Neutral Citation Number: [2023] EWHC 3157 (KB)

Case No: QB-2021-003619

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: [8] December 2023

**Before** :

**MR JUSTICE CONSTABLE**

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**Between :**

**(1) HOPE CAPITAL LIMITED**

**(2) HOPE CAPITAL 2 LIMITED**

**Claimants**

**- and -**

**ALEXANDER REECE THOMSON LLP**

**Defendant**

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ROGER STEWART KC and ANDREW NICOL (instructed by Penningtons Manches Cooper LLP) for the Claimants
TOM ASQUITH (instructed by Kennedys LLP) for the Defendant

Hearing date: 6 December 2023

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**Mr Justice Constable:**

1. This is the judgment dealing with costs related issues which arise between the parties following the Judgment handed down on 27 September 2023 [2023] EWHC 2389 (KB) (the 'Main Judgment'), together with the Claimants application for Permission to Appeal. In the Main Judgment, the Court concluded that, notwithstanding the (ultimately) admitted negligence of the Defendant, the Claimants have suffered no actionable loss. As a result, the Claim was dismissed.

2. The Defendant made a Part 36 Offer ('the First Offer') on 22 March 2022, in the sum of £375,000 which offer has been beaten. A further offer of £650,000 was made on 17 October 2022 ('the Second Offer'). The Claimants made a Part 36 Offer in the sum of £1.4m on 6 April 2023. On 12 May 2023, the Defendants made a Calderbank Offer of

£1.15m including interest and costs ('the Third Offer'). The net effect of this offer (excluding interest and costs) is unlikely to be materially better than the Second Offer. On 29 June 2023, a second Part 36 Offer was made by the Claimants in the sum of £1.2m, restated the following day as an all inclusive offer to receive £2m. The Defendant made a further offer following trial of £720,000 ('the Fourth Offer'; together 'the Offers').

3. The Claimants accept that they should pay the costs of the Defendant from the expiry of the First Offer. However, two issues of principle arise:

   (1) whether there should be a proportionate deduction from the recoverable costs incurred by the Defendant up to the expiry of the First Offer. The Claimants contend that they should be ordered to pay 50%, on account of its partial success: principally on the question of breach, which was admitted for the first time in Closing. The Defendant contend that there should be no deduction.

   (2) The basis upon which the Claimants should pay the Defendant's costs, both before and after the expiry of the Offer(s). The Claimants contend that they should be on a standard basis throughout. The Defendants contend that (1) costs should be on an indemnity basis throughout; (2) alternatively, costs should be on a standard basis up to a particular point (e.g. the expiry of the First Offer, or later) and on an indemnity basis thereafter; (3) alternatively, costs should be on a standard basis, but the Court should order that costs be assessed without reference to its costs budget. This latter contention was modified somewhat during the course of argument, which I refer to further below.

4. There are also issues relating to two specific applications made prior to ('the Medical Evidence application') and after the trial ('the November application'). There is potentially an issue on the appropriate level of payment on account, depending on the outcome of the indemnity costs debate. The Claimants accepts that interest on costs is to be awarded from the date upon which the various invoices were paid until the date when interest becomes payable under the Judgments Act, at the rate of 2% above base. This judgment should be read together with the facts and findings set out in the judgment on liability and quantum.

5. CPR Part 44 states:

> *"44.2*
> *(1) The court has discretion as to-*
> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs;*
> *(c) when they are to be paid.*
>
> *(2) If the court decides to make an order about costs –*
> *(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but*
> *(b) the court may make a different order.*
> *...*
> *(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*

*(a) the conduct of all the parties;*
*(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
*(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*

*(5) The conduct of the parties includes –*
*(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;*
*(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
*(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
*(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.*

*(6) The orders which the court may make under this rule include an order that a party must pay –*
*(a) a proportion of another party's costs;*
*(b) a stated amount in respect of another party's costs;*
*(c) costs from or until a certain date only;*
*(d) costs incurred before proceedings have begun;*
*(e) costs relating to particular steps taken in the proceedings;*
*(f) costs relating only to a distinct part of the proceedings; and*
*(g) interest on costs from or until a certain date, including a date before judgment.*

*(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.*"
…'

6. The Court has a general discretion. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the Court may make a different order. There is no dispute that the Defendant is to be regarded as the successful party.

7. Whilst it is open to a Court to make an issue-based order under CPR 44.2(6)(f) neither party urges that outcome on the Court. Not least because of the complications that can arise on assessment, this is not an option I will consider practical in the present case.

Proportionate Reduction

*Principles*

8. In relation to whether any proportionate reduction in the Defendant's costs should be ordered, the Defendant relies upon the extracts from relevant prior authorities set out in

the decision of O'Farrell J in *Triumph Controls – UK Ltd and another v Primus International Holding Company and others* [2019] Costs LR 1571 (paragraphs 12 to 15) to advance the following key principles:

(1) In commercial litigation, any winning party is likely to suffer some defeats. That does not mean that the winner should not get all its (assessed) costs;
(2) The reasonableness of the winner's pursuit of points which it lost is relevant;
(3) The case should be looked at globally.

9. I accept that these are clear principles which can be correctly drawn from the authorities. I would add that:

(1) Sales J's guidance in *F&C Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 2807 (Ch) identifies the circumstances where there are, for example, a number of different grounds relied upon to support a particular alleged entitlement. The caution he advises in limiting the overall winner's entitlement to its costs where they have not been successful on all such factual disputes or grounds is based upon the need to *"avoid finely detailed divisions of issues and sub-issues*'. When looking, as one must, at the overall justice of any decision to deprive the successful party of its part of its costs, it will likely be necessary therefore to consider the nature and importance within the litigation as a whole of those points upon which the defendant was unsuccessful and the extra costs associated with the failed point(s);

(2) When considering the reasonableness of the winner's pursuit of points which it lost, the burden is generally upon the paying party to demonstrate the unreasonableness of the pursuit of any point by the successful party. This follows from the guidance of Waller LJ in *Straker v Tudor Rose* [2007] EWCA 368 (CA) in which he said:

> *"[12] The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include ... (b) whether a party has <u>unreasonably</u> pursued or contested an allegation or an issue; ...*
>
> *[13] ...In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule, e.g. if it is to be said that a successful party 'unreasonably' pursued an allegation so as to deprive that party of what would normally be his order for costs, there must be a clear finding of which allegation was unreasonably pursued."*
>
> *[<u>Emphasis</u> in original]*

*The Parties' Positions*

10. The Claimants contend that the outcome at trial should be characterised as follows: the Claimants' case was accepted so far as the correct bracket to be applied was concerned, the competence of the valuation, reliance and their assertion that this was a "no loan" transaction and the reasonableness of the mitigation measures taken. In contrast, the

Defendant succeeded so far as the questions of interest as damages, actionable loss and contributory negligence were concerned. In light of this characterisation (and, in particular, with emphasis on the ultimate concession on breach) the Claimants contend that it is appropriate to order a reduction of 50% from the costs to be recovered by the Defendant up to the expiry of the First Offer.

11. The Defendant argues that, whilst it is correct that the Claimants won on breach, this turned on the substantive debate which related to true valuation of the Property, and this was a matter upon which the Court came down between the parties. The Defendant points out that whilst the proper valuation remained hard fought to the end of the trial, the issue of breach was not the subject of much consideration in addition to the true valuation argument, in that it was broadly a consequence of whether the valuation fell inside or out of the relevant bracket (as to which there was a short debate about 15% v 20%). The Defendant submitted, in addition, that relevant to the question of valuation insofar as it affected breach, was the Savills' marketing file which was disclosed late, and even then had been inappropriately redacted. The other 'wins' stated by the Claimants were not significantly disputed (reliance/no transaction loan). It also characterises the arguments around mitigation (again conceded by the end of the case) as minor in the broad scheme of the case. The Defendant therefore argues that there should be no reduction in the recovery of its costs.

*Discussion*

12. It does not in my judgment involve detailed division of issues and sub-issues to conclude that, stepping back, the Defendant lost on breach and won on scope of duty (see paragraph [161] of the Main Judgment and the analysis leading up to it), and the causal nexus between that duty as defined losses caused by matters for which no duty was owed, namely the conduct of the borrower coupled with COVID (see paragraph [171] of the Main Judgment and the analysis leading up to it). Because the Defendant won on these issues, it defeated the claim. This is not a granular distinction, but a broad one. It is one that is of the type which merits consideration of whether the fact that the Defendant lost on the question of breach should deprive it of some of its costs. The question I ask myself, bearing in mind the guidance of Waller LJ quoted above, is: was it unreasonable for the Defendant not to admit negligence until the conclusion of the evidence?

13. The Defendant was no doubt aware that, with its expert evidence taken at its absolute highest at the outset of trial, it was only just within a 20% bracket of tolerance from the impugned valuation; and it was outside a 15% bracket on any view. As such, its prospects of holding the line on breach were, at best, slim. I have already found the views of the Defendant's valuation expert, Mr Rusholme, were properly held, in accordance with his duties to the Court (see paragraph [28] of the Main Judgment). Given that the experts had jointly agreed that a 20% bracket was appropriate (a proposition the Court ultimately rejected), it was, at least until Mr Rusholme's various concessions during oral evidence, arguable. I also accept that the Defendant is correct that the contents of the marketing file - the majority of which came to be provided shortly before trial (in circumstances described in the Court's earlier judgment but which are not repeated here) - also made a finding of breach more likely, in that it provided contemporaneous material going to valuation not otherwise before the Court some of which undermined Mr Rusholme's initial expert evidence.

14. The disputed valuation evidence which would, when resolved, determine breach was always going to remain at the heart of the case because it was central to the questions of the calculation of loss. I do not regard having kept breach an open issue as an unreasonable course of action in light of the expert evidence which the Defendant had, notwithstanding the objective likelihood of ultimate success on the point was low given that the Defendant's best case placed the valuation at the outer edge of the more generous bracket of tolerance. In my assessment, within the context of the case as a whole, the question of breach did not meaningfully add to the substantive issues necessary to determine the true valuation for the purposes of the assessment of loss. Whilst breach remained therefore a big 'headline' point, it did not significantly affect the substance of the evidence which needed to be called or the trial itself. Neither did the other sub-points upon which the Claimants had success. In these circumstances, I do not regard it is appropriate to make any deduction from the ordinary starting point in which the Claimants, as the unsuccessful party, should pay all the Defendant's assessed costs.

Standard or Indemnity Basis

*Principles*

15. The starting position is that the Defendant should recover its costs on a standard basis. Pursuant to Part 36.17(3), the automatic consequence of beating its offer (unless it is unjust) is that the Defendant is entitled to its costs, together with interest on its costs. Of course, in circumstances such as the present where the claim is dismissed entirely, the recovery by the Defendant of its costs on a standard basis would be the ordinary course of action in any event, and irrespective of any offer.

16. The principles to apply when considering the discretion to award indemnity costs are well established. They may be summarised, in the context of the relevant issues in this case, as follows:

    (1) As identified in the White Book at CPR 44.3.9, the discretion is ultimately to be exercised so as to deal with the case justly. The discretion is '*extremely wide'* (Three Rivers DC v Bank of England [2006] 5 Costs LR 714);

    (2) the making of a costs order on the indemnity basis is appropriate in circumstances where (1) the conduct of the parties or (2) other circumstances of the case (or both) takes the situation '*out of the norm*' (per Waller LJ in Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson [2002] EWCA (Civ) 879);

    (3) indemnity costs are appropriate only where the conduct of the paying party *'is unreasonable to a high degree'* (Elvanite Full Circle Limited v Amec Earth and Environmental (UK) Limited [2013] EWHC 1643 (TCC), pre Coulson J as he then was, relying on Simon Brown LJ (as he then was) in Kiam v MGN Ltd [2002] EWCA Civ 66);

    (4) the pursuit of a weak case will not usually on its own justify an order for indemnity costs, provided that the claim was at least arguable. The pursuit of a

'*hopeless*' claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order (Elvanite). That said, the shorthand '*hopeless*' should not be taken to indicate any sort of gloss on the conventional description of claims which are '*speculative, weak, opportunistic or thin*' giving rise to the possibility of indemnity costs. The judge should ask whether, at any time following the commencement of the proceedings, a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued (Lejonvarn v Burgess [2020] EWCA Civ 114; [2020] 4 WLR 4 per Coulson LJ).

(5) whilst an indemnity costs order does, as set out in Excelsior and in Kiam, carry some stigma, and it is to be regarded as penal rather than exhortatory, dishonesty or moral blame does not have to be established (Courtwell Properties Ltd v Greencore PF (UK) Ltd [2014] EWHC 184 per Akenhead J);

(6) a weak case coupled with an illegitimate collateral purpose may well justify an order for indemnity costs (see for example Arcadia Group Brands Ltd & Ors v Visa Inc & Ors [2015] EWCA Civ 883: '*The weakness of a legal argument is not, without more, justification for an indemnity basis of costs, which is in its nature penal. The position might be different if proceedings or steps taken within them are not only based on a plainly hopeless case but are motivated by some ulterior commercial or personal purpose or otherwise for purely tactical reasons unconnected with any real belief in their merit*'; and Lejonvarn where '*[a]n irrational desire for punishment unlinked to the merits of the claims themselves is precisely the sort of conduct which the court is likely to conclude is out of the norm*')

(7) a defendant who beats their own Part 36 offer is not automatically entitled to indemnity costs. A defendant can seek an order for indemnity costs if they can show that, in all the circumstances of the case, the claimant's refusal to accept that offer was unreasonable such as to be "*out of the norm*". Moreover, if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made. The court should consider '*whether the claimant's conduct in refusing that offer took the case out of the norm by asking whether at any stage from the date of the offer to disposal of the claim, there was a point when the reasonable claimant would have concluded that the offer represented a better outcome than likely at trial*'. (Lejonvarn);

*The Parties' Positions*

17. The Defendant contends that there are seven bases which should lead the Court to the conclusion that the Claimants' conduct in pursuing its claim was unreasonable, such that I ought to award costs to be assessed on an indemnity basis for the entire proceedings. In seeking indemnity costs, the Defendant also relies upon the Claimants' refusal to accept the Offers as justifying (in themselves or coupled with the other complaints) indemnity costs from the date one or other of the Offers was made. The Defendant relies upon the witness statement of Caterina Yandell in support of its application.

18. Mr Asquith does not contend that the claim as a whole should not have been brought. It is not contended, for example, that the claim was so weak or speculative by reason of the ultimately determinative area of dispute – namely the scope of duty and the nexus between some of the claimed losses and that scope of duty – that indemnity costs should be ordered.

19. Instead, Mr Asquith contends that the pursuit of the lost profits/contractual element of the claim is the primary reason that indemnity costs should be awarded. This is where the focus of Ms Yandell's evidence lies. It is said, in summary:

(1) this aspect of the case played a central part in the evidence called, and the time taken at trial;

(2) claims for lost profits in the context of valuers' negligence claims are conceptually valid, but likely to be rare in practice. In this context it was particularly important that the Claimants sought to check and collate the necessary relevant evidence before making 'overly bold' contentions. The need to do so was also implicit in Master Dagnall's direction that the Claimants in October 2022 were to break down and explain their losses; however:

(3) the claim was instead based upon numerous confusing and opaque schedules, which were subject to amendment at various times;

(4) the supporting documentation that was provided - principally the 'Data Tapes' and the 'Lost Loan Spreadsheets' – were found to be '*wholly insufficient*' (see paragraph 115 of the Main Judgment) and unreliable (see paragraph 117 of the Main Judgment); and the types of documentation which would be expected to have been provided was not provided (it seemingly having been lost: see paragraph 112 of the Main Judgment);

(5) much of the factual witness evidence related to the lost profits claim, and the Court generally found the evidence of the principal witness, Mr Sealey, as unreliable save where supported by contemporaneous documents (see paragraphs [22] to [24] of the Main Judgment);

(6) the Claimants' case on alleged profitability was found to be wholly lacking in credibility (see paragraph [118] of the Main Judgment).

20. The second to seventh examples of the Claimants' unreasonable conduct as advanced as a basis for indemnity costs are:

(2) The denial of contributory negligence. It is said that it was unrealistic to have maintained that there was no contributory negligence at all.

(3) The absence of attention paid by Mr Sealey, the principal (and principal witness) of the Claimants, to reading documents produced in this litigation;

(4) The 'false' evidence of Mr Sealey. Mr Sealey made a number of factual assertions in evidence which were rejected by the Court. Those particularly emphasised by Mr

Asquith are (1) his repeated evidence about not being able to make £1m+ loans (2) evidence relating to Triple Point maxing out; (3) his (lack of) knowledge of works at the Property (essentially those items listed at paragraph 22(1), (2) and (5) of the Main Judgment);

(5)&(6) The late emergence of the Savills Marketing File. The substance of these matters is in essence set out at paragraph [17] and [28] of the Main Judgment;

(7) The misconceived amendment application. This is dealt with at paragraphs [4] to [20] of the Main Judgment.

21. The Claimants contend that, whilst ultimately unsuccessful at trial, there was nothing abusive about any element of the claim advanced by the Claimants, nor was any aspect, including the loss of profits claim, 'speculative, weak, opportunistic or thin'. In this context, it is pointed out that the Court gave permission for the Claimants to amend to bring the loss of profits claim, and it was legally permissible and conceptually coherent. It simply failed on the evidence. The Claimants have served responsive evidence from Kamran Rehman.

22. It is further said that, insofar as criticisms are made of Mr Sealey, those criticisms did not amount to any finding of dishonesty, and the mere rejection of a central witnesses' evidence, even on robust terms by the Court, does not amount to a reason of itself to require costs to be paid on an indemnity basis by way of 'sanction'.

*Discussion*

23. The starting point is that the claim for negligence was not, itself, in any way weak, or speculative. Indeed, an important point militating against seeing the Claimants' conduct in pursuing the matter to trial as unreasonable is the fact that breach/negligence was not conceded until the close of evidence. This is no doubt why Mr Asquith focuses on the loss of profits/interest as damages point. However, the consequence of making an order that all costs incurred (whether throughout or from a particular date) are assessed on an indemnity basis because it was unreasonable to take one particular point, giving rise to what would be no doubt identifiable costs, is that the costs of all the entirely reasonably taken points (including here, the central ones of scope of duty and nexus of loss) are also assessed on the indemnity basis. It only has to be said for it to be recognised that a Court will be slow to reach the conclusion that such an outcome is likely to do proper justice between the parties. It may be that if particular issues are separated out for the purposes of costs assessment, a court might more readily consider an order requiring the costs of a particular issue to be dealt with on an indemnity basis for particular reasons, but dealing with matters on an issue-basis comes with its own difficulties which make a Court reluctant to make such an order, as already identified.

24. Undoubtedly, the pursuit of the lost profits claim was ambitious. Mr Nicol was candid in his acceptance that it is a head of loss only awarded in rare cases. The head of claim failed (or would have failed, if the Claimants had succeeded on the prior question of actionable loss) principally as the result of a combination of three factors: the absence of contemporaneous supporting documentation, the unreliability of the spreadsheets/data tapes relied upon and my conclusion that the oral evidence based

upon recollection could not make up for the deficit in supporting documentary evidence. The Court was, as Mr Asquith points out, critical of Mr Sealey's oral evidence. However, I did not find (and nor was it put to me that I should find) that he was a dishonest witness. My impression, having heard the evidence, was that the absence of attention to detail Mr Sealey showed in relation to the review of some of the Court documents commented upon by Mr Asquith lay at the heart of his belief that the documents he and Ms Cowan relied upon were sufficiently robust to substantiate what I consider Mr Sealey probably did believe, although without any thorough analytical justification, to be true – namely that his losses caused by the failed bridging loan included lost interest from other transactions. Ultimately, this was not a credible proposition, but no less so in many respects than the Defendant's own position on the question of breach. I regard the Claimants' stance on contributory negligence similarly: it was ultimately wrong, but it did not represent anything which could properly be regarded as '*out of the norm*', justifying, of itself, anything other than the usual cost consequences which follow. I do not regard matters (5), (6) and (7) as matters which could, of themselves, and in the context of the claim as a whole properly justify the imposition of indemnity costs.

25. It is necessary to go on to consider, however, the Offers made. The refusal of the Offers would not of itself justify an order of indemnity costs because if this were the ordinary course, it would amount to an illegitimate re-writing of Part 36. I must ask whether at any stage from the date of an Offer there was a point when the reasonable claimant would have concluded that the offer represented a better outcome than likely at trial. I consider this question in the round (including the Defendant's points about the weakness of the loss of profits claim and position on contributory negligence).

26. It was plainly reasonable to start and continue with the claim until a reasonable offer was made in circumstances where the Defendant had clearly been negligent, notwithstanding the likely difficulties (as may often be the case) in relation to loss. Whilst I have rejected the contention that bringing the interest as damages claim was so speculative or weak that it might justify indemnity costs of itself, the combination of (a) the conceptual difficulties with such a claim in the context of valuer's negligence cases for the reasons set out at paragraphs [102] to [106] of the Main Judgment (b) the absence of contemporaneous documentation should have made it obvious to a reasonable claimant that little regard to that particular head of loss when considering any potential offers made. However, it appears from the Claimants' own Part 36 Offer, pitched a little under their calculation of their claim based upon cost of funding rather than interest as damages, that they, reasonably, understood this area of their claim was weak. Put another way, it does not seem to me that it was an unreasonable failure to recognize the difficulty of the loss of profits element of the Claimants' case that led to the rejection of the Offers.

27. I do not regard it as unreasonable to have continued with the litigation after the First Offer (on 22 March 2022, in the sum of £375,000). As pointed out by Mr Stewart, but for the scope of duty/nexus point (which was to some degree binary), the Claimants beat this sum (see paragraph [176] in which I found in the alternative a loss after contributory negligence of £437,700.70 plus statutory interest).

28. Was it unreasonable to continue with the litigation after the second offer (£650,000) was made on 17 October 2022? Ultimately, I do not think so. £650,000 was plainly

a well judged offer, and it fell in between the Court's determination of what would have been recoverable with and without a deduction for contributory negligence if, contrary to the primary finding, there was some actionable loss. However, had the assessment of percentage deduction for contributory negligence been different, the alternative analysis may have exceeded this offer too. Whilst clearly it would have been reasonable for the Claimants to accept the offer, this is not the same as saying it was unreasonable (without the benefit of hindsight) for them not to do so. The proper question is whether some within the broad range of reasonable Claimants would decided to press on? I consider that some within the range of reasonable Claimants would have done. For completeness, it is also clear that the Claimants were not pressing on regardless, intent on some irrational desire for punishment of the Defendant unlinked to the merits of the claim itself or some ulterior motive: they made their own, relatively sensible, offer, albeit one which ultimately was not borne out by the conclusions drawn by the Court. In these circumstances, it would not be appropriate to impose indemnity costs for any part of the costs order.

29. I turn, therefore, to the third way in which the Defendant seeks an order affecting the way in which costs should be assessed. It was initially suggested that I should order that the Defendant's costs should be without reference to its costs budget.

30. As made clear in *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] EWCA Civ 906; [2014] 1 WLR 3926, Lord Dyson MR and Vos LJ:

> "*If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR r 3.18 in relation to its costs budget.*"

31. Proportionality is a key feature of assessment on the standard basis. A costs budget arising out of costs management relates to sums which are proportionately incurred, not merely those reasonably incurred. A cost may be reasonable but not proportionate. It is only approved if it is both. A key feature of awarding indemnity costs is freeing the receiving party from its costs budget and the presumption of proportionality therein. Whilst it also reverses the burden of proof in relation to reasonableness which otherwise applies when assessment takes place on the standard basis, reasonableness is separate to proportionality. It is likely in many cases that removal of the requirement for proportionality has a greater effect on the additional costs recoverable on an indemnity basis than the reversal of the burden of proof.

32. The removal of the requirement for proportionality is explicitly justified as a consequence of ordering indemnity costs by the wording of CPR 44.3. In circumstances where the Court has determined that an award of indemnity costs is not justified, the Court should not go on (in light of the very same reasons unsuccessfully advanced in the context of indemnity costs) to remove the important requirement for proportionality by the backdoor by ordering that costs should be assessed free from the constraints of the costs budget, even if the Court had power to make such an order, which I doubt. In this context, the only specific power to depart from an approved or agreed budgeted costs resides in CPR3.18 and this power is to be exercised '*when assessing costs*' i.e. by the costs judge. It is for the costs judge to determine whether there is a good reason to depart from the budgeted costs. It may be that some of the matters raised as 'conduct' issues in the context of an indemnity costs application are matters which, in

due course, amount to good reasons for such a departure but that is not a matter for determination by me at this stage.

33. Recognising the difficulty of seeking an order disapplying the cost budget altogether, Mr Asquith nevertheless invited the Court to make, should it wish, comments - having heard the various conduct related arguments - which might be taken account of in due course. I note, first, that such comments would not be of the type envisaged either by rule 3.15(4) or 3.17(3), which appear to be (pursuant to CPR 3.18(c)) the only type of comments which, when also recorded on the face of an order, the cost judge is to take into account. I doubt therefore whether I have the power to make comments of the type I have been invited to. However, even if I had the power to pursuant to general case management provisions such as CPR 3.1(m) or otherwise, I would not do so in the present case. I have determined that the appropriate basis of assessment is a standard basis. It is now for the costs to be assessed, if not agreed, on that basis and it is for the parties to make any submissions they consider appropriate to the costs judge at the relevant time.

34. Therefore the Claimants are to pay the Defendant its costs, to be assessed on a standard basis, if not agreed.

35. In these circumstances, the issue relating to the amount of interim payment falls away. The sum to be paid on an interim basis is 70% of the incurred costs figure in the budget, plus 90% of the approved costs, which makes a total of £377,430.95.

<u>The Defendant's application relating to Ms Cowan's medical evidence dated 6 April 2023</u>

36. An issue arose between the parties in the context of disclosure. Data relating to the Claimants' transactions were held on a cloud based server called Egnyte. Data was lost when the Claimants moved from Egnyte, in circumstances briefly described at paragraph [112] of the Main Judgment. In June 2022, the Claimants' account with Egnyte had been reactivated, but Ms Cowan had forgotten this during the disclosure exercise, in which she played a central role from the Claimants' side. This oversight did not become apparent until the late stages of the preparation of witness evidence. The Claimants made an application for extra time for service of witness evidence. Reasons were provided within the application explaining the oversight which related to Ms Cowan's health. The details of this are sensitive and it is not necessary to describe for the purposes of this judgment, but the thrust of the contention was that Ms Cowan's health issues had affected her memory.

37. Ms Cowan dealt with the issue in her substantive witness statement served in support of the Claimants' claim. The Defendant contends that the clear inference from the witness statement, and in particular at paragraph 67, was that there were relevant documents evidencing the relevant aspects of Ms Cowan's medical condition as at the date of the witness statement. In light of Ms Cowan's reference to her issues and related investigations being '*well documented*', this was a reasonable understanding. In due course, a letter from a GP was produced, but the Defendant contended that this was inconsistent with previous assertions as to, on its understanding, the existence of prior supporting medical evidence. On 6 April 2023, the Defendant therefore applied for disclosure on the basis of the impression generated as to the existence of other relevant material which had not been provided. The Claimants confirmed in the

context of the application that no such documents existed, and the only evidence being relied upon was the later GP letter. That confirmation was taken at face value, and the application was not pursued further on the basis that costs were reserved.

38. The Claimants say that the application was abandoned, substantively without merit (such that if it had been heard, it would have been unsuccessful) and that it was irrelevant to any pertinent issue in the case. It should, therefore, have its costs. The Defendant says that it should have its costs, given that the application was driven by the misleading impression as to the extent of medical evidence, alternatively that costs should be in the case.

39. I consider that, on the basis of the documentation I have seen (some of which was explored in cross-examination with Ms Cowan which I have reminded myself of), there was justification for some confusion on the part of the Defendant as to what documentation in fact existed to justify the statement made at paragraph 67 of Ms Cowan's witness statement. She was an important witness supporting key financial information and her credibility was an issue in the case. Medical records relating directly to matters affecting her memory, had they existed, may have been sufficiently relevant in a number of ways. The Defendant was entitled to explore these matters. The matter was, sensibly, not taken further once a clear statement had been provided as to the non-existence of responsive material. This is a matter which was raised during the general management of the case between the parties, and agreement reached before an order was required. The appropriate order is costs in case.

<u>The Defendant's application dated 14 November 2023 relating to readiness for this hearing</u>

40. From the beginning of October 2023, the Defendant, through counsel to counsel communication and through solicitor to solicitor communication, sought an indication of what the Claimants' position was going to be at the instant hearing (then listed for 8 December 2023) dealing with consequential matters. No substantive response through either channel had been received by the end of October 2023, when solicitors for the Defendant chased again. No response was received prior to 14 November 2023. The application was not placed before me until 27 November 2023, at which point I directed that a response be provided setting out the Claimants' position by 4pm 29 November 2023.

41. The Claimants contend there should be no order as to costs, because it was not necessary by mid-November to apply to the Court to force a response when the hearing dealing with consequential matters was yet some three weeks away. However, the absence of any substantive indication of its position on relatively straight forward matters for some 6 weeks following the handing down of the Main Judgment was not constructive on the part of the Claimants (not least without some clear indication of why they were unable yet to engage or agreement as to a clear timetable for future engagement). I consider that the Defendant was justified in involving the Court to prompt the Claimants into action.

42. The Defendant is entitled to the costs of its application on a standard basis (albeit that, in the context of the orders dealing with the matter overall, this is to the same effect as ordering costs of the application to be in the case).

Permission to Appeal

43. The Claimants seek Permission to Appeal on three grounds. In summary:

(1) it was wrong in fact and law to conclude that the Claimants had suffered no actionable loss by reason of advancing loan monies to the borrower. The Court should have held that the Claimants were entitled to recover substantial damages;
(2) it was wrong to determine that it was not possible to determine the proper Cost of Funding of the monies;
(3) it was wrong to make any finding of contributory negligence or, if there was to be such a finding, that the appropriate reduction for contributory negligence should not be any greater than 20%.

44. I do not give permission to appeal.

Ground 1:

(1) The ground of appeal relates to (a) the analysis of the scope of duty of the Defendant and/or (b) the application of the scope of duty, as found, to the factual circumstances (i.e. the nexus between the scope of duty and losses claimed);

(2) as to the scope of duty, the Claimants do not identify or specify any error of law in the analysis of applicable legal principles at paragraphs 133 to 154, nor take issue with any aspect of the summary of the relevant principles distilled from the preceding analysis at paragraph 155. There is no basis upon which it can be said that the analysis of the relevant law was arguably wrong;

(3) as to the application of the law to the facts, the draft grounds of appeal similarly do not engage with the specific facts found and detailed analysis of the *purpose* of the valuation in this case. It is not reasonably arguable that, on the facts of this case, the purpose of the valuation was to protect the Claimants against all foreseeable risks attendant upon entering the transaction (rather than, as is generally the case, limited to protecting the Claimants in relation to the value of the security);

(4) having properly identified the scope of duty, it is not discernible from the draft grounds how it is said that (and is not reasonably arguable that) losses found as a fact to have been caused by the conduct of the borrower coupled with the effects of COVID were not properly to be regarded as losses which had no proper nexus with the subject matter of the scope of duty;

(5) it is not therefore reasonably arguable that the Judgment involved anything other than an orthodox view of the law post-*SAAMCO* applied to the facts. For related reasons, it is not reasonably arguable that it was wrong to follow the rationale of the Privy Council in *Charles B Lawrence* (derived from the same underlying rationale of *SAAMCO* and subsequent authorities).

Ground 2

(1) The point is obiter in light of the subject matter of Ground 1;

(2) the ground of appeal relates to a finding of fact on the evidence. Moreover, the Claimants did not in fact make any submission as to how the Court could and should do the exercise it criticises the Court for failing to do. It is not reasonably arguable that the Court was wrong to conclude that it was not able to determine on the facts before it the proper Cost of Funding given the absence of transparency about use of the High Net Worth funding which contributed to overall funding (and the absence of relevant submission from the Claimants at the time).

Ground 3

(1) The point is obiter in light of the subject matter of Ground 1;

(2) the finding of 50% contributory negligence was a reflection of the Court's assessment of blameworthiness and culpability having heard all the evidence and having formed a view about the seriousness of the Claimants' own failings in making the loan in breach of its own lending criteria and other failings, which failings in the circumstances of this case not just to the making of an imprudent loan but also to the factual circumstances in which the security was unrealisable at the point of breach by the borrower. The Defendant' breach was also undoubtedly serious, but it is not reasonably arguable that on the facts of this case an assessment of equal potency and blame for the loss sustained is one no judge could reasonably arrive at.