Neutral Citation Number: [2021] EWHC 2204 (Comm)

Case No: LM-2021-000145

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
LONDON CIRCUIT COMMERCIAL COURT (QBD)

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

Date: 04/08/2021

Before :
CLARE AMBROSE
Sitting as a Deputy Judge of the High Court

- -

Between :

FALCON TRIDENT SHIPPING LIMITED	**Claimant**
- and -	
LEVANT SHIPPING LTD	**Defendant**

- -
- -

Thomas Steward (instructed by **MFB**) for the **Claimants**
Michal Hain (instructed by **Clyde &Co**) for the **Defendants**

Hearing date: 27 July 2021
Draft Judgment provided to parties on 29 July 2021

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Approved Judgment

Covid-19 Protocol : This judgment will be 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 10.30am on Wednesday 4 August 2021

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Clare Ambrose :

Introduction

1. This is the final hearing of the Claimant's Part 8 claim for a declaration that it is entitled to the costs of the proceedings up to 22 May 2020, and that the costs of the proceedings includes 6 listed items totalling USD 86,825.31.

2. This was a trial about costs. By the time the matter came to trial the sum in dispute was USD 60,000. The legal costs generated by these proceedings must have greatly exceeded this. The parties told the court that alternative dispute resolution was not appropriate such that a High Court trial was required. Common sense and proportionality would suggest otherwise for a costs dispute of this size.

3. I deal with the matter in some detail because the parties chose London jurisdiction and there are questions of general interest as to the effect of a pre-action Part 36 offer, and as to the proper categorisation and recovery of fees that are incurred in investigating and securing a claim in another jurisdiction. This happens quite often in shipping disputes and the position regarding such expenses is not always clear.

4. The background, which was agreed as common ground, is that on 21 April 2019, the parties' vessels were involved in a collision in India. The Defendant's vessel was arrested in India and it later admitted 100% liability.

5. The parties' solicitors entered into correspondence on their behalf to discuss quantum of liability. On 12 May 2020, the Claimant made an offer to settle the claim to the Defendant, pursuant to Part 36 of the Civil Procedure Rules 1998 in the amount of USD$775,000 inclusive of interest (the "Part 36 Offer").

6. On 22 May 2020, the Defendant accepted the Part 36 Offer.

7. At the Defendant's request the parties drew up a settlement agreement dated 26 May 2020 (the "Settlement Agreement"). The Settlement Agreement appended the Part 36 Offer.

8. It is common ground that the Claimant is entitled to recover some of the legal fees of its English solicitors, MFB, (plus counsel's fees) in addition to the principal sum of USD$775,000 but these have not been assessed.

9. The dispute centres on the proper construction of the Settlement Agreement, and whether the Claimants are entitled to the disputed items.

10. There was considerable contemporaneous correspondence relating to the quantum of claims made by Owners following the collision, and also as to exchanges leading to the Settlement Agreement. Mr Montgomery, the solicitor acting for the Claimant, put in 3 statements and Mr Hall of Clyde & Co, acting for the Defendant, put in 2 statements. Somewhat unusually for a Part 8 claim the solicitors who acted on each side gave evidence. This followed from directions given by Picken J in May 2021 and the Defendant's allegation that there had been a misrepresentation. The witnesses gave their evidence fairly and honestly, but it was of limited relevance since the case centred on issues of construction and the misrepresentation case was based on statements in documents.

The claim and the Issues

11. The claim was made under Part 8 for an order that the Claimant is entitled to costs pursuant to CPR Rule 36.13 and/or the Settlement Agreement on grounds that the recoverable pre-action costs include six items in the total sum of just over USD 86k. The claim for one of those items, an invoice from the Owners' P & I Club was withdrawn. Another of the listed items is for MFB and counsel's fees claimed at USD 25,920.14. These fees are not disputed as recoverable in principle but remain to be assessed.

12. Accordingly, the central dispute relates to the recovery of 4 items (which I call the disputed items), totalling about USD 60,000:

    (1) USD 9,531.50 for agency fees incurred in India on owners' behalf for instructing an Indian advocate Mr Ashwani Kumar who was involved in the arrest.

    (2) USD 10,000 for fees of an Indian advocate Mr Girihdaran fee note;

    (3) USD 13,086, for PANDI correspondent's fees covering liaison with lawyers, agents and surveyors, and meetings with lawyers relating to the arrest;

    (4) USD 27,000.42 for fees of Italian lawyer, Bonelli Erede who had been appointed by Italian hull insurers.

13. The Defendant's primary position is that these items are irrecoverable because they were settled in May 2020. The Claimant's position is that these items are recoverable as costs of the proceedings pursuant to Part 36 and were not compromised by the Settlement Agreement. The central issues are as to the proper construction of the Settlement Agreement and the Part 36 Offer that gave rise to it.

14. In their case memorandum the parties identified the following issues:

    a) On a proper construction of the Settlement Agreement, did the parties agree that the Defendant’s payment of the Principal Sum of USD775,000 would be in settlement of some of the disputed items? And if so which?

    b) Did the parties agree that the Settlement Agreement was to supersede and/or replace the terms of the Part 36 Offer and acceptance?

    c) Would those items have been recoverable pursuant to CPR Part 36.13?

    d) Did the Claimant represent to the Defendant that payment of the Principal Sum would be in settlement of the disputed items and did the Defendant (through its legal representative Mr Martin Hall) rely on such representation when entering into the Settlement Agreement?

    e) What is the Claimant entitled to recover in addition to the sum of USD 775,000 under the Settlement Agreement?

Factual Background

15. As explained above, although liability for the collision had been admitted, quantum remained in dispute. The Defendant's vessel had been arrested in India following the collision in order to obtain security that was provided by way of a letter of undertaking with a choice of English jurisdiction. The Claimant's Vessel had undergone permanent repairs and there was also a claim for loss of hire and bunkers. The Claimant commissioned a report dated 6 February 2020 dealing with the quantum of expenses incurred as a consequence of the casualty. The solicitors entered correspondence In April 2020 to discuss the quantum.

16. On 3 April 2020 the Claimant's solicitor, Mr Montgomery of MFB sent a letter of claim enclosing various reports including the GME report and stating: "*we now turn to our clients' quantum claim which has been presented in the sum of USD 827,483.08, plus interest and costs*". The items within the figure of USD 827,483.08 included court fees, costs of an in-house lawyer and the UK Defence Club costs but MFB stated that it agreed that legal costs should not form part of the principal claim and should be assessed separately. The letter gave a further total claim figure of USD 857,078 including both principal and costs, but not including MFB's and counsel's fees which had not been quantified. On 9 April 2020 Clyde & Co responded.

17. On 12 May 2020, Mr Matthew Montgomery of MFB, acting for the Claimant contacted Clyde's and indicated he had instructions to commence court proceedings:

> *"Our clients have identified the following additional invoices which have been added to the claim:*
>
> *1. PANDI Correspondents.*
>
> *2. Giridharan;*
>
> *3. Peters & Prasad Associates; and*
>
> *4. Bonelli Erede.*
>
> *Apart from the final invoice, which is being located by our clients, these invoices are attached. We also attach a Scott Schedule which sets out a breakdown of our clients' claim for ease of reference. This document is subject to finalisation as the proof of payment details are still being collected and interest needs to be calculated. Furthermore, it does not include our legal costs incurred to date.*
>
> *…*
>
> *Our clients do not see the value in litigating this matter via correspondence. They are confident in their claim and are content to allow the Court to make a determination on quantum. We have therefore been instructed to press ahead with Court proceedings and note in this regard that you are authorised to accept service."*

18. The Scott Schedule was in the form of an Excel spreadsheet. It included items line by line with a sum for each item. It had a section for costs. This section included an item for "Legal fees (MFB)" and "Legal Disbursements" in GBP but with a blank sum. Under the costs section it also included a number of items including the four disputed items, the P&I Invoice that was withdrawn in these proceedings and also a claim for the fees of an in-house lawyer that was withdrawn at an earlier stage. The costs items came to a total of USD 63,804.75. The Scott Schedule included a "*Summary of Claims*" page at the end:

"Summary of Claims (including Agency Fee)	
Physical Damage Claim	*437,455.18*
Off-hire / Bunkers / Loss of Hire	*367,374.56*
Costs	*63,804.75*
Sub-Total	*868,634.49*
1% Agency Fee (on PD Claim and Off-hire,	
bunkers and loss of hire)	*8,048.30*
Total	*876,682.79"*

19. Shortly afterwards, Mr Montgomery of MFB sent the Part 36 Offer. The letter stated:

> *"[The Claimant] makes this offer to settle pursuant to Part 36 of the Civil Procedure Rules 1998. This offer is intended to be a Claimant's Part 36 offer.*
>
> *3. If the offer is accepted within 21 days of service of the date of this offer, your clients will be liable for our clients' costs up to the date of acceptance in accordance with CPR Rule 36.13.*
>
> *4. This offer is to settle the claims arising out of the collision between the NEW LEVANT and the FALCON TRIDENT on 21 April 2019 (the "Claims").*
>
> *5. FTSL will accept the sum of US$ 775,000 (seven hundred and seventy-five thousand United States Dollars) inclusive of interest in accordance with Rule 36.5(4), payable within 14 days of acceptance of this offer, in respect of the Claims.*
>
> *6. If this Part 36 offer is accepted within 21 days of service of this letter, Owners of the vessel "NEW LEVANT" will be liable for our clients' pre-action costs in accordance with CPR Part 36.13(1) and 36.13(3). Thereafter, unless withdrawn, the offer may still be accepted but the costs consequences in CPR Part 36.13(4) and 36.13(5) will apply."*

20. On Friday, 22 May 2020 the Defendant accepted the Part 36 Offer stating:

> *"We refer to your clients' attached Part 36 offer. We confirm that our clients accept your clients' attached Part 36 offer of US$775,000 inclusive of interest but plus your clients' reasonable and recoverable pre-action legal costs to be agreed or failing agreement to be assessed. Please let us have your clients bank account details and also details of your proposed recoverable costs so that we can see if these can be agreed and paid at the same time as the US$775,000?".*

21. About 3 hours later, the Defendant's solicitor, Mr Hall, wrote by email that "*We will let you have a draft settlement agreement in* [sic] *Tuesday*". On the next working day, Tuesday, 26 May 2020, the parties' solicitors signed a Settlement Agreement on their clients' behalf.

22. The Settlement Agreement provided as follows:

> "WHEREAS
>
> D. The "FALCON TRIDENT" Owners submitted their claim following permanent repairs to the "FALCON TRIDENT", as set out in the letter of claim from MFB Solicitors dated 3rd April 2020, and as subsequently amended in the Scott's schedule dated 12th May 2020, in the total sum of US$876,682.79 plus interest and legal costs (the "Claim").
>
> …
>
> F On 12th May 2020, the "FALCON TRIDENT" Owners made a Part 36/without prejudice save as to costs offer set out at Annex I to this Settlement Agreement (the "Offer"). The Offer was accepted by the "NEW LEVANT" Owners on 22nd May 2020 (the "Acceptance").
>
> 1. In accordance with the Offer and the Acceptance, the "NEW LEVANT" Owners will pay and the "FALCON TRIDENT" Owners will accept:
>
> a. the sum of US$775,000, inclusive of interest (the "Principal Sum"); and
>
> b. the recoverable pre-action legal costs of "FALCON TRIDENT" Owners up to the Acceptance in accordance with. CPR Rule 36.13 (the "Costs")
>
> in full and final settlement and discharge of the Claim and all losses, damages, expenses and costs whatsoever and howsoever arising between the Parties out of the Collision.
>
> …

> 3. The Costs of the "FALCON TRIDENT" Owners shall be assessed by the High Court of Justice in London, if not agreed between the parties.
>
> …
>
> 7. This agreement constitutes the entire agreement between the parties, with regard to its subject matter, and supersedes the terms of all previous agreements, whether written or oral between the Parties. …"

23. Pursuant to the Settlement Agreement, the Defendant paid USD 775,000 on 2 June 2020. The dispute arose when MFB sent a summary of its costs totalling the sum now claimed.

24. By a Part 8 claim form dated 20 January 2021, the Claimant now seeks an additional sum of USD 85,538.06 in respect of "*recoverable pre-action legal costs*" on top of the USD 775,000 it already received.

25. Mr Montgomery gave evidence explaining how each of the four disputed items related to the cost of gathering evidence and surveys, arresting the New Levant in Kakinada and seeking to persuade the Defendant to agree English jurisdiction and to admit liability.

The proper construction of the Settlement Agreement

26. The Claimant's position was that the Part 36 Offer was made and accepted in accordance with Part 36 and accordingly the consequences of a Part 36 offer must follow. The Settlement Agreement merely memorialised the Part 36 Offer and gave effect to what had already been agreed, as shown by the fact that it followed the wording of the Part 36 Offer, referred expressly to costs being recoverable in accordance with CPR 36.13 and appended the Part 36 Offer.

27. The disputed items were recoverable under CPR 36.13 because they are recoverable pre-action costs within the meaning of CPR Part 36. The Claimant says that in the ordinary way the disputed items are costs recoverable as "*costs of and incidental to the proceedings"* under s51 of the Senior Courts Act 1981 and CPR 36.13. For this purpose, they rely on authorities such as *The Kos* [2010] 1 Lloyd's Rep. 87, [2008] EWHC 1843 (Comm) showing that costs of seeking security are treated as costs of and incidental to proceedings.

28. The Claimant submitted that both parties would have known that a Part 36 offer cannot be made inclusive of costs. In addition, the manner in which the costs items were separated from the principal items on the Scott Schedule (and as explained in MFB's earlier letter of 3 April) meant that the parties knew that these items were not part of the principal claim agreed to be settled for USD 775,000. In the Settlement Agreement both parties understood that costs would be treated differently from principal, as seen by the correspondence between the solicitors. The Claimant submits that the agreement to pay USD 775,000 was intended to cover everything other than those items which the parties had been treating as costs up to that point. The Claimant argued that that the

figure in the recital should be ignored as the body of the contract should take precedence unless there is an ambiguity.

29. The Defendant's position was that the Settlement Agreement superseded the Part 36 Offer and that the definition of claim in recital D should be applied to identify what was agreed to be settled under clause 1, such that the sum of USD 775,000 covered the claims covered by the sum of USD 876,682.79 quantified in the Scott Schedule, including the disputed items. It argued that the same approach applied to the Part 36 Offer which was also referable to the Scott Schedule where costs had been treated as part of the claim. The Defendant said that its construction of both the Part 36 Offer and the Settlement Agreement better reflected business common sense since the Claimant's construction would mean that the claim put forward was settled with a discount of less than 5%.

Conclusions on construction

30. I accept that the correct approach to contractual construction is explained by Popplewell J in a well-cited passage from *Lukoil Asia Pacific v Ocean Tankers* [2018] EWHC 163 (Comm) [8].

31. Both sides asked me to consider the parties' negotiations both before and after the Settlement Agreement was concluded, including evidence as to who put forward which parts of the wording, and communications the solicitors had with their clients. I took these matters into account to the extent that they showed the background knowledge available to both parties, and what both sides would reasonably have understood the language of the Settlement Agreement to mean. However, these exchanges were of limited relevance insofar as they were relied on to show what either side believed at any given point in the negotiations. There was also evidence as to what each solicitor understood he was bargaining for, and Mr Hall's view as to what discount for litigation risk would make commercial sense. Generally, one side's view as to the commercial sense of a bargain will be of limited relevance unless one construction is clearly contrary to business common sense (which was not the case here, especially when the difference between the parties was USD 60,000).

32. Here, the solicitors may well have expected different things from the settlement and their views have now become firmer which is perhaps why the matter has been fiercely litigated. However, authorities such as *Lukoil* make clear that one side may agree terms that, with hindsight, do not serve his interest, or that at the time of negotiating a contract parties may fail (whether deliberately or otherwise) to make precise terms reflecting what they may have expected.

33. I am satisfied that the Settlement Agreement was a binding contract that superseded the acceptance of the Part 36 Offer. This was because on 26 May 2020 the parties chose to conclude a written settlement agreement with fresh wording and an entire agreement clause. Looking at the parties' fuller wording in the Settlement Agreement, and taking into account that the Part 36 Offer had been accepted and incorporated by way of an annex, the parties' objective intention was to provide a fuller settlement agreement, not merely an agreement memorialising the Part 36 Offer.

34. The conclusion of a fresh settlement agreement served a useful purpose in setting a clearer basis for the recovery of costs than the accepted Part 36 Offer. This was because

a pre-action Part 36 offer does not in itself give rise to the consequences of CPR 36.13 and could require proceedings to be issued. This is explained at the White Book commentary at CPR Part 36.7.1) which states:

> *"Where a Part 36 offer is both made and accepted before proceedings are commenced, rr.36.13 and 36.14 have no effect since they are dependent upon there being extant proceedings. A party wishing to make a Part 36 offer in advance of proceedings should consider including a statement in the offer that, in the event that it is accepted before the commencement of proceedings, the costs provisions of Pt 36 (and Pt 44 if desired) will apply, thereby binding those terms into any settlement. Alternatively, the claimant would need to seek agreement that the defendant pay his costs. Either way the claimant would need to bring costs-only proceedings under Pt 8: see r.46.14."*

35. However, the Settlement Agreement must be construed against the Claimant having made the Part 36 Offer that had been accepted. That was part of the factual matrix against which the Agreement was made. It reflects common sense and the explanation of Rix LJ in *HIH Insurance v New Hampshire* [2001] IR Lloyd Law Rep. 596. In turn the Part 36 Offer and its acceptance must be construed against the parties' knowledge at that time and this includes the Claimant's email of 12 May 2020 enclosing the Scott Schedule. Any reasonable person receiving the Part 36 Offer would have read the offer together with the email sent at the same time enclosing the Scott Schedule.

36. The Part 36 Offer defined the claims being settled as the claims arising out of the collision between the vessels. The recitals in the Settlement Agreement defined the Claimant's claim as being submitted on 3 April and then amended on 12 May 2020 and being in the total sum of USD 876,682.79 plus interest and legal costs. The figure of USD 876,682.79 was the total in the summary of claims in the Scott Schedule that included the four items now disputed (but did not include MFB's and counsel's fees).

37. Recital D of the Settlement Agreement was not merely a formal recital setting out common ground, it contained a definition of "the Claim", and expressly referred to the Scott Schedule which was the best available quantification of the claim at the time. On its ordinary meaning recital D was a part of the contract identifying the claims being settled. The same term was used in paragraph 1 of the Settlement Agreement to identify what had been settled. Mr Steward valiantly argued that the definition of claim in recital D had limited relevance, and even tentatively asked at a late stage of the trial that the recital should be rectified. However, it made little sense to ignore the parties' agreed definition of the claim being settled, and his approach also meant that "legal costs" had a different meaning in paragraph 1 and recital D. On its ordinary meaning, paragraph 1 had to be read together with the recital identifying the Claim to be settled by reference to the Scott Schedule and would be understood to mean that all items within the sum of USD 876,682.79 given in the summary of claims would be settled by payment of USD 775,000.

38. Mr Steward fairly pointed out that the parties agreed that the payment of USD 775,000 plus pre-action costs would be in final settlement of not only the claim as defined but also any other losses and damages. This wording did not assist his construction since

it was only an ordinary sweep up to make clear that the settlement covered all possible claims arising out of the collision.

39. In making and accepting the Part 36 Offer the parties probably intended that it would be an effective Part 36 offer and not be inclusive of costs. Under the Settlement Agreement costs and principal were not fully separated, save in respect of MFB's costs. This meant that it may have given a different effect to the acceptance of the Part 36 Offer by including items that could be regarded as costs. This was not wholly surprising where the Part 36 Offer had not clearly identified the claims that had been settled and left entirely open what sums were claimed as damages as opposed to costs. In addition, it would not in itself have given rise to an enforceable costs order.

40. It was also unsurprising that the Settlement Agreement had not meticulously separated costs and principal. At that stage the Scott Schedule was the best document that either party could rely on to identify the claims and the Claimant had not yet drafted a claim form. While MFB had agreed that costs be dealt with separately, and the Scott Schedule had separated costs items from other items the separation was not rigorous in defining the claim. Costs were grouped with the other heads of claim whereas legal fees and legal disbursements (solicitors' and counsel's fees) were left over for assessment. Some items within the costs tab in the Scott Schedule were subsequently recognised to fall better outside recoverable legal costs (including the P&I Club Invoice and the costs of in-house counsel). As explained below, there may be a grey area in categorising expenses. It was significant that the quantified costs items in the Schedule were included within the total claim given as the bottom line, and this could have been relevant for the purposes of overall settlement and assessment of interest.

41. After long and bitter legal argument over more than 12 months both solicitors are now acutely aware of the finer differences between the various costs items, whether they were separated out, and whether they are recoverable as costs or damages or at all. Not surprisingly both consider that their preferred view was agreed. However, at the time no claim had been drawn up and on its face the Scott Schedule was intended to itemise all heads of claim save for solicitors' and counsel's costs which were left for assessment. It was in both sides' interest to pin down what had been settled and avoid the prospect of further argument or litigation about the recoverability of items such as Indian agency or lawyers' fees.

42. A pre-action Part 36 offer may confer certainty where a claim has been clearly identified or is formulaic (typically a personal injury claim). However, the Claimant's Part 36 Offer taken together with the Scott Schedule was not entirely clear in identifying which claims were settled, not least since the Scott Schedule listed claims including costs items. In addition, for the offer to take effect proceedings would have to be issued so it was unsurprising that the parties agreed a fuller settlement agreement that gave greater certainty. Looking at the parties' objectively stated intentions at the time their purpose was to achieve a full settlement agreement which would avert the need for litigation and clearly identify the bottom line figures that had been settled rather than leave substantial heads of claim open to assessment on grounds that they were costs.

43. I find that on its proper construction:

    a) the Settlement Agreement superseded the Part 36 Offer;

b) the "legal costs" recoverable under paragraph 1(b) did not include items listed in the Scott Schedule within the sum of USD 876,682.79 referred to in the recital;

c) items listed within the sum of USD 876,682.79 in the Scott Schedule were settled and covered by the agreement to pay USD775,000 under paragraph 1(a).

44. There was some debate as to whether the disputed items would have been recoverable under CPR Part 36.13. Given my conclusion that the Settlement Agreement superseded the Part 36 Offer it was not strictly necessary for me to draw conclusions on this and it would be speculative to attempt to determine the outcome if no settlement agreement had been concluded.

45. However, I address the issue briefly because Mr Steward put forward careful argument and the Settlement Agreement must be construed in light of the Part 36 Offer that was accepted. As explained above, Part 36.13 does not apply as a matter of law to a pre-action Part 36 offer so there would be no deemed order for costs. *The Kos* suggests that the costs of obtaining security are in principle recoverable as legal costs of and incidental to proceedings within s51 of the Senior Courts Act 1981. This is important for a defendant who may have no claim in damages. However, *The Kos* is not authority that costs associated with obtaining security automatically fall within s51. The question as to whether such items are recoverable as costs or damages will be fact sensitive and depend on the claim put forward. Mr Hall fairly commented that this was a grey area. *The Kos* suggests that if an expense is recoverable as a litigation cost then it is not recoverable as damages. However, the issue in *The Kos* arose in somewhat unusual circumstances where a costs order had been made in favour of a defendant.

46. In practice English courts do not apply a hard distinction such that expenses associated with obtaining security in a foreign jurisdiction are only recoverable as costs. This is perhaps because such expenses may be factually more closely linked to the events giving rise to the cause of action than the proceedings subsequently pursued. Expenses such as agency fees, surveyors' fees and foreign lawyers' fees incurred to obtain security or resolve a legal issue are commonly pleaded and awarded as a head of damages or indemnity. Even following *The Kos* there remains some debate as to whether the cost of obtaining security for a claim is recoverable as costs in an arbitration but I need not address that question.

47. Where a pre-action Part 36 offer has been made a court does not have the benefit of a pleaded claim in order to assess whether an item must be categorised as costs. This again shows that a settlement agreement may confer greater clarity than a pre-action Part 36 offer. On the facts here I would probably have concluded that the fees of Indian and Italian lawyers Instructed to obtain security, admit liability or agree English jurisdiction would be recoverable as legal costs. Agency fees, P&I correspondent fees and the costs of gathering contemporaneous surveys where there has been a casualty are much less obviously identifiable as costs. In practice these items are more frequently claimed as damages or expenses, and I would have declined to rule that they were only recoverable as costs.

Misrepresentation

48. The Defendant's position on misrepresentation had varied and in correspondence on 15 March 2021 Clyde & Co had suggested that fraudulent misrepresentation could be in issue. At trial the Defendant alleged that the Claimant falsely represented in its emails of 12 May 2020 to the Defendant that payment of USD 775,000 would be in settlement of the disputed items so that only MFB's fees and disbursements remained outstanding, and that the Defendant (through its legal representative Mr Martin Hall) relied on such representation when entering into the Settlement Agreement.

49. The Defendant did not press its misrepresentation case at the hearing. This was unsurprising since it was not supported by the evidence. The parts of Mr Hall's statement that were said to support the case as to what was falsely represented went to Mr Hall's own view as to the commercial sense of the Settlement Agreement. The emails relied upon as giving rise to the misrepresentation also gave no support to the case either. I reject the misrepresentation case.

Assessment of costs

50. I dismiss the claim for the four disputed items because they were covered by the Settlement Agreement. Accordingly, the only recoverable item is for MFB's fees (including counsel's fees).

51. The remaining issue is the assessment of that item. The Defendant correctly contends that this should be done on a summary basis. The amount in issue was the sum of USD 25,920.11 that had been converted from sterling. The conversion appears to have been with a view to having a single currency. Given that the other items are not recoverable it makes better sense to deal with the sum charged in sterling, namely £17,510.50. The Defendant complained that no schedule of costs had been and that the court should assess the fees at 70% on grounds that the time spent was excessive and there was duplication of work between the trainee and partner working on the case.

52. I did not consider that the hours spent were excessive or that there was undue duplication. I award 85% of the fees claimed and allow £14,885 in costs.