

Neutral Citation Number: [2020] EWHC 2795 (Ch)

CASE NO: D30BM70

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST (CH.D)**

Judgment handed down remotely on 20 October 2020

B E T W E E N:

(1) PRAVIN PATEL

(2) NALINI PATEL

Claimants

- and -

(1) BARLOWS SOLICITORS (a firm)

**(2) PAUL STANLEY AND PAUL BARBER (as joint trustees in bankruptcy
of Drupad Chorera)**

(3) MR NIRMAL TANNA

Defendants

**BEFORE HIS HONOUR JUDGE MITHANI QC, SITTING AS A JUDGE OF THE
HIGH COURT, at the Birmingham Civil Justice Centre, Priory Courts, 33
Bull Street Birmingham, B4 6DS**

Mr Sam Laughton (instructed by Frisby & Small LLP) for the Claimants

**Mr John Vickery (instructed by Irwin Mitchell LLP) for the Second
Defendants**

The Third Defendant did not appear and was not represented

Approved Judgment

Introduction

- 1 Following the handing down of my judgment (“the Main Judgment”) in the Claim (as defined in the Main Judgment) on 16 October 2020, the neutral citation for which is [2020] EWHC 2753 (Ch), I heard

submissions from both counsel in relation to various matters which arose from the Main Judgment. I made orders finally determining those matters and indicated that I would give written reasons for my judgment at a later date. I did so because the Second Defendants indicated that they wished to appeal the orders which I had made in the Claim and in relation to the Expenses Application (as both defined in the Main Judgment) and, as obtaining a transcript of that later judgment to enable them to do so would have taken time, I considered that it would be much speedier if I produced my written reasons as soon as I could after the hearing.

- 2 These are my reasons for the orders I made on 16 October 2020. For this purpose, I will use the same definitions and abbreviations as I used in the Main Judgment.

Account and Inquiries

- 3 The terms of the draft order for the taking of the accounts and inquiries were largely agreed.
- 4 The only substantive issue which arose concerning the terms of the draft order was whether I should accede to a provision which the Second Defendants wanted to include in the draft in the following terms:

“AND IN TAKING the Accounts and Inquiries directed above the Second Defendants are to be at liberty to submit any claims as to just allowances which they may be advised ought to be made to them on account of their services in recovery of the Settlement Sum and such allowances if any as shall appear to be proper in respect therefore are to be made accordingly.”

- 5 I refused to accede to it. I took the view that this might be going behind the orders which I had made both in the Claim and in connection with the Expenses Application. The District Judge who undertakes the account and inquiries will be fully aware of what proper allowances should be made in favour of the Second Defendants (arising from the Bankrupt’s interest as a former partner in the Joint

Venture) and will know, from the terms of the Main Judgment, how he should approach that matter. I did not, therefore, consider it necessary to give any further directions on how the account should be conducted.

- 6 For the avoidance of doubt, I made it clear that the partnership account needed to be taken involving the three partners I had found in the Main Judgment to be partners, i.e. the First Claimant, the Bankrupt (now represented by the Second Defendants) and the Third Defendant.
- 7 With the consent of His Honour Judge David Cooke, the lead Business and Property Judge for Birmingham, I have nominated District Judge Murch, a specialist Chancery District Judge, to undertake the account and inquiry.

Fresh Proceedings

- 8 The First Claimant sought to include the following provision in the draft order:

“The First Claimant be at liberty, if so advised, to bring fresh proceedings against the Second Defendants in respect of breach of duty in their capacity as trustees of any cause of action against the First Defendants on behalf of the First Claimant or the Partnership.”
- 9 I refused to accede to the First Claimant’s request that this wording should be included in the draft order.
- 10 It is clear from the Main Judgment that I was not precluding a claim for breach of duty being brought by the First Claimant against the Second Defendants arising as a result of the Negligence Claim being compromised by the Second Defendants without the consent of, or reference to, the First Claimant. I can see nothing in the way that the case was pleaded against Barlows or the Bankrupt (in the original Particulars of Claim or the amended Particulars of Claim) or against the Second Defendants (in the Re-Amended Particulars of Claim), which would have that effect. The relief sought against the Second Defendants in the Claim was for a declaration that the Settlement

Amount was held on trust for the First Claimant (to the extent of the Claimants' Advance), so that was a markedly different basis for claiming against the Second Defendants than the further claim which the First Claimant wishes, or may wish, to bring against the Second Defendants. That may enable the First Claimant to bring a claim against the Second Defendants for the alleged failure on the part of the Second Defendants to, for example, obtain the entirety of the interest which he claims should have been paid by Barlows, though, of course, I express no view about the merits of such a claim. However, it may be an altogether different matter if the First Claimant sought to bring a claim for the loss which the Bankrupt says was suffered as a result of Barlows' acts or omissions based on the documentation at pages 241 to 244 of the Documents Bundle. That may or may not amount to an abuse of process in accordance with the principles in *Henderson v Henderson* (1843) 3 Hare 100, though whether it does is not a decision for me to make in these proceedings. However, the provision which the First Claimant requested should be incorporated in the draft order appeared to me to proceed on the basis that I had decided that point in his favour, and given the First Claimant permission to bring such a claim, which was incorrect. On that particular issue, it seems to me right that the Second Defendants should be entitled to raise a *Henderson v Henderson* argument if they wish.

Interest on payment of the Claimants' Advance on account

- 11 The Second Defendants are correct: in the absence of any agreement between the partners, interest is not payable on any return of capital to a partner.
- 12 As paragraph 320 of the Main Judgment says, the reason for directing that the Claimants' Advance should be paid to the First Claimant out of the Settlement Amount was to return his capital amount to him at the earliest possible opportunity. That was because the Claimant had been kept of that amount for over 10 years. As I acknowledged at paragraph 320, whether the First Claimant should be entitled to interest on that

amount is not straightforward. I also indicated that, given that the taking of the account will finally determine what each party should be entitled to receive as a result of the dissolution of the partnership, the repayment of the Claimants' Advance should be made "on account" of any amounts due to him as a result of such dissolution. It seems to me inappropriate, therefore, that I should order interest to be paid on that amount, even interest which has accrued on the amount since the date when the Settlement Amount was paid into a deposit account with the Second Defendants' solicitors. The First Claimant can make his representations concerning that point when the account is taken or could bring a claim for it in a separate claim, as he indicated he might do.

- 13 The payment to the First Claimant on account should, therefore, only be of the amount of the Claimants' Advance.

Incidence of Costs

- 14 The principles governing the payment of costs are set out in CPR 44.2.
- 15 The general rule, specified in CPR 44.2(2)(a), is that the unsuccessful party should pay the successful party's costs. That had to be my starting point in this case. I saw no reason to depart from that general principle.
- 16 However, I made different orders for costs concerning the application for relief from sanctions which the First Claimant had to make in respect of the witness statements of Mr Thakrar and the Third Defendant.
- 17 In the order I made on 10 September concerning that application, I stated that the costs of the application should be reserved to the trial.

- 18 In my view, the approach of the Second Defendants to the application for relief from sanctions in respect of Mr Thakrar's witness statement was entirely correct. They did not oppose the application. They left it to the court to decide whether the application should be granted.
- 19 I granted the application. However, the Main Judgment makes it clear that the breach in question was neither trivial nor insignificant, nor was there a good reason for it. As the application was necessitated by the First Claimant's acts or omissions, I ruled that it was appropriate that he should pay the costs of that application, so far as it related to Mr Thakrar's witness statement.
- 20 The position in respect of the witness statement of the Third Defendant was different.
- 21 As I stated in the Main Judgment, that breach was also neither trivial nor insignificant, nor was there a good reason for it. In addition, the First Claimant's solicitors wholly misconceived what they needed to do in order to be entitled to rely upon that witness statement. However, the Second Defendants actively opposed the application. I rejected their opposition to it.
- 22 The Second Defendant's opposition to the application was not based on an opportunistic attempt by them to obtain a windfall for the first Claimant's errors. If it had been then I might have made a different order as to the costs of the application. That is because the Second Defendants, as well all the other parties to a claim, are required to help the court to further the overriding objective in CPR 1.3 and, as the Court of Appeal observed in *Denton v T H White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3296, at [40]-[43], parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of that obligation. It is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from

sanctions would be denied and that they would obtain a windfall strike out or other litigation advantage.

- 23 It seemed to me appropriate that the order for costs I should make should reflect what I said in the Main Judgment about the errors for which the First Claimant was solely responsible and the fact that ultimately, I determined the application against the Second Defendants. I considered that the appropriate order should be no order as to costs. Subject to that, I held that the Second Defendants should pay the Claimants' costs of the Claim and of the Expenses Application.

Costs incurred by the Claimant for bringing the Claim against Barlows

- 24 The basis upon which the Claimants seek those costs can be summarised in the following three short points.
- 25 First, they say that it was necessary for them to issue the Claim against Barlows because it was their claim, not that of the Second Defendants, to pursue. If they had not taken that course of action, and if the Second Defendants had either not brought the Negligence Claim, or if that claim had been dismissed, the First Claimant would have lost the entirety of the investment which he had made in the purchase of the First and Second Properties.
- 26 Second, as the Main Judgment makes clear, the Previous Trustee and the Second Defendants had ample opportunity to act in concert with the Claimants against Barlows to collect the losses which they all claimed to have suffered as a result of Barlows' negligent acts or omissions. The Second Defendants failed to cooperate with the Claimants; rather, they compromised the Negligence Claim without the consent of, or reference to, the First Claimant.
- 27 Finally, the claim by the Claimants against Barlows had to be discontinued because the Second Defendants pulled the rug out from under the First Claimants' feet by settling the Claim without any prior

reference or notice to the Claimants. That, in turn, led to the Claimants having to discontinue their claim against Barlows.

28 The court plainly has jurisdiction to order that the Second Defendants should pay the Claimants' costs of the abortive claim against Barlows in addition to paying the Claimants' costs of the Claim against the Second Defendants. This is made clear by the following provisions of CPR 44.2:

- (a) CPR 44.2(1)(a) which states that the court has discretion as to whether costs are payable by one party to another; and
- (b) CPR 44.2(6) which sets out the non-exhaustive powers which the court has in determining the costs which are payable by one party to a claim to another party or parties when deciding how it should exercise its discretion on costs.

29 The Claimants relied on the decision in *Jabang v Wadman* [2017] 4 Costs LR 807 and *Woodland v Swimming Teachers' Association* [2018] 3 Costs LR 469 in support of their claim for those costs.

30 In the latter case, His Honour Judge Pearce, at [41], approved the following summary of the principles which governed the making of such an order, based on the decision of the Court of Appeal in *Irvine v Commissioner of Police* [2005] EWCA Civ 129 on that issue:

- (a) the issue is one for the court's discretion, informed by the overriding objective and CPR 44.2;
- (b) where a claimant does not know who wronged him, it may be reasonable for him to join more than one defendant and not see his damages eroded by failing to recover costs against a successful defendant;
- (c) but such orders are 'strong order[s]' capable of working injustice on defendants, who can become liable to pay cost[s] of parties they had no choice in joining;
- (d) even where a claimant reasonably joins more than one defendant, there is no rule compelling a costs order in his favour; the court must consider potential injustice to the defendant as well.
- (e) the 'ordinary circumstance' for an order is where a claimant sues the defendants in the alternative and is sure to succeed against one of them.

However, while this may be the 'classic' scenario for an order, it does not mean that an order may not be made in other circumstances.

- (f) orders are less likely where the causes of action asserted against defendants are different.
- (g) the reasonableness of the claimant's action is an important consideration.
- (h) whether one defendant blames another is also significant – although not determinative, as even where a defendant does, a claimant must exercise his own judgment.”

- 31 The Second Defendants contended that the application of these principles militated against an order being made for them to pay the costs of the Claimants arising from the dismissal of the Claimants' claim against Barlows.
- 32 I respectfully disagree.
- 33 In every case, the decision of the court will be to determine whether it was just to exercise its discretion in favour of making such an order. That decision will depend entirely upon the facts of an individual case and is recognised by the first of the factors specified in paragraph 41, i.e. paragraph 41(a).
- 34 The Second Defendants' response to factor (b) was to say that this factor was not applicable in the present case. I do not agree.
- 35 As soon as the Second Defendants issued their own claim, i.e. the Negligence Claim, against Barlows, and it became apparent that the Second Defendants would claim the benefit of the fruits of the Negligence Claim for themselves, albeit on behalf of the creditors of the Bankrupt, the Claimants would have had to join the Second Defendants to the Claim to seek a declaration that the loss suffered as a result of Barlows' acts or omissions was their, not the Bankrupt's, loss. If they had not taken that course of action, and the court had found that the only person having standing to bring the claim against Barlows was the Bankrupt (and, through him, the Second Defendants) on the basis that the Bankrupt was the only person on whose behalf Barlows had acted in the proposed purchase of the First and Second Properties, their claim against Barlows would have been dismissed. It

was essential, therefore, for the Second Defendants to be joined to the Claim, not just to avoid that outcome but also to ensure that all the potential claimants were before the court and were bound by its judgment. It would have been an act of sheer folly if the Claimants had not taken that course of action. Indeed, in my view, if the Claimants had not done so, it is likely that Barlows would have done because of the potential risk that if they paid any amount payable under the Negligence Claim to one party, as opposed to the other, they might be exposed to the risk of a further claim by the other party. That was why the two claims were consolidated and why paragraph 5 of the Schedule to the Tomlin order included a provision that the Second Defendants would indemnify Barlows from any claims made by the Claimants against Barlows.

- 36 In those circumstances, it had to be reasonable for the Claimants to have taken the course of action they did. Factor (b), therefore, has to be taken into account in favour of the Claimants. It cannot be said to be irrelevant.
- 37 As regards factors (c) and (d), the Second Defendants make the bold statement that it "would be unjust to order the Second Defendants to pay the First Claimant's costs of his claim against Barlows for a period when the First Claimant could not possibly have succeeded against the Second Defendants."
- 38 That statement proceeds on an entirely flawed basis.
- 39 As the Main Judgment makes clear at various places, the Previous Trustee put in issue the First Claimant's entitlement to the Claimants' Advance almost from the point when he was appointed. That position was adopted by the Second Defendants and continued throughout the progress of the Claim and also at the trial of the Claim. In those circumstances, it is difficult to see how it can conceivably be said that there was ever a point that the First Claimant could not have succeeded in their claim against the Second Defendants.

- 40 Factor (d) makes it clear that the making of an order of the type sought by the Claimants is intended to be compensatory, not penal, although neither the Court of Appeal nor Judge Pearce used those expressions. In other words, it would not be appropriate for a court to make the order *pour encourager les autres* or to penalise the Second Defendants. In the present case, the court should only make the order if it is satisfied that it is reasonable to do so in order to compensate the Claimants for the unnecessary costs which they have incurred in bringing the Claim against Barlows.
- 41 It is clear to me that by not making the order, real injustice will only be caused to one party, *viz* the Claimants. Given the findings I made against the Second Defendants in the Claim, it would be wrong for me not to compensate the Claimants for the costs which they properly and reasonably incurred in bringing the Claim against Barlows – a claim which they had to discontinue because of the entirely unacceptable actions of the Second Defendants. If I decided that the order should not be made, I would indirectly be rewarding the Second Defendants for those actions; and I would be failing to compensate the Claimants for the expense which they incurred in bringing the Claim against Barlows, which, at the time the Claim was brought, it was perfectly proper for them to do so.
- 42 Factor (e) stipulates the ‘ordinary circumstance’ in which such an order can be made and expressly states that where the ordinary circumstances do not apply, “it does not mean that an order may not be made in other circumstances.”
- 43 The reliance placed by the Second Defendants on what constitutes “ordinary circumstances” is misplaced. True it is that the Claim was not made against Barlows and the Second Defendants in the alternative. But the crucial point here is that the Claim was almost certainly likely to succeed against Barlows if the Second Defendants had not intermeddled with it and had conceded the Claimants’ entitlement to bring it.

- 44 It is very difficult to see a clearer case of a claim against Barlows for negligent acts or omissions succeeding and this is reflected by the fact that even before the Negligence Claim and the Claim were issued, Barlows had made an offer of settlement to the Bankrupt and subsequently, the case was resolved without the Negligence Claim having to be tried. I have not seen the defence of the Barlows to the Negligence Claim. It is difficult to see what their substantive defence would have been if they had not settled the Negligence Claim at the point at which they did.
- 45 The plain fact is that the Claim against Barlows was necessary because they had dissipated the Claimants' Advance and the claim against the Second Defendants was necessary because they were claiming to be entitled to the repayment of the Claimants' Advance and the interest thereon for their own benefit. It was necessary, therefore, for the Claimants to bring a claim against both.
- 46 For the reasons referred to in the Main Judgment, there is no substance in the point made by the Second Defendants in response to factor (f), which in any event, only says that orders are less likely where the causes of action asserted against defendants are different. The causes of action against Barlows and the Second Defendants may have been different but they were inextricably linked and, given the stance taken by the Second Defendants, it is difficult to see how the Claimants could have proceeded with the Claim against one and not the other.
- 47 Nor for the reasons set out in the Main Judgment can I see any substance in the Second Defendants' response to factor (g) which refers to the reasonableness of the claimant's action as being an important consideration. The Second Defendants' response seeks to go behind the Main Judgment. Other than in connection with the application for relief from sanctions, I cannot see anything in the Main Judgment which amounts to a criticism of the First Claimant about how

he has sought to recover his losses against Barlows or the Second Defendants.

48 Nor does the suggestion made by the Second Defendants that there was no cause of action against the Second Defendants withstand proper scrutiny. It wholly ignores the nature of the relief that the Claimants sought against the Second Defendants. The Second Defendants had advanced a claim to be entitled to the proceeds of the Negligence Claim. Those proceeds did not belong to them and, so far as they were claiming to be entitled to them, it was perfectly appropriate for the Claimants to seek to maintain a claim to those proceeds against the Second Defendants. The Claimants sought a declaration that the Claimants' Advance belonged to them. That was precisely the relief that they should have sought in the Claim.

49 Factor (f) is irrelevant.

50 For all the reasons set out at paragraphs 24-49, above, I directed that the costs payable by the Second Defendants to the Claimants should include the costs incurred by the Claimants for bringing the Claim against Barlows.

51 So far as the Second Defendants seek to restrict those costs to costs incurred after the issue of the Claim or suggest that some of the costs may have been duplicated by the Claimants having changed solicitors, those matters seem to me to be matters for the detailed assessment.

Standard or Indemnity Costs

52 I decided that the Claimants should be entitled to their costs on the indemnity basis.

53 CPR 44.3 and CPR 44.2(4) and (5) permit the court to award indemnity costs against a party where it has ordered that party to pay the costs of a claim.

- 54 The circumstances in which such an order will be made will vary from case to case. For that reason, other than giving broad and generic guidance, the courts have steadfastly refused to provide any detailed guidance on the subject. In every case, what is necessary for the court to do is to hold to the language of CPR 44.2.
- 55 The principal decision on the point is the decision in *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879 in which the Court of Appeal ruled that that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation 'out of the norm' in a way that justified the making of such an order. It also stressed that the right starting point was the CPR themselves, especially CPR 44.2 and CPR 44.3 (the successor provisions to CPR 44.3 and 44.4 respectively), and drew attention to the width of the discretion conferred on the court by those provisions.
- 56 CPR 44.2 sets out the non-exhaustive factors which the court must take into account in deciding the basis of assessment. The relevant parts of that provision state:
- (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.”

57 I need only to refer to the Main Judgment which sets out my findings on how the Second Defendants have conducted themselves in this matter, both before and during these proceedings. I entirely agree with the Claimants that the conduct of the Second Defendants takes this case out of the norm and wholly justifies the making of an order for costs against the Second Defendants on the indemnity basis.

58 The Claimants rely on the decision in *Re Capitol Films Ltd (In Administration)* [2010] EWHC 3223 (Ch), in which the court had found that the award of indemnity costs was justified where:

- (a) the administrators’ conduct was ‘neither’ rational nor reasonable’; indeed, it was ‘irrational and misconceived’;
- (b) they should have engaged constructively with the secured creditors;
- (c) they were wrong to commence and pursue their application in the manner they did.

59 All these matters are present here. But it seems to be, for the reasons I have indicated in the Main Judgment, that there is an even more compelling case for costs to be awarded on the indemnity basis in this case. It relates to the evidence which Mr Stanley gave at the trial. Very little of what he had to say was correct. To mention but a few examples of this, the material in support of the Expenses Application was incorrect; the information he gave about the realisations he made was either incorrect or incomplete; and the information about what work the Second Defendants and the Previous Trustee undertook was incomplete or not available. At paragraph 48 of the Main Judgment, I stated that the Second Defendants (and particularly Mr Stanley) had fallen seriously short of the standards expected from insolvency

practitioners. This type of unacceptable conduct is a further significant factor in favour of an order for indemnity costs being made.

- 60 Given the matters referred to in paragraphs 52-59, above, I found that an indemnity award of costs was amply justified in the present case.

Mediation

- 61 The Second Defendants pointed to the alleged failure of the Claimants to engage in mediation as a reason why I should not make the usual order for costs or not award costs on the indemnity basis.
- 62 There is no question – and this is reflected by the provisions of both CPR 44.2(4) and (5) and CPR 1.4(2)(a) – that the parties should consider the resolution of a case by an appropriate ADR procedure and that the unreasonable failure on the part of a party to do so may be visited by a sanction in costs: see, for example, *Halsey v Milton Keynes NHS Trust* [2004] EWCA Civ 576 in relation to a failure of a party to mediate.
- 63 However, the failure to do so will not always be visited by such a sanction. In *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd* [2014] EWHC 3148 (TCC), [2015] 3 All ER 782, Ramsey J said that where a party had refused ADR, there were six factors relevant to determining costs: (i) the nature of the dispute; (ii) the merits of the case; (iii) the extent to which other settlement methods had been attempted; (iv) whether the costs of ADR were disproportionately high; (v) whether any delay with ADR would have been prejudicial; and (vi) whether ADR had a reasonable prospect of success.
- 64 Leaving aside the nature of the dispute, which has no particular significance in the present case, all the other factors point to the fact that even if the Claimants had decided out of hand not to mediate,

which, for the reasons set out below, they plainly did not, I would not have considered their position to be unreasonable.

65 The claim against the Second Defendants was very strong; there were other methods attempted at settlement which did not work; the costs of the mediation would have been high (a whole day, with solicitors and counsel having to be involved and the costs of the mediator to pay); and while the delay in bringing the claim to a trial would not have been prejudiced, the plain fact is that it is difficult to see how the ADR would have succeeded.

66 But the important point here is that the Claimants did not reject the offer of mediation outright.

67 The Second Defendants had made an offer to the Claimants to resolve the Claim by agreeing to pay the sum of £40,000 in full and final settlement of the Claimants' claim against them. That offer was rejected by the Claimants.

68 The Second Defendants had also suggested a mediation meeting to see if the matter could be resolved. On 6 March 2020, Ms Ashleigh Robinson-Beaumont had written on behalf of the Second Defendants to Ms Anjali Narshi on behalf of the Claimants suggesting such a meeting.

69 In Ms Anjali Narshi's response dated 23 March 2020, on behalf of the Claimants, to Ms Ashleigh Robinson-Beaumont's request, on behalf of the Second Defendants, for mediation, Ms Narshi specifically stated that:

"My client is not against Mediation per se. However, in an attempt to keep costs down, we are working with Counsel to see if we can put forward a possible offer. I will of course keep you updated as to how we get on but should this not be possible, I would be happy for you to suggest 3 mediators from whom we can select one."

70 When Ms Narshi said that the Claimants intended to put forward an offer of settlement, Ms Robinson-Beaumont replied by email dated 30 March 2020 saying that she was "prepared to pause progressing mediation arrangements for a limited period of time in order to

allow your clients to put forward an offer in writing (which you have indicated is your clients' intention)."

71 A Part 36 offer was served on behalf of the Claimants upon the Second Defendants on 14 May 2020 in which the Claimants agreed to accept a sum slightly above £315,000 to settle the Claim against the Second Defendants.

72 The offer was not acceptable to the Second Defendants and was formally declined by Ms Robinson-Beaumont on 3 June 2020.

73 Matters did not end there. On the same day Ms Narshi wrote to Ms Robinson-Beaumont asking her to let Ms Narshi know whether the Second Defendants wished to make a counter-offer.

74 The response from Ms Robinson-Beaumont was to the following effect:

"... the Trustees are amenable to further without prejudice discussions with a view to exploring settlement. *Notwithstanding this, it would appear at this stage that the parties are simply too far apart to engage in sensible discussions.* We say this with reference to your clients' part 36 offer and our clients' last without prejudice offer, made in January 2019. *In order for sensible discussions to take place, your clients would need to accept that their part 36 offer is beyond reason and further that any settlement would include the Trustees retaining a significant percentage of sums held on account.* Moving forward, *perhaps you could take instructions and provide an indication as to whether a without prejudice telephone conference would be a productive use of time and resources* in all of the circumstances."

(My emphasis).

75 Subsequently, on 20 July 2020, Ms Robinson-Beaumont wrote to Ms Narshi in the following terms:

"... your clients' offer lacks any appreciation of any risk to your clients. As a consequence of that lack of appreciation *we consider that mediation is unlikely to be productive.* If you disagree then please let us know, our clients remain willing to mediate."

(My emphasis).

76 The parties were very far apart in terms of what would have been acceptable to them to bring the Claim to a conclusion. That is not surprising. The offer made by the Second Defendants to bring matters

to a close was £40,000. The Claimants were only prepared to accept £315,000. At that point, as the emphasised words in the preceding paragraph demonstrate, Ms Robinson-Beaumont herself felt that mediation was unlikely to be productive because of how far apart the parties were in terms of what they would be prepared to accept. In those circumstances, it is difficult for me to see what else could have been achieved by mediation.

77 I cannot see any basis upon which the Claimants can be criticised for refusing to mediate when without prejudice communication had been attempted and proved wholly unsuccessful.

78 Either party could have improved on the offer which they had made. Neither did so. There was, therefore, no reason to explore mediation any further. It was unlikely that either party would have been prepared at any mediation meeting to make the sort of concessions which would have resulted in the resolution of the Claim.

The Second Claimant's costs

79 There is no substance in the point that the assignment of the Second Claimant's claim against the Second Defendants was in the nature of a discontinuance. In the Main Judgment, I indicated why she was made a party to the claim.

80 In order to make good the First Claimant's alternative claim to be entitled to the Claimants' Advance, it was essential for her to be a party to the Claim. That became no longer necessary once her interest in the Claim was assigned to the First Claimant. If any additional costs have been incurred as a result of the Second Claimant being a party to the Claim, those costs are likely to be *de minimis*, given that, at all times, the same solicitors were acting for both of them.

Payment on Account

81 I agree with the observations that the Second Defendants make about the amount of the payment on account of costs to this extent: first, it is not appropriate for the court simply to look at the approved costs budget of the receiving party and order a payment of account of a percentage of those costs. If, for example, costs have been included in the budget which have not been incurred (such as in relation to mediation in the present case), then it is obvious that the amount payable on account of costs should not include any element of those costs.

82 Second, I do not read the observations of Birss J (as he then was) in *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2015] 3 Costs LR 463 as enabling the receiving party in every case to seek 90% of the budgeted costs, as appear often to be contended for on behalf of receiving parties. It is worth recalling exactly what Birss J had to say in that case, at [60]:

“Bearing in mind that unless there is a good reason to depart from the budget, the budget will not be departed from, but also taking into account the vagaries of litigation and things that might occur and the fact that it is, *at least, possible that the assessed costs will be less, although no reason why that is so has been advanced before me*, I will make an award of 90% of the sum in the claimant's budget ...”

(My emphasis).

83 It seems to me to be clear from those observations – and is a matter of plain common sense – that the court will carefully look into the costs budget to see if items included in it should be excluded because work representing those items has not been done. I am not suggesting that the court should look at the budget in the same way as it would if it were conducting a summary assessment of costs. It should look at it on a broad-brush basis (perhaps in the same way as it would look at a draft bill of costs on an application for security for costs) to ascertain whether the payment on account properly reflects what is likely to be recovered under the budget.

- 84 Nor do I consider that the 90% figure is set in stone. Every case will depend on its own facts and circumstances. The court may well consider that a lower percentage figure is more appropriate in the particular circumstances of a case, such as where a convincing reason is put forward to the court that the actual costs incurred by the receiving party are likely to be substantially or significantly lower than the budgeted costs because, for example, the parties were able to agree or narrow certain of the issues which formed the subject of those costs.
- 85 I am unable to agree with the Second Defendants that ordering a payment on account of costs is not appropriate. CPR 42.2(8) makes it clear that where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.
- 86 I have heard no convincing reason from the Second Defendants why I should not do so.
- 87 The Claimants say that the payment on account which I order must take into account the fact that I have awarded costs on the indemnity basis. That must be correct. However, that does not mean that, for the purpose of fixing the amount of the payment on account, I should disregard the costs budget entirely.
- 88 There are conflicting authorities on whether the last approved budget should form the starting point for the assessment of costs on an indemnity basis: see *Elvanite Full Circle Limited v AMEC Earth & Environmental (UK) Limited* [2013] EWHC 1643 (TCC), [2013] 4 All ER 765 and *Anton Barkhuysen v Sharon Patricia Hamilton* [2016] EWHC 3371 (QB) [2016] 6 Costs LR 1217, at [21(1)], and compare with *Kellie (Peter) v Wheatley & Lloyd Architects Ltd* [2014] EWHC 2886 (TCC), [2014] All ER (D) 152 (Aug). That, of course, is not a matter for me but for a costs judge to decide.

- 89 However, for the purpose of fixing the amount of the payment on account, I consider it appropriate to start with the budgeted costs, even though I have awarded costs on the indemnity basis.
- 90 I indicated to the parties that my starting point, to take into account the objections raised by the Second Defendants, was in the sum of £115,000 or thereabouts. I did not see any reason to depart from the 90% figure suggested in *Thomas Pink Ltd*. In the circumstances, I directed that the amount to be paid on account should be £100,000, being rounded off downwards from £103,500 (90% of £115,000).

Indemnity out of the free assets in the Bankrupt's bankruptcy

- 91 The starting point about whether the Second Defendants should be entitled to their costs out of the assets in the Bankrupt's estate is rule 10.149 of the Insolvency (England and Wales) Rules 2016, the relevant provisions of which say:

"The expenses of the bankruptcy are payable out of the bankrupt's estate in the following order of priority–

- (a) expenses or costs which: (i) are properly chargeable or incurred by ... or the trustee in preserving, realising or getting in any of the assets of the bankrupt *or otherwise relating to the conduct of any legal proceedings which ... the trustee has power to bring (whether the claim on which the proceedings are based forms part of the bankrupt's estate or otherwise) or defend ..."*

(My emphasis).

- 92 Assuming that the words of r 10.149 are wide enough to give a court jurisdiction to pay an unsuccessful trustee's costs of bringing a claim in respect of trust assets out of the free assets comprised in a bankrupt's estate, the question arises whether the Second Defendants' costs should be paid out of those assets in the present case.
- 93 In *Re Capitol Films Ltd (In Administration)* [2010] EWHC 3223 (Ch), Mr Richard Snowden QC (as he then was), sitting as a deputy judge of the High Court, accepted that the liability of an administrator for an adverse costs order made against him, and his own costs of

unsuccessful litigation, were both capable of being an administration expense in an appropriate case. However, the court had a discretion to deprive an administrator of such right of recoupment. He continued:

“[101] The circumstances in which the court might exercise its discretion to deprive an office-holder of a right of recoupment have, in the case of liquidations, been said to include cases in which the office-holder has been guilty of misconduct (see *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 at 286f-g); where he has made a “blunder” or serious mistake (see *Re Silver Valley Mines* (1882) 21 Ch D 381 at 385–386); or where it would be unjust for other reasons to permit such recoupment (see *MC Bacon Ltd (No.2)* [1990] BCLC 607 at 615–616). ...

[102] In the instant case, whilst I have not needed to decide whether the Administrators were guilty of misconduct, I have held that the approach of the Administrators to the application ... was irrational and misconceived. That conduct is, in my judgment, in the same category as the “blunder” or serious error discussed in the *Silver Valley Mines* case, and justifies an order preventing the Administrators from recouping themselves from the assets of the Company.

[103] On the particular facts of the case, I also believe that it would be unjust if the Administrators were entitled to recoup themselves ahead of the claims of the holder of any floating charge or unsecured creditors. ... In short, I do not see why any assets that might come into the hands of the Administrators, and which are destined for the holder of the floating charge or unsecured creditors, should be diminished by the costs of an application which does not appear to have been at all likely to serve their interests.”

The learned deputy judge accordingly made an order that the Administrators should not be entitled to recoup for themselves either in respect of their liability to the secured creditors or in respect of their own costs from any assets of the company which were the subject of a floating charge or which would be available for unsecured creditors.

94 Likewise, in *Nutting v Khaliq* [2012] EWCA Civ 1726, Etherton LJ (as he then was) stated, at [32], that “a trustee in bankruptcy is only to be required to bear costs and expenses personally if he or she has fallen below the standard of a reasonable insolvency practitioner acting reasonably.”

95 I am entirely satisfied that the Second Defendants should not be entitled to recoup the costs which they have incurred in the Claim (including the costs which they are obliged to pay under the costs orders which have been made by me against them) from the free

assets available in the Bankrupt's bankruptcy. The reasons relate to the entirely unsatisfactory way in which the Second Defendants and the Previous Trustee have dealt with the Claim and the subject-matter of the Claim, both before and during its progression in this court, including in the course of the trial. Those reasons are amply set out in the Main Judgment and do not need repetition here. As the Claimants rightly state, the conduct of the Second Defendants has fallen below (indeed well below) the standards expected from insolvency practitioners.

- 96 For those reasons, I saw no reason why this court should order those expenses to be paid out of the assets of the bankruptcy at the expense of the general creditors of the bankrupt. The whole case of the Second Defendants was based on their having – to use Mr Laughton's words – "taken a punt" in seeking to recover an asset which, it would rapidly have been apparent to them, was unlikely to be recoverable if only they had spent some time in investigating the matter. It might also have made a difference if the Second Defendants had sought the views of the creditors before exposing the assets available to those creditors in engaging in risky litigation. There is no evidence that they did so.
- 97 I indicated at the hearing on 16 October that if the creditors of the Bankrupt thought it appropriate, out an abundance of goodwill and generosity to the Second Defendants, to pay those costs to the Second Defendants from the assets of the Bankruptcy, that was up to them. This court cannot prevent the creditors from doing so. It follows that if the creditors are prepared to forgo any dividend to which they may be entitled in the bankruptcy, and are content to apply the assets for the payment of the Second Defendants, that is up to them. I suggest that at the very least, the Second Defendants would need the consent of all the creditors of the Bankrupt to that course of action, though, given that this bankruptcy is more than 10 years old, I do not see why that consent cannot be obtained at a meeting of creditors specifically and

properly called for that propose. If any creditor objects, his entitlement to any dividend which might otherwise be payable to him would need to be paid. It is unlikely that there will be a surplus to the Bankrupt. However, if there is, they must also pay the surplus, which the Bankrupt would have been entitled, to him.

- 98 If the Second Defendants decide to adopt the course of action referred to in the preceding paragraph, they should:
- (a) ensure that the creditors are provided with a copy of the Main Judgment in order that they can make an informed decision in the matter; and
 - (b) comply with any guidance issued by their regulating body on the subject, whether in the form of "SIP" (i.e. Statement of Insolvency Practice) guidance or otherwise.

Permission to Appeal

- 99 The Second Defendants indicated that they wished to appeal the conclusions I reached in the Main Judgment as well as the costs and some of the other orders I made on 16 October, following the handing down of the Main Judgment.
- 100 The basis of the proposed appeal appeared to me largely to involve impugning the factual findings I had made or challenging the reasons for which I had exercised a discretion. Neither is likely to be interfered with by the Court of Appeal and, therefore, warrant permission being granted by me.
- 101 In the circumstances, I dismissed the Second Defendants' application for permission to appeal. It does not appear to me that the appeal has any real prospect of success. Nor is there any other compelling reason why an appeal should be heard.

MATTERS ARISING

- 102 The carriage of the order, which can now be finalised, is with the Claimants' solicitors. It is for them to serve the order on all the parties, including on the Third Defendant.

 - 103 I again express my deep and sincere gratitude to counsel for all their assistance in this matter.
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