify an order for indemnity costs.

35. I agree that these are important considerations to bear in mind. I also accept that, in considering whether or not particular conduct is out of the norm, the court must be satisfied either of misconduct or conduct deserving of moral condemnation, or that there has been conduct which is unreasonable to a high degree.

36. They also submitted that the mere fact that a claim which can be seen to be weak is not of itself sufficient to justify an order for indemnity costs, even if it can be seen to be "thoroughly bad" and does not (or would not) survive an application for summary judgment. I agree that that is the case. It will not normally be sufficient for the ground relied on to be that the paying party's conduct was wrong or misguided with the benefit of hindsight; something more, such as misconduct deserving of moral condemnation or

conduct which is unreasonable to a high degree, is required. Thus, if the Stay Application could properly be described as "speculative, weak, opportunistic and thin" (to adopt the language of the Court of Appeal in *Lejonvarn v Burgess* [2020] Costs LR 45 at [44], citing with approval the judgment of Tomlinson J in *Three Rivers DC v Bank of England* [2006] 5 Costs LR 714 at [25(5)]), indemnity costs may be justified.

37. But the application of even this principle all depends on the precise circumstances of the case and conduct which cannot properly be stigmatised as unreasonable to a high degree can also justify an order for indemnity costs when taken into account as one of an "aggregation of factors" (*Suez Fortune* at [11]). Another way of putting the same point is that the authorities support an approach which recognises that the degree to which a point is a bad one may go into the scales when deciding whether to make an order for indemnity costs (Investor and PWHL both cited *Dixon v Radley House Partnership* [2016] EWHC 3485 (QB) at [6] to this effect).

38. The basic circumstance on which the BIG Parties relied was that both the Stay Application and the Debarring Application were fundamentally misconceived, not least because the combination of success on both applications would lead to a manifestly unfair and unjust result. They said that this was illustrated by the fact that PWHL and Mr Waddell said that a stay was appropriate on the grounds that the Part 7 issues could be determined in a binding manner in the petition, even though three of the defendants in the Part 7 claim (MidCo, BidCo and BMW) were not even parties to the petition. In the same context, Investor also said, in support of a submission that the Stay Application was sufficiently speculative, weak, opportunistic and thin to justify an award of indemnity costs, that PWHL and Mr Waddell never advanced a coherent explanation as to which of the Part 7 issues would be left undecided once the petition had been determined – a fundamental aspect of any application for a stay on these particular case management grounds. Nor did they ever explain why the overlap between the issues did not point to joint case management rather than a stay of the Part 7 claim.

39. This was said by both Investor and the BIG Parties to have been exacerbated by the fundamental *volte face* on the part of PWHL and Mr Waddell which I have described at some length in the November Judgment, and which will have caused very significant wasted expenditure. This was conduct which demonstrated a high degree of unreasonableness because they were seeking a stay of a claim which they themselves had started, which had been underway for five months and for some considerable time after they had changed their legal team and which was the subject of an order for expedition which they had sought and obtained from Mr Rosen KC on determination of their unsuccessful application for injunctive relief. In [75] of the November Judgment I described this flatly inconsistent conduct as one of the circumstances which gives rise to a powerful inference that PWHL and Mr Waddell were not doing enough to help the court to further the overriding objective in accordance with their duty under CPR 1.3. I agree with the BIG Parties' characterisation of what I said in [75] of the November Judgment as a significant criticism.

40. I consider therefore that it is right to describe the Stay Application as speculative, weak, opportunistic and thin. With particular reference to its speculative and opportunistic nature, there was never a proper explanation as to why a stay of the Part 7 claim was a remotely sensible way to case manage the two sets of proceedings (as opposed to joint case management). Nor was there ever a sensible explanation for why PWHL and Mr Waddell changed their minds from their original pleaded contention at the time of the

issue of the petition that joint case management was the right approach. I do not go so far as to say, as asserted by Investor, that PWHL and Mr Waddell appreciated that the Stay Application was hopeless or nearly so but decided to pursue it anyway. However, it is right to record that I came close to reaching that conclusion in light of the circumstances in which it was issued, including the facts that there was no pre-warning, and that the *volte face* came out of the blue.

41. The BIG Parties submitted that the highly unreasonable conduct of PWHL and Mr Waddell in relation to the Stay Application was intimately linked both to the Debarring Application and that contested part of the Petition Amendment Application which accused TopCo's directors of misfeasance in causing TopCo to serve points of defence at all. It is said that this was all part of the same pattern of inconsistent conduct and meant that the application was obviously hopeless in light of the earlier agreement by PWHL and Mr Wadell that TopCo could take the very course of which they now made serious criticism in the form of an allegation of misfeasance. In the light of that clear agreement, reached by PWHL and approved by the court, an application for permission to amend in order to allege that the mere filing of a defence was a misfeasant act was always hopeless.

42. In my view, and notwithstanding the general principle described by Hoffmann J in *Crossmore*, TopCo's argument that it should not be prevented from separate participation in the petition in respect of its own separate interests was always a good one (see the points made by SH as described in [23] of the November Judgment and my conclusions as to the applicable test at [43] and elsewhere). However, I accept that, absent the prior agreement, PWHL's answer to the reasons why TopCo contended that it had its own separate interests to protect might simply have been regarded as one which can be seen in hindsight to have been weak (as to which see the citation from *Kiam v MGN Ltd (No 2)* [2002] EWCA Civ 66 in *Excelsior* at [30]). In such circumstances, indemnity costs would not have been justified.

43. However, the prior agreement cast the argument in a very different light. In my view, the Debarring Application was also always going to be speculative, weak, opportunistic and thin, unless PWHL was able to advance a clear and convincing explanation for its change of heart. But this was never given, and there was never any proper explanation as to why its obvious *volte face* was justified. It follows that, in circumstances in which PWHL had earlier given a considered consent to TopCo's substantive participation in the petition, I think that the Debarring Application can properly be described not just as weak and thin, but also as reflective of conduct which is to be deprecated as a speculative and opportunistic *volte face* for which no proper explanation was ever given.

44. PWHL also submits that the Petition Amendment Application could not be described as hopeless because of the conclusions I reached in [56] to [58] of the November Judgment to the effect that it had a prospect which is more than fanciful of establishing that TopCo's approach to the form of its points of defence was capable of being stigmatised as conduct amounting to unfairness or breach of duty by its directors. That is an accurate summary of my findings, but they had no effect on the outcome of the Petition Amendment Application itself, the costs of which are the matter with which I am concerned. In my judgment, the fact that permission is now to be given to amend the points of claim in respects which reflect allegations that PWHL intended to make, but which were not in a properly pleaded form, does not detract from the fact that the

contested parts of the Petition Amendment Application comprehensively failed. As they were all part of the same considered course of conduct as that which included the hopeless allegations in relation to the mere filing of the points of defence and the Debarring Application, I think that it would be both artificial and disproportionate to split them out for the purpose of contending that some part of the Petition Amendment Application did not in itself warrant an order for indemnity costs.

45. In these circumstances, I agree with the BIG Parties and Investor that the circumstances in which the Petition Amendment Application, the Debarring Application and the Stay Application came to be made were out of the norm in the sense described in *Esure*, and in a manner which justifies the making of an order for indemnity costs.

Summary Assessment

46. The usual rule (CPR PD 44 paragraph 9.2(b)) is that a court will carry out a summary assessment at the conclusion of a hearing which has lasted not more than one day. As the November hearing was concluded within a single day, the BIG Parties and Investor invite me to take that course. In respect of the Petition Amendment Application and the Debarring Application, TopCo seeks £57,000. In respect of the Petition Amendment Application Mr Fardad seeks £16,000 and Mr Vaughan seeks £69,000. In respect of the Stay Application, Investor seeks £231,000 and the BIG Parties seek £115,000. Save for Mr Fardad's application, all of these amounts assume a summary assessment on the indemnity basis.

47. PWHL say that in the current case a summary assessment is effectively impossible or impracticable, notwithstanding the fact that the hearing took a single day. It submits that the information made available to the court is inadequate to enable it to carry out the necessary scrutiny, both because the schedules that have been filed by the BIG Parties are not broken down by reference to each application and because the BIG Parties and Mr Vaughan have made an entirely arbitrary apportionment of the costs both as between the Part 7 Application and the Petition Application and as between TopCo and Mr Vaughan.

48. As to Investor's costs, it is said that summary assessment is also inappropriate because the costs schedule which has been provided supports a single figure for the hearing and spans at least five applications across the two claims. In response, Investor says that the need to disentangle the costs is in fact a reason for summary assessment because the judge who heard the applications is in a far better position to assess allocation than a costs judge would be.

49. PWHL also relies on the fact that the total amounts in issue are very substantial (£488,000), which is far in excess of amounts in respect of which other judges have declined to make a summary assessment on the grounds that the amounts involved are too substantial to be dealt with in that way (*Les Ambassadeurs Club Ltd v Albluewi* [2020] EWHC 1368 (QB) at [16] and *Broseley London Ltd v Prime Asset Management Ltd* [2020] EWHC 1057 (TCC) at [27]). While I agree that it is not uncommon for courts in the Chancery Division to make summary assessments where the amounts claimed exceed £100,000, a figure of almost £500,000 is very substantial for a one-day

hearing (even one which deals with a number of different applications). It gives rise to real questions of whether a detailed assessment is required.

50. In my view, there is good reason not to carry out a summary assessment and a detailed assessment is required in the present case. There are a number of interlinked reasons for this.

51. The first is that it was only through adopting a very strict timetable that it was possible to get through all of the applications in a single day at the November hearing. Those which were disputed can properly be described as substantial applications and the hearing as a whole was right at the margins of the type of hearing for which the PD envisaged that a summary assessment is appropriate.

52. The second is that it is impossible to tell with any degree of accuracy the reasonableness of the apportionments which have been made by the BIG Parties and Mr Vaughan as between themselves. There has also been little attempt by the receiving parties to apportion as between the various applications which were heard at the November hearing. Having all chosen to apportion in the way they have, that is the basis on which the court must conduct its assessment. It has at least some immediate practical impact in relation to VAT (for which Mr Vaughan has claimed, but which no other receiving party has) and may do so in the future. I do not agree that I have the information I need to carry out that task, nor do I agree that I am in any better a position at this stage to apportion the costs than a costs judge will be in due course.

53. The third relates to the claimed hourly rates, which require much more careful scrutiny than I am able to give. As to the costs of Investor and Mr Fardad, I accept that this is a high value case which is very significant to the parties. Nonetheless, I do not accept that, by drawing attention to the factors it relies on in paragraph 16 of its reply submissions, Investor has established the clear and compelling justification envisaged by Males LJ in *Samsung v LG* [2022] Costs LR 627 at [6] for hourly rates in material excess of the guideline hourly rates. That is not to say that it may not do so on a detailed assessment, but whether it will be able to resist a challenge to the reasonableness of the claims it actually makes must be open to real doubt, even when assessed on the indemnity basis: it claims for an hourly rate at c.250% of the guideline rate for the relevant Grade A and B fee earners. These are huge uplifts and only the claimed rate for a paralegal comes near the guidelines. Similar issues arise in relation to the costs claimed by the BIG Parties and Mr Vaughan, although in a significantly less pronounced form, because the uplift from the guideline hourly rates is closer to 150%.

54. The final issue is that the solicitors' pre-hearing costs for the various applications amount in aggregate to just under £170,000 for Investor and Mr Fardad and to £87,000 for the BIG Parties and Mr Vaughan. These are very different as between themselves, but quite apart from that, they are very large amounts for a one-day hearing and I am not satisfied that it is possible on a summary assessment properly to test whether their attribution to these applications as opposed to the more general conduct of the litigation has been correctly carried out.

55. I shall therefore order the costs to be subject to detailed assessment if not agreed. I must also order a payment on account unless there is good reason not to do so (CPR 44.2(8)). No good reason is suggested. In fixing the figure for the payment, the right approach is for the court to estimate the likely level of recovery, subject to an

appropriate margin to allow for error in the estimation, per Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [23].

56. In applying this test, I have regard to the factors I have already considered in relation to the question of why a summary assessment is not appropriate, applying where appropriate the standard or the indemnity basis and reflecting to the extent I am able the concerns I have about the extent of the hourly rate uplift. Bearing in mind that the estimate is by its nature a relatively broad-brush exercise, I have concluded that the following payments on account must be made in relation to the two separate application notices (compounding where appropriate the amounts payable in respect the Petition Amendment Application, the Debarring Application, the Part 7 Amendment Application and the Stay Application):

    i) PWHL must pay TopCo £40,000 in respect of its costs of the Petition Application (c.70% of the amount claimed);

    ii) PWHL must pay Mr Vaughan £48,000 in respect of his costs of the Petition Application (c.70% of the amount claimed);

    iii) PWHL must pay Mr Fardad £8,000 in respect of his costs of the Petition Application (c.50% of the amount claimed);

    iv) PWHL and Mr Waddell must pay the BIG Parties £80,000 in respect of their costs of the Part 7 Application (c.70% of the amount claimed);

    v) PWHL and Mr Waddell must pay Investor £127,000 in respect of its costs of the Part 7 Application (c.55% of the amount claimed).

57. The parties are to agree and submit for my approval an order to reflect the conclusions I have reached and recorded in this judgment.