Neutral Citation Number: [2021] EWHC 1039 (Comm)

Case No: CL-2021-000109

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2021

Before :

THE HONORABLE MR JUSTICE CALVER

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Between :

LOUIS DREYFUS COMPANY SUISSE S.A. (A Company incorporated in Switzerland)	**Claimant**
- and -	
INTERNATIONAL BANK OF ST. PETERSBURG (JOINT-STOCK COMPANY) (A Company in liquidation in The Russian Federation)	**Defendant**

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- -

Stephen Houseman QC (instructed by **Orrick, Herrington & Sutcliffe LLP**) for the **Claimant**

The Defendant did not appear and was not represented

Hearing dates: 23 April 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 23 April 2021 at 3:30 am

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THE HONORABLE MR JUSTICE CALVER

Mr Justice Calver :

I. THE MATERIAL EVENTS

1. Louis Dreyfus Company Suisse S.A. ("LDCS") is part of the Louis Dreyfus Company group of companies ("LDC"), a group established in 1851 that is a global merchandiser and processor of commodities, operating a significant network of assets around the world, including in agriculture, food processing and finance.

2. Between 2013 and 2017 LDCS, together with another LDC subsidiary, Louis Dreyfus Company Asia ("LDCA"), entered into at least 23 transactions involving the Defendant ("IBSP") and a Cyprus-registered entity named Hervet Investments Limited ("Hervet") involving the sale of goods against letters of credit. Hervet is amongst other things itself a shareholder of IBSP.

3. With regard to those sale transactions dated 26 September 2017 and 10 October 2017 (the "Sale Transactions") which are related to the letter of credit reference No. L/771I dated 12 October 2017 (the "LOC"), this included the following steps:

    i. LDCA sold to LDCS a quantity of Brazilian soyabeans (the "Goods") in the amount of USD 10,998,519 under Contract No. B2-S01091 dated 26 September 2017. The soyabeans were to be delivered to a Chinese port by 19 October 2017. The terms of payment provided for the issuance of a documentary letter of credit to be issued by a Russian bank. Contract B2-S01091 is governed by English law and refers to arbitral proceedings in the English language (under the heading, "GOVERNING LAW / ARBITRATION").

    ii. LDCS in turn sold the Goods to Hervet for the amount of USD 10,998,519 under sale contract No. E6-S00439 dated 26 September 2017 (the "Hervet Sale Contract"). The payment terms for this sale provided that Hervet would make payment on 25 September 2018, namely 365 days after the sale of Goods, following delivery of an original commercial invoice and a copy of the bill of lading. The Hervet Sale Contract is governed by English law and provides for dispute resolution by arbitration seated in London under the LCIA rules.

    iii. On 10 October 2017, LDCS entered into a letter of credit issuance agreement No. GF 10.17.01.11 with IBSP ("LOC Issuance Agreement"). The LOC Issuance Agreement provides for the issuance of the irrevocable letter of credit no. L/771I, namely the LOC, for an amount of USD 10,998,519 by IBSP in favour of LDCA as beneficiary. It provides by clause 4.2 as follows:

        "*The Applicant undertakes to repay the Deferred Payment Amount to the Correspondent Account on the Maturity date, unless other conditions are satisfied as agreed between the Applicant and the Bank.*"

And by clause 8.2:

> "*Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of Arbitration ("LCIA"), which rules are deemed to be incorporated by reference into this clause … The governing law of the contract shall be the substantive laws of England.*"

iv. By its clause 4 and the definition of Security, The LOC Issuance Agreement also provided for the issuance of a standby letter of credit by LDCS in favour of IBSP by KBC Bank NV in the amount USD 10,998,519 to ensure the performance of payment obligations by LDCS to IBSP under the LOC Issuance Agreement. The LOC Issuance Agreement is, as I have said, governed by English law and provides for the resolution of disputes by arbitration seated in London under the LCIA rules.

v. Also on 10 October 2017, LDCS and IBSP entered into a discharge of obligations agreement ("Discharge Agreement") under which LDCS assigned its rights to receive payments from Hervet under the Hervet Sale Contract to IBSP. The Discharge Agreement provides that all amounts due from LDCS in connection with the LOC "*have been repaid in full by* [LDCS] *to* [IBSP]*'s satisfaction*", and that IBSP will have no further recourse to LDCS. The Discharge Agreement is governed by English law and provides for the resolution of disputes by arbitration seated in London under the LCIA rules (see "Applicable Law"). The LOC was issued on 12 October 2017. It is expressly governed by English law and incorporates UCP 600.

vi. On 16 October 2017, LDCA received from IBSP USD 10,682,123.25, under a letter of credit in fulfilment of LDCS's payment obligation towards LDCA for the Goods.

vii. On 20 September 2018, LDCS notified IBSP of the termination of its collecting agent function under the Discharge Agreement.

4. Hervet did not pay the amount of USD 10,998,519 to IBSP as assignee of the debt which originally arose under the Hervet Sale Contract [AAK1/21].

II. RUSSIAN COURT PROCEEDINGS

5. On 15 October 2018, the Bank of Russia placed IBSP under provisional administration. Shortly afterwards, on 31 October 2018, the Bank of Russia revoked IBSP's banking licence.

6. On 24 September 2019, the Russian Court declared the bankruptcy of IBSP and the State Corporation Deposit Insurance Agency ("DIA") was appointed as IBSP bankruptcy receiver (trustee).

7. A memorandum prepared by LDCS's Russian lawyers ("Alrud") on 26 February 2021 outlines the proceedings before the Russian Court. This explains that IBSP – represented by the DIA – filed court proceedings against LDCS and four other parties, including Hervet, on 14 November 2019 (originally filed on 14 October 2019) (the "Russian Court Application"). The Russian Court Application requested inter alia that the court invalidate the Discharge Agreement dated 10 October 2017 and apply consequences of its invalidity.

8. LDCS's Russian counsel advises that the reasons cited in the Russian Court Application for the invalidation of the Discharge Agreement are due to grounds related to IBSP's bankruptcy, namely that the transaction is undervalued, and on the basis that the Discharge Agreement was entered into by IBSP's representative to the detriment of IBSP's interests. Pursuant to the Russian Bankruptcy Law, the jurisdiction of the Russian Court arises in relation to disputes relating to the invalidation of a debtor's transactions in connection with a bankruptcy case before that court.

9. Crucially, on 20 October 2020, after the invalidation proceedings before the Russian Court had been underway for almost a year, counsel for IBSP filed an application in which it sought to clarify to the Russian Court the outcome it seeks should the court decide to declare the Discharge Agreement invalid. IBSP sought to amend the wording of its claim as follows: "*To declare invalid the Discharge of Obligations Agreement as of 10 October 2017* [...] *and to apply consequences of transaction invalidity in the form of ordering LDCS to pay USD 10,998,519 to IBSP* [...]."

10. In effect, this proposed clarification (the "New Debt Claim") changes the nature of IBSP's consequential claim against LDCS from one which relates purely to a declaration invalidating and unwinding the Discharge Agreement itself, which is related to the bankruptcy proceedings before the Russian Court and which would have no direct enforceability against LDCS's assets, into a claim for payment of USD 10,998,519 arising from the underlying and distinct commercial transactions governed by English law and containing a mandatory LCIA arbitration agreement.

11. Furthermore, the New Debt Claim involves enforcement of the LOC Issuance Agreement and/or the LOC, both of which are separate agreements from the Discharge Agreement subject of IBSP's original application for invalidation. This is not restitution consequent upon invalidation of the Discharge Agreement. The New Debt Claim creates a risk for LDCS that a judgment issued by the Russian Court can be enforced and executed against LDCS's assets.

12. It follows that the New Debt Claim involves an alleged private law contractual debt, the existence of which is expressly contingent upon (and hence distinct from) the claim to invalidate the Discharge Agreement pursuant to Russian bankruptcy law. No arbitrability or public policy issues therefore arise in respect of the New Debt Claim; cf. *RiverRock Securities Ltd v. International Bank of St. Petersburg (Joint Stock Co)* [2020] EWHC 2483 (Comm); [2020] 2 Lloyd's Rep. 591 (Foxton J - interim relief); [2020] EWHC 3324 (Comm) (Sir Michael Burton - final relief) ("*RiverRock*").

13. As a matter of English law, which is the governing law, I am entirely satisfied that this claim for repayment in respect of the LOC is a dispute "*in connection with*" the LOC Issuance Agreement, given the express obligation "*to repay the Deferred Payment Amount … on the Maturity Date*" pursuant to clause 4.2 thereof.

14. On 27 October 2020 LDCS filed its detailed objections to the New Debt Claim, arguing that this approach in seeking to advance this new claim is inadmissible, both as a matter of Russian procedural law - as the 'clarification' actually amounts to the belated filing of a new claim - and because the effect of this new claim would be that the Russian Court would decide on the payment of amounts which arise under agreements governed by English law and subject to LCIA arbitration.

15. In subsequent hearings held on 8 December 2020 and 3 February 2021, a discussion apparently arose between counsel for IBSP and the judge regarding the admissibility of the New Debt Claim. LDCS's counsel objected to the admission of the New Debt Claim on the basis that the Russian Court lacks jurisdiction to hear a case on debt recovery which arises under agreements governed by English law and subject to LCIA arbitration. During the hearing on 3 February 2021, the court accepted IBSP's amended claim as part of the proceedings and subject to any jurisdictional challenge.

16. LDCS then issued its application for anti-suit relief on 26 February 2021, with that application first coming before Cockerill J on 1 March 2021 (when it was granted by her).

17. The next hearing before the St. Petersburg Court is scheduled for Wednesday 28 April 2021, i.e. two clear working days after the present hearing. The Claimant says and I accept that there is (at least) a real risk that judgment may be entered at that hearing in respect of the New Debt Claim unless the same is terminated or withdrawn in the meantime: see Al-Khasawneh 3 at [9].

III. CLAIM FOR FINAL RELIEF

18. I turn next to the applicable principles for the grant of an anti-suit injunction. The court, of course, has the power to make an anti-suit injunction under *s.37(1) of the Senior Courts Act 1981* where it is just and convenient to do so. That provision reads as follows:

> "*The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*"

19. The Court has the power under *s.37(1) of the 1981 Act* to grant an anti-suit injunction restraining foreign proceedings where they are issued in breach of an exclusive jurisdiction agreement or an arbitration agreement: see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87, and *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC* [2013] 1 W.L.R. 1889.

20. The burden rested upon the Claimant to satisfy the Court on the material adduced at the interlocutory hearing that there is a high degree of probability that there is a binding and applicable arbitration agreement: *Emmott v Michael Wilson & Partners* [2018] 1 Lloyd's Rep. 299 (CA) [38]-[39]. Now, at this final hearing, the Claimant has to prove this fact on the customary balance of probabilities.

21. If the Claimant can do so, the court will ordinarily exercise its discretion to grant an anti-suit injunction to restrain a party from commencing or continuing with foreign proceedings in breach of an arbitration agreement, unless the defendant can show strong reasons why the injunction should not be granted: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87 *and AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant* [2013] UKSC 35 per Lord Mance at [24-28]. The burden therefore falls at this stage upon the Defendant.

22. Where an anti-suit injunction may result in a material injustice to the injunction respondent, this may amount to a strong reason not to grant the injunction but only in circumstances where the material injustice arises from a matter which is not a foreseeable consequence of the exclusive jurisdiction agreement.[1] Cases where such a material injustice has amounted to a strong reason in the face of an exclusive jurisdiction agreement include, for example, those where the respondent's substantive claims would be time-barred before the contractual forum but only where the respondent has acted reasonably in not commencing in the contractual forum before the time-bar. However, these considerations do not arise in this case.

23. In contractual cases, *forum conveniens* considerations are irrelevant to the exercise of the discretion to grant an anti-suit injunction.[2] Such considerations are insufficient to amount to strong reasons against the grant of an injunction because the parties can be taken objectively to have foreseen considerations of relative convenience or inconvenience of forums for dispute resolution at the time of contracting and are therefore encompassed by the parties' agreement.[3]

24. Furthermore, comity has little if any role to play when the court is considering whether to exercise its discretion in contractual cases, save of course for

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[1] *Raphael, The Anti-Suit Injunction*, [8.15].

[2] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chub* [2020] UKSC 38; [2020] 2 Lloyd's Rep. 449, [179].

[3] *Donohue v Armco* [2000] 1 Lloyd's Rep. 579, 589 (reversed on other grounds [2001] UKHL 64; [2002] 1 Lloyd's Rep 425); also see *The Anti-Suit Injunction*, Raphael QC (2nd ed., 2019), [8.10].

considerations of any delay in seeking the anti-suit relief.[4] The court's concern will be to uphold the parties' bargain, absent strong reason to the contrary.

25. Thus, whilst the court should feel no diffidence in granting an anti-suit injunction to restrain a breach of a London arbitration clause, it has, nonetheless, been emphasised that this is provided it is sought promptly and before foreign proceedings are too far advanced: *The Angelic Grace* per Millett LJ at p.96, column 2.

26. I am satisfied, as I have said, that LDCS has shown the existence of the contractual provisions which provide that English law and LCIA arbitration are applicable in relation to any dispute for payment arising under the Sale Transactions, including the New Debt Claim, and that IBSP is bound by them.

Declaration sought in para 2 of the draft Order:
("*The Defendant's introduction and pursuit of the New Russian Debt claim constitutes a breach of the Arbitration Agreement, irrespective of whether such contingent claim is based upon the LOC Issuance Agreement or LOC itself, as a matter of English law*.")

27. I accordingly grant the relief sought in paragraph 2 of the draft Order. Given the ambiguous foundation of the New Debt Claim in terms of precise contractual analysis, the declaration is required to cover both available bases. On either view, the New Debt Claim falls squarely within the Arbitration Agreement.

Anti-suit relief sought in para 4 of the draft Order

("*4. The Defendant, whether by itself, its servants, agents or otherwise, including the DIA as its official receiver in Russia, is forthwith and permanently:*

4.1 restrained from taking any steps to pursue, progress or prosecute the New Russian Debt Claim in the IBSP Bankruptcy Proceedings and/or Russian Invalidation Proceedings;

4.2 *restrained from commencing or prosecuting any other monetary or debt-recovery or equivalent claim or proceedings in any other court or tribunal arising out of or in connection with the Contracts, otherwise than by commencing LCIA arbitration proceedings pursuant to the Arbitration Agreement*; *and*

4.3 *restrained from taking any steps to recognise or enforce any subsequent judgment of the Russian Court in respect of the New Russian Debt Claim*.")

28. Applying the English case law principles that I have described, I am accordingly also satisfied that anti-suit relief is required to be granted in this case and that there are no strong reasons or countervailing discretionary factors against such final relief. The present action was commenced promptly after the introduction of the New Debt Claim into the Original Invalidation Proceedings in February 2021. That constituted a first-time breach of distinct arbitration rights on the part of the Defendant.

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[4] *Enka Insaat ve Sanayi AS v OOO Insurance Company Chub* [2020] UKSC 38; [2020] 2 Lloyd's Rep. 449, [180], [183]-[184]; *The Yusef Cepnioglu* [2016] EWCA Civ 386; [2016] 1 Lloyd's Rep. 641, [34].

29. Accordingly, the relief sought in paragraph 4.1 and 4.2 of the draft Order is appropriate and I grant it.

30. Further, as in *RiverRock* itself, it is appropriate that the final ASI relief should restrain enforcement of any adverse judgment/order made by the St. Petersburg Court on the New Debt Claim (see draft Order, para.4.3): *RiverRock* (final judgment) at [9]. I grant that relief as well.

Mandatory injunction sought in para 5 of the draft Order
("The Defendant shall forthwith take all steps necessary to withdraw and/or discontinue and/or terminate the New Russian Debt Claim before the Russian Court").

31. Moreover, a mandatory injunction is appropriate (paragraph 5 of the draft Order) in order to give effect to the contractual position and protect the Claimant from the risk of an adverse judgment being entered at the next hearing on 28 April 2021. See *Mobile Telecommunications Co. v. Al Saud* [2018] EWHC 1469; [2018] 2 Lloyd's Rep. 192 at [19]; *RiverRock* (final judgment) at [6]-[8].

Declaration of good service sought in para 3 of the draft Order

("*These proceedings were properly served upon and brought to the attention of the Defendant, including through representatives of the DIA, on Tuesday 2 March 2021 and in any event by no later than Tuesday 9 March 2021*").

32. Out of an abundance of caution and in order to preserve the practical utility of any final relief granted by the Court, the Claimant seeks a declaration as regards good service upon the Defendant.

33. Pursuant to paragraphs 5 and 7 of the Order of Cockerill J dated 1 March 2021, at around 4.23pm on Monday, 1 March 2021, a service bundle ("Service Bundle") was sent by email to those email addresses referred to in paragraph 5 of the Judge's Order, split into two emails due to content size restriction. This means that service took place on 2 March 2021, as paragraph 6 of the Order provides that service of these proceedings is deemed to have taken place the next day if sent by email after 4pm GMT. The Service Bundle contained amongst other things the arbitration claim form; application notice; and the Order of 1 March 2021 (containing a penal notice and interim anti-suit injunction, together with various service-related permissions and other directions).

34. On Tuesday 2 March 2021 a copy of the Service Bundle was served by hand at the offices of the DIA in Moscow. The DIA receptionist signed a confirmation of receipt alongside the agency's stamp.

35. Also on 2 March 2021 two copies of the Service Bundle were sent by registered post, one to IBSP in Saint Petersburg and the other to the DIA in Moscow. The Russian Post delivery tracking service confirms that the Service Bundle was delivered to the DIA on 6 March 2021.

36. On Saturday 6 March 2021 a full Russian translation (of documents in English) of the Service Bundle was sent by email to the same email addresses referred to in paragraph 5 of the Court's Order of 1 March 2021. At about 8.24am GMT, being 11.24 am in Moscow on Tuesday 9 March 2021, the Russian translation of the Service Bundle was downloaded by Mr Babelyuk Sergey Nikolaevich, the DIA representative appearing in the Russian Court proceedings who is the owner of one of the stated email addresses.

37. Also on 9 March 2021 the Russian translation of the Service Bundle was delivered by hand to the DIA in Moscow, the DIA receptionist signed a confirmation of receipt alongside the agency's stamp.

38. In the meantime, on Thursday 4 March 2021 the first draft transcript of the 1 March Hearing was sent by email to the same email addresses referred to in paragraph 5 of the Order of 1 March 2021 with a covering explanation. On Tuesday 16 March 2021, a revised and finalised version of the hearing transcript, in which minor typographical errors had been corrected, was sent by email to the same email addresses.

39. In all the circumstances I am fully satisfied that it is necessary and appropriate to grant the relief sought in paragraph 3 of the draft Order.

Damages sought in para 6 of the draft Order

("*The Defendant shall pay the sum of £20,055.65 to the Claimant by way of damages for the breach of contract referred to in paragraph 2 above measured as at 31 March 2021 with liberty for the Claimant to apply to seek an additional award of damages for losses sustained after 31 March 2021*").

40. LDCS appointed Alrud to act as Russian counsel to defend it in the proceedings before the Russian Court. LDCS did not object to the jurisdiction of the Russian Court insofar as it arose from a dispute relating to the invalidation of a debtor's transaction in connection with a bankruptcy case before the Russian Court. However, LDCS raised timely objections to the jurisdiction of the Russian Court upon the amendment by the DIA of IBSP's claim against LDCS to the New Debt Claim, being a claim for payment arising from underlying and distinct commercial transactions governed by English law and containing the mandatory LCIA arbitration agreement.

41. LDCS accordingly claims as damages the legal costs borne in connection with objecting to the New Debt Claim before the Russian Court. Alrud has identified these costs in isolation from the general costs of its legal representation in the Russian Court proceedings. They are itemised in the exhibit to the third witness statement of Ali Al Khasawneh which is before me. The total amount of damages claimed by LDCS in connection with defending the New Debt Claim before the Russian Court on 31 March 2021 is €23,130, the equivalent of £20,055.65.

42. I grant the relief sought in paragraph 6 of the draft Order. In light of IBSP's and DIA's failure to desist from pursuing the New Debt Claim before the Russian Court despite the issuance of an interim anti-suit injunction Order of Mrs Justice Cockrill dated 1 March 2021 to this effect, LDC will be forced to bear further damages in defending its position in the New Debt Claim. I accordingly grant liberty to apply in this respect.

Costs sought in paras 7-9 of the draft Order

43. Finally, the Claimant seeks its costs of these ASI proceedings on the indemnity basis reflecting the "*usual practice*" where contractual ASI relief is granted by the Commercial Court: see *RiverRock* (final judgment) at [11].[5]

44. The Claimant's Schedule of Costs has been provided to the court. The total amount claimed of £292,066 is surprisingly large, despite the fact that there have been three unopposed hearings.

45. CPR 44.3 and 44.4 provide that where costs are to be assessed on an indemnity basis, the court (1) will not allow costs which have been unreasonably incurred or are unreasonable in amount; (2) will have regard to all the circumstances in deciding whether costs were unreasonably incurred or unreasonable in amount; and (3) will resolve any doubt which it may have as to whether costs were unreasonably incurred or were unreasonable in amount in favour of the receiving party ("*the receiving party presumption*").

46. Whilst there was the need for some Russian law advice on *RiverRock* issues, this was a relatively straightforward application. A sum of £292,066 appears to me to be excessive in amount for such an application. The three hearings were uncontested and relatively short and straightforward. On a taxation I am sure that the costs would be heavily taxed down, even after the application of the receiving party presumption.

47. I bear in mind the words of Leggatt J (as he was) in *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm) at [13]:

> "*In a case where very large amounts of money are at stake* [or I would add, important points of principle], *it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to*

[5] The 2013 authority referred to by Sir Michael Burton in *RiverRock* at [11] is *Bannai v. Erez* [2013] EWHC 4287 (Comm) at [2] ("*the convention in this court*").

distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."

48. It is of course the entitlement of the Claimant (and any Claimant) to appoint Counsel of its choice and here to appoint leading counsel, Mr. Houseman QC, who has conducted and presented the case throughout with his customary skill, rather than instructing him with junior counsel and allowing the bulk of the work to be carried out by junior counsel. However, that does not mean that the Claimant should be entitled to recover from the Defendant, even on an indemnity basis, costs which are significantly greater in amount than it might otherwise reasonably have incurred, whilst still having its case conducted and presented proficiently.

49. In all the circumstances, I consider that the appropriate sum to award on an indemnity basis is £200,000.