



Neutral Citation Number: [2022] EWHC 2594 (Ch)

Case No: BL-2021-000574

IN THE COUNTY COURT AT CENTRAL LONDON
BUSINESS AND PROPERTY LIST (Ch)

Rolls Building
Fetter Lane
London, EC4A 1NL

14/10/2022

BEFORE:

MRS JUSTICE JOANNA SMITH
(sitting as a Judge of the County Court)

BETWEEN

VARIOUS SAM BORROWERS

(being those persons listed in Schedule 2 annexed to the Particulars of Claim)

Claimants

- and -

- (1) BOS (SHARED APPRECIATION MORTGAGES) NO. 1 PLC**
- (2) BOS (SHARED APPRECIATION MORTGAGES) NO. 2 PLC**
- (3) BOS (SHARED APPRECIATION MORTGAGES) NO. 3 PLC**
- (4) BOS (SHARED APPRECIATION MORTGAGES) NO. 4 PLC**
- (5) BOS (SHARED APPRECIATION MORTGAGES) NO. 5 PLC**
- (6) BOS (SHARED APPRECIATION MORTGAGES) NO. 6 PLC**
- (7) BOS (SHARED APPRECIATION MORTGAGES (SCOTLAND)) LIMITED**
- (8) BOS (SHARED APPRECIATION MORTGAGES (SCOTLAND) NO.2) LIMITED**
- (9) BOS (SHARED APPRECIATION MORTGAGES (SCOTLAND) NO.3) LIMITED**
- (10) BANK OF SCOTLAND PLC**

Defendants

Daniel Burton (instructed by **Teacher Stern LLP**) for the **Claimants**
James Duffy (instructed by **Dentons UK and Middle East LLP**) for the **Defendants**

Hearing date: 28 September 2022

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.

This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email. The date for hand-down is deemed to be 14 October 2022.

Mrs Justice Joanna Smith:

1. This judgment follows a second costs management conference in this matter. Owing to time constraints and to the nature of the arguments advanced before me, I indicated to the parties that I intended to provide a short reserved judgment addressing the issues raised and explaining my approach.

THE BACKGROUND

2. These proceedings comprise claims brought by 161 consumers, many of whom are now elderly, infirm or deceased, in respect of a particular type of mortgage product, known as a shared appreciation mortgage (“**SAM**”), sold by the Defendants between 1996 and 1998. The Claimants allege that the SAM products were inherently unfair and were sold in circumstances which give rise to an unfair relationship for the purposes of section 140A of the Consumer Credit Act 1974 (“**the 1974 Act**”). They seek relief under section 140B of the 1974 Act to the effect that the SAMs be struck down or alternatively varied, and they also bring a claim for unjust enrichment in respect of SAMs that have been redeemed.
3. Owing to the number and nature of the claims, the Chancellor of the High Court ordered on 19 April 2021 that they be case managed and tried by a designated Judge of the Chancery Division sitting as a County Court Judge.
4. The claims have essentially been case and cost-managed in two stages. At the first case management conference on 5 October 2021 (“**CMC1**”), the court gave directions for the initial case management of the claims, including the process for selecting 26 “Pleading Claimants”, the exchange of individual pleadings for those claims and disclosure. The court directed that a further case management conference should then be listed with a view to arriving at the number and identities of the Lead Claims which it was anticipated would then be tried (“**CMC2**”). The Claimants sought an order for costs management, which was not resisted by the Defendants, and directions were put in place for a first costs management conference for the phases up to and including CMC2 (“**the Phase 1 Budgets**”).
5. At the first costs management conference on 19 January 2022, the court made a costs management order for the Claimants in the sum of £509,635 and for the Defendants in the sum of £646,375. The court also recorded pursuant to CPR r.3.15(4) that the Defendants’ costs of £228,665.50 incurred in relation to CMC1 were disproportionate and unreasonable in amount, and would have been subject to reduction by the court had they not already been incurred. The total amount of the budgets at this point (including incurred costs) stood at £1,661,094.02 (for the Claimants) and £2,698,913.30 (for the Defendants).
6. At CMC2 on 22 July 2022, the court gave directions for the trial of 15 Lead Claims. The directions included the identity of the Lead Claimants, directions for exchange of witness statements, permission for expert evidence in the fields of valuation, residential mortgages and economics, the listing of a further case management conference of half a day 16 weeks before trial to consider the potential for a reduction of the number of Lead Claims prior to trial (“**CMC3**”).

and the listing of the trial to be heard over 6 weeks (with the court sitting for 4 days each week) in a window between 8 January 2024 and 19 February 2024.

THE COSTS BUDGETS FOR THIS HEARING

7. In September 2022, the parties exchanged Precedent H budgets for the next phase of costs budgeting (which include their approved budgets for Phase 1). Precedent R Budget Discussion Reports were exchanged on 21 September 2022.

The Claimants' Budget

8. The Claimants' Precedent H costs budget, including its Phase 1 budget, totals £4,272,512.36. With the exception of a proposed contingency for a specific disclosure application of £132,346.00, included as Contingency A in the Claimants' budget, their budget has been agreed by the Defendants (albeit not without the suggestion that it may reflect an under-estimate of the work required to trial). On any view, the Claimants' budget appears to me to represent a very substantial legal spend for a 24 day trial.
9. In any event, pursuant to CPR 3.15(2)(a), I record that the Claimants' budget (with the exception of Contingency A, to which I shall return at the end of this judgment) has been agreed. During the course of the hearing, it was further agreed that an additional sum would be added to the Claimants' budget for ADR. I shall return to this in a moment.

The Defendants' Costs Budget

10. The Defendants' total costs budget, including their Phase 1 budget, as advanced in a Precedent H budget dated 6 September 2022, totalled £8,323,831.00 ("**the First Budget**"), nearly twice that of the Claimants' budget. This was subsequently amended by a second Precedent H budget served on 21 September 2022 which revised the total budget to £7,748,831.10 (of which incurred costs amount to £2,124,721.00 and estimated costs amount to £5,624,110.00) ("**the Second Budget**"). Estimated costs under the Second Budget therefore substantially outstrip the totality of the Claimants' budget.
11. The revisions in the Second Budget came too late to be addressed in the Claimants' Precedent R Discussion Report, which objected to the vast majority of the sums in the First Budget on the grounds that they were both unreasonable and disproportionate. Very much reduced offers were made by the Claimants in respect of the Defendants' budgeted costs, in many cases designed to reflect the figures that they had themselves included in their costs budget for particular individual phases of the litigation.
12. The revisions included in the Second Budget have made no difference to the Claimants' position. They continue to object in the strongest terms to the figures put forward by the Defendants in the Second Budget. Indeed, their objections appear to have precipitated an open offer on 27 September 2022 from the Defendants ("**the Offer**") (designed, as it makes clear, to try to seek agreement on budgets), to accept a yet further reduction to their budget of £937,090.00

(achieved by offering not to seek budget approval in respect of the third member of their counsel team and by applying a reduction of 10% across the board to the estimated amounts in each phase).

A Summary of the Arguments on the Defendants' Costs Budget

13. On behalf of the Claimants, Mr Burton submitted (in a nutshell) that the Second Budget is far outside the range of reasonable and proportionate costs, that the Offer is insufficient to remedy that position and that the various unexplained revisions to the Defendants' budget may cause the court to "have concerns about [its] reliability". In his skeleton argument, Mr Burton contended that the First Budget was so far outside the scope of any reasonable and proportionate costs that the court should consider whether it amounts to a collateral attack on the Claimants' ability to conduct the litigation and/or oppressive conduct of the sort contemplated by paragraph 13 of CPR PD3E. During his oral submissions, however, he very properly made clear that he was not suggesting any intentional oppression on the part of the Defendants and nor was he seeking to make any application pursuant to paragraph 13 of CPR PD3E. Instead, he said, the potential for objective oppression was of relevance to the court's consideration of the issue of proportionality.
14. Mr Duffy, on behalf of the Defendants, skilfully sought to dispel any impression that the Second Budget was excessive, submitting that in all the circumstances of this case (to which I shall return) the court should find that the figures included in the Second Budget fall within the range of reasonable and proportionate costs and that, as a fall-back position, the Offer plainly represented a reasonable and proportionate outcome. He rejected any suggestion of oppression or that the Defendants' budget was unreliable, submitting that the Defendants have behaved properly in seeking to reduce their budget and in making the Offer.

THE APPLICABLE REGIME

15. The court's cost management powers as set forth in CPR 3 and Practice Direction 3E are well known. However, I should identify the key principles, together with some helpful guidance in recent cases to which my attention was drawn by the parties:
 - i) Where budgeted costs are agreed between the parties, the court can do no more than record that agreement (CPR 3.15(2)(a)). However, where the court has reservations as to the agreed figures on grounds of reasonableness and proportionality, it may record its comments to that effect (see WB, Vol 1 at 3.15.4).
 - ii) Where budget phases are not agreed, the court will review them and record its approval after making appropriate revisions (CPR 3.15(2)(b)).
 - iii) The court will limit its approval in respect of the budgeted costs of each phase to those which are both reasonable and proportionate (PD3E at paragraphs 5 and 12).

- iv) In deciding the reasonable and proportionate costs of each phase of the budget, the court will have regard to the factors set out in CPR 44.3(5) and 44.4(3) (PD3E at paragraph 5). Pursuant to CPR 44.3(5), costs incurred are proportionate if they bear a reasonable relationship to (amongst other things, and focussing on the factors identified by the parties as relevant in this case): (i) the sums in issue in the proceedings; (ii) the complexity of the litigation; and (iii) any wider factors involved in the proceedings such as reputation or public importance. Pursuant to CPR 44.4(3), the court will have regard to various additional factors, many of which overlap with those in CPR 44.3(5). Neither of the parties to this application focussed on any additional factors in CPR 44.4(3), although I note that one factor that does require the court's attention is "the receiving party's last approved or agreed budget".
- v) When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs (PD3E at paragraph 12). See also *Various Claimants v Scott Fowler Solicitors* [2018] EWHC 1891 (Ch), per Chief Master Marsh at [16]: "I emphasise that the court is not required to have regard to the constituent elements of each budget phase (it may do so) and the court's task is to decide whether the total for each phase falls within a range of reasonable and proportionate costs". See also *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB) per Warby J, as he then was, at [66]. What is reasonable and proportionate in this context must be viewed objectively.
- vi) The court's task is not to carry out a calculation or strict arithmetical exercise. Reasonableness may involve having close regard to the calculations in the budget, but proportionality does not (*Various Claimants v Scott Fowler Solicitors* [2018] EWHC 1891 (Ch) at [16]).
- vii) A comparison between budgets may be informative but it can never be determinative; "the court is not a slave to comparison" (*Various Claimants v Scott Fowler Solicitors* [2018] EWHC 1891 (Ch), at [17]). Similar work in the hands of different legal teams may result in different costs. That is why, if they are to be approved by the court, a party's costs need only fall within a range. Thus the "touchstone" need not be the lowest amount a party could reasonably be expected to spend: "the court should allow some flexibility to the parties to ensure that their conduct of the action is not unnecessarily and potentially unfairly hampered by an unrealistically low assessment or by only the lowest assessment of what would constitute reasonable and proportionate expenditure" (see *Discovery Land Company v Axis Specialty Europe* [2021] EWHC 2146 (Comm) per Peter MacDonald Eggers KC sitting as a Deputy High Court Judge at [18]).
- viii) Whilst it is helpful to have an eye on the overall budgeted figure, that is not the focus of the task set for the court – PD3E paragraph 5 is expressly concerned with the reasonable and proportionate costs of "each phase".
- ix) The future (i.e. estimated costs) element of the costs budget is binding on a subsequent detailed assessment and the figure for those costs should not be

departed from on assessment (whether upwards or downwards) unless a “good reason” can be shown (CPR 3.18 and *Harrison v University Hospitals NHS Trust* [2017] 1 WLR 4456). Accordingly, decisions made by the court at the costs management stage are both significant and important.

THE FEES OF COUNSEL

16. Although the court is concerned with considering the total budget for each individual phase, a key area of contention between the parties at this hearing concerned the size of the Defendants’ counsels’ fees, particularly in the expert, trial prep and trial phases of the litigation, which Mr Burton described as “stratospheric”. Indeed it was the level of these fees and their impact on the size of the Defendants’ budget for these individual phases and thus on the size of the Defendants’ overall budget, which really lay at the heart of the dispute between the parties at this hearing.
17. I have already observed that similar work in the hands of different legal teams may result in different costs and that can obviously be for a variety of reasons. It may be down to differently constituted teams of lawyers, the location from which those lawyers are operating, the differing expectations and needs of the client and different (entirely legitimate) views as to the volume of work that will need to be undertaken in any given phase in order properly to conduct the litigation. If reasons of this sort account for a discrepancy in budgets between parties to the same litigation, then it may well be that those budgets will fall within a reasonable range. However, whilst a party is of course entitled to spend whatever it wishes in purchasing a “Rolls Royce” service with no expense spared, it cannot expect to recover its costs (over and above that which it would have been reasonable and proportionate to spend) from the other party if it is unsuccessful at trial.
18. Mr Burton drew my attention to the recent decision of Deputy Master Campbell in *Hankin v Barrington* [2022] 1 WLUK 6 (QB) in dealing with a dispute over the fees of counsel on a detailed assessment. In that case, the Deputy Master referred (at [20(i)] to an observation made by Pennycuick J in *Simpsons Motor Sales (London) Ltd v Hendon Corporation (No2)* [1964] Costs LR (Core) 29 to the effect that “...one must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief...”. Mr Burton submitted that this was the approach I should take to the counsel fees in this case and he pointed to the Deputy Master’s decision to reduce the brief fee of leading counsel in a complex clinical negligence matter for a 13 day trial from £110,000 to £75,000.
19. I should say at once that I do not consider that I gain any assistance from *Hankin* as to what may be the appropriate level of brief fees in what is, plainly, an entirely different case. Furthermore, it seems to me that I must take care before simply rejecting the Defendants’ budgeted figures on the grounds that they include the fees of a “pre-eminent” team of three counsel. That is not the question for the court. On the contrary, my only task is to arrive at a total figure per phase that is

reasonable and proportionate having regard to the relevant considerations identified above. It may be that the court arrives at the conclusion that the impact of a party's choice of counsel in fact renders the overall figure arrived at in any particular phase unreasonable or disproportionate and that in arriving at that decision, the court will look in a granular way at (amongst other things) how those fees are made up. However, as Chief Master Marsh said in *Various Claimants v Scott Fowler Solicitors* at [16], "...the court is not bound by a party's choice of representative in the sense that a party is entitled to choose an expensive law firm and/or be represented by leading and junior counsel. The court makes no judgment about such choices. It is only interested in whether the total figure per phase is reasonable and proportionate".

20. I shall return to this issue further when I come to consider the phases which are particularly affected by it.

PROPORTIONALITY

21. The parties are not *ad idem* as to the nature of this claim and its value. This inevitably influenced the approach they took to the question of proportionality. Before I come to the detailed submissions on each phase of the Defendants' budget, I consider that it would be useful to set out my general approach to the overarching submissions on proportionality made by the parties.
22. Mr Burton makes the point that in this action the court is trying 15 Lead Claims worth, on the most optimistic analysis, something in the region of £7.3 million. He accepts that the case is complex, but he says that it is properly to be regarded as consumer credit litigation involving individual consumers and customers of the Defendants. He contends that when seen through this lens, it is obvious that a total budget of more than £7 million is excessive – it bears no reasonable relationship to the sums in issue in the proceedings or indeed to the levels of complexity.
23. Mr Duffy rejects this submission, maintaining that this case is significant, "heavy", commercial litigation involving 161 claims with a total potential value of in excess of £50 million. He says that this is why an order was made under section 5 of the County Courts Act 1984 for a High Court Judge to be appointed to manage and try the claims and that it has always been understood that the case would be managed with a view to determining key principles which would then lead (without further litigation) to the settlement of the remaining claims. He points to observations to that effect in skeleton arguments lodged at court by both sides at CMC1. In particular, I note the point made in the Claimants' skeleton for that hearing to the effect that whilst the determination of lead claims would not be binding on the remainder of the Claimants, "it was accepted that there would be sufficient findings that the parties ought to be able to reach a settlement of those remaining claims". In addition he says that this case is of the utmost importance to the Defendants, that it has already resulted in adverse comment in the press and that there are reputational issues at stake which feed into the assessment of proportionality.

24. Having considered these submissions with care, I think the truth lies somewhere between the two disparate positions of the parties.
25. The litigation is certainly complex, as both sides recognise, not least because it involves a large number of Claimants, each advancing differing factual cases in individual pleadings and each requiring consideration of alleged unfairness under section 140A of the 1974 Act. However, it is difficult to see that this will involve the levels of complexity that will often arise in heavy commercial cases, truly so-called. I have little doubt that a commercial court judge schooled in the intricacies of commercial court litigation would not regard this as a “heavy commercial case”, although it may loosely be described as such.
26. Furthermore a glance at the Case Summary and List of Issues proposed for trial, as prepared by the Defendants’ solicitors, reveals a four page case summary and the statement that “in broad terms” there are 3 issues for trial: (i) whether the relationship between each Claimant and the applicable Defendant is unfair within the meaning of section 140A of the 1974 Act; (ii) if so, what relief should be granted; and (iii) in respect of SAMs redeemed more than 6 years before the issue of the claim form, whether those claims are time-barred. Of course there are specific issues to be considered by the experts, as identified in the Order of 22 June 2022, but these issues do not appear to me to be particularly burdensome, unusual or “heavy” in the context of a claim of this sort.
27. Furthermore, the question of the relationship between the complexity of the case, such as it may be, and the budgeted costs must be considered primarily having regard to the costs of a particular phase, a point to which I shall return when considering each phase in turn. In their submissions, the parties tended to focus on the overall value of the claim rather than considering the extent to which the costs of any particular phase could be justified by the complexity or volume of the work required in that phase.
28. As for the sums in issue in the proceedings, on careful reflection, I think it would be artificial to ignore the fact that the rationale for managing the case with a view to identifying only a limited number of claimants to take part as Lead Claimants at the trial was to avoid the need for an unmanageable, extremely lengthy and prohibitively expensive trial of all of the claims. It is plain that all parties recognised and endorsed this aim from the outset. Whilst there may be a danger, as Mr Burton contends, of the Defendants refusing to arrive at a speedy compromise on all remaining claims in the event of defeat at the trial of the Lead Claims, such that some additional costs may need to be spent before all claims can be resolved, nevertheless it seems to me that I must have regard to the fact that the stated ambition of both parties is to fight the trial in respect of Lead Claims which cover a broad range of the characteristics which arise across the claimant pool, thereby facilitating a final resolution of all 161 claims.
29. If the Defendants are unsuccessful in that trial, their ultimate exposure will therefore be to the circa £50 million claimed by the totality of Claimants, rather than merely the £7.3 million claimed by the 15 Lead Claimants. Accordingly it would be unfair and unrealistic not to take this exposure (and the Defendants’ understandable desire to manage the litigation with a view to ensuring the best possible chance of limiting their exposure in so far as possible) into account in

considering the question of proportionality. In my judgment, therefore, a straightforward comparison between the value of the Lead Claims and the Defendants' budget is unlikely to be particularly helpful. As Mr Burton ultimately accepted, there is an obvious "ancillary benefit" to litigating the Lead Claims. Equally, however, I must bear in mind that one of the aims of litigating the Lead Claims alone is plainly to avoid disproportionate expenditure on all claims (including disproportionate expenditure in dealing with phases of the litigation).

30. Turning to Mr Duffy's submissions about the Defendants' reputation, there is no doubt that any litigation of this type involving a banking institution will naturally involve press interest and comment. However, this case does not involve allegations of dishonesty or deliberately unfair conduct on the part of the Defendants. Furthermore, the SAMs with which the litigation is concerned date back many years, have not been a feature of the Defendants' offering in recent times and might fairly be regarded as historic. Whilst I have no doubt that the Defendants are anxious to avoid adverse comment in the press and that (as Mr Duffy submitted) their defence of the claims is very important to them, I do not consider that the question of the relationship between the Defendants' budgeted costs and any such anxiety is a relationship that weighs heavily in the scales when it comes to considering proportionality.
31. In making his revised submissions on oppression, Mr Burton pointed out that the Claimants are all ordinary consumers (or their personal representatives) who are funding this litigation by a combination of contributions to a pool, conditional fee agreements and ATE insurance. Therefore, he submitted, there is an inequality of arms in the financial means and resources of the parties to which I must have regard in considering the question of proportionality.
32. In my judgment, however, this submission really goes nowhere. That is because, as Mr Burton himself acknowledges, the Claimants accept that "they are not entitled to the litigation they are prepared to pay for" but "they are entitled to the litigation that it is right to conduct having regard to the interests of both parties and to the proper administration of justice" (see *Tew v Bank of Scotland (Shared Appreciation Mortgages) No 1 Plc & Others* [2010] EWHC 203 (Ch) per Mann J at [31]). Mr Burton expressly confirmed during his submissions that the Claimants are not seeking "special treatment".
33. Ultimately, as Mr Burton accepts, this litigation inevitably involves a cost exposure to the Defendants which the Claimants accept will be at an amount which is reasonable and proportionate in all the circumstances. The fact that the Claimants may have limited means by comparison with the Defendants is, in my judgment, of little significance in approving the Defendants' budget, beyond, perhaps, the need for the court to be alert to the possibility that the Claimants' budget is tighter than might otherwise be the case and so may be at the very lowest end of any reasonable range.
34. However, in this case, as I have already remarked, it seems to me that the Claimants' budget is in fact a sizeable budget involving the anticipated expenditure of substantial sums. I have seen nothing that leads me to suppose that the Claimants' budget is particularly depressed or that, as Mr Duffy

submitted, it under-estimates the cost of any particular phases of the litigation. Whilst a straightforward comparison between the Claimants' and the Defendants' budgets would not be appropriate, nevertheless I consider that the agreed figures in the Claimants' budget provide a useful starting point for consideration of the range of figures within which the Defendants must fall if their budget is to be both reasonable and proportionate.

35. Finally, Mr Burton submitted that I must have regard to the fact that all the figures in the Defendants' budget are exclusive of VAT and that, accordingly, it is only fair to the Claimants that, when considering the issue of proportionality, the court should add a 20% premium to the figures. I reject that submission. There is nothing in CPR 3, or PD3E to support such an approach and the standard Precedent H forms expressly exclude VAT (if applicable). The focus for the court is on what it is reasonable and proportionate for a party to spend on the litigation and there is no justification, in my judgment, for taking account of VAT in considering proportionality.

RELIABILITY

36. I should say something briefly about the Claimants' submissions on reliability. In short, Mr Burton contends that unreliability "permeates" the Defendants' budget owing to (i) the lack of detail; (ii) the lack of any real explanation for the reduction in figures between budgets; and (iii) the question-marks over the statement of truth on the First Budget (bearing in mind the substantial reduction in the Second Budget) and on the Second Budget (bearing in mind the substantial reduction in the Offer).
37. Whilst I accept that there is, on occasion, a lack of detail in the Defendants' budgets which has created difficulty and which I shall address when dealing with the individual phases, on careful reflection I am not in a position to determine that the Defendants' budget is obviously unreliable. Indeed the Claimants disavow any suggestion that the Defendants' budget is intentionally set at an oppressive level or that the statements of truth on the First and Second Budgets are deliberately misleading. Whilst it may be somewhat disconcerting for a party to present three separate sets of (reducing) figures in quick succession, nevertheless I accept Mr Duffy's submission that ultimately, the Defendants have tried to take a reasonable and conciliatory approach. They reconsidered their First Budget, arriving at the Second Budget. Upon analysis of the Claimants' continuing objections, they then made the Offer identifying yet further reductions by way of what Mr Duffy described as "a pragmatic compromise" with a view to saving court time.
38. This seems to me to be the conduct of parties who (upon sight of the other side's budget) recognise that their initial budget was likely set too high and take steps to address that discrepancy. Such conduct is very far from the conduct of the claimant in *CIP Properties v Galliford Try* [2015] 2 Costs LR 363, the authority on which Mr Burton relied. In that case, Coulson J, as he then was, considered the claimant's budget to be unreliable in circumstances where its original estimate of costs in its Case Management Information Sheet had increased threefold by the time of the costs management hearing (a year or so later), vastly outstripping

those of the four defendants, and broadly totalling the costs of all of the defendants combined. There was no justification whatever for this vast increase and the Judge observed that the absence of any explanation for the increase in costs “makes the court suspicious of the figures for incurred costs” advanced by the claimant.

39. I cannot see any proper basis for arriving at a similar conclusion on the facts of this case and I reject the submission that the Defendants’ budget is unreliable. The costs budgeting regime expressly anticipates that parties will identify their estimated litigation spend and that they will then seek to agree that spend with opposing parties. In the course of seeking to reach agreement, it is inevitable that there will be some movement in the estimates provided and that parties will revise their original views. However, one cannot infer from any such revisions alone that their budgets generally are inherently unreliable.
40. It is important to remember that (leaving aside incurred costs) budgets are concerned with estimates of future expenditure and that a party may arrive at a genuine estimate, which on reflection and having regard to a different approach taken by another party or to further investigations into the costs of disbursements or to a re-jigging of responsibilities within the overall team, it may then decide was overstated in the sense that it was not reasonable or not proportionate.
41. Whilst movements of the magnitude that have occurred here (both in the Second Budget and in the Offer) may lead the court to infer that the original estimate was neither reasonable nor proportionate, that will not always be the case. Mr Duffy invites me to approve the Second Budget notwithstanding the reduction in figures proposed by the Defendants in the Offer.
42. Against the background set forth above, I turn now to consider each of the disputed phases of the Defendants’ budget.

CMC3

43. I have already recorded the purpose of CMC3, a half day case management conference designed to provide the opportunity to determine whether the number of Lead Claims for trial may be further reduced. The Defendants’ Second Budget puts the estimated costs of CMC3 at £121,650, indicating that they have assumed that there will be “no substantial issues save in relation to trial claimant selection”. The Claimants contend that this is “grossly disproportionate” for a half day hearing and have offered to agree £65,480 (the same level of costs which has been agreed on their own budget for this phase). By the Offer, the Defendants have simply reduced their costs estimate by 10% to a figure of £109,485.
44. In my judgment, the Defendants’ figure of £121,650 is not reasonable or proportionate for what should be a relatively straightforward half day CMC. In particular, looking at the constituent elements of this phase, 160 hours of solicitor time and counsel fees of £65,000 appear to me to be obviously unreasonable. The Claimants will be required to prepare the bundle and yet their total estimate is only approximately half that of the Defendants in their Second Budget.

45. Mr Duffy pointed out that I permitted a figure of £147,450 for CMC2 and it is obviously right that I should have regard to the approach I took to the Phase 1 Budgets. However, CMC2 was a full day's hearing and was considerably more involved - the costs of £147,450 plainly bore a reasonable relationship to the complexity of that phase of the litigation. The same cannot be said for proposed costs of £121,650.
46. Doing the best I can and recognising that the figure I arrive at must fall within a reasonable range, I consider that a sum of £80,000 would be both reasonable and proportionate.

EXPERT REPORTS

47. The Defendants' estimate for the costs of their expert reports has reduced very substantially since their First Budget (which, amongst other things, estimated its expert fees at £420,000, including £100,000 for its expert in residential mortgages and £300,000 for its economics expert). The total estimate for this phase in the First Budget (excluding incurred costs of £27,737.60) was £815,200 – a figure now reduced to £690,200 in the Second Budget, a reduction which I infer (and which was confirmed by Mr Duffy, at least in respect of the fees of the economics expert) represents an acknowledgement that the First Budget was neither reasonable nor proportionate.
48. The Offer reduces this figure still further to £571,680 (albeit that Mr Duffy maintained, for the purposes of this hearing, that the figure in the Second Budget remained a reasonable and proportionate figure). By contrast, the Claimants' agreed estimate for expert reports (excluding incurred costs of £44,000 odd) is £379,361.50. They have made an offer to agree a figure of £423,782.84.
49. There is little doubt that expert evidence is likely to be of the utmost importance in the context of the issues in this trial, and in the circumstances, I cannot conclude that the estimated spend on behalf of the Defendants as set out in their Second Budget is obviously disproportionate having regard to the potential for this trial to resolve claims worth in excess of £50 million. However, as I have said, proportionality is not to be assessed solely by reference to the relationship of the costs to the overall value of the claim. Costs will only be proportionate if they also bear a reasonable relationship to (amongst other things) the complexity of the phase of the litigation in which they occur.
50. Where both sides must instruct experts to deal with exactly the same issues (and indeed where one of the experts is in any event a single joint expert) I consider it to be entirely legitimate to take the Claimants' agreed estimate (which is nearly half of the Defendants' Second Budget figure) as a starting point. In particular I consider it to be reasonable to regard the Claimants' agreed estimate as an indicator of a sum which bears a reasonable relationship to the complexity of this phase. In this case, the Claimants have expressly identified their residential mortgage and economics experts by name, thereby providing comfort that the fees they have set out in their budget are realistic and achievable in the market.

51. The difference between the Claimants' figure for this phase and the Defendants' figure is accounted for by: (i) the Defendants' estimate that they will spend 772 solicitor hours in dealing with the experts (as opposed to approximately 500 hours to be spent by the Claimants' solicitors); (ii) counsel fees of £185,000 (as opposed to fees of approximately £55,000 on the part of the Claimants' counsel) and (iii) expert fees of £270,000 (as opposed to fees of £152,500 for the Claimants' experts). Having regard to the size of the discrepancy across all elements of this phase, I consider that the Defendants' Second Budget is both unreasonably high and disproportionate.
52. I cannot see the justification for so much legal time to be spent dealing with expert reports. Whilst solicitors will obviously be involved in instructing the experts, preparing bundles for them and liaising with them, as well as attending meetings with counsel and reviewing draft reports, 772 hours of time appears to me to be excessive; the issues to be addressed by the experts have already been identified by the court in its Order of 22 June 2022 and one of the experts is a single joint expert whose remit is limited to valuing the mortgaged properties for unredeemed SAMs relevant to the Lead Claims. I do not therefore consider that the complexity of the expert issues justifies the amount of time that the Defendants' solicitors intend to spend.
53. The counsel spend is equally unreasonable in my judgment, involving three counsel spending between 50 and 80 hours each in dealing with expert issues; to my mind an unnecessary duplication of work. If the Defendants wish to instruct three counsel to deal with expert issues then that is a matter for them, but the additional fees that the instruction of three counsel add to the overall figure for this phase are unreasonable (and I note in this context that the Offer strips out the fees of the third counsel).
54. Turning to the fees of the experts, it seems to me to be regrettable that the Defendants have not seen fit to provide information in their Second Budget as to how the very substantial figures identified have been arrived at. The reduction in fees for the economics expert from £300,000 in the First Budget to £150,000 in the Second Budget is wholly unexplained and there is no suggestion in either budget that these figures have been derived from quotations obtained in the market. Mr Duffy tells me that the original figure of £300,000 for an economics expert was based on a quotation which (after further research) it is now accepted to have been unreasonable. The revised figure of £150,000 is apparently based on an assessment of a range of quotations, albeit that the Defendants have not yet made a decision as to the identity of their economics expert.
55. In the absence of a clear explanation in the Defendants' Precedent H for substantial expert fees, the court has no assistance on the question of whether those fees are reasonable and proportionate and (where they are far in excess of the fees identified by the other party) is far more likely, in my judgment, to arrive at the conclusion that they are neither.
56. Mr Duffy argued that the Claimants' budget under-estimates the extent of the task to be done in relation to the experts and/or that it takes account of the fact that the Claimants' team already has familiarity with the expert issues at stake by reason of the involvement of (at least) their counsel and residential mortgages expert in

another similar piece of litigation. This was disputed by Mr Burton who pointed out that the Defendants created the SAMs products and so are inevitably more familiar with them than the Claimants. I am not in a position to determine this point one way or the other. However, even assuming that Mr Duffy is correct, I cannot see that a reasonable range would nevertheless extend to figures that are nearly twice as much as the Claimants' figures.

57. Having regard to all of the points made above and taking what can only be a relatively broad-brush approach, I am prepared to approve the Defendants' expert budget at the level of £500,000, which seems to me to be at the very upper end of any reasonable and proportionate range.

TRIAL PREP

58. In their Second Budget, the Defendants identify their estimated costs of the trial prep phase of the litigation at £2,462,200, a figure that assumes the Claimants will be responsible for the trial bundles and that there will be an electronic bundle (50% of the cost of the electronic bundle, estimated at £75,000, having been included in the total figure). In the Offer, the Defendants revised this phase to £2,013,480 by removing the fees for their third counsel and applying an additional 10% reduction. However, even the figure put forward in the Offer remains approximately twice as much as the Claimants' agreed estimate of £1,098,150.
59. The key constituent elements of this phase are (i) 920 hours of solicitor work and (ii) brief fees amounting to a total of £2,100,000. These include a brief fee for leading counsel of £1,250,000 together with brief fees for the two junior counsel of £225,000 and £625,000 respectively. The latter fee of £625,000 for junior counsel is exactly the same as the fees of leading and junior counsel for the Claimants combined, which the Claimants make clear in their budget are based on an assumed period for trial preparation of 7 weeks.
60. Whilst the solicitor hours estimated in this phase and the cost of those hours does not appear unreasonable (not least when compared with the higher figures in the Claimants' budget), in my judgment the very substantial fees identified in respect of counsel plainly have the effect of rendering the overall estimate for this phase both unreasonable and disproportionate having regard to the issues at stake in the litigation and their complexity. No information has been provided as to how brief fees have been arrived at and indeed it was not until the hearing that the Claimants and the court were informed that those fees were based on an assumed 14 week period of preparation for a 24 day trial.
61. I can do no better in this context than quote again from the judgment of Chief Master Marsh in *Various Claimants v Scott Fowler Solicitors* at [27]:

“Inevitably, in the absence of a cogent explanation for a substantial brief fee, the court is likely to conclude that the estimate is aspirational. I consider it is essential, if the court is to undertake costs management in accordance with the Rule and Practice Direction, either for the assumptions in a budget to explain how counsel's fees

for the trial have been estimated or for this information to be provided with the budget in a covering letter”.

62. Mr Burton submitted that a fair rule of thumb is that trial preparation will take roughly the same amount of time as the trial itself. This is a rule of thumb with which I am familiar but it is inevitably a somewhat rough and ready approach which cannot be slavishly applied across the board (and has in fact been deviated from by the Claimants themselves). There may be cases where its application will significantly under-estimate the time needed to prepare for trial (perhaps because of the complexity of the issues involved or the recent involvement of new counsel); equally there may be cases where its application would be too generous (perhaps because the case involves numerous defending parties and agreement has been reached between defending counsel to share the burden of the work). Yet further it may be important to bear in mind that a “heavy” trial will command a substantial booking fee, recognition of the fact that counsel may have turned away other lucrative work in order to devote herself to the case in hand. What is important, it seems to me, is that there should be a coherent explanation for trial preparation time that (as in this case) far exceeds the normal rule of thumb.
63. Regrettably, that has not occurred here and whilst I now know that the Defendants’ brief fees are based on 14 weeks’ preparation, I find it very difficult to see why a trial of this sort requires a preparation time of more than twice the length of the trial itself. The following points immediately occur to me:
 - i) On the face of things, the involvement of two juniors, including a specialist in consumer law (who I am told will be instructed regardless of whether his fees are recoverable in the budget), ought to relieve leading counsel of considerable amounts of preparation time – certainly in relation to opening submissions.
 - ii) In considering the time it may take to prepare the cross-examination of the 15 Lead Claimants and two opposing experts, it is impossible to ignore the planned significant contributions of all members of the counsel team at the witness statement and expert report phases. The Defendants’ counsel will be approaching the trial with a pre-existing depth of knowledge as to the evidence that will ensure a shorter preparation time than might otherwise be the case.
 - iii) Whilst cross-examination of 15 Lead Claimants may appear an onerous task, the key issues for each of the Claimants will be the same (e.g. what were their individual circumstances at the time of their entry into the SAMs and what advice, if any, did they receive) and their individual mortgage documents are likely to be relatively limited.
64. For reasons I have already given, I say nothing about the Defendants’ choice of counsel, or the Defendants’ decision to include estimated brief fees for their counsel which I regard as little more than aspirational. It would be invidious for me to descend into a discussion over the perceived “pre-eminence” of one leader, or junior, or another leader or junior (as it seemed at times during the hearing I was being invited to do).

65. Standing back, however, I do not consider it reasonable or proportionate, having regard to the complexity of the litigation, for the Claimants to be exposed to such a high figure for trial preparation. The reason it is so high appears to be down to the fees of counsel. I also do not consider that my earlier observations about the value of the overall claim affects this position. I have identified factors which cut both ways but, even assuming that it is correct to consider the costs of this phase by reference to their relationship with the potential value of the 161 claims, I remain of the view that they cannot be justified having regard to the complexity of the exercise required in the trial prep phase.
66. Although this is not ultimately a mathematical exercise, in this context it does seem to me that one way of determining what might be reasonable for this phase is to look at the impact of removing elements of the counsel fees which appear obviously to render the overall figure unreasonable.
67. The first such element is the fees for junior counsel (too high by reason of the decision to instruct two juniors). A reduction for the fees of the additional junior amounts to £225,000. The second element concerns what I consider to be the purely aspirational (and therefore unreasonable) level of fees for preparation time of 14 weeks. A reduction of the remaining brief fees by half (a reduction of approximately £900,000) would bring them roughly into line with the 7 week preparation time assumed by the Claimants. The third element concerns the £75,000 estimated for the electronic bundle, in circumstances where there has, as yet, been no agreement as to the use of, or cost of, electronic bundles. This is an expense that can, if necessary, be addressed in due course. Applying these reductions to the existing total of £2,462,200 in this phase of the Second Budget, I arrive at a reduced figure of approximately £1,200,000.
68. Standing back from those calculations, and having regard to the Claimants' fees for this phase, whilst the figure of £1,200,000 is still substantially higher than the Claimants' figure, I nevertheless consider it to be within a reasonable and proportionate range for the work required in this phase (albeit very much at the top end of that range).

TRIAL

69. In the Second Budget, the Defendants estimate their costs of trial at £1,009,250, a figure they have reduced to £773,325 in the Offer. These figures are to be contrasted with the Claimants' equivalent figure of £417,531 (made up of roughly £100,000 worth of solicitor time and counsel fees of £284,500 together with a small amount of additional disbursements). The two main reasons for the discrepancy between the budgets are (i) the planned attendance of both a grade A partner and an associate acting on behalf of the Defendants throughout the trial; and (ii) the estimated fees of the Defendants' three counsel, amounting to a total of £585,000.
70. Whilst I accept that it is reasonable in the context of a trial of this nature for the Defendants to desire the attendance of both a partner and an associate at the trial (together with support at the office as and when required), once again, it is the fees of counsel together with a different approach to the trial time estimate which

increase the level of expense in this phase to well above that of the Claimants' equivalent phase. In particular, while the Claimants have budgeted on the basis of a 24 day trial (albeit taking place in 6 weeks), the Defendants have expressly budgeted on the basis of an "estimated length of hearing [of] 30 days", i.e. their budget assumes work on the case on non-sitting days.

71. In my judgment, the estimated costs for trial in the Second Budget are unreasonable and disproportionate. For reasons I have already identified, I do not consider the costs of a third counsel (in the sum of £150,000 for this phase) to be reasonable and nor do I consider it reasonable or proportionate to budget for solicitor time costs and counsel fees in respect of a 30 day trial when the trial has been fixed for 24 days. Once again, this appears to me to be aspirational.
72. Standing back, and always bearing in mind that the court is not engaging in a purely arithmetical exercise, it seems to me that a figure of £700,000 for the trial phase (albeit clearly at the top end of the range) is both reasonable and proportionate.

REMAINING AGREED PHASES IN THE DEFENDANTS' BUDGET

73. The parties are agreed: (i) that a figure of £327,294 may be included in the Defendants' budget for witness statements, although I would like that budget to record (as I have been told by Mr Duffy) that this is designed to reflect a minimum of three statements and a maximum of six; (ii) that a figure of £93,546 may be included in the Defendants' budget for the PTR; and (iii) that the inclusion in each of the Claimants' and Defendants' budgets of an additional figure of £75,000 for ADR would be reasonable and proportionate - this figure will therefore replace the existing figures for ADR in the Claimants' budget and the Defendants' Second Budget. I approve all of these figures.
74. Looking at the overall figures that I have now approved for the Defendants' budget to trial, their total budget for this phase of the litigation, including incurred costs in this phase, will be a little north of £3 million. Adding the costs I approved in the Phase 1 Budget produces a figure of approximately £5.7 million. For the reasons already set out above, and in so far as this may work as a cross-check, I do not regard this figure as disproportionate in the context of the potential value of the 161 claims, or indeed as disproportionate in the context of 15 Lead Claims designed to try to resolve the 161 claims. It is higher than the Claimants' total budget, but having regard to the exercise that I have undertaken on a phase by phase basis, to my mind it still falls within the appropriate range for litigation of this type, albeit at the very top of that range.

CONTINGENCY A IN THE CLAIMANTS' BUDGET

75. The only controversial issue arising on the Claimants' Budget concerns Contingency A, a contingency for a specific disclosure application with an estimated cost of £132,346. In short, Mr Burton canvassed the possibility of a specific disclosure application at the first costs management conference, but in circumstances where disclosure had not then taken place and it was unclear

whether there would be any need for such an application, the court refused to approve its inclusion as a Contingency. Now, however, Mr Burton says that matters have progressed and that it is more likely than not that there will be an application for specific disclosure (see *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB) per Warby J at [71]); it is neither unexpected nor improbable.

76. Mr Duffy rejects this characterisation of the potential for a specific disclosure application, submitting (in my view correctly) that there remains uncertainty around the likelihood of such an application being made, together with a lack of clarity over the scope of any such application.
77. Mr Burton showed me a letter from his solicitors dated 5 September 2022 indicating that the Claimants are “minded to make an application for specific disclosure” but also making it clear that the objective of the letter is to “afford the Defendants a final opportunity to consider their position before such an application is made”. It is common ground that whilst the Defendants have responded to some aspects of the letter (thereby potentially reducing the scope of any subsequent application for specific disclosure), they have not yet responded to the key points. Mr Duffy informed me, however, that the Defendants are taking those points seriously and that they intend to prepare a proper response. In light of their previous engagement, he anticipates that (at the very least) some further issues will fall away.
78. In all the circumstances, it still seems to me to be premature to include a Contingency for a specific disclosure application in the Claimants’ budget. Pending a full response from the Defendants to the letter of 5 September 2022, I do not see how I can determine the scope of any such application, or, therefore, its likely cost. Furthermore, I can see no disadvantage to the Claimants in not including this as a contingency at this stage – as Mr Duffy pointed out, if an application is made, costs may be assessed on a summary basis, if appropriate. I did not understand Mr Burton to suggest otherwise.

CONCLUSION

79. I now invite the parties to revise their budgets in accordance with this judgment and to provide me with an agreed order in appropriate terms. I should end by thanking both counsel for the helpful submissions.