Neutral Citation Number: [2023] EWHC 1351 (Comm)

Case No: CL-2018-000297 and ors

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Date: 07/06/2023

Before :

MR JUSTICE FOXTON

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Between :

(1) GRAHAM HORN
(2) ANUPE DHORAJIWALA
(3) RAJEN SHAH **Applicants**

- and -

(1) CHARLES JOSEPH KNOTT
(2) JAMES EDWARD HOOGEWERF
(3) MICHAEL MURPHY
(4) DANIEL FLETCHER
(5) JONATHAN GODSON
(6) THE GODSON CONSULTING LLC 401K PLAN
(7) THE LAWLER NOBLE 401K PLAN
(8) THE IDEA GUY LLC 401K PLAN
(9) THE WATTS STREET CAPITAL 401K PLAN
(10) ERIS INVESTMENTS LIMITED
(11) MANKASH JAIN
(12) OBERIX INTERNATIONAL CORPORATION
(13) DOUBLE TWO HOLDINGS LIMITED
(14) DOUBLE TWO INVESTMENTS LTD **Respondents**

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David Head KC and **Sophia Dzwig** (instructed by **DWF Law LLP**) for the Applicants (**the DWF Defendants**)
Ian Bergson (instructed by **Reed Smith LLP**) for Mr Knott and Mr Hoogewerf
Mr Fletcher in person
Mr Godson in person and on behalf of the 6th to 9th respondents
Mr Jain in person and on behalf of the 10th and 12th to 14th respondents
Mr Murphy did not appear and was not represented

Hearing date: 28 April 2023
Further written submissions: 10, 19 and 24 May 2023
Draft Judgment Circulated: 24 May 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 07 June 2023 at 10:30am.

The Honourable Mr Justice Foxton:

Introduction

1. On 7 March 2022, the Court of Appeal made an order allowing the Claimant's (**SKAT**'s) appeal against the order of Mr Justice Andrew Baker which had held that SKAT's claims against the Defendants were inadmissible in court under the so-called "Revenue Rule". The unsuccessful respondents to that appeal comprised the following:

    i) A group of defendants represented by Meaby & Co Solicitors LLP known as **the Sanjay Shah Defendants**. I am told that there were 28 defendants in this group before Mr Justice Andrew Baker, and either 27 or 28 before the Court of Appeal, although I have not determined this issue.

    ii) A group of defendants represented by DWF Law LLP known as **the DWF Defendants** comprising the three applicants.

    iii) The first and second respondents, represented by Reed Smith LLP, who I shall refer to as **the Reed Smith Defendants**.

    iv) The third respondent, **Mr Murphy**, who was represented by Simons Muirhead & Burton LLP (**SMB**) before the Court of Appeal, but who from March 2022 has acted in person.

    v) The fourth respondent, **Mr Fletcher**, who acted in person before Andrew Baker J and was represented before the Court of Appeal by SMB.

    vi) The fifth to ninth respondents, known as **the Godson Defendants**, who acted through Mr Godson before Andrew Baker J and were represented by SMB the Court of Appeal.

    vii) The tenth to fourteenth respondents, known as **the Jain Defendants,** who acted through Mr Jain before Andrew Baker J and were represented by SMB before the Court of Appeal.

2. The Court of Appeal made a joint and several costs orders in respect of the Revenue Rule point (referred to as "Ground 1"):

    i) in respect of the costs before Mr Justice Andrew Baker, against the Sanjay Shah Defendants, the DWF Defendants, the Reed Smith Defendants, the Godson Defendants, the Jain Defendants and Mr Fletcher, in respect of which an interim payment on account of £600,000 was ordered;

    ii) in respect of the costs of the appeal, against the Sanjay Shah Defendants, the DWF Defendants, the Reed Smith Defendants, the Godson Defendants, the Jain Defendants, Mr Fletcher and Mr Murphy, in respect of which an interim payment on account of £1,600,000 was ordered.

    No ruling was reached and no order for costs made in respect of the arguments on the other ground raised in the appeal ("Ground 2").

3. I should mention that there were other parties who participated in the Revenue Rule trial and appeal who were not subject to any costs order by the Court of Appeal nor any application for

contribution today. No submissions were made as to the significance, if any, of that fact, and nothing in this ruling is intended to address or determine the position of those parties (cf. *Dufoo v Tolaini* [2014] EWCA Civ 1536).

4. SKAT, as it was entitled to, has chosen to recover the full amount of the interim payments of £2.2 million from the DWF Defendants. The DWF Defendants assert an entitlement to contribution from the other parties against whom the costs orders were made. They have agreed to receive such a contribution from the Sanjay Shah Defendants in the sum of £120,000 in respect of the interim payment on account of the costs before Andrew Baker J (i.e., 20%), and £400,000 in respect of the appeal costs (i.e., 25%). The DWF Defendants now seek contributions to those costs liabilities from the Respondents as follows:

    i) In relation to the costs before Andrew Baker J, of £150,000 (i.e., 25%) from each of (i) the Reed Smith Defendants jointly; and (ii) Mr Fletcher, the Godson Defendants and the Jain Defendants jointly (but not from Mr Murphy), with the result that the DWF Defendants would remain responsible for 30% of the interim payment.

    ii) In relation to the appeal costs of £400,000 (i.e., 25%) from each of (i) the Reed Smith Defendants jointly; (ii) Mr Fletcher, the Godson Defendants and the Jain Defendants and Mr Murphy jointly with the result that the DWF Defendants would remain responsible for 25% of the interim payment.

5. At the hearing, the Reed Smith Defendants accepted that the DWF Defendants are entitled to a contribution but contended that:

    i) they should together only be liable for 15% of the costs before Andrew Baker J and of the appeal (a position later revised, in circumstances which I explain below, to a contention that they should each be severally liable for 2.27%); and

    ii) there should be a stay of execution until the conclusion of the proceedings, alternatively until the Supreme Court has determined the appeal from the decision of the Court of Appeal on the Revenue Rule issue, which is due to be heard in July 2023.

6. It is accepted that, due to an oversight, Mr Murphy was not served with the DWF Defendants' application and supporting documents until 25 April 2023. Mr Murphy informed the court that he was out of the country on the date of the oral hearing, does not have access to legal advice, and he has generally reserved his rights.

7. I return to the position of Mr Murphy below.

The basis of the jurisdiction to order contribution

8. There are three possible sources for the court's jurisdiction to order one party to a joint and several costs order to make a contribution in a specified amount to another party who has made a payment in respect of that order.

9. First, this might form part of the court's general jurisdiction to make costs orders in respect of proceedings before it, under s.51 of the Senior Courts Act 1981 (s.51(3) of which gives the court

"full power to determine by whom and to what extent costs are to be paid"), CPR 44.2 and/or the inherent jurisdiction of the court. As to this:

i) The court can, at the time it makes a joint and several costs order, fix the respective percentages for which the respondents should be liable in contribution proceedings, although no such order was made in this case.

ii) The costs jurisdiction may be used to apportion liability for a costs order made in the main proceedings as between the defendant and a third party in contribution proceedings (and see also *Mouchel Ltd v Van Oord (UK) Ltd (No 2)* [2011] EWHC 1516 (TCC), [23] and [29]). I was referred to a number of cases in which this had been done, although in none of them had the point been argued (*R v Independent Television Commission ex parte Virgin Television Ltd* 26 January 1996, p.31; *R (Elmbridge BC) v Secretary of State for the Environment, Transport and the Regions* 10 November 2000, [192] and *Venture Finance plc v Mead* [2006] 3 Costs LR 389, [27]).

iii) It is clear that the court's jurisdiction to make costs orders does not simply extend to making primary costs orders, but also to make orders intended to address what might be termed "secondary" liability, whereby a party ordered to pay costs to party B can obtain an order against another party requiring reimbursement. This is the effect of costs orders of the kind considered in *Bullock v London & General Omnibus Co* [1907] 1 KB 624 and *Sanderson v Blyth Theatre* [1903] 2 KB 533. Similarly, where one of three claimants pursued a case to trial, the others settling, the Court of Appeal treated the issue of whether the settling claimants should be ordered to make a contribution to that costs liability as raising an issue to be determined under CPR 44.2 in *Dufoo v Tolaini* [2014] EWCA Civ 1536.

iv) In In *Parkman Consulting Engineers v Cumbrian Industrials Ltd* [2001] EWCA Civ 1621, [115], the Court of Appeal observed that the power of the court under s.51 of the Senior Courts Act 1981 extended to ordering a contribution by a non-settling party to a settlement payment made on account of costs.

10. Second, the claim for contribution might be based on the right of contribution which arises under common law and in equity (which I shall refer to compendiously as "common law contribution"), and which is discussed in *Goff and Jones: The Law of Unjust Enrichment* (10th), [19-08]-[19-15]. This was the analysis of HHJ Keyser KC in *ARAG v Jones* [2020] EWHC 3484 (Comm), [12] and [18]. There are other decisions which appear to assume that the consequences of a costs order being "joint and several" so far as claims between the liable parties are concerned are those arising at common law (see e.g. *Mainwaring v Goldtech Investments Ltd (No 2)* [1999] 1 WLR 745), with the joint and several debt created by the court's procedural order being subject to contribution principles in the same manner as a joint and several debt created by contract. I was also referred to an Irish authority, *Newry Salt Works Co v Macdonnell* [1903] 2 IR 454, 456, in which Lord Chief Baron Palles appeared to treat the claim for contribution between defendants in relation to a joint and several costs order as an application of the rule that "when one of several joint debtors pays the whole amount of the debt, he is entitled to contribution from the others", although he clearly regarded the claim as having certain special features, holding it could be asserted in the action itself without the need for independent proceedings.

11. Third, the claim for contribution might be statutory, under the Civil Liability (Contribution) Act 1978. The difficulty with this analysis is that s.1(1) of the 1978 Act applies where two parties are liable "in respect of the same damage.". There are cases in which a party who has settled a claim for damages on terms which include a payment in respect of the claimant's costs has sought contribution under the 1978 Act for that payment. There are conflicting decisions on the issue of whether the 1978 Act applies to such a claim. In *J Sainsbury plc v Broadway Malyan* [1999] PNLR 286, 335-36 and *The Police Federation v. Ryder* (unreported, Michael Davies J., July 18, 1990), it was held that s.1(4) of the 1978 Act (allowing a claim for contribution to a settlement or compromise of any claim made against the party seeking contribution "in respect of any damage") did not extend to the costs element of the settlement. However, the contrary view was reached in *Adams v Associated Newspapers Ltd* [1999] EMLR 26, 36, 38, *BICC Ltd v Parkman Consulting Engineers* [2001] EWCA Civ 1621, [121], [123] and *Mouchel Ltd v Van Oord (UK) Ltd (No 2)* [2011] EWHC 1615 (TCC). Contribution under the 1978 Act was awarded in respect of both damages and a costs order following judgment in *Mohidin v Commissioner of MPC* [2016] EWHC 105 (QB).

12. However, there is no support for the argument that the 1978 Act applies to claims for costs awarded in respect of a hearing in which damages were not sought or ordered, and where no damages claim was settled. Whatever the position might be in other cases, I am not persuaded the 1978 Act can be applied to the costs orders made by the Court of Appeal (a conclusion consistent with that reached by His Honour Judge Keyser KC in *ARAG v Jones* [2020] EWHC 3484 (Comm), [15] and [20]). It has also been held that the 1978 Act does not apply to claims for contribution between sureties in respect of a debt (*Hampton v Minns* [2002] 1 WLR 1).

13. Whether the jurisdiction to order contribution otherwise than as a term of the original costs order is essentially procedural, or involves the application of common law principles of contribution, may well be important when assessing what contributions each party should make. In particular:

    i) The court's procedural power to make costs orders confers a wide discretion, and, at least in principle, there are a broad range of factors which may be relevant to the exercise of the discretion.

    ii) A claim for contribution at common law is a legal right, and, to the extent that it is necessary to invoke equity's jurisdiction to order contribution (which, in respect of a claim for contribution between joint debtors, will be rare), any discretion is a weak one, heavily circumscribed by well-established principles. In particular, as explained below, there is a considerable body of authority to the effect that contribution is to be ordered to ensure that the shared liability is borne by those liable in equal shares.

    iii) The duty to contribute at common law is "always several" (Professor Glanville Williams, *Joint Obligations* (1949), [90]) whereas it is open to the court under its costs jurisdiction to make joint and several orders.

14. So far as claims for contribution at common law between joint debtors are concerned, *Chitty on Contracts* (34th), [19-027] states that "if one has paid more than their share of the debt, they can recover the excess from the others in equal shares, subject to any agreement to the contrary" and that "in the absence of agreement to the contrary each co-debtor is liable for an equal share of the debt or obligation." That the contribution in respect of a joint and co-extensive liability for the same debt is fixed by the number of solvent debtors, rather than a matter for the discretion of

the court, is reflected in the decisions in *Dering v Earl of Winchelsea* (1787) 1 Cox 318; *Boulter v Peplow* (1850) 9 CB 49 and *Batard v Hawes* (1853) 2 E & B 287. If there had been a power to readjust the contributions by reference to other factors, it could only have been in equity rather than at common law strictly so-called, but there is nothing to suggest that the right to seek a contribution in equity differed from its common law counterparty in this way (see *Meagher, Gummow & Lehane's Equity: Doctrine & Remedies* (5th), [10-030]-[10-035]).

15. The DWF Defendants initially argued that, when a contribution claim was brought at common law between joint debtors of co-extensive liability, the court had a wider discretion when fixing the appropriate shares than simply by reference to the number of solvent debtors. They relied in this regard on *Goff and Jones* [20-88] and [20-96]. At [20-88], *Goff and Jones* states:

> "Several principles emerge from the cases in which the courts have decided how much of the burden of paying a third party should ultimately be borne by the defendant. First, where the claimant and the defendant's relationship is governed by a contract that allocates responsibility for paying the third party, effect is usually given to this allocation. Secondly, where there is no contractual allocation, the courts have adopted a default rule of equal apportionment. But, thirdly, this rule may be departed from, and an unequal apportionment made, where the causative potency of the parties' actions was unequal. Fourthly, the same result follows where the moral blameworthiness of the parties' actions was unequal. Fifthly, the same result follows where one party gains a larger benefit than the other from the transactions which gave rise to their respective liabilities. After some comments on the apportionment process, we consider each principle in turn and assess their relative weight."

16. At [20-96], it continues:

> "Where there is no contract allocating responsibility between the parties, the courts apply a default rule that they are equally responsible for paying the third party. The courts then ask whether they should depart from this rule, and make an unequal apportionment in accordance with one or more of the three rules discussed in the next three sections. It can happen that a court arrives back at an equal apportionment after applying these further rules. But the point to note here is that a court will always apportion liability equally where none of these other rules applies, or if it possesses insufficient information to apply any of them clearly."

17. It is easy to see why considerations of causal potency, moral blameworthiness and respective gain may be relevant when determining the appropriate level of contribution between two parties who are jointly liable for damages caused by a legal wrong to a third party, in the exercise of a statutory discretion (whether under the 1978 Act or the Merchant Shipping Act 1978). However, I am not persuaded that they are relevant to a claim for contribution between joint debtors at common law, and I would respectfully doubt the utility of analysing the principles for determining the appropriate level of contribution in these two very different contexts by reference to a single set of principles. I would note that on my own review, all or almost all of the authorities cited in the paragraphs dealing with the three principles involved contribution between wrongdoers in respect of a liability for damages.

18. In the present case, the parties' positions on whether the claim for contribution was correctly analysed as an application of the court's costs jurisdiction, or a claim at common law was determined by the perceived advantages or disadvantages of narrowing the criteria which might be relevant to the exercise. The DWF Defendants initially favoured a common law analysis, on the basis that it would favour splitting costs between the four represented groups of defendants. The Reed Smith Defendants favoured the costs jurisdiction analysis, and on that basis argued that the apportionment should reflect considerations such as who first raised the Revenue Rule point and the amount of time their respective group's submissions occupied before Andrew Baker J and the Court of Appeal.

19. However, at the hearing I raised the question of whether, under the common law approach:

    i) what mattered was the number of defendants who were parties to the joint and several order, rather than the number of firms of solicitors representing them; and

    ii) it was possible to obtain contribution on the basis of a joint and several order against a group of defendants (such that the consequences of one of those defendants being unable to pay would be allocated among the members of the group, rather than all of those liable under the joint and several costs order), or whether only several orders could be obtained.

20. The parties were permitted a further round of submissions to address these questions, which led to a notable repositioning:

    i) The DWF Defendants served submissions, and over 280 pages of further authorities, in which the claim for contribution was advanced by reference to s.51 and by reference to the doctrine of unjust enrichment (and a modest 3 pages in reply).

    ii) The Reed Smith Defendants served submissions, and over 400 pages of further authorities, in which they argued that contribution could only be sought at common law, which required a division by reference to the number of parties who were liable to the order, regardless of their ownership or litigation allegiance.

    The ability of litigating parties to change positions in respect of a particular argument in the course of the same hearing is one of the occasional fascinations of litigation. However, the result has been that the argument has effectively been conducted in lengthy post-hearing submissions, rather than at the hearing as it should have been. The product of comprehensive legal research is always more welcome before the hearing, than afterwards, not least because it will then reach the court at a point when time has been allocated to read for the hearing.

21. In their post-hearing submissions the DWF Defendants submitted that a claim for contribution at common law was flexible enough, in the present context, to permit the court to divide the claim up by reference to the groups of litigants represented by different solicitors, rather than the number of parties, but if that contention was rejected, they submitted that the process of determining the appropriate level of contribution was a matter for the court's costs jurisdiction after all.

22. If the question of contribution arises at common law, then the DWF Defendants argued that the court was entitled to have regard to the fact that connected groups of litigants had acted in the litigation, on the basis that contribution involved the application of equitable principles, which

are based on "fairness and justice". Up to a point, that last assertion is no doubt true, but that does not permit an abstract appeal to what would and would not be fair in a particular case, but only to settled equitable principles which were developed to serve the ends of fairness and justice, but which fall to be applied on their own terms (c.f. *Re Diplock's Estate* [1948] Ch 465, 481). The concept of fairness or justice which underlies the equitable doctrine of contribution is set out in Story's *Commentaries on Equity Jurisprudence* 3rd (1920), 491:

> "The claim certainly has its foundations in the clearest principles of natural justice; for, as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards the benefit obtained by all …. And the doctrine has an equal foundation in morals, since no one ought to profit by another man's loss where he himself has incurred a like responsibility. Any other rule would put it in the power of the creditor to select his own victim and, upon motives of mere caprice or favouritism, to make a common burden a most gross personal oppression. It would be against equity for the credit to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment … It can be no matter of surprise, therefore, to find that courts of equity, at a very early period, adopted and acted upon this salutary doctrine, as equally well-founded in equity and morality."

23. Equitable contribution, therefore, involved contribution between joint debtors *equally* (*Dering v Earl of Winchelsea* (1787) 2 Bos & P 270 and *Pendlebury v Walker* (1841) 4 Y&C Ex 424) or proportionately if the original liability was not co-extensive. In equity, in contrast to common law properly so-called, contribution involved an allocation between solvent parties, to avoid the debtor who had discharged the full debt being left with a disproportionate share of the liability when insolvent debtors could not meet their share (*Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th), [10-030]). However, I was not taken to any English case which suggested that contribution in equity could be undertaken by reference to wider considerations.

24. There is some support in the (dissenting) judgment of Justice Kirby in *Burke v LFOT Pty Ltd* [2002] HCA 17, [119]-[121] for the view that a wider range of considerations can be taken into account when fixing the appropriate levels of contribution in equity, although he noted that "the weight of authority, and perhaps the history of contribution to this time, appear to be against unequal apportionments". That view did not attract the support of the majority (see e.g., Gaudron ACJ, Hayne J and McHugh J at [14] and [38]). Further:

    i) The editors of *Meagher, Gummow & Lehane*, [10-085] state that "the fact that parties are equally liable for co-ordinate obligations also underlines the inability to apportion between them other than equally (contrary to cases of contribution between tortfeasors pursuant to statute)".

    ii) In *Leigh-Mardon Pty Ltd v Wawn* (1995) 17 ACSR 741, 751-2, Hodgson J in the Supreme Court of New South Wales Equity Division, rejected the contention that there was a "general discretion to adjust contributions by reason of some perceived difference in responsibility for the incurring of the debt".

25. Given the decision of the Supreme Court in *International Energy Group Ltd v Zurich Insurance plc* [2015] UKSC 33, it would be a bold puisne judge who sought to circumscribe the limits of contribution in equity to any significant extent. Nonetheless, I am not persuaded that the doctrine extends to permitting the court to undertake the task of allocation on a basis which treats

different legal entities in the same beneficial ownership as a single entity for allocation purposes, still less to treat different parties who have made common cause on a particular issue in litigation as a single party for that purpose:

i) Substantive private law does not generally ignore differences in legal personality.

ii) It was open to SKAT to recover the entirety of the interim payments from any one of the respondents (including a corporate vehicle). In that eventuality, every other party with joint and several liability (including those in the same litigating group) would have benefited from that fact, and all of those parties (including those in the same litigating group) could be made subject to a claim for contribution by the payer. Any other approach would have the potential to disadvantage creditors of a particular respondent, for whom issues of common beneficial ownership or litigation strategy are of no obvious significance.

iii) The Law Commission in Law Com No 79, "Law of Contract: Report on Contribution", considered and rejected the argument that there should be a statutory power to redistribute liability for joint debts (see [9], [15], [27]-[29] and [80(a)]). At [29], they observed:

> "It has been argued that the existing rules can work unfairly in contribution proceedings between persons jointly liable for the same debt … It has been argued that this can lead to injustice and that the courts should therefore be given an overriding discretion in contribution proceedings to redistribute the burden of the debt in whatever way the justice of the case may require … Our conclusion, so far as joint *debts* are concerned, is that it is more important that the rules should be reasonably certain than that the court should have a wide discretion to redistribute the burden of each and every joint debt according to the general merits of the particular case. We accordingly make no recommendation for changing the existing law of contribution as it applies to joint debts."

The Law Commission having considered, and decided against, reforming the law in a particular direction, and Parliament having passed legislation to give effect to their recommendations, it would be a bold thing for the courts to develop the common law to the same end.

26. By contrast, I accept that, in exercising its procedural costs jurisdiction, the court can have regard, in an appropriate case, to the fact that particular parties before it are litigating in the same economic interest and/or have instructed the same legal team, when determining what costs order to make. The court's costs jurisdiction permits a wide variety of factors to be taken into account. Parties who jointly instruct a solicitor are generally required to undertake joint responsibility for the solicitor's costs. Parties who act in litigation through one legal team will incur a single set of "own party" costs, and their co-ordinated actions in the litigation will not generally increase the level of costs incurred by the opposing party (or parties) merely because that common position is taken on behalf of a group of instructing parties, rather than a single party. How far it is appropriate to make joint and several costs orders will depend on the circumstances of each particular case.

27. I note that in *Flinders Diamonds Ltd v Tiger International Resources Inc* [2006] SASC 139, Layton J sitting in the Supreme Court of South Australia rejected an argument that, in

determining the appropriate level of contribution towards a joint and several costs order, regard could be had to the fact that certain of the parties who were liable were in common beneficial ownership. In that case, the claimant sought contribution at common law ([18]) and that was the basis on which Layton J determined the claim ([24], [28]). The Judge does appear to acknowledge that, in a costs context, it may be permissible to bring other factors such as the parties' conduct in the litigation into account ([109]-[110]), and his conclusion was at least in part influenced by the approach adopted by the trial judge when making the original costs order ([114]).

28. I am satisfied that the court does have power to determine the appropriate contributions to be made by respondents to joint and several costs orders pursuant to its costs jurisdiction, such that a party who has discharged the liability in full is not restricted to a claim for contribution at common law:

    i) The debt created by an order for costs does not arise from a private law obligation, whether voluntarily assumed or one arising under the general law, but follows from the exercise of a procedural discretion by the court as part of its management of court process. It is not therefore possible, as it is in the case of contractual debts, for the parties to agree the levels of contribution *ex ante* (one factor which led the Law Commission in Report No 79, [29], to oppose any statutory discretion to redistribute liability for joint debts).

    ii) The court's costs jurisdiction is not simply a compensatory mechanism, but gives effect to important policy considerations concerning the conduct of litigation, and access to justice. Many of those considerations are in play when the court is deciding the respective contributions of two unsuccessful parties to a costs order, just as they are when deciding what costs orders should be made as between opposing parties.

    iii) It would be very surprising if the applicable jurisdiction depended on whether the court's determination was undertaken at the same time as the costs order was imposed ([9(i)] above) or on a subsequent application. The claim for contribution is likely to require the court to consider the course of the proceedings in which the costs liability was imposed, and therefore raise issues of the kind which frequently arise in the exercise of the court's costs jurisdiction.

29. I am also satisfied that any exercise of the court's procedural jurisdiction to determine levels of contribution ousts any inconsistent right of contribution at common law. Were matters otherwise, a party who was unhappy with the court's allocation would be able to bring a common law claim for contribution seeking to revisit the court's decision by reference to a different set of principles. This can be seen as one of a number of occasions when the court's control of costs orders in its own proceedings ousts common law claims which might otherwise be applicable. Thus the court is entitled to award costs on some basis other than that which the parties have agreed (*Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, [192]-[194]) and it retains the right to order one party to pay the costs of a particular issue even if the parties have contracted otherwise (*Autoridad del Canal de Panama v Sacyr SA* [2017] EWHC 2337 (Comm), [48]). It is not necessary to decide whether the costs jurisdiction exclusively occupies the field so far as a claim for contribution between parties who are jointly and severally liable for a costs order in English court proceedings is concerned, or whether such

a determination once made precludes any alternative claim. However, there are obvious benefits of clarity and simplicity in a "non-cumul" rule of the former kind.

30. It follows that, in this case, the issue of contribution as between parties to a joint and several costs order can be rescued from the choppy waters of the law(s) of restitution, and moved to the safe harbour of the law of civil procedure.

What factors are relevant when determining the appropriate level of contribution?

31. In the light of the conclusion I have reached, the factors identified in CPR 44.2(4) and (5), or otherwise relevant to a court costs determination, are all of potential relevance to the court's determination of the appropriate level of contribution, and I am not persuaded that any of them are *a priori* excluded from an assessment of the appropriate level of contribution between those parties with joint and several liability for a costs order. I note that conclusion is consistent with the conclusion reached by the Court of Appeal, when considering a claim for contribution against parties who had settled the claim for which an adverse costs order was made against the party seeking contribution, in *Dufoo v Tolaini* [2014] EWCA Civ 1536, [55], [70]-[71].

32. The only obvious limitations are:

    i) Clearly the court cannot determine the issue of contribution between the joint and several respondents on a basis which would be inconsistent with the reasons why the joint and several costs order had been imposed.

    ii) Costs determinations must be assessed on a pragmatic basis, and it will frequently be necessary to make costs determinations when the final outcome of the proceedings, and therefore the ultimate economic significance to particular parties of success or failure on a particular point, are not known.

    iii) The fact that a party does not have means to pay a costs order is not a reason not to impose one, albeit a party may be able to raise its inability to pay the costs order at the present time in support of a claim for a stay of execution: *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 2817 (Ch), [41]-[42].

The appropriate level of contribution in this case

33. The costs order in this case relates to a potential defence which, had it availed, would have provided a complete answer to the claims against all of the defendants. While the exposures the respondents face from those claims, and their centrality in the events which give rise to them, may well differ, and those might be factors capable of being relevant to the exercise of my discretion, there was no real attempt in this application to distinguish between the position of the various respondents to the Court of Appeal's costs order on that basis. As Mr Justice Andrew Baker noted in his judgment when ordering that the Revenue Rule issue should be determined as a preliminary issue ([2020] EWHC 2022 (Comm), [1]):

> "A feature in the case … is the wide variety of different defendants or defendant groups in the case, the wide variety of types of claim that SKAT makes against different defendants and defendant groups, the vastly different orders of magnitude involved, in some cases, in

the sums being claimed by SKAT against certain defendants in comparison to the sums claimed against certain other defendants".

34. However, the following points emerge clearly:

i) It is the Sanjay Shah Defendants who have the central role in the litigation, SKAT alleging that (in effect) Mr Shah conceived and co-ordinated the fraud of which it claims to be a victim, with varying degrees of involvement by other parties. It is clear from the statements of case that different defendants are alleged to have realised different levels of benefits from different types of involvement in the various schemes alleged, but I have been unable to find any sufficiently clear statements of the position which would allow me to distinguish between the various respondents to the joint and several costs order on that basis. However, as the Sanjay Shah Defendants put the matter in their skeleton argument at the consequentials hearing before Andrew Baker J:

> "The Sanjay Shah Defendants were the primary defendants to the claims, and it was thus reasonable for them to be closely engaged with every application, hearing and item of correspondence".

ii) The DWF Defendants have adopted a leading role in the litigation. As they acknowledged in their skeleton argument for the consequentials hearing before Andrew Baker J:

> "While having no wish to do so, the DWF Defendants have taken a leading role in addressing SKAT's allegations in these proceedings, and in doing so shouldered a disproportionate burden since the January 2020 CMC in defending these claims".

Implicit in that submission is that the role taken by the other respondents was a lesser one.

35. The payments on account of the Defendants' costs ordered by Mr Justice Andrew Baker in respect of the costs of the proceedings are consistent with those characterisations. He ordered payments of:

i) £9m to the Sanjay Shah Defendants.

ii) £5m to the DWF Defendants.

iii) £3.25m to the Reed Smith Defendants.

iv) Sums of £950,000 to £1m to each of the Godson Defendants, the Jain Defendants, Mr Fletcher and Mr Murphy.

36. I turn now to the contribution made by way of written and oral argument at the Revenue Rule trial and on appeal. I accept Mr Head KC's submission that a court must be careful in relying on considerations of that kind when determining the respective contributions to a joint and several costs order, given the need to ensure that proceedings are conducted efficiently, and without duplication. Nonetheless, the fact that particular parties take the lead or do the "heavy lifting" on a particular application will often reflect the centrality of their role in the proceedings, particularly when supported by other considerations pointing in a similar direction. I also accept that the mere fact that the DWF Defendants and the Sanjay Shah Defendants were the foremost

proponents of trying the Revenue Rule argument as a preliminary issue is not, of itself, a reason to increase the level of their contribution to the joint and several order. Other defendants were happy to adopt the argument, and the Court concluded that having a preliminary issue on the Revenue Rule was the most efficient means of progressing the case.

37. As to the position before Mr Justice Andrew Baker:

    i) The DWF and Sanjay Shah Defendants served the lead submissions on the Revenue Rule issue (with total submissions of 100 pages and 88 pages respectively). The Reed Smith Defendants served total submissions of 60 pages, but a significant part of this addressed SKAT's "Ground 2" argument that the Brussels Regulation precluded the operation of the Revenue Rule. The Godson Defendants served total submissions of 46 pages. The Jain Defendants and Mr Fletcher each served separate submissions of 3 pages adopting Mr Godson's submissions. Mr Murphy did not participate at the trial.

    ii) At the hearing, and in relation to both Ground 1 and Ground 2, the DWF Defendants made submissions over 135 pages of transcript, the Sanjay Shah Defendants over 100 pages, the Reed Smith Defendants over 87 pages, Mr Fletcher as a litigant in person over 16 pages, Mr Jain as a litigant in person over 11 pages and Mr Godson as a litigant in person over 9 pages. Mr Murphy did not make submissions.

38. In the Court of Appeal:

    i) The Sanjay Shah Defendants were designated the 'Lead Respondent', with their skeleton argument of some 30 pages filed first, and a supplemental skeleton argument of 10 pages. The DWF and Reed Smith Defendants served a joint skeleton argument of 21 pages on the Revenue Rule issue. The Godson and Jain Defendants, Mr Fletcher and Mr Murphy served a joint skeleton argument of 12 pages addressed to Ground 2 only.

    ii) The oral submissions of the Sanjay Shah Defendants and the DWF Defendants were around 150 minutes and 90 minutes respectively, with the Reed Smith Defendants making short oral submissions for 30 minutes on the morning of Day 3 of the appeal. Counsel for the Godson and Jain Defendants, Mr Murphy and Mr Fletcher addressed the court for 45 minutes.

39. Against that background, I have determined the appropriate level of contribution between the respondents to the joint and several costs order, and sought to arrive at levels of contribution which fairly reflect how central the role of particular respondents is in the litigation, and their contribution to the Revenue Rule arguments at first instance and on appeal.

40. So far as the costs before Andrew Baker J are concerned:

    i) An allocation of 45.1% to the Sanjay Shah Defendants is appropriate. In circumstances in which they litigated as a single unit, I am satisfied that this should be joint and several as between all of the Sanjay Shah Defendants.

    ii) An allocation of 30% to the DWF Defendants, on a joint and several basis for the same reason.

iii) An allocation of 15% to the Reed Smith Defendants, on a joint and several basis.

iv) An allocation of 3.33% each, but severally, to the Godson Defendants (who are jointly and severally liable for their 3.33%), to the Jain Defendants (who are jointly and severally liable for their 3.33%) and Mr Fletcher.

41. So far as the costs before the Court of Appeal are concerned:

i) An allocation of 44% to the Sanjay Shah Defendants on a joint and several basis is appropriate.

ii) An allocation of 28.33% to the DWF Defendants on a joint and several basis.

iii) An allocation of 14.33% to the Reed Smith Defendants on a joint and several basis.

iv) An allocation of 13.33% for the Godson Defendants, the Jain Defendants, Mr Fletcher and (subject to [42] below) Mr Murphy, on a joint and several basis, since they acted before the Court of Appeal as a single litigating unit.

42. So far as Mr Murphy is concerned, this determination has been made in circumstances in which he was not served with the application and supporting materials in time. In these circumstances, he is entitled to apply to set aside the order so far as he is concerned pursuant to CPR 23.10, such an application to be made within 7 days of the service of the final order giving effect to this determination upon him, and there is to be no execution of any order against him until Mr Murphy has had an opportunity to set aside the order so far as he is concerned and/or to apply for a stay of execution. The DWF Defendants have undertaken not to seek to increase the level of contribution to be made by any other respondent if the order against Mr Murphy is set aside.

43. Any applications for stays of executions are to be made at the consequentials hearing following the hand-down of this judgment.