Neutral Citation Number **[2022] EWHC 3280 (SCCO)**

Case No: SC-2021-BTP-000344

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 19th December 2022

Before:

COSTS JUDGE WHALAN

BETWEEN:

NICOLETTE BERRIN ADCOCK
DAVID LYNCH
(1) MR DAVID JOHN POLLARD
(2) MRS ANGELA POLLARD

Claimants

and

BLEMAIN FINANCE LTD

Defendant

Mr Kevin Latham, instructed by Checkmylegalfees.com, for the Claimants
Mr Andrew Hogan, instructed by Eversheds Sutherland, for the Defendant

Hearing dates: 16th May 2022

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JUDGMENT APPROVED BY THE COURT

Costs Judge Whalan:

Introduction

1. This judgment determines two issues that have arisen in these costs assessments, namely:

(i) The claim(s) for pre-judgment interest; and

(ii) Disputed issues in respect of Legal Hub.

2. The three assessments are 'test cases' for over 600 outstanding assessments. The parties agree that the issues raised are points of principle and general application.

3. Issue (i) applies to all three claims, whereas (ii) is a live issue in the matters of Lynch and Pollard only.

(i) Pre-judgment interest

Background

4. The substantive claims concern actions brought by various Claimants against the same Defendant on the grounds that loan arrangements entered between them were unfair within the meaning of the Consumer Credit Act 1974. The Claimants cite specifically payments made by the Defendant as "secret commissions" to brokers who arranged the loans. In every case, the Claimants had fallen into difficulty in servicing the loans advanced. The three claims were each successful, securing settlement in the sums of £30,000 (Adcock), £10,000 (Lynch) and £6,500 (Pollard).

5. The Claimants assert that they were unable to privately fund disbursements in their litigation, so they took out loans in order to fund those costs. These 'funding loans' were non-recourse loans secured against the proceeds of the claims, so they did not trigger periodical payments as the cases progressed. The interest rate(s) payable under the loans is 30.3% per annum. The Claimants now seek to recover the interest they have incurred on those loans by an award of pre-judgment interest.

6. In Adcock, at the date of commencement on 8th October 2020, interest on the disbursement loan totalled £3,030.87, continuing at a rate of £6.21 per day. In Lynch, as at 8th March 2021, interest on the disbursement loan totalled £3,026.86, continuing at a daily rate of £4.14 per day. And in Pollard, as at 25th January 2021, interest on the disbursement loan totalled £2,761.27, continuing at a daily rate of £8.61 per day.

CPR

7. Under the CPR, the court has a discretionary power to award interest on costs from the date that they were incurred, rather than from the date on which judgment was given. CPR 40.8 deals with interest on judgments generally and provides:

> (1) Where interest is payable on a judgment pursuant to section 17 of the Judgments Act 1838…the interest shall begin to run from the date the judgment is given unless –
>
> a. …

b. the court orders otherwise.

(2) The court may order that interest shall begin to run from the date before the date that judgment is given.

CPR 44.2(6)(g) outlines the court's specific power to award interest on costs and provides:

(6) The orders which the court may make under this rule include an order that a party must pay –

…

(g) interest on costs from or until a certain date, including a date before judgment.

8. Interest under the Judgments Act 1838 will run automatically on costs from the date that a final order is made. The provision is intended to compensate the receiving party for any delay in paying the judgment sum. Additionally, as noted, the court may direct that interest runs from an earlier date. The purpose of this provision, argues the Claimants, is to compensate the receiving party for the expense of funding litigation, in circumstances, for example, where they have had to borrow funds to pursue the litigation.

Claimants' submissions

9. The Claimants' submissions are set out in Mr Latham's Skeleton Argument dated 12th May 2022 and in his oral submissions at the hearing.

10. The Claimants, in summary, submit that the borrowing costs, incurred in order to fund the litigation, should be recovered in the assessments. These charges were incurred in order to vindicate the Claimants rights and the additional costs, insofar as they are a reasonable amount, should be paid by the Defendant.

11. Mr Latham relies on the judgment of the Court of Appeal in Jones v. Secretary of State for Energy & Climate Change [2014] 3 All ER 956. In that case the claimants had brought claims in a group litigation under CFA's which contained a standard provision rendering them liable for the payment of disbursements incurred, whether or not the claim was successful. These disbursements were primarily (although not exclusively) payments for experts and counsels' fees. They were paid by the claimants' solicitors under an arrangement by which the solicitors entered into a 'disbursement funding agreement', whereby the solicitors provided credit to the claimants, in return for payment of a credit charge, agreed at 4% above the base rate. Sharp LJ, applying CPR 44.2(6)(g), outlined the relevant principles as follows:

[17] The power to order interest on costs, including pre-judgment interest on costs is derived from CPR 44.2(6)(g). The equivalent rule was CPR 44.3(6)(g) before the Jackson reforms. The rule provides that the court may order "interest on costs from or until a certain date, including a date before judgment". The purpose of such an award is to compensate a party who has been deprived of the use of his money, or who has had to borrow money to pay for his legal costs. The relevant principles do not materially differ from those applicable to the award of interest on damages under s35A of the Senior Courts Act 1981. The discretion conferred by the rule in respect of pre-judgment interest is not fettered by the statutory rate of interest, under the Judgments Act 1838, but is at large. Ultimately, the court conducts a general appraisal of the position having regard to what is reasonable for both the paying and the receiving party. This normally involves

> an assessment of what is reasonable having regard to the class of litigant to which the relevant party belongs, rather than a minute assessment which it would be inconvenient and disproportionate to undertake. In commercial cases the rate of interest is usually set by reference to the short term cost of unsecured borrowing for the relevant class of litigant, though it is always possible for a party to displace a "rule of thumb" by adducing evidence, and the rate charged to a recipient who has actually borrowed money may be relevant but is not determinative. …
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> [18] The rate may differ depending on whether the borrower is classed as a first class borrower, an SME or a private individual. Historically at least, first class borrowers have generally recovered interest at base plus 1%, unless that was unfair or inappropriate though in the light of recent interest rate developments there is no presumption that base rate plus 1% is the appropriate measure of a commercial rate of interest. …SMEs and private individuals have tended to recover interest at a higher rate to reflect the real cost of borrowing to that class of litigant….

12. Reference is also made to Involnert Management v. Aprilgrange Ltd. [2015] 5 Costs LR 813, where Leggatt stated that CPR 44.2(6)(g) "…is now routinely exercised when an order for costs is made following a trial to award interest at a commercial rate from the dates when the costs were incurred until the date when interest becomes payable under the Judgment Act", and described this as the "usual" order in the Commercial Court.

13. These principles, submits Mr Latham, should be applied here. Although pre-judgment interest may be "the norm" in the Commercial Court, there is no justification for treating private individuals less favourably than big businesses. Although the amount of interest may be small in each case, failure to recover may nonetheless leave the Claimants undercompensated, representing, in effect, a deduction from their (relatively small) sums in damages. Mr Latham's submissions are summed up at paragraph 23 of his Skeleton Argument: "The Claimants were unable to privately fund their claim. They reasonably incurred borrowing charges in order to fund disbursements. They thereby obtained effective access to the court. The Defendant, having agreed to pay the claimants' costs, is liable to pay interest on costs in the usual way".

14. As to the rate and the amount of interest to be awarded, Mr Latham submits that it should be assessed so as to cover the borrowing charges which the claimants actually incurred. Applying the test in Jones, the charges "are unexceptional for non-recourse short-term borrowing with limited and uncertain security". Although the interest rate payable under all the loans is 30.3%, the relevant periods are different obviously in every case, meaning that each assessment should invoke a specific, bespoke calculation. Alternatively, submits Mr Latham, the court could apply a broader brush, utilising a common period for the claims as a whole.

15. Mr Hogan, representing the Defendant, replies that Jones should not be relied on as authority for the proposition that pre-judgment interest should be award where a funding loan exists. He cites the following passage in the headnote: "The defendants accepted that the claimants were entitled to pre-judgment interest on disbursements but disputed the appropriate rate of interest". Jones, in other words, is based on a concession and not the considered determination of the court, so that the only disputed issue is the rate of interest to be awarded.

Defendant's submissions

16. The Defendant's submissions are set out in a Skeleton Argument drafted by Mr Hogan and dated 9th May 2022, and in oral submissions at the hearing.

17. Mr Hogan submits that in respect of interest on costs, as a general rule the court does not award interest on a case-by-case basis tailored to the expenses of the individual litigant, but rather by the application of the incipitur rule to award a litigant interest at the Judgment Act rate from the date of the costs order. In recent years, an interest rate of 8% "has represented a generous return on costs incurred". Mr Hogan cites initially five reasons for the primacy of the incipitur rule. First, that it represents a settled and readily applicable rule usually understood by litigants. Second, it avoids the expense of individual investigation and calculation in individual cases. Third, it draws a bright line rule that avoids difficult questions of calculating compensation for opportunity costs. Fourth, it strikes a balance between the interests of receiving and paying parties. Fifth, it reflects a more general principle that the costs of funding are not recoverable between the parties. He acknowledges that the court has a discretion to depart from the incipitur rule, but describes this as "a "weak" discretion rather than a "strong" discretion". It should, in other words, be exercised on a limited basis and not simply because an individual claimant in a consumer claim has incurred funding costs.

18. Mr Hogan submits that the starting point or "general rule" is that set out by the Court of Appeal in Hunt v. RM Douglas (Roofing) Limited 1987 WL492269. In that case, the court dismissed the appeal of the claimant, who challenged the decision of a taxing officer to disallow an item described as "the cost of funding disbursements during the currency of the action based on (a) overdraft rates at the National Westminster Bank, (b) loss of interest based on interest rates at the National Westminster Bank for deposit accounts". Describing the item as a "funding cost", Purchas LJ recognised that "the courts have never attempted to achieve full or perfect indemnity for a successful litigant". The award of costs has always "been a matter of discretion in the court rather than the recognition by the court of a right possessed by a successful litigant". Thus, "by established practise and custom funding costs have never been included in the category of expenses, costs or disbursements envisaged by the statute and [as was] RSC O.62. "To include them", he added, "would constitute an extension of the existing category of "legal costs" which is not under the prevailing circumstances warranted".

19. Then, recognising that Hunt pre-dates the introduction of the CPR, Mr Hogan refers to two cases which, he submits, illustrates the continuing application of this general rule.

20. First, in Simcoe v. Jacuzzi [2012] 1 WLR 2393, which Mr Hogan described as the "most proximate decision of the Court of Appeal to this issue", Lord Neuberger emphasised that the court must do justice to both parties, but that it could do so, in broad terms, by the application of the incipitur rule at 8% pa. His reasoning was set out at paragraphs 47 and 48 of the judgment:

> 47. We were referred to Fattal v. Walbrook Trustees (Jersey) Limited [2009] 4 Costs LR 591, paras 25-30 in which Christopher Clarke J held, in summary terms, that the effect of CPR 40.8 was that (a) the general rule is that interest on costs runs from the incipitur rate; (b) a departure from that general rule is justified if it is "what justice requires"; (c) the notion that a departure can only be justified in "exceptional" cases is an unhelpful guide; (d) the primary purpose of an award of interest is "to compensate the recipient for [having] been precluded from obtaining a return on [his] money; (e) "[since] the payment of solicitors' costs involves the payment of money which would otherwise have been profitably employed, the overwhelming likelihood is that justice requires some recompense…in the form of interest".
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> 48. I agree with all those observations, but I would add two precautionary comments on his observations. First, I would discourage too detailed an approach to the facts of the

particular case in hand for the purpose of determining the date from which interest should run. As Lord Ackner's speech in the Hunt case [1990] 1 AC 398 implies, when making such a determination, the court should take a broad view of the position. Prolonged argument, let alone detailed evidence, on the issue must be avoided. There will often be no perfect date, and the decision inevitably will, indeed should, be broad brush. Further, if interest was to run from different dates on different components of the costs, it would, in many cases, lead to arguments which would do the legal system no credit. The second observation is that I would not necessarily agree with the suggestion [2009] 4 Costs LR 591, para 30 that it may be inappropriate to award interest on costs where the case has been funded by a third party entirely voluntarily or otherwise free of any cost. I would have thought that, following the logic of reason (v) in para 11 above (and see para 46 above), if interest on costs is payable from the incipitur date, the party to whom it is paid may have to account for it to the third party, and, if that is correct, there would seem to me to be a powerful argument for saying that the third party should get interest on costs in the normal way.

21. The second relevant case, submits Mr Hogan, is Schumann v. Veale Wasbrough [2013] WHC 4070, QB, in which Dingemans J declined to award interest on costs pre-judgment. He summarised his reasoning as follows:

> 4. In this case I have decided not to award interest to be paid on the costs paid to legal representatives before judgment. This is for a number of reasons. First the making of such orders is not usual. This is not necessarily a reason for not making such an order, but it suggests that there might be proper reasons for not making such an order. I consider that there are good reasons for not making such an order, as appears below. Secondly the exercise of costs jurisdiction has always been rough and ready. For example, it is well known that an order for payment of costs on the standard basis rarely provides a complete indemnity of the winning party. The parties have always had to accept that there is a cost of being involved in litigation. Thirdly the making of such an order will introduce an unnecessary level of sophistication into the process for assessing costs, with parties being required to show not only when bills were rendered, but how and when they were paid. This is likely to generate further costs for both parties when preparing such schedules of information, and in checking them. A generation of further costs creates barriers for parties litigating in the Courts.
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> 5. Fourthly provisions relating to the summary assessment of costs on interim applications, and interim payments on account of costs, are other routes providing a system which ensures that such parties who have paid costs to their legal representatives are not kept out of pocket for long periods. These other methods avoid the need for careful calculations and evidence about payment dates. Fifthly there is nothing in this case which renders the making of such an order appropriate, such as a very long delay in the action.

22. Mr Hogan then referred to three first instance decisions which, he submits, supports the Defendant's interpretation.

23. In Nosworthy v. Royal Bournemouth & Christchurch Hospitals NHS Foundation Trust (2020) SCCO BRO1805481, the court considered the claim for pre-judgment interest in a personal injury action where the litigation was funded (in part) by a loan with an interest rate of 15% pa. Costs Judge Brown dismissed (this part of) the claim. Distinguishing Jones, for the reasons cited by Mr Hogan, his reasoning was set out from paragraph 19:

> 19. I am not satisfied that the court in Jones intended to set a general rule that an award of interest on costs should be made in respect of the period before judgment. That such an award should be made in that case had been conceded before Swift J at first instance. The only issue before the Court of Appeal was the narrow one set out above. It is clear, moreover, that not only did Dingemans J take the view that such an award was not the general rule in ordinary litigation he also took the view that it was undesirable that there should be such a general rule. At the risk of stating the obvious, in large commercial claims or multi party actions it is much more likely to be proportionate for the court to undertake the sort of enquiry into interest which is anticipated by this claim. In a case such as this one, self-evidently, it is not.

Then, having noted that there were "no circumstances in this case which, to my mind, taken out of the ordinary" (21), CJ Brown continued:

> 22. As Dingemans J observed, the making of an order of the sort which is requested by the Claimant would introduce an unnecessary level of sophistication to the process for assessing costs. If it were right that the court were required in general to specifically consider the interest rate applicable to experts' funding, then presumably also the same would apply to counsels' fees, solicitors' fees and other disbursements (such as court fees). Further, the parties would have to take into account such matters as to the payments on account and the allocation of such payments to different expenditure. The schedule of the Claimant's costs relied on for the oral hearing put his costs at close to £4,000. Even ignoring the extent to which the Claimant's representatives had been dealing with what, to my mind, might be regarded as a novel point the costs incurred in dealing with a claim such as this are still liable to be disproportionate. The complications which would arise would, to my mind, be substantial even in a modest case; and they would exist even assuming that the rates and the principle of payment were agreed. Further, paying parties might legitimately question whether they should be paying any interest if the receiving party had, for instance, the means, by way of insurance or otherwise, to pay up front for disbursements without taking out a loan. The potential for yet further legitimate disagreement would be substantial in the context of ordinary litigation (which may involve litigants in person). In respectful agreement with the comments of Dingemans J such complications and costs would, to my mind, set significant barriers for the parties litigating in the courts.

His final conclusion was then set out at paragraph 27:

> 27. Accordingly (and in any event), I am not satisfied that there is any principle of law that would prevent me having regard to the judgment rate interest received in exercising any discretion under this provision, or that any such sum could not be expected to be used to cover the costs of funding. Indeed it appears that not only did the court in Hunt and Simcoe seem to envisage that such awards might be used to cover the costs of funding; they did not appear to have it in mind that the costs of funding in ordinary litigations should be met by a separate of interest. Further and in any event I do not accept that there is any restriction of the sort contended for by the Claimants in CPR 44.2(6)(g) as to the circumstances in which the Court can take into account when exercising its discretion under this provision. It seems to me clear that discretion as to interest generally is to be exercised on a "broad brush" basis.

25. In Marbrow v. Sharpes Garden Services Limited (2020) SCCO Ref: SC-2020-BTP-000327, a claim for personal injury arising from an accident at work, the claimant took out a

loan with his solicitors to fund disbursements at an interest rate of 5% pa, and then (atypically) claimed the costs of funding the loan as an item of costs. Senior Costs Judge Gordon-Saker disallowed recovery of this item. At paragraph 28 of his judgment, he noted that "the court should depart from the incipitur rule only where that is what justice requires in the particular case and should avoid awarding interest on different dates on different components of costs". He then summarised his reasoning as follows:

> 32. Given my decision that the Claimant should be entitled to interest at the rate of 8% from the date of judgment, is there any particular reason to award interest on part of the costs before judgment?
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> 33. Jones was a rather different case to the present: a group action in which the disbursements came to a total in excess of £787,500. The present case is a straightforward personal injury claim. No evidence of the Claimant's means have been produced but for present purposes I am happy to accept, on my reading of the papers, that it is unlikely that the Claimant would have had the means to fund disbursements other than by a loan. That is almost certainly the case for the vast majority of claimants in personal injury actions. Yet the incipitur rule remains the default position and Parliament did not choose, when enacting the Legal Aid, Sentencing and Punishment of Offenders Act 2013, to make specific provision for the funding of disbursements whether by enabling the recovery of funding costs or by creating a default entitlement to pre-judgment interest.
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> 34. In my view, justice does not require departure from the general rule in this case and the Claimant should be entitled only to interest from the date of the costs order. The higher rate of interest under the Judgment Act should go some way to compensating the Claimant for the interest that he is liable to pay for funding the disbursements.

26. In Godfrey v. Automotive Products Limited (2020) 17th December, an assessment at Liverpool County Court, the claimant in an industrial deafness case, funded disbursements by means of a 'funding loan' charging interest set at 15.3% APR. DJ Baldwin, in a judgment which Mr Hogan describes as the "latest decision on this point", again disallowed recovery. His reasoning was as follows:

> 28. Firstly, I am asked to assume that there was a real and genuine need for the Claimant to finance his disbursements by way of a loan as a result of impecuniosity. In other words, it seems to me, to come to a conclusion that the claim is likely to have been stifled, without such financial assistance being provided. Indeed, Mr Williams draws a parallel with impecuniosity in credit car hire claims. However, it cannot be overlooked, in my view, that the impecuniosity in the realm of credit hire is not self-proven, as has been highlighted by recent changes to CPR PD16 and in Diriye v. Bojaj & Quick-Sure [2020] EWCA Civ 1400. Whilst other judges might be prepared to make such assumptions in the costs arena, perhaps when furnished with rather more information and/or context than in the instant case, I prefer to adopt a more cautious approach in the context of lower value, sometimes high volume, personal injury claims into which category this claim, I believe, fits. Accordingly, at a very basic level, I am not persuaded that the evidence before me is sufficient to engage the operation of any discretion.
>
> 29. It might be said that this ignores the "class of litigant" approach in Jones, but this, to my mind, is somewhat circular, certainly in this claim, as it asks the Court to make assumptions as to any such class without more. I also accept the proposition that the

> decision in Jones is more focused upon the facts of that case, namely the notion of the reality of the loan arrangement with the solicitors and the interest rate which should be applied, rather than providing any overarching principle or encouragement as to the exercise of the Court's discretion as to compensating for disbursement funding loan interest generally in personal injury claims going forward. If that was intended, any wider applicability seems to have been singularly overlooked by many lawyers in this field for some time.
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> …
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> 31. But, why should the Court be engaging in any sort of guessing or "doing one's best" type of exercise at all in this situation? Does justice and equivalence demand it, as Mr William urges?
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> 32. My answer, in line with the overall conclusion of Master Brown in Nosworthy, is "no". The overriding objective encourages the Court to deal with all matters justly and at proportionate cost. This finding is echoed, in my judgment, in both Jones and Simcoe where there is significant encouragement to the assessing judge not to engage in in-depth evidence gathering exercises, but to adopt a broad brush, that is a proportionate approach.

27. Mr Latham, in reply, challenges the relevance of Schumann, Nosworthy and Marbrow. In Schumann, he argues, Dingemans J, in a comparatively brief section of the judgment, exercised his discretion on the facts of that particular case. In Nosworthy, he submitted that CJ Brown "approached the question of interest wrongly", as at para. 20 of the judgment he purported to indicate that circumstances must exist to take a case "out of the ordinary", before the discretion could be exercised. Finally, in Marbrow, another case which turned on its particular facts, SCJ Gordon-Sakar was influenced clearly by the fact that the Judgments Act rate was higher than the interest incurred under the disbursement funding agreement, meaning that the fact of the former could compensate for the loss of the latter.

My findings and conclusions

28. I am not satisfied that in these cases the Claimants should be entitled to recover pre-judgment interest incurred pursuant to funding loans. Undoubtedly the court has discretion to award pre-judgment interest, by virtue of the provisions of CPR 40.8 and 44.2(6)(g). Insofar as CJ Brown in Nosworthy may have purported to invoke a requirement of 'exceptionality' – and I do not actually think he did so – I agree with Mr Latham that this would represent an incorrect application or fetter on the exercise of the discretion. It is clear nonetheless that the incipitur rule constitutes the default position and that pre-judgment interest should only be awarded where justice requires a departure from this general rule. Generally, as has been acknowledged repeatedly in the cases cited above, it is important to avoid awarding interest from different dates and/or on different items or components of a costs assessment. And whether the discretion to be exercised is a "weak" as opposed to a "strong" one, as Mr Hogan submits, it is clear that it should be exercised on a "broad brush" basis. It is clear to me, on the facts of these cases, that justice does not require a departure from the general rule. Although I am dealing effectively with a large number of cases against a common Defendant and citing an identical cause of action under the Consumer Credit Act, it is not large commercial litigation or, indeed, a multiparty action. Notwithstanding these common points of principle, each case will produce a bill that will require separate, individual assessment by a Costs Officer, in circumstances where both the judgment sums and the costs claimed per case are necessarily modest. Recognising the prejudice identified by Dingemans J in Schumann, and elsewhere,

namely the undesirability of importing "unnecessary levels of sophistication" into assessments, the balance of advantage on this issue undoubtedly favours the Defendant, and by a clear margin. It is not desirable for the assessment process to invoke a separate, bespoke calculation as to the interest that has accrued. Quite apart from the additional work and complexity involved, raising potentially, on a case-by-case basis, contentious issues of evidence and/or disputed issues of calculation, and leading almost inevitably to more prolonged argument to dispute on assessment, it is clear to me that there is a significant risk that the costs of assessment would rapidly become disproportionate. I am not attracted to Mr Latham's submission that this prejudice could be properly mitigated, either wholly or in part, by the application of some common period of claim applicable to each individual case. Not only would this impose a somewhat arbitrary norm, it would still require an individual case-by-case calculation, and an irreducible risk of dispute and contention, in circumstances where the interest upon that item would be different necessarily to the interest calculations in respect of the assessment as a whole. No costs assessment provides a complete indemnity to the receiving party, but I am satisfied that the application of the general rule and, in turn, a rejection of the claimants' claim for pre-judgment interest, constitutes a just outcome for the Claimants in these cases.

29. As such, it is not necessary for me to either engage with or determine specifically any of the other evidential issues cited by the advocates. I do not, in other words, determine any disputes as to the Claimants' need for a funding loan, whether the interest rate claimed is reasonable or otherwise, or whether the accounts proffered in Adcock, Lynch and Pollard rely on calculations which are correct or otherwise. Given, in other words, my determination of the general principle, it is unnecessary for me to consider or determine specifically any matters set out in the Skeleton Arguments of Mr Latham (para. 24-26) or Mr Hogan (paras. 20-31).

(ii) Legal Hub

Background

30. The Claimants brought claims against the Defendant pursuant to the Consumer Credit Act 1974, for alleged mis-selling of financial products. Each claim was supported by a 'Legal Hub Report'. Legal Hub was the trading name of Lend Logic Limited. The alleged purpose of the Legal Hub Reports ('LHR') is explained by Amanda Grimes, formerly a Director of Pure Legal Limited, in her witness statement dated 10th December 2021. She avers (para. 19) that the "purpose of the Legal Hub Report was to establish that Claimants had viable undisclosed commission claims and [to provide] a rough estimate as to quantum". "Without this report", she states, "it would have been difficult or impossible for Pure Legal to assess the merits or viability of a claim and the potential quantum". Redacted examples of LHR's are exhibited at AG2 and each report covers approximately 20 pages.

31. The Claimants contend that the cost of obtaining the LHR is a recoverable item in the assessments. The Defendant submits that recovery should be disallowed as the LHR "represents a transparent attempt to conceal a fee paid to the ultimate introducer of the case to Pure Legal". It asserts, in other words, that what appears to be an "expert report fee" actually camouflages an illicit "referral fee". Such payments should be disallowed pursuant to the misconduct provisions at CPR 44.11.

CPR

31. CPR 44.11 provides:

(1) The court may make an order under this rule where –

(a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or

(b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

(a) disallow all or part of the costs which have been assessed; or

(b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

(3) Where -

(a) the court makes an order under paragraph (2) against a legal represented party; and

(b) the party is not present when the order is made,

the party's legal representative must notify that party in writing of the order no less than seven days after the legal representative received notice of the order.

Defendant's submissions

32. The Defendant's primary position is set out in the Supplementary Points of Dispute (Hearing Bundle, pp 30 onwards). These points are developed in the submissions at paragraphs 32-35 of Mr Hogan's Skeleton Argument and in his oral submissions at the hearing. The Defendants rely specifically on the witness statement of Martin Ward, a Partner at Eversheds, dated 27th January 2022.

33. The Defendant's submission begins with Mr Barry Taylor, an ex-employee of the defendant's group of companies. Mr Taylor left the Defendant's employment in October 2007, but it is alleged that before he did so downloaded the Defendants' customer lists dating from 2002. It is then alleged, by reference to "an anonymous letter from a whistle blower", that Mr Taylor and/or Claire Jackson, his partner and another ex-employee of the Defendant, passed on this stolen information "through various hands", and ultimately to a management company called LSQ Claims. LSQ then "sold" this information to Pure Legal (either directly or indirectly), with each contact generating a "referral fee", the fact and cost of which was concealed in the production of the LHR.

34. Aside from the information supplied apparently by the anonymous whistle blower, Mr Hogan refers to other indirect indicators which suggest, at least collectively, that the LHR had no purpose or legitimacy. First, the timing of the CFA's incepted by Pure Legal suggest that the firm had decided to take the claimants' cases before the production of the LHR. Pure Legal, in other words, were satisfied that the claims had merit, irrespective of the LHR. Further, insofar as the reports were "in standard form" and "contained generic commentary and irrelevant opinion" and were "widely inaccurate in their assessments of quantum", they had no practical purpose, either as expert reports or otherwise. Mr Taylor, moreover, was the sole director and shareholder of Legal Hub, so that it "is beyond coincidence that [he] is both a

principal financial beneficiary of these fees and in possession of the customer list permitting the claims to be brought".

35. Mr Hogan's submissions are summarised at para.35 of his Skeleton Argument:

> In short, the overwhelming probability is that in return for the provision of the "lead" of the Defendants' former customer, a referral fee structure was created which had the possibility of visiting the fees on the defendant paying party, through the provision of inadequate, evidentially flimsy "reports", which disguised the true nature of the transaction. Per Sharratt the court looks at the reality of the transaction, not the label given to it by the receiving party's solicitors and these fees are not recoverable as costs.

The court should, therefore, disallow recovery the costs of Legal Hub, pursuant to the powers of misconduct at CPR 44.11.

Claimants' submissions

36. The Claimants' case is set out in the Replies to the Supplemental Points of Dispute and paragraphs 29-34 of the Skeleton Argument of Mr Latham, along with his oral submission at the hearing. The Claimants rely specifically on the witness statement of Amanda Grimes, formerly a director of Pure Legal, dated 10th December 2021.

37. The Claimants refute the Defendant's submission pursuant to CPR 44.11. Mr Latham's submissions are proffered in the alternative.

38. First, it is submitted that the provisions of CPR 44.11 cannot apply, as the relevant conduct must be that of 'a party or that party's legal representative'. Insofar as the conduct complained of is that of Mr Barry Taylor, a former employee of the Defendant, it cannot be the conduct of any of the Claimants or their legal representatives. As such, "the Defendant's point of dispute is wholly misplaced and ought to be dismissed without further consideration".

39. Alternatively, the evidence does not support any of the prejudicial assertions advanced by the Defendants. Ms Grimes is clear that the "Claimants' representatives had never paid a referral fee to a company owned or controlled by Mr Taylor". The three claims currently before the court were referred to the Claimants' legal representatives by other sources, namely Express Claims (Adcock and Pollard), or as a result of internal marketing (Lynch). Legal Hub is not the only source of the relevant merits/quantum reports; in fact, reports were also obtained from other providers. Whilst the LHR were not, perhaps, expert reports in the true sense, they were an important evidential screen, comprising "a quick and efficient assessment of the strength of the claim and a rough valuation". The evidence of Mr Ward relies on a series of unsubstantiated inferences that cannot be preferred to the direct evidence of Ms Grimes. Thus, concludes Mr Latham at para. 34 of his Skeleton Argument:

> The undeniable fact is that the fees paid to Legal Hub were in respect of the reports exhibited to Ms Grimes' witness statement and were properly incurred disbursements in the prosecution of the claimants' claim. It is noteworthy that the points of dispute challenges these disbursements in principle only, and not the quantum of the fees paid. They should be allowed as claimed.

My analysis and conclusions

39. Mr Latham's last point demands initial emphasis. The challenge maintained by the Defendants is to the recovery of these disbursements in principle, not the quantum of the fees paid. My analysis, in other words, is predicated on this 'all-or-nothing' approach. Should the submissions of the Claimants be preferred to that of the Defendant, the court will not assess the reasonableness or otherwise of the fees claimed but will allow the item as drawn.

40. On the first issue, namely the application of CPR 44.11 in these circumstances, I prefer the submissions of the Claimants to those of the Defendant. Mr Hogan's inferences, assessed at their highest, focus exclusively on the conduct of Mr Taylor and, in servient part, Ms Jackson. Neither fall under the definition of the Claimants or the Claimants' legal representative (as defined in CPR 2.3(1)). Stretched to the limits of possibility, Mr Hogan purports to cast doubt on the conduct of someone at Pure Legal. But in reality, the misconduct alleged is essentially that of Mr Taylor, who is not a party to these (or any) of the relevant actions and is not a legal representative of the Claimants. In conclusion, therefore, the provisions of CPR 44.11 have no practical application to these issues, and I dismiss the Defendant's point of dispute on this ground.

41. Further, or alternatively, I agree with Mr Latham that, insofar as witness evidence assists the determination of this issue, that of Ms Grimes should be preferred to that of Mr Ward. Neither witness gave evidence in person and none of the evidence was tested by cross-examination. Ms Grimes provided direct evidence as to the origins and purpose of the LHR, evidence which included a clear and emphatic denial as to the payment by Pure Legal of "a referral fee to a company owned or controlled by Mr Taylor". Mr Ward, in contrast, relies initially on the apparent information of an unidentified, unattributed whistle blower, combined with a succession of (increasingly vague) inferences. While these points may collectively raise an arguable suspicion, they fall, in my conclusion, a long way short of what is required to establish a finding of misconduct. Should, therefore, I be wrong about the application of CPR44.11, I could not conclude reasonably that the Defendant has demonstrated unreasonable or improper conduct on the part of the Claimants or their legal representatives. For these reasons, I find that the LHR fees are recoverable.

Summary

42. My conclusions can be summarised as follows:

(i) The Claimants' claim for pre-judgment interest is dismissed.

(ii) The Defendant's challenge to the fees of Legal Hub pursuant to CPR 44.11 is dismissed.