



Neutral Citation Number: [2021] EWHC 133 (Ch)

Case No: BL-2019-000383

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
PROPERTY, TRUSTS AND PROBATE LIST

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 27th January 2021

Before :
JAMES MELLOR QC (sitting as a Deputy Judge of the High Court)

Between :

(1) DR NIGEL CRANSTOUN

Claimants

(2) DR CLAIRE RUMLEY

- and -

DR GURPREET NOTTA

Defendant

Amardeep Dhillon (instructed by **FTA Law**) for the **Claimants**
Simon Butler (instructed by **Gunnercooke LLP**) for the **Defendant**

Hearing date: 22nd January 2021, further submissions 24th January 2021

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

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 2pm on Wednesday 27th January 2021.

James Mellor QC (sitting as a Deputy Judge of the High Court) :

Introduction

1. I handed down judgment following the trial on 21st December 2020, the neutral citation being [2020] EWHC 3488 (‘the Main Judgment). On the same day I made an order which recorded my findings on the two main issues: (a) that pursuant to the Dental Costs Sharing Agreement between the parties (‘the CSA’) the correct date for the valuation of the Defendant’s practice assets was the date of that judgment and (b) that the valuation of those assets was £96,000. This judgment follows the form of order hearing held on Friday 22nd January 2021, following which I received later that afternoon, at my invitation, an application from the Claimants to revise their costs budget. The Defendant’s Counsel very helpfully provided his response to that application on Sunday 24th January 2021 which, subject to other commitments, enabled me to complete this judgment.
2. At the hearing the points in issue were (a) what the order should provide other than on costs; (b) the order for costs; (c) the basis of assessment and (d) whether an interim payment on account of costs should be made and if so, in what sum.
3. This action commenced in February 2019 but it was not until a CMC on 7 November 2019 that a Costs Management Order (‘CMO’) was made. By that date, each side had incurred relatively significant amounts of costs. I will return to the Costs Management Order below.
4. In the Main Judgment, I set out certain steps in the action which were pertinent to the issues I had to decide. I now need to relate certain other parts of the history of this dispute, which are principally relevant to the costs issues. Some of this derives from the additional bundle which was filed for this hearing, which contained significant correspondence, including Part 36 and other without prejudice save as to costs offers (“WPSATC”), along with other materials relevant to the costs issues. I am conscious however, that I do not have the complete correspondence and I am not in a position to form decided views as to the numerous issues raised and debated aside from the issues I had to decide in the Main Judgment. However, I noted that the general impressions I formed reading the correspondence were largely confirmed by certain passages in the Claimants’ witness statements. In his witness statement, the Defendant dealt only with certain specific incidents and claimed to have always acted reasonably. I have taken all the evidence and correspondence into account.

The early stages of the dispute

5. Mr Dhillon drew attention to the conduct of the Defendant from the early stages of the dispute down to the hearing before Master Kaye on 24 May 2019. His basic submission was that the Defendant’s conduct was unreasonable and took this case out of the norm (cf *Excelsior*).
6. The correspondence reveals that the origins of disputes between the parties date all the way back to 2016 or perhaps even further than that. At that early stage it was the Defendant who raised a number of grievances, although my impression is

that none of them were ultimately pursued. In the course of that early correspondence the Defendant's representative made it clear that the Defendant was not interested in buying the Claimants' share of the practice. In 2017, the Claimants proceeded with a valuation of their interests with a view to selling them to the associate Ms Melissa Khong. The Claimants' position is that this proposed sale was frustrated by the Defendant unreasonably refusing to sign an expense sharing agreement with Ms Khong, an allegation which the Defendant denies. I cannot resolve that issue. What is clear is that it did not go ahead. This incident led the Claimants solicitors in September 2017 to propose mediation under clause 27 of the CSA.

7. In July 2018, the Defendant's current solicitors were instructed. I understand this occurred after the Claimants solicitors had sent draft Particulars of Claim in June 2018, the inference being that the Claimants considered that step necessary in order to secure some meaningful response from the Defendant or his advisers. Certainly by August 2018, the Claimants' solicitors were asking for a clear statement of the Defendant's position, stating that the Claimants' position had been clear from the outset, that they were prepared '*to 1. Sell their interests to your client or 2. Buy your client's interest*'. Due to previous statements from the Defendant that he had limited funds, they stated in terms that it seemed unlikely that he would be in a position to purchase the Claimants' interests. They proposed that within 14 days, the Defendant should provide them with a valuation of his assets, goodwill and interest in the premises and his accounts for the last three years. A subsequent proposal for simultaneous exchange of those materials from each side was then not responded to.
8. The Claimants then proposed mediation on 4 October 2018. On 12 October 2018, the Claimants' solicitors sent a 'Costs Warning' letter which set out details of the Defendant's lack of engagement with the various proposals which had been put forward and indicating the level of costs which had already been incurred on the Claimants' side (over £15,000).
9. This led to a letter from the Defendant's solicitors denying that there was any basis for termination of the CSA under clause 23.2, denying that the Defendant could be deemed to be the seller and denying every other supporting allegation. That letter also indicated the Defendant was engaging in a proposed mediation by then set for 26 November 2018.

Relevant offers to settle

10. The mediation was conducted on 26 November 2018 with Mr Michel Kallipetis QC as the Mediator. Following the mediation, the Claimants solicitors sent a draft Settlement Agreement to the Defendant's solicitors. That draft was directed to a somewhat different scenario to that which I had to consider in that it concerned a sale of the entire practice by all three participants on the basis of valuations conducted pursuant to the terms of the CSA. For present purposes the pertinent point is that in that draft the Claimants offered to pay the valuation of the Defendant's interests (whatever it was found to be) together with a premium of 7.5%. That was, as the Claimants submitted, a generous offer, albeit one in a somewhat different scenario, as I have indicated. Counsel for the Claimants

submitted that this different scenario would have resulted in a higher valuation of the Defendant's practice assets, because the buyer would acquire the entire practice and there would be no question of having to work with any existing practitioners, than the situation I had to consider. Although this appears logical, I consider I have not received sufficient evidence or argument to reach a concluded view. Nonetheless, this offer reinforces the point that the Claimants were trying everything they could to resolve this dispute without recourse to litigation.

11. Following the failure of the mediation to achieve a resolution, the Claimants proceeded to issue the Claim form in this action on 15 February 2019. The immediate response of the Defendant was to contest jurisdiction, raising an issue over the effect of the arbitration clause 28 in the CSA that had been debated in correspondence back in July 2018, in the course of which the Claimants had explained their position in some detail as to why clause 28 did not prevent them proceeding with an action in the High Court. Again, I form no view as to the rights and wrongs of those arguments, save to note that it was this application which was set to be heard by Master Kaye on 24 May 2019, that the application was withdrawn and the parties reached an agreement which had an important impact on the further conduct of this dispute and this action – see the Order from the hearing on 24 May 2019, the Order being dated 30th May 2019 and sealed on 3 June 2019, discussed in the Main Judgment at [7].
12. Thereafter, initial expert's reports were exchanged on or about 27 September 2019, followed by the further hearing on 7 November 2019 at which the CMO was made and the Defendant was ordered to provide additional financial information – see the Main Judgment at [57] – which led to the service of supplementary expert reports in late January 2020.
13. On 1st April 2020, the Claimants' solicitors sent an offer under Part 36 and WPSATC. The offer was to settle the entire proceedings (there being no counterclaim) on the following terms:
 1. Our clients will pay your client the sum of £100,000.00 ("**the Settlement Sum**") to acquire the Defendant's entire interest;
 2. Within 21 days of agreeing a Sale and Purchase Agreement (this to be agreed within 21 days from accepting the offer), the Settlement Sums shall be paid to the Defendant;
 3. The Claimants' costs shall be off set from the Settlement Sum. Your client will be liable to pay our clients' costs on the standard basis, to be assessed if not agreed, up to the date of service of notice of acceptance if this Offer is accepted within the relevant period.
 4. Payment will be made via bank transfer. Please provide us with details of your client account.
 5. This Offer is made in full and final settlement of the entire proceedings.

14. The letter concluded with various warnings concerning the additional relief available for a successful claimant's offer as specified in CPR36.17(4) plus the stipulation that the offer remained open for 28 days. Accordingly, after that 28 period expired, the offer was withdrawn, with the result that, pursuant to CPR36.17(7), the additional entitlements set out in CPR36.17(4) do not apply. This means that it is not necessary for me to reach a conclusion on the objections which the Defendant's solicitors raised in their letter in response dated 24 April 2020 and whether those objections rendered the offer non-compliant with CPR Part 36, having regard to *PHI Group Ltd v Robert West Consulting Ltd* [2012] EWCA 588 per Lloyd LJ at [38] and *Shaw v Merthyr Tydfil County Borough* [2014] EWCA 1678 at [14]-[15]. However, in case it is of assistance to these parties, I incline to the view that the offer was non-compliant at least because it required a Sale and Purchase Agreement to be agreed within 21 days of acceptance of the offer. To avoid this objection, the Claimants should have enclosed a draft Agreement which they would have been prepared to accept. There might also have been a lack of clarity as to how the proposed set-off was going to operate.
15. Notwithstanding the points arising under CPR Part 36, the Claimants have still achieved a more advantageous outcome from the Main Judgment than they offered.
16. I note that the Defendant then made his own Part 36 offer on 17 June 2020, essentially to sell his practice assets for £220,000.
17. The remainder of the relevant history is largely covered in the Main Judgment. I refer to my findings at [55] and [66] of the Main Judgment, which I will not repeat, and to [65] where I recorded Ms Webber's comment on the lack of up to date financial information from the Defendant (a situation she described as 'unusual'). As my finding at [55] indicates, I agreed with her description.

The Form of the Order other than relating to costs

18. The Claimant originally proposed a draft Order with a number of paragraphs which appeared to me to cover matters which were not in dispute or which had not actually been decided in the Main Judgment (e.g. the claim for specific performance of clause 24.1). For those reasons, explained during the hearing, I indicated I declined to make orders covering those matters and invited the parties to submit a further draft Order giving effect to my indications and covering just matters in dispute. This they did, identifying the rival expressions where agreement had not been reached. The Order made coinciding with this Judgment records my decisions in that regard.

The order for costs

19. In light of the various points argued before me, I adopt the now routine three questions (see e.g. *Hospira UK Ltd v Novartis AG* [2013] EWHC 886) for cases in which the Court is asked to consider an 'issue-based' order: first, who has won?; second, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that issue?; third, is it appropriate in all the

circumstances of the individual case not merely to deprive the winning party of its costs of an issue in relation to which it has lost, but also to require it to pay the other side's costs?

20. The competing opening positions were as follows: for the Claimants Mr Dhillon submitted that the Claimants were correctly to be characterised as the winners and that they should recover all their costs; Mr Butler for the Defendant submitted that the correct order was 'no order as to costs'. In his skeleton argument, the basis put forward was concerned with the outcome of the valuation in this action, which he submitted produced a result which should be characterised as 'honours even'. A second reason emerged only in the course of oral submissions: it arose from the agreed variation to the CSA which occurred at the hearing before Master Kaye on the 24th of May 2019. Mr Butler confidently submitted that when the parties agreed the variation such that the valuation of the defendants practice assets should be carried out by the court, the parties retained a provision in the schedule to the CSA which provided that neither side would recover the costs of the valuation undertaken under the provisions of the schedule.
21. There are two answers to this latter point. The first is the short answer: I cannot find any provision in the Schedule to the CSA which provides that the parties bear their own costs of the valuation. To the contrary in fact. The concluding sentence in clause 24.1 provides that 'The costs of such valuations shall be met by the Seller'.
22. In case I misunderstood Mr Butler's point, I proceed with a second answer. I pointed out in the Main Judgment the fact that, following the events at the hearing on 24th May 2019, the pleadings were not amended to reflect what then remained in issue. It seems that this is yet another respect in which the points actually in issue were not identified in any pleading. In my view, this point should have been pleaded or, at the very least, identified as an issue of interpretation of the CSA (as varied) at trial. Nonetheless, I propose to deal with it.
23. In my judgment, this argument fails. It is opportunistic and wrong. When the parties agreed to replace the mechanism for valuation set out in the Schedule to the CSA and have the Court carry out the valuation, in my judgment they were agreeing to all the attendant powers of the Court in an action i.e. all the provisions of the Civil Procedure Rules, including the power to give directions, to rule on disputes e.g. over disclosure and to rule on costs. A valuation conducted by the Court necessarily was going to be a much more involved and costly process than a valuation carried out pursuant to the terms of the Schedule. The process set out in the Schedule allowed for both parties to make representations to the valuer(s), but thereafter the valuer(s) appointed just got on with producing their valuation(s).
24. It seems to me quite clear that the Defendant did not, until the middle of the hearing on 22nd January 2021, ever conduct his case consistently with this supposed term of the CSA as varied. Quite apart from the Costs Management Order made by Master Kaye on 7th November 2019, she and other Masters made orders as to the costs of various interim hearings which took place in this action. All of this was, on the Defendant's argument, wholly unnecessary. Further, as I have recited above, the Defendant made at least one Part 36 offer, again wholly unnecessary.

25. I am in no doubt that if the result of the trial had been more favourable to the Defendant – assume that I had agreed with the date of valuation for which the Defendant had contended and that I had adopted the valuation provided by the defendant's expert – it would be the defendant who would now be arguing that he should recover all of his costs.
26. Furthermore, if this really had been a term of the agreement reached on the 24th of May 2019, it seems to me to be the sort of term which needed to be spelled-out specifically, for at least two reasons: first, because to agree to submit the valuation to the Court automatically carried with it the assumption that the Court would have all its usual powers. A specific variation or restriction on those powers would be unusual and for that reason needed to be specifically identified and expressly agreed. The second reason is because such a term would have been immediately applicable at the conclusion of that hearing when the Master came to the question of costs. If this really had been a term of the agreement, Counsel for the Defendant would inevitably have raised the point there and then, but of course, nothing was said.
27. Having ruled on that point, I can revert to the main question: which side (if any) should properly be characterised as the winner. Naturally I have regard to the provisions in CPR44.2 which I have very much in mind but which I need not set out.
28. I have no hesitation in finding that the Claimants were the winners of this action for a number of reasons which include the following:
- 28.1. First, they succeeded not only in securing the admission from the Defendant that he was to be deemed the Seller under the CSA (a point which he had firmly resisted until 24 May 2019), but they have also now secured a valuation of his practice assets which owed much more to the evidence of their expert than to the evidence of the expert called by the Defendant.
- 28.2. Second, as I set out in the Main Judgment, I found that the materials put forward by the Defendant as to the financial performance of his practice were unsatisfactory and this undoubtedly increased the difficulty and costs of this action.
- 28.3. Third, because the Defendant is very likely to have achieved a better result if he had accepted the Claimants' offer following the mediation.
- 28.4. Fourth, because the Claimants achieved a result more advantageous than their offer dated 1st April 2020.
29. Finally and standing back from the detail, the contrast between, on the one hand, what occurred in the lead up to and then in this action to get to this point where the parties now have a valuation to form the basis of an acquisition of the Defendant's interests and, on the other hand, the relatively simple but clearly laid down procedure in the CSA, is remarkable. That procedure works if the Seller acts sensibly and reasonably, particularly in the provision of the financial information reasonably required to undertake a valuation. Although there are no doubt frustrations on both sides, my clear overall impression is that the Defendant

must bear far more of the responsibility for the undue time and effort which has been required to reach this point.

An issue-based order

30. One of the points which the Defendant put forward in support of his ‘honours even’ argument translates into an alternative submission that there was a suitably circumscribed issue on which the Claimants did not succeed. It concerns the allegations of the breaches of the CSA set out in the Particulars of Claim. Mr Butler drew my attention to the fact that the Defence firmly denied all such breaches. He submits that the Claimants’ witness statements dealt with matters going to the allegations of breach and that the Claimants’ Counsel indicated on the first day of trial that the allegations of breach were no longer pursued.
31. All his points are true, but it is important to keep in mind the following:
- 31.1. First, the Defendant’s witness statement also dealt with the allegations of breach, even though, following the hearing on 24 May 2019, those allegations had already served their primary purpose of establishing that the Defendant was the Seller. This was another aspect of the case on which both sides failed properly to consider what really remained in issue following that hearing.
- 31.2. Second, the fact that the allegations of breach were not pursued at trial was at least partly due to my message to the parties in advance of trial that I was unable to see how those matters impinged on either of the issues which seemed necessary for me to decide and which I did decide in the Main Judgment.
- 31.3. Third, and most importantly, it is necessary to keep in mind the terms of paragraph 22 of the Defence which I quoted in [8] of the Main Judgment. The Defendant could have simply agreed to be the Seller under the CSA without prejudice to a denial of all the alleged breaches, but that is not what the Defence said. I acknowledge that all the allegations of breach were denied in the Defence, but, in my view, that does not detract from the terms of the final phrase in paragraph 22 of the Defence: *‘and the Defendant was deemed to have given notice to terminate the CSA pursuant to clauses 23.2.4; 23.2.10; 23.2.11 and/or 23.2.12 on 24 October 2018’*. The Defendant’s argument seems to require the terms of the provisions mentioned to be ignored, but that seems unrealistic. I emphasise that I have made no finding that the Defendant was in breach, nor was it necessary for me to make any such finding either in the Main Judgment or in this judgment.
32. I take the Defendant’s submission to be that I should disallow the costs of the Claimants’ witness statements because they dealt with the alleged breaches and consider ordering the Claimants to pay the costs of the Defendant’s witness statement. I decline to do so for the following reasons:
- 32.1. First, in their witness statements, both of the Claimants set out the facts, including the history of this dispute, in measured terms expressing in particular their frustrations at how long this dispute had taken and how costly the whole process had been. Part of the history they related did concern

aspects of the alleged breaches, but it is not true to say that their witness statements dealt only with the breaches.

32.2. Second, in the Claimants' costs budget, the costs allowed for witness statements were modest, both generally and relative to the overall costs on each side.

32.3. Third, because much of the history in those witness statements is relevant to issues concerning costs.

32.4. In essence, I do not consider the costs of dealing with the breaches in the witness statements can be considered a suitably circumscribed set of costs which it is possible to identify or which I should deduct. After all, it has often been said that it is a rare case where the claimant succeeds on every point.

The basis of assessment

33. The Claimants contend for an award of indemnity costs in respect of two distinct periods: first, from the inception of the dispute until 29 May 2019; second, from the end of the period of acceptance on 21st April 2020 of the Claimants' Part 36 offer dated 1st April 2020, down to today.

34. Taking into account the early stages of this dispute, although I have formed the view that there was a degree of unreasonableness in the Defendant's conduct, in my view the position is complicated by the facts that (a) there were other disputes between the parties and (b) other solutions were explored. Accordingly, I decline to award indemnity costs for that initial period, albeit I record the Claimants have failed by only a narrow margin. For that reason I propose to record a comment in the Order which will be made to give effect to this Judgment to that effect pursuant to CPR3.15(4) to assist any subsequent assessment proceedings, should they take place.

35. However, once the action was underway and the principal issues were defined by the developments at the hearing on 24 May 2019, I consider that the Defendant could and should have been significantly more co-operative in the provision of up to date and reliable financial information. It seems to me his conduct caused a significant increase in the costs and complexity of this action, which would have been avoided by adherence to the overriding objective.

36. This brings me to the offers made by the Claimants which I discussed above.

37. If the Defendant had accepted the offer made immediately after the Mediation, both he and the Claimants would be significantly better off. As for the offer dated 1st April 2020, this was, of course, shortly after the imposition of the first 'lockdown' and reflected that development. It was a serious offer of more than I have decided as the actual valuation and which, in the event, the Defendant should have accepted. The alleged 'defects' in the form of that offer would not have prevented a resolution of this action being achieved very quickly if the basic sum had been acceptable to the Defendant. If the Defendant had accepted that offer, (and taking into account what I decide below) he would now be in a better

financial position, although I suspect the Claimants would have been slightly worse off. The fact the offer was made is a further demonstration that the Claimants were regularly exploring ways to resolve the dispute and save costs.

38. In my view, by the 1st May 2020, all the circumstances of this case discussed in the Main Judgment and above, including in particular the offers made by the Claimants combine to take this case out of the norm. Costs from 1st May 2020 are to be assessed on the indemnity basis, if not agreed.

Interim payment on account of costs

39. In this section of the judgment, all costs figures exclude VAT unless otherwise indicated. Contrary to my initial assumption, dental work is classified as medical care and therefore exempt from VAT. Although I understand there is or may be an ongoing issue as to whether some cosmetic procedures properly qualify as medical care, it was not submitted that this issue has any impact on the Claimants. Since the Claimants are not able to recover VAT as an input tax, to the extent that they recover costs, such costs are payable including VAT.
40. The Claimants' Precedent H which was prepared some days before the hearing on 7 November 2019 showed incurred costs of approximately £78,500. The Court approved amounts for the future phases of the litigation totalling £40,200 including a PTR and a further sum for ADR/Mediation. Since no costs were incurred for those matters, they must be left out of account, with the result that the total approved costs for the phases which were in fact completed amounted to £30,070, including the costs of trial preparation and trial (then estimated to be 3 days) of £2,700 and £14,500 respectively on the basis that the Claimants' case would be conducted by leading counsel. The amounts approved in the Defendant's budget going forward were somewhat higher (and perhaps more realistic), with the total being £59,069 and the trial preparation and trial costs approved in the sums of £7,000 and £20,000 respectively
41. In the result, the evidence was concluded within 3 days but there was insufficient time to deal with closing submissions. I directed that oral closing submissions should take place on a deferred fourth day with short written closings served in advance. Furthermore, it has proved necessary to have a hearing to resolve the outstanding matters in the light of my Judgment. Both these developments have undoubtedly increased costs on both sides.

The application to vary the Claimants' costs budget.

42. This application came about in the following way.
43. With his skeleton argument, Mr Dhillon presented a 'Summary of Costs arising outside of Budgeted Costs'. This document raised a number of issues, not least the point that, a Costs Management Order having been made, when assessing costs on the standard basis, the court will not depart from the budgeted costs unless satisfied there is a good reason to do so (CPR3.18(b)).

44. At the hearing I indicated that I might entertain an application from the Claimants to revise their costs budget to take account of recent significant developments in a similar way to what was done by Birss J. at the form of order hearing in *Victoria's Secret v Thomas Pink Ltd* [2014] EWHC 3258, where he revised the winning party's costs budget to take account of additional costs incurred at the trial and for the form of order hearing. I directed that if such an application was to be made, it must be served by 5pm on Friday 22nd January 2021 and Mr Butler for the Defendant indicated he would respond on Sunday 24th January 2021. These deadlines were helpfully complied with.
45. Before I turn to that application, I should mention that certain of the earlier entries in the Summary, at least at first sight, seemed to be inconsistent with the sums set out in the Claimants' Precedent H. However, I was satisfied that there were no inconsistencies. Although if the Claimants' costs are the subject of a detailed assessment, it will be for the Costs Judge to rule on which costs are allowable and in what amount, for the purposes of the rulings I have to make, I was satisfied that the entries in the Summary prior to 7 November 2019, which was the date of the CMO, identified the costs incurred on the Claimants' side, albeit some of them did not appear in the Precedent H.
46. At the hearing when the CMO was made, the order was 'costs in the case'. The Claimants' costs of that hearing are identified as being £12,013.70 but I can see that these costs are not reflected in the incurred costs set out in the Claimants' Precedent H which was served some days in advance of that hearing. When making the CMO, the Master did not record the levels of incurred costs, but merely set out the budget for each side and for the future phases of the action.
47. In respect of the entries in the Summary which date from after 7 November 2019, there were three: the first was for a sum of £3,779 from the hearing on 24 September 2020 before Deputy Master Hansen where the order was for costs in the case; the second was for a sum of £16,011 (excl VAT) identified as "extra day of trial"; and the third was for a sum of £8744 (excl VAT) for the form of order hearing: total sought £24,755. In fact, the 'extra day of trial' included certain additional expert witness fees and certain travelling and hotel expenses.
48. In the Precedent T served as the application, the budget items for the PTR and ADR/Mediation were removed, but the three entries in the Summary had morphed somewhat. I will set out each variation claimed and rule on each one.
49. I approach the application for variation having regard to CPR3.15A and part of the guidance in the notes on costs management generally which state (and have stated for some time, albeit the previous version referred to different provisions):
- "Once a CMO has been made, each party must actively reconsider its budget and, if a significant development warrants the making of a revision, upwards or downwards, must promptly seek such a revision either by agreement with other parties or with the approval of the Court..."

50. In my view, the promptness (or otherwise) with which a variation is sought may well reflect on whether the revision is or is not in respect of a significant development.
51. Furthermore, I can well understand that it may be difficult to turn one's mind to a costs budget revision in the lead up to trial when the focus is very much on attending to the issues live in the trial, but it is also important to bear in mind that most costs budget revisions ought to be done on paper, without any significant costs being expended on them, and should best be done in advance of the result being known.
52. The first variation claimed is for £3,726 and claimed in respect of Leading and Junior Counsel 'in respect of the application heard at the CMC'. The Defendant objects to this revision. I confess I do not fully understand this part of the application. The costs budget approved by Master Kaye had no provision for CMC costs because they had all been incurred by the time of that hearing, as I understand it. In my view, this variation is not in respect of a significant development and is sought far too late.
53. I hold the same view in respect of the second variation for £900 in respect of an 'additional witness'. Not a significant development and far too late.
54. The third variation is in respect of disbursements of £4,335 on expert's fees. Although the Defendant submitted that £1,000 was reasonable for the short opinion on the impact of COVID-19, I will allow an additional £4,000 for expert's fees due to the additional complications from the Defendant's disclosure and for the additional report on the impact of COVID-19.
55. I will take the fourth and fifth variations sought together because they concern Trial Preparation and Trial. For the first item, an extra £2,838.10 is claimed, of which £1,000 is solicitors fees, £1,500 is counsel's fees and £338.10 is in respect of transcript services engaged for the hearing on 4 September 2020 and said to be due to the Defendant's lack of co-operation. In respect of Trial costs, an extra £16,643 is claimed, of which the time costs amount to £6,579 and disbursements £10,064.
56. The significant developments said to justify these additional sums are expressed as follows:

“Increase in solcitors fees for trial being extended to 5 day:
£2000.00

Increase in fees due to amendments to the Judgment. In addition to advising on Judgement, holding a conference with the clients; and a conference with Counsel: £2029.00.

Increase in fees in respect of Form of Order Hearing: £1550.00.

Solicitors fees for attendance at the Form of Order hearing:
£1000.00

Total fees: £6579

Counsel's additional fees for extended trial: £3000.00

Video Bridging service was instruction on the Courts instructions: £312.00

Train Ticket incurred due to extended Trial: £245.00

Counsel provided a conference to update the clients and advise on Form of Order Hearing: £1250.00

Counsel's fees for Form of Order Hearing: £2500.00

Disbursements: £1064.00”

57. Whilst the first set of time costs do add up to the stated total of £6579, the total at the end of the second set of figures, meant to represent the total disbursements, is wrong on two counts. First the disbursements listed total £7,307, and the total given of £1064 seems to be a typo when compared with the disbursements figure of £10,064 in the Table. So the corrected figure for the Trial costs revision is £13,886
58. Counsel for the Defendants realistically accepted that the additional hearings of 1 day for Closing Submissions and ½ day for the form of order hearing were significant developments. I agree. However, he went on to make a series of points that the sums claimed were excessive. His points have some force, in particular that a number of the sums now sought for trial preparation were either already included in the budgeted costs or are in any event part of the work covered by a refresher. Furthermore, I think it is right to record that, in my view, the Court should be somewhat wary of an attempt to revise the costs budget of a successful party upwards when (a) the revisions are out of line with the rates adopted in the previously allowed budget and (b) the revisions are presented in the knowledge or expectation that that party is the winner.
59. However I formed the view that the estimates which the Claimants put forward in their Precedent H for the future costs (all of which were approved) somewhat underestimated the amount of work which was actually required. This underestimation was probably due at least in part to the additional difficulties in securing reliable and up to date financial information from the Defendant.
60. It is to be noted that the sum approved in the costs budget for the trial costs was £14,500, of which £10,000 was the fees of Leading Counsel for the 3 day trial (which can be divided roughly into a brief fee of £7,000 and two refreshers of £1,500) and £4,500 were time costs (say 3 x £1,500). The revision sought is for a total of £16,643 (corrected to £13,886), essentially for an additional 1.5 days of trial, albeit separated into hearings of 1 day and then ½ day and with the preparation of written closing submissions and a skeleton argument.
61. In terms of time costs, Mr Butler was inclined to agree £1,500 and £750 for the closings and form of order, to which I will add a further £1,000 for additional

preparation (e.g. of the additional bundle). In terms of disbursements, Mr Butler estimated refreshers at £2,000, giving a total of £4,000, but contended that the additional conferences claimed were part of the work covered by the refreshers. To a large extent I agree with his point and exclude the costs of the additional conferences. I will however take more generous refreshers at £4,000 plus a further £1,000 to cover the additional documents prepared by Counsel and the additional hearing days. I also allow the additional expenses of £557. I refuse to make the other revisions sought.

62. Accordingly, the Claimants' costs budget will be revised as follows:

- 62.1. Expert evidence: £4,000;
- 62.2. Trial Preparation: £1,000;
- 62.3. Trial: Time costs: £3,250; Disbursements: £5,557.
- 62.4. Total upward revisions: £13,807.
- 62.5. Total removals: £10,130 (PTR and ADR/Mediation).

63. By my calculations, the costs the Claimants had incurred by the time of the CMO amounted to the total shown on their Precedent H (£78,469.30 ex VAT) plus the costs of that hearing, at which the Order was costs in the case, (£12,013.70 inc VAT, or £10,078.50 ex VAT), totalling £88,547.80. The total budgeted costs (as revised) amount to £43,877, yielding an overall total of £132,424.80 ex VAT. I derive some comfort from a rough comparison of the Defendant's overall costs, which I was informed amount to approximately £125,000, especially since in an action of this nature one would expect the Claimants' costs to be somewhat higher than those of the Defendant.

64. In a normal case, one would expect the costs incurred by the time of the CMO to be less (perhaps considerably less) than the budgeted future costs. However in this case the fact that the normal pattern is reversed is not a surprise bearing in mind the efforts made by the Claimants pre-action to reach a resolution and the fact that considerable work had been done in the action (including the service of what turned out to be the initial expert's reports) by the time the CMO was made.

65. In order to include VAT, I am conscious it would not be accurate to simply apply the VAT rate of 20% to the total figure set out above since it will include some costs which are not the subject of VAT (court fees for example). However, since the bulk of the costs are made up of solicitors, counsel and expert's fees, on which VAT is charged at 20%, and since I can take account of any inaccuracy when setting the level of interim payment, the overall total plus 20% comes to nearly £159,000.

66. Although it is a decision to be taken in the circumstances of each case, I am aware that other Judges have awarded high percentages (e.g. 80% and 90%) as interim payments in cases where a CMO has been made. In the particular circumstances of this case, I consider it is appropriate to award the Claimants a relatively high percentage – approximately 80% - of the total by way of an interim payment on

account of costs, on the basis that, on a detailed assessment, they would recover a sum in excess of the resulting figure, albeit not significantly in excess.

67. Accordingly, I order the Defendant to make an interim payment on account of the Claimants' costs in the sum of £127,000, to be paid within 21 days, i.e. on or before 17 February 2021.

Set off

68. I consider it is appropriate that the amount to be paid by the Claimants to acquire the Defendant's practice interests under the CSA (as varied), namely £96,000 should be set off against the sum I have ordered the Defendant to pay by way of interim payment.

Permission to Appeal

69. In the course of the hearing Mr Butler made an application for permission to appeal the Order resulting from the Main Judgment on two grounds. I gave a short ruling refusing permission to appeal and I will briefly record here the grounds and my reasons.
70. The first ground was to the effect that I had erred if I had proceeded on the basis that the Defendant had committed the breaches of the CSA alleged in the Particulars of Claim. Since I did not proceed on that basis in the Main Judgment (nor in this Judgment for that matter), this ground has no substance or merit.
71. His second ground was that I erred in reducing the multiplier due to the effects of the pandemic because he got Ms Webber to accept in cross-examination that the pandemic had no impact. I rejected this ground because it misunderstands the role of the expert evidence, which was to instruct me as to the principles to apply when valuing the Defendant's practice interests. It also misunderstands that I had to undertake a multi-factorial assessment of all the circumstances when deciding the appropriate multiplier to adopt. Furthermore, I believe Ms Webber's answer was made on certain assumptions which, in my view, were not applicable. For these brief reasons, I concluded that an Appeal on those grounds would have no realistic prospect of success.