Neutral Citation Number: [2019] EWHC 2060 (QB)

Case No: QA-2019-000119
Claim No: CL-2015-000421

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM THE DECISION OF
MASTER JAMES IN THE SENIOR COURT
COSTS OFFICE – SCCO REF: JJ1704076
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2019

Before:

MR JUSTICE FREEDMAN

- -

Between:

(1) DIAL PARTNERS LLP
(2) DIAL HOUSE CONSULTANTS LTD

Appellants

- and -

(1) EASTERN AIRWAYS INTERNATIONAL LIMITED
(2) BRYAN HUXFORD
(3) RICHARD LAKE

Respondents

- -
- -

Mr Dan Stacey (instructed by **Candey**) for the **Claimants**
The Defendants did not attend and were not represented

Hearing dates: 9 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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MR JUSTICE FREEDMAN

Mr Justice Freedman:

Introduction

1. This is a renewed oral application for permission to appeal against an order made by Master James on 28 February 2018. The application for permission to appeal was on the basis that the appeal was made in time and thus there was no application for an extension of time. The date of the decision was said to be 17 April 2019, and the Appellant's Notice is dated 7 May 2019. On 9 July 2019, I heard Mr Stacey of Counsel and gave an ex tempore judgment. The essence of that judgment was to find that an appeal against the order to withhold profit costs of the Claimants had a real prospect of success despite the views of the Master and by Nicol J, and that this was a case where it was appropriate to give permission to appeal in respect of that part of the order of the Master. However, I wished to see the transcript before an order was made.

2. Overnight, I had a concern about whether in fact the appeal was brought in time. On 10 July 2019, I directed that no order should be entered and I sought a further written argument as follows:

> *"The Appellant's notice at section 2 states that it was brought in time, and that the date of the decision is 17 April 2019. Please explain why it is said that the application was brought in time. In particular, please explain why time did not start to run from 28 February 2018 when Master James decided not to award the profit costs. In any event, what happened on 17 April 2019. I note that the order is dated 24 April 2019. If the matter is out of time, then it would be premature to grant permission. It would first be necessary to consider an application for an extension of time. Before considering that, I need to know whether the Appellant's Notice was in time."*

I directed that a written argument should be provided by not later than 4:00pm on 11 July 2019.

3. On 11 July 2019, Mr Stacey provided a document headed "*Appellant's note addressing point on appeal timing raised by the Court on 10th July 2019*" that accompanied an email from Mr Nabarro of Candey Solicitors to Mr Stacey setting out the history of the matter.

4. I shall first deal with the matters relating to whether the appeal was brought in time, and if so, whether there should be an extension. I shall thereafter set out the transcript of what I said in respect of the application for permission to appeal at the time when the matter was proceeding on the basis that the appeal was in time and that no extension was necessary.

The relevant rules

5. Mr Stacey has referred to CPR 52.12 under the heading:

> *"**Appellants notice***
>
> *(1) Where the appellant seeks permission from the appeal court, it must be requested in the appellant's notice.*
>
> *(2) The appellant must file the appellant's notice at the appeal court within—*
>
> *(a) such period as may be directed by the lower court (which may be longer or shorter than the period referred to in sub-paragraph (b)); or*
>
> *(b) where the court makes no such direction, and subject to the specific provision about time limits in rules 52.8 to 52.11 and Practice Direction 52D, 21 days after the date of the decision of the lower court which the appellant wishes to appeal."*

6. However, it is also necessary to refer to the following, namely

> *"CPR 52.(3)(2) which provides:*
>
> *"an application for permission to appeal may be made-*
>
> *(a) to the lower court at the hearing at which the decision to be appealed was made; or*
>
> *(b) The appeal court in an appeal notice."*

7. I must also consider PD 52.B about which I have not been addressed. This contains additional provisions relating to CPR 52.12 about extending time in which to appeal. The relevant paragraphs are as follows:

> *"3.1 A party may apply to the lower court for an extension of time in which to follow the appellant's notice. The application must be made at the same time as the appellant applies to the lower court for permission to appeal.*
>
> *3.2 Where the time for filing an appellant's notice has expired the appellant must include an application for an extension of time within the appellant's notice (form N161 or, in respect of the small claim form N164) stating the reason for the delay and steps taken prior to making the application.*
>
> *3.3 The court may make an order granting or refusing an extension of time and may do so with or without a hearing…"*

8. In the recent case of *McDonald v Rose & Ors* [2019] EWCA Civ 4 the Court of Appeal reaffirmed that *"the date of the decision of the lower court which the appellant wishes appeal"* for the purpose of CPR 52.12(2)(b) is the date that the decision is formally announced in court and not the date that the formal order recording the decision is issued: see *Sayers v Clarke Walker* [2002] EWCA Civ 645; [2002] IWLR 3095. Where there is a formal hand down without dealing with the

question of permission to appeal, it is necessary for the Court to ensure that the hand-down hearing is not formally concluded, so that the Court retains jurisdiction under CPR 52.3(2)(a). Accordingly, if the application for permission to appeal is not made at the decision hearing itself, it is necessary to ask for the hearing to be formally adjourned in order to give more time to do so. If no permission application is made at the original hearing, and there has been no adjournment, then the hearing at which the decision was made is concluded and the lower court is no longer ceasing the matter and cannot consider any retrospective application for permission to appeal. *In McDonald v Rose* at (21)(5), the Court stated

> "*Whenever a party seeks an adjournment of the decision hearing…they should also seek an extension of time for filing the appellant's notice, otherwise they risk running out of time before the permission decision is made."*

9. In the instant case, the initial decision by Master James depriving the Claimants' profit costs was delivered orally on 28 February 2018, and permission to appeal was sought immediately upon the judgment being delivered on that day. Thus, contrary to the Practice Direction, no application for an extension was made at the same time as the application for permission to appeal.

10. On 13 March 2018, Candey, Solicitors for the Claimants (a) asked the Master to reconsider her decision and (b) asked for confirmation that the 21-day period for appealing pursuant to CPR 52.12 be extended to 28 March 2018 to afford the Defendant's time to respond to their suggestion. The Master reconsidered her decision.

11. On 14 March 2018, the Master agreed "*this is an entirely sensible suggestion and I am happy to do that. The parties are obviously going to need something in writing from me and it will include a reference to CPR 52.12 when it comes out."*

12. On 16 March 2018, the Master said *"Given that I am content for the proposed Appellants' time for Appealing, to depend upon the date on which they receive my decision, I see no problem with letting this go into the early part of next week."* In fact, following other exchanges, it was not until 18 December 2018 that the Master sent a detailed email decision refusing to change her decision of 28 February 2018. On that day, Candey sought a 14-day extension of time to file the Claimants' Notice under CPR 52.12 (2)(a). On 20 December 2018, the Master agreed.

13. On 20 December 2018, Candey asked for confirmation of the 21-day period pursuant to CPR 52.12 would not start running until *"a final order has been made/agreed."* The Master responded *"Yes, providing that it is agreed no later than end January 2019."*

14. On the same day Eversheds, Solicitors for the Defendants, wrote *"…until such time as you are in a position to make a decision on the question of my client's costs incurred from 13 March onwards, the parties will not be in a position to perfect an order."*

15. Costs submissions were exchanged on 21 and 23 January 2019, but no decision was made by the Master until 10 April 2019 when Eversheds chased the Master in the following terms:

> *"The parties however await your determination of the quantum of the additional costs in order that a final order can be drawn. The deadline for appeal runs 21 days from the sealing of the order and the Claimant has reserved its right in that regard. As such, our client's anxious to try and draw a line under this matter as soon as possible."*

16. On 17 April 2019, the Master handed down her decision in respect of the costs of the post-judgment dispute, awarding them to the Defendants.

17. The Appellants' Notice was lodged on 7 May 2019, 20 days after the Master's order of 17 April 2019 and 13 days after the terms of the Order were agreed by the parties which happened on 24 April 2019.

18. In the submission of the claimants, time for appealing had not expired by the time that the Appellants' Notice was filed and the appeal is in time. He relies upon the extension by the Order or direction of the Master made by email of 16 March 2018 until the date that the claimants "received my decision". The decision was then received on 18 December 2018, and on 20 December 2018, a 21-day extension was provided. This was provided on the basis that it did not go beyond the end of January 2019, but in the event, and without further decision from the Master at that stage, matters went beyond January 2019. This was because the Master did not provide her decision on the costs of the post-judgment dispute until 17 April 2019 and that was then recorded in a composite order dealing with all aspects of costs in one order. Understandably, Eversheds, as the successful party in respect of that aspect, wished for that to be included in the Order in this matter.

Discussion

19. If I were clearly of the view that there was no need for an extension in these circumstances, then I could proceed to affirm the permission which I indicated in my oral judgment should be ordered. However, if it might be the case that the application for permission to the appeal court was not brought in time, then an extension would be necessary. It would be wrong for an extension to be made without first giving an opportunity for the Defendants to be heard in relation to the question of an extension. Further, it would be premature to grant permission until such time as the issue of an extension had been decided.

20. In my judgment, there is a real question to be decided as regard an extension. Having regard to PD52B para. 3.1, the application for the extension *"must be made at the same time as the appellant applies to the lower court for permission to appeal."* The application for the extension was not made on 28 February 2018.

21. That arguably invalidated the steps taken thereafter and in particular, the decisions of the Master on 14 and 16 March 2018 and on 20 December 2018 to extend time. Further, there is the point that the extension on 20 December 2018 was arguably limited in time by reason of her decision being on the basis that there would be agreement of the Order by no later the end January 2019.

22. Despite the foregoing, this is an unusual case in that the Master was acting pragmatically at all times by agreeing the extensions to the extent that she did.

Further, albeit that there is an argument that the extension was not addressed precisely as it should have been, broadly the Claimants were mindful throughout of the need to have an extension of time for appealing and raised it with the Court with Eversheds on behalf of the Defendants being informed at each stage. Not only was there no objection from Eversheds at any stage, but Eversheds wrote in terms on 10 April 2019 to the Master saying that *"the parties however await your determination of the quantum of the additional costs in order that a final order can be drawn. The deadline for appeal runs 21 days from the sealing of the Order and the Claimant has reserved its rights in that regard. As such, our client's anxious to try and draw a line under this matter as soon as possible".*

23. That reflected two matters, namely

(1) Eversheds wanted a determination of the quantum of the additional costs in the reconsideration to form a part of the Order in this matter and that did not occur until 17 April 2019,

(2) Eversheds on behalf of the Defendants accepted that the deadline for the appeal did not run until 21 days from the sealing of the Order and that the Claimants had reserved their rights in that regard.

24. In those circumstances, it remains to be seen whether the Defendants would take any point in relation to the extension of time given the common understanding of the parties that time had been extended until after the making or sealing of the Order. It will then be for the Court in any event to make a decision to grant an extension, if it is the case that one is required.

25. The time spent on permission was not wasted. If I had been of the view having heard the permission application that there should not be permission, then the appeal would not have been permitted to go further. However, since my view is that subject to the issue of time, the appeal does raise a real prospect of success, I intend to take the following course:

(1) To order a rolled-up hearing before the Judge to hear the following, namely

(a) To consider whether there should be an extension including whether one is required at all;

(b) If an extension is granted or is not required, whether permission should be granted;

(c) If permission is granted, whether the appeal should be allowed.

26. The only reason why I have not granted permission at this stage is because logically, the extension comes first. I have not acceded to the suggestion of the Claimants that I should extend time because of the need to hear the Defendants. I considered adjourning for myself to hear the Defendants in the event that they do not consent to an extension. However, it is more practicable and cost effective to have one rolled-up hearing.

27. At the end of the note of the Claimants, they enquire as to whether a formal application for an extension of time is necessary, they must take their own course. They will bear in mind the fact that at this stage, this matter has not been considered by the Defendants nor has there been a ruling about the extension issues by the Court. I shall now set out what my ruling would have been on permission based upon the oral judgment that I gave in court.

28. There now follows the substance of what I said in my oral judgment, albeit that I have omitted the giving of permission. It follows from what I have said above that this case takes a different turn without permission being given at this stage. Had I not considered that a real prospect of success was raised, I should simply have refused an extension and/or permission (as I do in respect of the order about the costs of redetermination contained in paragraph 3 of the Order). However, since I take the view that there is a real prospect of success as regards paragraph 2 of the Order, and since I would have ordered permission to appeal but for the question, if any, of an extension of time, it is appropriate to send the matter to the Judge for a rolled-up hearing.

29. My oral judgment after a preamble about the judgment being ex tempore started as follows. The order appealed against concerns the costs of a detailed assessment following an action between the parties which in the end was the subject of a settlement on the eve of trial on 12 November 2016 when the Defendants agreed to pay the Claimants' £625,000 plus costs of the claim, to be assessed if not agreed.

30. There was a bill of costs dated 10 March 2017. The bill of costs was assessed in the sum of £394,392.65, together with interest in the sum of £17,922.29. The Defendants were ordered to pay the Claimants' costs of the detailed assessment, summarily assessed in the sum of £44,803. That sum appears to have been intended to include the costs of the disbursements of the claimants in connection with the detailed assessment. That seems likely to have included from the information provided to me by the claimants today, the costs of Mr Strickland who is not within the Claimants's solicitors but has been referred to as the costs lawyer.

31. I was provided with information to the effect that the profit costs of the assessment were a sum of in excess of £88,000 and the disbursements were a sum of about £23,000. It may be that a sum of over £20,000 out of the £88,000 is referable to Mr Strickland and that the sum of £44,803 is a combination of the approximate sums of about £23,000 for disbursements and about £20,000 for Mr Strickland's fees. If that is the case, the balance would be a sum of over £66,000 in respect of profit costs. As regards those profit costs, the Master has disallowed the profit costs in her determination in relation to the assessed costs.

32. The Master also ordered that the claimants shall pay the Defendants' costs of redetermination of the decision in relation to the costs of the detailed assessment in the sum of £6,660. That redetermination is referred to in brackets at the end of the first paragraph of the skeleton argument of the Claimants. In the course of the hearing, I asked what this was about and at my request, I was provided with a clip of correspondence of submissions and evidence that was put before the Master. Before the order had been entered, the claimants sought to have clarified or elaborated the reasons for the decision pursuant to *English v Emery*. That then in turn led to a plethora of correspondence over a period of time and eventually there was an email

from Master James dated 18 December 2018 to her Clerk, which was passed on to the parties and made points at (a) to (o) dealing with the matters which were raised in that protracted exchange. I shall return to that later in the judgment.

33. The successful parties in the action were the Claimants and an order for costs was made in their favour. There was, in the course of the costs assessment, an offer made by the Defendants of £350,000 in full and final settlement of the Claimants' costs. That offer was made on 27 April 2017. It followed that, by the judgment for costs in the sum of £394,362.65, even before interest that that offer was beaten by a sum of £44,392.65, in other words, the amount awarded by way of costs, excluding interest, was 12 per cent higher than the offer. When interest is added to those costs, there is a significantly higher sum, albeit that the figure that was provided to the court was the figure of interest up to the hearing of the costs judgment on 28 February 2018, which was the sum of £17,922.29. Some of that interest accrued before 27 April 2017 and some after.

34. The Master decided that, due to conduct issues, the defendants should not have to pay the profit costs of the Claimants' solicitors but that there should be paid the Claimants' disbursements. She took the view that the Claimants failed meaningfully to engage in the Defendants' various attempts to negotiate a settlement of this matter, including calls from the Defendants' solicitors seeking to negotiate and with no counter-offer being made by the claimants in April 2017 or thereafter. The Master also said, in the course of her written reasons for refusing permission to appeal, that her decision "*was also taken in order to bring the costs in this lengthy hearing process, which after many days ultimately achieved an improvement of around 12 per cent, less than £50,000, upon the Defendants' above referred to offer made in April 2017 to a reasonable and proportionate level*".

35. The Master refused permission to appeal in addition to that which I have quoted on the basis that the decision was within the proper exercise of her broad discretion such that there was no real prospect of success in an appeal.

36. The matter was referred to the High Court Judge on a paper application. Nicol J refused the paper application for permission to appeal for the same reason, namely that the decision was one within the discretion of the Court. He said that although not limitless, an appellate court would allow a generous band to that discretion. He said that one of the factors which it is legitimate to take into account is the conduct of the parties: see CPR 44.2(4)(a). He also referred to the part that I cited from the written document of the Master refusing permission and said that a costs judge was particularly well able to assess what is a reasonable and proportionate level, especially after a three-day detailed assessment.

37. I take into account first the generous ambit of discretion of the costs judge to which I shall return; second, the view of the costs judge about permission; and third the view and the reasoning of Nicol J in refusing permission.

38. As regards the first of those matters, I take into account that in an appeal about costs, it is necessary to establish that the order sought exceeds or falls outside the generous ambit of discretion is be based upon a discretion being exercised on a wrong basis or not at all. Not only are appeals on costs alone discouraged, but it has been said that such appeals are "*overcast from start to finish by the heavy burden faced by the*

appellant in establishing that the judge's decision falls outside the discretion in relation to costs": see the Court of Appeal in *Dickson v Blindley Health Investments Limited* [2015] EWCA Civ 1023, citing with approval *SCT Finance v Bolton* [2002] EWCA Civ 56.

39. The Civil Procedure Rules state among other things the following at CPR 44.2:

> *"(1) The court has discretion to -*
> *(a) whether costs are payable by one party to another;*
> *(b) the amount of those costs; and*
> *(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;*
> *...*
> *(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."*

At subparagraph (5) the rules go on to give examples as to matters included within the conduct of the parties.

40. In seeking permission to appeal, Mr Stacey, counsel on behalf of the Claimants, relies upon various matters which he contends go to the basis on which the exercise of discretion and where he says that the Master has failed to exercise the discretion on a proper basis. First, he points out that the Master placed central importance on the fact that there had been no counter-offer made and regarded that as being relevant to conduct. As indicated above, the offer had been made in April 2017 and there had been no counter-offer. Reference was made to communications which took place between the parties a few weeks prior to the costs hearing. They are summarised in the transcript of the hearing of 28 February 2018 and in particular at internal page 22H to 24C from the submissions of Mr Parker, counsel on behalf of the Defendants.

41. Mr Stacey pointed out that the first of the communications there referred to was an email from Mr Nabarro, a partner of Candey on behalf of the Claimants, who stated without prejudice *"after yesterday's result, is it worth us having a word?"* That was a reference to the decision of the Court to refuse to find, contrary to the Defendants' submissions, that there was a cap in respect of costs of a sum of £250,000. There then appear other communications between the parties. This culminates in an email in a response dated 1 February 2018 from Mr Nabarro where he said:

> *"In the absence of an improved offer, our instructions are to proceed to the detailed assessment."*

42. The judge's view about this approach is at page 32 internally of the transcript where she said the following:

> *"Candey are entitled to sit on their hands and say 'No, we do not propose to make a counter-offer. We do not think you will take it if we do. We are not going to propose to make one. We are in a Dutch auction. Either you improve your position or you go away.' I think that in today's world that is not an acceptable way to proceed and it, it is something that I can take into account in awarding costs."*

43. Earlier in the course of the hearing at page 16B, the Master said the following:

> *"However, the single most troubling thing that I have heard this morning is the lack of an offer on the part of the claimants, and that I think is a very significant matter…"*

The Master referred to the Court of Appeal decision of *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002

44. The Master regarded the failure on the part of the Claimants to make a counter-offer following the offer of April 2017 and in the course of the communications of January 2018 was a matter of conduct which should be reflected by the refusal to grant the Claimants their profit costs in the manner referred to above.

45. Mr Stacey submitted that there is an argument with a real prospect to success that the Claimants are able to make in this matter in an appeal against that judgment that the Master erred in that there was no obligation, either generally or on the facts of this case, to make a counter-offer and that a party in the position of the Claimants, either generally or on the facts of this case, can legitimately say that the offer is not enough and that a higher offer will have to be made in order to achieve a settlement.

46. There are cases where the court has had to consider close offers, sometimes referred to as "*near misses*", and whether that was sufficient to disallow costs or to displace the starting point that the successful party should have its costs.

47. I was referred by Mr Stacey to the case of *Hammersmatch Properties (Welwyn) Limited v Saint-Gobain Ceramics and Plastics Limited & Anr* [2013] EWHC 2227. In that case, the Part 36 offer had been beaten by less than £4,000 which was less than 0.4 per cent of the amount of the sum awarded of £1,058,768. Ramsey J referred to a case of Jackson J in *Multiplex* where Jackson J had said that there might arise a case where the offer is nearly but not quite sufficient and where the other party rejects that offer outright without any attempt to negotiate and that it might then be appropriate to penalise the second party in costs. It is not necessary on a permission application to go into detail in relation to the reasoning of Ramsey J which then ensued. However, he referred to an earlier Court of Appeal case of *Johnsey Estates (1990) Limited v Secretary of State for the Environment, Transport and Regions* [2001] EWCA Civ 535 where Chadwick LJ said:

> "... a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made."

48. At para. 31, Ramsey J said that:

> "... whilst a failure to negotiate argument has a superficial attraction in a situation where an offer is a 'near miss', experience shows that this is a dangerous path to tread."

49. Ramsey J took the view at paragraph 36 that there was no "*near miss*" rule and that he was doubtful, on analysis as to whether a "*near miss*" offer can generally add anything to what otherwise would be conduct in the form of unreasonable refusal to negotiate. He said:

> "*To do so would raise the difficulties in Johnsey and seek to base an exercise in discretion on offers which neither party made at the time but which, with the benefit of hindsight, one party should have made and the other party should have accepted*."

50. Mr Stacey submitted that there is an argument with at least a real prospect of success, that the conduct of the Claimants in failing to make a counter-offer should not, either generally or in relation to the facts of this particular case, have led to the penalty of being deprived of their profit costs. He challenged both the existence of the near-miss argument in principle and the notion that there was a near-miss in this case, bearing in mind the extent to which costs awarded exceeded the sum offered.

51. The second criticism of the judgment of the Master was that the refusal of the profits costs arose out of the failure to engage in negotiations. Mr Stacey says that, as regards the communications that took place in January, that is to equate the conduct of the Claimants with a party who ignores communications. Mr Stacey relies upon the fact that on 17 January, the first communication about "*having a word*" was initiated by Mr Nabarro. Further, he refers to the communications that were referred to by the Master (at internally 23F) that there was some discussion about something that the emails did not reveal and which is referred to in the skeleton argument of Mr Stacey at paragraph 21(d)(iv) about a conversation on 22 January 2018 which appears to be disputed by the defendants. Thirdly, he relies upon the fact that there was a response on 1 February as referred to above, albeit that it expressly did not made a counter-offer.

52. Insofar as the judgment is predicated upon a failure to engage in negotiations, Mr Stacey says that the Master has exercised her discretion on a false basis.

53. Thirdly, if and to the extent that the Master took into account the consequences in relation to the case of *Halsey v Milton Keynes General NHS Trust & Ors* above, Mr Stacey says that even in the context of an unreasonable failure to participate in ADR, the burden is on the unsuccessful party to show why there should be a departure from

the general rule and that there is no presumption in favour of mediation. Mr Stacey submits that, even to the extent that there was a failure to negotiate, that would not suffice in the circumstances of this case to give rise to a departure from the starting point of the successful party having their costs. But his primary reasoning is to the effect that there was an engagement in the discussions as set out in his second point.

54. Fourthly, Mr Stacey criticises the passage to which I have referred above where the Master said that her decision was taken in order to bring the costs in the process to a reasonable and proportionate level. He says that the Master there confused the quantum of the costs with the incidence of costs. He says that at a point in the argument, the Master had in mind that they were indeed two separate matters and he refers to internal page 15D to E, where the Master said:

> "*... this is more in my view something to deal with on the assessment rather than on the incidents(sic) of those costs...*"

55. It is apparent from page 16 that the judge was more exercised as regards the decision to disallow costs upon the lack of a counter-offer, see page 16B.

56. Finally, Mr Stacey submits that there are concerns about what he would submit is the disproportionate impact of the decision to disallow the entirety of the profit costs. He says in particular the following. First, as regards the failure to negotiate as found by the Master in January, that was just before the hearing when a significant part of the profit costs had already been incurred. Secondly, by that stage, several parts of the profit costs had been incurred in connection with the issue when the Defendants failed in relation to the alleged cap of £250,000 and the consequence of the order was that no part of those profits costs were to be paid. Thirdly, he makes the comparison between the costs of £113,000 on the Claimants' side against the costs of £81,000 on the Defendants side in submitting that proportionality should not have played such a large part in relation to that.

57. In my judgment, those arguments provide a basis from which the Court is able to form a view that there is a real prospect of success of an appeal. They do raise real questions as to whether the discretion of the Master was exercised on a proper basis such as would enable an appellate court to interfere with the exercise of that judgment.

58. At a permission stage, there is no benefit in setting out the arguments in greater depth. The fact that I have referred to the arguments of the Claimants, does not mean any more that the application has reached the minimum threshold of a real prospect of success. This is not the place to set out the inevitable arguments in response of the Defendants. It is simply that this is not a case where the Defendants are bound to succeed in a response to the appeal, but that there is sufficient in this case to justify permission being granted. It will be for the appellate court hearing the arguments to decide whether this was an exercise of discretion with which it cannot interfere or whether all or any of the matters raised by the Claimants, justify an interference in whole or in part with the order made by the Master.

59. Finally, I wish to make reference again to the Claimants 'request for reconsideration of the Court's decision on costs. Having looked at the clip of correspondence and the

judgment of the judge, I sought the clip of correspondence and the views of the Master in relation to it because I was concerned that there may be matters in relation to that that would affect the decision in relation to permission. Having looked at the bundle, I have some concern as to whether it was appropriate to ask for that reconsideration and to have the extensive arguments that thereafter appeared. In my judgment, this fell outside the residual Barrell jurisdiction: see *Re Barrell Enterprises* [1973] 1 WLR 19. It is an impermissible attempt to re-argue the case, and there was no justification for it. The Master was entitled to award the Defendants' costs of the redetermination of the decision, awarding the sum of £6,600 to be paid by the Claimants to the Defendants. That part of the costs order stands and there is no permission to appeal against it or to seek an extension of time in respect of the same.

60. Further, I had a real concern as to whether the reasoning of the Master would in fact indicate that this was not a case where permission would be appropriate. I note that among the things that she said at paragraphs (a) to (o), she said that she was not persuaded that the solicitors for the Claimants had engaged meaningfully in settlement negotiations and therefore some reduction to their costs was warranted. She said at (e) that the level of manpower was neither reasonable nor proportionate. She said at (h) that there was no counter-offer from the Claimants and that the discussions in January consisted of Candey asking whether the defendants wished to offer a larger sum. She said at (n) that Candey were achieving costs in excess of £40,000 and it is difficult to see any argument why they had been hard done by.

61. In my judgment, relevant though the matters may be that the Master has stated in her email of 18 December 2018, they do not, in my judgment, affect my view that the points raised by the Claimants have a real prospect of success.

62. For all these reasons, I would have granted permission to appeal, albeit disallowed it as regards the costs of the redetermination. However, for the reasons given above, there should be a rolled-up hearing where the decision on permission to appeal will fall to be decided by the Judge hearing the rolled-up hearing. The part of this judgment reflecting what happened at the hearing is not wasted. If and to the extent that I had held that the subject matter of the intended appeal had no real prospect of success, as in fact I have done as regards the costs of the redetermination, I should have refused the rolled-up hearing. It is only due to my view that there are real prospects of success on the other part that I have directed this case to go to rolled-up hearing in the manner set out above. The order should leave undisturbed the order which the Master made as regards the costs of reconsideration. I should be grateful if a draft minute of order would be prepared by the Claimants.