



Neutral Citation Number: [2019] EWHC 2769 (QB)

Case No: HQ16X02378

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2019

Before :

MATHEW GULLICK
(sitting as a Deputy High Court Judge)

Between :

(1) PEPE'S PIRI PIRI LIMITED
(2) PEPE'S FRANCHISING LIMITED

Claimants

- and -

(1) MUHAMMAD ALI JUNAID
(2) FOOD TRENDS LIMITED (now dissolved)
(3) OPTIMUM SERVICES INTELLIGENCE
LIMITED
(4) SYED ADIB AMHAD
(5) SYED HASIB AHMAD
(6) RAZI SIDDIQUI
(7) INFINITI FOODS LIMITED
(8) KHUDEJA RAZI
(9) OPTIFOODS GSN LIMITED

Defendants

Paul Strelitz (instructed by **Boddy Matthews**) for the **Claimants**
Barry Coulter (instructed directly) for the **First Defendant**
Tim Welch (instructed directly) for the **Third to Ninth Defendants**

The Second Defendant did not appear and was not represented

Written Submissions: 20 August and 4 September 2019

Approved Judgment

Deputy Judge Mathew Gullick:

Introduction

1. In my judgment given on 31 July 2019, neutral citation [2019] EWHC 2097 (QB) (below, “the Main Judgment”), I allowed the claim against six of the nine Defendants. I awarded damages in the sum of £2,523.07. The total amount, including interest to the date of judgment, was £3,164.37. The parties were unable to agree on what costs order should result. They have each now filed written submissions on costs and, in the case of the Claimants, a reply to the Defendants’ submissions. Both Mr Coulter, for the First Defendant, and Mr Welch, for the Third to Ninth Defendants, were content having seen the submissions filed on behalf of the Claimants to rely on their original submissions rather than file further submissions in reply.
2. This is my judgment on the two issues in respect of costs with which those submissions are concerned:
 - i) What order as to costs should be made in respect of the Claimants’ application dated 5 March 2019, which I allowed during the trial (see paragraph 8 of the Main Judgment)?
 - ii) What order should be made in respect of the costs of the claim generally?
3. Below, I shall refer to those Defendants against whom judgment was entered for the sum to which I have just referred as “the Judgment Defendants”. I shall otherwise refer to the Defendants and the witnesses by the names which I used in the Main Judgment.

Background

4. I shall not rehearse the content of the Main Judgment. However, that judgment does not set out my reasons for allowing the Claimants’ application of 5 March 2019, which were given in an *ex tempore* judgment on 13 March 2019, the second day of the trial, but which have not been transcribed for the purposes of this application. I shall therefore summarise the position in respect of that application.
5. On 5 March 2019, one week before the commencement of the trial, the Claimants issued an application for permission to rely on a supplemental expert report from Mr Blake and four further witness statements. By order of Master Kay QC made on 4 January 2018, following a hearing at which all parties were represented by counsel, the parties had been ordered to exchange witness statements of the witnesses of fact by 23 August 2018. The order provided in terms identical to CPR 32.10 that oral evidence at trial would not be permitted where witness statements had not been served in accordance with the order. The Master’s order further provided for the claimants to serve the report of an expert in the field of accountancy and business valuation by 12 October 2018. It gave the defendants permission, if so advised, to file their own expert report by 7 December 2018 and then for the experts to meet and to prepare a joint statement for the court. There was no provision in the Master’s order for any further witness evidence or any supplemental expert evidence to be filed by any party.
6. Witness statements were exchanged in accordance with Master Kay QC’s order and expert reports were served by both sides by the dates specified. Mr Cohen, the Defendant’s expert, made points in his report which were entirely new to the litigation and which, if they were to be made by the Defendants, required a response from the

Claimants. In particular, Mr Cohen raised the issues of whether the Claimants had failed to mitigate their claimed losses and, in broad terms, considering the position of several of the Claimants' other franchisees, whether the Claimants' business model was a viable one.

7. On 4 January 2019, the Claimants' solicitors served on the Defendants four further witness statements. Two were from existing witnesses, Mr Munir Hussain and Mr Clive Sawyer. Two were from new witnesses, Mr Ian Wilson and Mr Lee Hussain, both of whose witness statements were very brief; in due course they were not cross-examined on their evidence (see paragraph 86 of the Main Judgment). In addition to the witness statements, the Claimants served an addendum report from their expert, Mr Blake, dated 9 January 2019, which addressed some of the content of Mr Cohen's report. Most significantly however it contained a revision of Mr Blake's view of the extent of the Claimants' losses, to which I made reference at paragraphs 92 and 241 of the Main Judgment. In response, the Defendants served their own supplemental expert report from Mr Cohen, dated 15 February 2019, addressing both Mr Blake's supplemental report and aspects of the Claimants' further witness evidence. No application was made in January 2019 by the Claimants for permission to rely, in response to the Defendant's expert's report, on the four further witness statements or on the supplemental report of Mr Blake. Nor was any such application made either prior to or at the pre-trial review before Dove J on 22 February 2019. Nor did the Defendants make an application to rely on the supplemental report of Mr Cohen.
8. On 8 February 2019, Mr Razi on behalf of the Third to Ninth Defendants wrote to the Claimants' solicitors stating that all four of the new witness statements should be withdrawn because they had not been served in accordance with the order of Master Kay QC. Mr Junaid wrote letters in materially identical terms on 14 February and 20 February. He stated in the second letter, "You cannot simple [sic] send statements to other side and to the court and expect them to be accepted out of time." Despite this, no application was made either before or at the pre-trial review on 22 February.
9. The Claimants' application to rely on the further witness and expert evidence was issued on the afternoon of 5 March 2019 and served on the Defendants by email after hours that day. It was not suggested by the Claimants, when the application was argued before me, that they did not need the permission of the court to rely on the further material. The application was supported by a witness statement from the Claimants' solicitor, Miss Matthews, in which she explained why the new evidence had been filed. Miss Matthews did not, however, give any explanation for the Claimants' delay in applying to the Court for permission to rely on those statements and that further report.
10. I considered that notwithstanding the fact that the Defendants did not positively object to the further evidence when it was served on them, the onus was at all times on the Claimants to secure the Defendants' agreement to the evidence being admitted and, in any event, to apply to the court for permission. Although they said nothing initially, the Defendants had objected to the Claimants' further material by 8 February 2019. As Lord Dyson MR emphasised in *R (on the application of Idira) v Secretary of State for the Home Department* [2015] EWCA Civ 1187, [2016] 1 WLR 1694 ("*Idira*") at [80], it is the court and not the parties – still less, one side – that is in control of the management of litigation. I considered that it ought to have been obvious to the Claimants and those advising them that permission to rely on the further evidence would be required, and that the application of 5 March 2019 was an extremely late recognition of that. The application was not made promptly.

11. In my view, the approach of the Court of Appeal set out in *Denton v TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926 was applicable. *Denton* itself was a case in which the defaulting party had served further witness statements very shortly before the trial, see at [46-57]. However, a fact-sensitive assessment is required in each particular case. I considered that the Claimants' breach, i.e. not having served the new witness statements in compliance with the case management order, was not serious or significant. This was because the statements were essentially, although not entirely, responsive in nature. They responded in large part to points raised by the Defendant's expert in his report, served well after the deadline for the witness evidence, which were not previously the subject of controversy between the parties. I did not consider that the Claimants should be criticised for not having anticipated these points in their own witness or expert evidence. It was also not suggested that, if the statements were to be admitted, the trial would need to be adjourned. There was in my view a good reason for the breach, because the Claimants were responding to issues raised, after the date for the filing of witness statements, by the Defendants' expert. In *Denton* it is at least implicit in the Court of Appeal's analysis of the particular issue in that case at [54] that it would have viewed the service of further evidence soon after the expert's report raising the issue (rather than as actually occurred, after a delay of 16 months) in a very different light in relation to one or both of the first stages of the process.
12. At the third stage of the analysis, I considered that the factors considered at the first two stages weighed in favour of relief being granted. However, a factor in the balance against relief was the serious delay of two months in making the application for permission to rely on the witness statements after those statements had been prepared and served on the Defendants. There was no good reason for that delay. There is no reason in principle why egregious and unexplained delay on the part of a litigant in making an application might not at the third stage of the *Denton* analysis outweigh the first two factors which are otherwise in favour, even strongly in favour, of the grant of relief. This is a point made at paragraph 3.9.6 of *Civil Procedure* ("the White Book") which cites for that proposition *British Gas Trading Ltd v Oak Cash and Carry* [2016] EWCA Civ 153, [2016] 1 WLR 4530 in which relief was refused because the delay in making an application, which would have been granted had it been made timeously, caused the trial date to be lost. However, delay in and of itself is only one factor and all the circumstances must be considered at the third stage.
13. I considered that in all the circumstances it would have been unjust not to permit the Claimants to rely on this evidence, notwithstanding the unexplained delay in making the application. The statements dealt, for the most part, with issues raised for the first time by the Defendant's expert's report. Mr Munir Hussain and Mr Sawyer would be giving evidence in any event and would have been likely to raise many of the matters contained in their supplemental witness statements when cross-examined. The statements of Mr Lee Hussain and Mr Wilson were brief and dealt with specific points. Nor was there a high degree of prejudice to the Defendants in the evidence being admitted, given that they had been in receipt of it for two months and that they had served a supplemental report from Mr Cohen which took the new evidence into account.
14. With regard to the further expert evidence, slightly different considerations applied; but those considerations appeared to me to be in favour of permitting the evidence to be adduced. Mr Blake had changed his opinion and so was required to inform the instructing party and also to amend his report – see paragraphs 64-66 of the Practice Direction to CPR 35. His revision of the assessment of the Claimants' losses was, in

any event, in the Defendants' favour. Given that the Claimants' further witness statements would be in evidence, it would have been artificial and unjust to exclude from the trial the expert analysis and opinion in respect of such evidence, which had been provided by both parties' experts. Although the Defendants had not issued an application to rely on Mr Cohen's supplemental report, it would have been unfair to refuse them permission to rely on it in these circumstances, particularly given that it was one of the factors reducing the prejudice to the Defendants arising from the Claimants' further witness statements.

15. I therefore gave permission to rely on the four further witness statements (in the case of the Claimants) and on the supplemental reports of the experts (in the case of both sides).

The costs of the application of 5 March 2019

16. For the Claimants, Mr Strelitz now submits that the application of 5 March 2019 was opposed by the Defendants when they ought to have consented to it. The application was successful, despite the Defendants' objections. The application was to adduce evidence by way of response to the points raised by the Defendants' expert. Therefore, he submits, the Claimants' costs of the application should be paid by the Defendants.
17. I do not accept Mr Strelitz's submission that the costs of the application should be paid by the Defendants in any event because they should have consented to it. In my judgment, the Defendants' opposition to this application – made barely a week before the trial and with no explanation for the Claimants' delay being given in Miss Matthews' evidence – was far from unreasonable. In *Idira*, Lord Dyson MR said at [80], in the context of a delay in filing a respondent's notice in the Court of Appeal:

“At para 43 in *Denton*, this court said that parties should not "adopt an unco-operative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions". It added: "it is unacceptable for a party to try to take advantage of a minor inadvertent error....". I would emphasise the words "unreasonably" and "minor inadvertent". A party is not required to agree to an extension of time in every case where the extension will not disrupt the time-table for the appeal or will not cause him to suffer prejudice. If the position were otherwise, the court would lose control of the management of the litigation.”

Indeed in that case, although relief from sanctions was granted, the respondent to the appeal (the applicant for relief) was ordered to pay the costs of the application on the indemnity basis because of what the court viewed as an excessive delay in filing the respondent's notice without a sufficient excuse – see at [74] and [84]. The Court of Appeal made that order even though the appellant (the respondent to the application for relief) had unsuccessfully opposed the application (see at [72] and [76]).

18. In my judgment, the present case is not one where the balance falls in favour of either side being awarded the costs of the application. Whilst, as in *Idira*, the Claimants' delay in making the application to rely on the new evidence was substantial and was not adequately explained (factors which, as in *Idira*, might result in an award of costs against a successful applicant for relief from sanctions), the new evidence had been

served on the Defendants two months before the trial. Further, the new evidence was, in significant part, responsive to points raised by the Defendants' expert and so the need for such evidence to be adduced in the first place resulted from the conduct of the Defendants rather than the conduct of the Claimants. In all the circumstances, in my judgment the appropriate order in respect of the application of 5 March 2019 is that the costs should be in the case.

The costs of the proceedings generally

19. CPR 44.2 sets out a number of factors which the court should consider when making a costs order. It provides, so far as is material:

“(1) The court has discretion as to –

- (a) whether costs are payable by one party to another;
- (b) the amount of those costs; and
- (c) when they are to be paid.

(2) If the court decides to make an order about costs –

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (b) the court may make a different order.

...

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

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

(5) The conduct of the parties includes –

- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings;
and
- (g) interest on costs from or until a certain date, including a date before judgment.

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

(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”

The general rule is that the costs of the successful party are paid by the unsuccessful party – see CPR 44.2(2)(a). The court may, however, make a different order – see CPR 44.2(2)(b).

20. I should deal first of all with the position of the Seventh Defendant, Infiniti and of the Eighth Defendant, Mrs Razi. The claim was dismissed against both those Defendants. They are therefore to be regarded, as against the Claimants, as the successful parties. The Claimants have accepted, in correspondence and in Mr Strelitz's written submissions, that they should pay the entirety of the costs of those two Defendants, to be assessed on the standard basis if not agreed. As between the Claimants and those Defendants, I will make an order in those terms.
21. The issue as to the payment of the costs of the claim generally arises as between the Claimant and the Judgment Defendants. Mr Strelitz submits that the Claimants are the successful parties as against the Judgment Defendants because they obtained a judgment in their favour albeit, he submits, that it was modest in pecuniary terms. Mr Coulter submits on behalf of the First Defendant, Mr Junaid, that he is the successful party as against the Claimants and that his costs of the proceedings should be paid by the Claimants. Mr Welch makes the same submission as Mr Coulter on behalf of the other Judgment Defendants.
22. In any event, both sides raise issues which they say should, if the other side is to be treated as the successful party for the purpose of costs, result in an order being made

which does not provide for the entirety of the successful party's costs to be awarded. Both the Claimants and the Judgment Defendants have raised a number of issues relating to the parties' conduct, pursuant to CPR 44.2(4)(a) and CPR 44.2(5). I will address those matters in more detail below.

23. Before determining what order as to costs should be made, I should note that pursuant to CPR 44.2(4)(c), one of the matters that the court may take into account when deciding what order to make about costs is whether any party has made an admissible offer to settle. In this case, there were no CPR Part 36 offers. My attention has now been drawn to the following offers made 'without prejudice save as to costs' following the issue of the claim:
- i) On 23 May 2017, the First Defendant and the Third to Ninth Defendants made what is described as a 'drop hands' offer to the Claimants, i.e. that the claim should be discontinued with all parties bearing their own costs. This offer was rejected by the Claimants.
 - ii) On 26 May 2017, the Claimants made a counter-offer to settle for the sum of £150,000 plus payment of the Claimants' legal costs. This was not accepted by the Defendants.
 - iii) On 15 September 2017, there was a settlement meeting between the Claimants and their solicitors on the one hand, and the First and Third to Ninth Defendants and their respective direct access counsel on the other. The Claimants offered to accept a total of £268,000, comprising £168,000 in respect of damages and £100,000 in respect of costs. They also requested that the Rio's Piri Piri shop that had been established at 23A Gold Street should be closed. This offer was rejected by the Defendants. The Defendants did not make any offers at the meeting, stating (according to the Claimants' solicitor's note) that they were prepared to make a contribution to a settlement but that the parties were clearly too far apart.

Discussion

Introduction

24. In *Straker v Tudor Rose* [2007] EWCA Civ 368, [2008] 2 Costs LR 205, Waller LJ (with whom Tuckey and Jacob LJ agreed) said this in respect of the approach of the court to an award of costs:

"11. How then would the rules suggest one should approach a case such as this? The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court.

12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a

different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part.”

[emphasis in the original]

25. There is no dispute between the parties that this is a case in which a costs order should be made; and I agree that it is appropriate that one should be made.

Identifying the successful party

26. The first question for the court to determine is therefore which, if any, of the parties is to be regarded as a successful party in this case within the meaning of CPR 44.2(2)(a), because the general rule is that a successful party's costs will be paid by the unsuccessful party. The Claimants contend that they are the successful parties because they obtained a judgment for damages in their favour. The Judgment Defendants contend that they are successful parties because the Claimants obtained less than one per cent of the amount of damages that they sought.

27. Several authorities were cited in the parties' written costs submissions. Whilst it has been stated that one way to determine the successful party in a commercial case is to see who “writes the cheque” at the end of the litigation, that is not the only approach. Moreover, in a case such as the present where there is such a significant disparity between the sum claimed and the sum awarded, there is authority that it is not the correct approach. It is convenient to start with the judgment of Sir Thomas Bingham MR in *Roache v News Group Newspapers Ltd* [1998] EMLR 161 at 168-169, where after reviewing a number of relevant authorities, he stated:

“The upshot of these cases is in my judgment clear. The judge must look closely at the facts of the particular case before him and ask: who, as a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?”

28. One of the cases considered by the Master of the Rolls in *Roache* was *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394, in which the plaintiffs had obtained judgment for damages to be assessed. At the assessment of damages hearing they claimed £82,500 but were awarded only £2. There had however been no payment into court by the defendants. The trial judge considered that costs should ‘follow the event’ and ordered the defendant to pay the plaintiffs' costs. The Court of Appeal allowed the appeal and reversed the costs order. Stephenson LJ, giving the leading judgment (with which Griffiths and Purchas LJ agreed), stated:

“But the event of an award of £2 was not the event at which the plaintiffs were aiming. They were aiming at £82,500, and the mere fact that they ultimately got something — token or nominal damages — does not enable me to regard them as remaining successful plaintiffs.”

Stephenson LJ went on to criticise the trial judge's reliance on the fact that the defendant could have made a payment into court to protect itself against an adverse costs order, but had not done so. The Lord Justice considered that making a payment to protect against a potential award of £2 would have been futile, because the plaintiff would never have accepted it:

“To have paid £2, or possible £5 or £10, into court in this case would have been very near to a “ritual' act. It would not have been taken out; the plaintiffs would have gone on with their mouth opened wider for a much larger sum; they did go on, having established a breach of contract, in the hope of getting a large sum of damages for that breach; in pursuit of that object they took up the time of the court and, more important from the point of view of this appeal, put themselves and the defendants to considerable expense over, as I have said, 15 working days; and at the end they came away empty-handed, because I cannot think that £2 in the hand disqualifies them from that description.”

29. In *Oksuzoglu v Kay* [1998] 2 All ER 361, Brooke LJ (with whom Hirst and Millett LJ agreed) reviewed a number of authorities, including *Alltrans*, and concluded:

“In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the court is entitled to ask itself: Who was essentially the winning party? It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted...”

30. Two later decisions of the Court of Appeal are also of significance. In *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750, damages of £2,000 were awarded to a claimant who had brought a clinical negligence claim for £525,000 arising from the loss of his left leg. The damages awarded represented additional pain which the claimant had suffered prior to the eventual amputation of his leg; but the main claim for damages for the loss of the leg failed entirely. The court decided by a majority (Sir Anthony May P and Tomlinson LJ, Jackson LJ dissenting) that the successful party was the defendant and ordered the claimant to pay 75 per cent of the defendant's costs. Sir Anthony May P, with whom Tomlinson LJ agreed, stated at [17]:

“In my judgment, the deputy judge was wrong in principle to conclude that the respondent was the successful party. The award of £2,000 was insignificant in the context of the claim and the action as a whole, and, although it was technically within the pleaded claim, it was in truth a last minute addition to salvage something (0.25%) from an action which the respondent lost... I have already indicated my view that such vindication as the action achieved was scant consolation for a claimant whose £525,000 claim had failed entirely. This is not a case in which identification of the party who has to write the eventual (very small) cheque is persuasive as to the costs order...”

31. In his concurring judgment, Tomlinson LJ said at [47-48]:

“47. Looked at as a matter of substance and reality, there is in my judgment no escape from the conclusion that the Claimant lost his action. £2,000 is of course a substantial sum, but it is not compensation for the loss of a lower leg and it is of no value to the Claimant in meeting the financial needs imposed upon him in consequence of the loss of his lower leg. The award of £2,000 was in truth irrelevant to the purpose of the action. Since, as the judge found, no rational person would either issue or defend proceedings such as these if the sum claimed had been £2,000, it is not in this case realistic to ask whether the Claimant could have recovered £2,000 without fighting the action through to a finish. An action to recover £2,000 would never have assumed this form and, whilst the matter has obviously not been put to the test, it seems unlikely that it would have been defended. What is however beyond argument is that the defendant Appellants substantially denied the claimant Respondent the prize which he fought the action to win.

48. I am in no doubt that the defendant Appellants should be regarded as the winners of this action...”

Both members of the majority in *Medway* considered that the defendant was not to be penalised for having failed to make a CPR Part 36 offer, as if such an offer had been made and accepted this would have required the defendant to pay substantial sums in costs, even if only £2,000 or something just above that sum had been offered, and because it was wholly unrealistic to suppose that such an offer would have been accepted. In his dissenting judgment, Jackson LJ took a different view as to which party was the successful party, at [30]:

“In my view, in a personal injury case where (a) the claimant has pursued his claim in a reasonable manner, (b) the claimant recovers damages (other than nominal damages) and (c) there is no or no sufficient Part 36 offer, the starting point should be that the claimant recovers his costs. That flows from rule 44.3(2)(a)...”

32. Shortly after the decision in the *Medway* case, a different constitution of the Court of Appeal (Ward, Moore-Bick and Jackson LJJ) gave judgment in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790. I will not set out the terms of the judgment in *Fox* in any detail because they appear sufficiently from the judgment of Briggs J in *Magical Marking Ltd & Another v Ware & Kay LLP & Others* [2013] EWHC 636 (Ch). In his judgment in that case, at [5] to [16], Briggs J reviewed a number of cases since the introduction of the Civil Procedure Rules in which the paying, rather than the receiving, party had been identified as the successful party. On the particular facts of *Magical Marking*, damages of £28,000 were awarded on a claim for £10 million; Briggs J considered that the defendants were the successful party. His analysis of the decisions of the Court of Appeal in the *Medway* and *Fox* cases was as follows:

“10. Counsel made extended submissions about the combined effect of two almost simultaneous decisions of the Court of

Appeal, namely *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750, in which judgment was given on 29 June 2011, and *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790, heard on 9 June 2011, in which judgment was handed down on 7 July 2011. In the *Medway* case, the claimant sued two doctors for professional negligence in failing to treat or diagnose a condition which led to the amputation of his leg. Quantum was agreed at £525,000 shortly before a liability trial in which the claimant failed, save for an alternative claim for £2,000 introduced as an afterthought for pain and suffering arising from a failure to prescribe appropriate painkillers. In a split decision the majority, May and Tomlinson LJ, concluded that the defendants had been the real winners, relying upon Sir Thomas Bingham's dictum in the *Roache* case. In his dissenting judgment, Jackson LJ concluded (like the trial judge) that the defendants should have paid the claimant's costs, since they had failed to protect themselves by a modest Part 36 offer. On that point, the majority view was that, at the earliest time when the defendants could have done so, they would have risked automatically incurring a disproportionate costs burden of some £100,000, so that they could not be criticised for having decided not to make a Part 36 offer.

11. In the *Fox* case, the Court of Appeal (Ward, Moore-Bick and Jackson LJ) were faced with an outcome where a claimant for personal injuries in the sum of some £280,000 obtained judgment for a net £31,700 odd, beating a Part 36 offer by the defendant of £23,500 odd. It became common ground during the appeal that the claimant ought to be regarded as the successful party. In giving the leading judgment, Jackson LJ included among the principles which he derived from a lengthy summary of the authorities, the following, at paragraph 48:

"In a personal injury action the fact that the claimant has won on some issues and lost on other issues along the way is not normally a reason for depriving the claimant of part of his costs: see *Goodwin v Bennett UK Limited* [2008] EWCA Civ 1658. For example, the claimant may succeed on some of the pleaded particulars of negligence, but not on others."

At paragraph 63 he concluded:

"In the context of personal injury litigation where the claimant has a strong case on liability but quantum is inflated, the defendant's remedy is to make a modest Part 36 offer. If the defendant fails to make a sufficient Part 36 offer at the first opportunity, it cannot expect to secure cost protection. Different considerations may arise in cases where the claimant is proved to have been dishonest, but (on the Judge's findings) that is not this case."

12. Thus the proposition that a defendant who is the paying party at the end of a trial cannot complain if he does not protect

himself with a Part 36 offer did not prevail in the *Medway* case, but did in the almost contemporaneous *Fox* case, in both of which the sum awarded represented a small proportion of the overall claim, which was otherwise successfully resisted.

13. Mr Fernando for Mrs Phillis submitted that the present case was *a fortiori* the *Fox* case. Although she had recovered only a tiny fraction of the £10 million odd claimed, £28,000 plus interest was by no means a nominal sum, and the defendants had made no Part 36 offer at all. All they had done, at a time when the claimant's costs exceeded £70,000, was to make an offer, inclusive of costs, of £25,000 in August 2010, after mediation. It was in substance (and on this Mr Douglas QC for the defendants did not demur) no more than an offer to make a modest contribution towards the claimant's costs to date, rather than a payment on account of the claim.

14. In my judgment the critical distinction between the *Medway* and *Fox* cases is that the former was, but the latter was not, about the question who ought to be regarded in the substance as the successful party. In deciding that question in the *Medway* case, the Court of Appeal followed the *Roache* case, as well as the closely analogous decision of the Court of Appeal in *Oksuzoglu v Kay* [1998] 2 All ER 631, in which Brooke LJ said, on analogous facts to the present:

"In this line of cases, where the plaintiff only recovers between 1% and 3% of his original claim (sometimes, but not always, after a late amendment) the Court is entitled to ask itself: 'who was essentially the winning party?' It will not be distracted from making a just order as to costs by the absence of a payment into court which the plaintiff obviously would not have accepted."

15. Since in the *Fox* case the question who was the successful party became common ground, and did not have to be decided by the Court of Appeal, it cannot be taken as detracting from the consistent line of Court of Appeal authority on the correct approach to that question, beginning with the *Roache* case and ending with the *Medway* case. Jackson LJ could not have been unaware of that line of authority when giving judgment in the *Fox* case, and yet none of them were mentioned in his judgment, save only the *Painting* case, which was about a dishonest exaggeration of the claim."

I respectfully agree with and adopt the analysis of Briggs J as to the nature and effect of the decisions in the *Medway* and *Fox* cases. This was also the view of Zacaroli J in *Brent London Borough Council v Davies* [2018] EWHC 3129 (Ch) at [46-47]. The Court of Appeal in *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93 also considered (at [88]) that the decisions in *Medway* and *Fox* were not inconsistent.

33. Approaching the issue on the basis of the principles set out in *Roache, Alltrans, Oksuzoglu* and by the majority in *Medway*, in my judgment it is the Judgment Defendants who are the successful parties, for the purpose of CPR 44.2(2)(a), in this litigation:
- i) This was a claim in which the sole remedy sought in the Particulars of Claim was the payment of money. The relief sought by the Claimants was set out at the end of the Particulars of Claim as being “damages”, “an account of profits”, “exemplary damages”, “interest” and “costs”. The sum recovered by the Claimants, by way of damages, was just over £2,500, exclusive of interest. This was less than one per cent of the amount sought at trial. The award was insignificant in comparison with the amount claimed. Mr Strelitz’s submission that the sum recovered was modest is, in my judgment, a significant overstatement. I also reject Mr Strelitz’s further submission, in his reply on behalf of the Claimants, that concentrating on the financial result of the claim is “blinkered” because the Claimants have secured an “important victory” over the Judgment Defendants by reason of the finding on liability. This was a money claim in which the Claimants sought more than half a million pounds in damages from the Defendants yet came away with barely £2,500. I do not consider that the result can be characterised, as Mr Strelitz submits, as an “important victory” for the Claimants simply because liability has been established on one of the three pleaded bases, irrespective of the remedy obtained. Moreover, even if (contrary to my view) it is appropriate to focus on the issue of liability rather than the overall outcome of the claim, it must be remembered that the Claimants’ primary case, that the Defendants had conspired together to injure the Claimants’ business, failed in its entirety.
 - ii) The Claimants’ budgeted costs, to the conclusion of the trial, incurred in recovering the principal sum of just over £2,500 are substantially more than £200,000. That figure does not include the fees of leading counsel (which were not provided for in the costs budget) and nor does it include the additional consultancy fees of Mr Sawyer for his work providing ‘legal support’ in connection with the claim (see paragraphs 258-267 of the Main Judgment). The amount ultimately recovered bears no relation at all even to the budgeted costs. In my judgment, no litigant would have incurred costs of that magnitude in pursuit of a claim which sought such a small sum in the first place. Indeed it is difficult to conceive that a claim for the sum ultimately recovered – which is well below the threshold for the small claims track, in which only very limited costs are recoverable (see CPR 27.14) – would ever have been advanced by a reasonable litigant in the position of the Claimants.
 - iii) To the extent that it is relevant, the Judgment Defendants are not, in my judgment, to be criticised for not having made a CPR Part 36 offer in these circumstances. Had an offer been made at or even substantially above the sum awarded, then it is clear, in my judgment, that it would not have been accepted by the Claimants. The offers that were made by the Claimants show that they were seeking a six-figure sum by way of settlement, plus payment of their legal costs. It is wholly unrealistic to suppose that a Part 36 offer of £2,500 or anything remotely close to it would have been accepted by the Claimants. In any event, the making of such an offer even at a level close to the sum awarded would, as in the *Medway* case, have resulted in the Judgment Defendants becoming liable for a disproportionately large amount in terms of costs if the offer had been accepted – the Claimants’ costs were already

£100,000 by the time of the settlement meeting on 15 September 2017, which was several months before the Costs and Case Management Conference and 18 months before the trial. Mr Strelitz submits that it is clear that the Defendants were not interested in making offers to the Claimants; but, in my judgment, the reality is that the parties were so far apart in their views of the merits of their respective cases that there was never a realistic chance of this claim being settled by agreement. Indeed at the meeting on 15 September 2017, according to Miss Matthews' note, the Claimants informed the Defendants that they had increased the amount that they were willing to accept in settlement and that any future offers of settlement made by the Claimants would be higher than that made in the meeting, which was £268,000 inclusive of costs. Miss Matthews' note records that Mr Coulter and Mr Welch informed the Claimants, having heard their offer to settle in that sum, that the parties were "too far apart". That was, in my judgment, an entirely accurate characterisation of the position.

Should the general rule be departed from?

34. Having identified the Judgment Defendants as the successful parties, I must go on to consider whether there should be a departure from the general rule that the costs of the Judgment Defendants should be paid by the Claimants. On this issue, I consider that the most significant arguments in the Claimants' favour are:
- i) the Judgment Defendants did not engage with the Claimants' solicitors' pre-action correspondence;
 - ii) the Judgment Defendants failed on one part of the issue of liability, albeit they successfully resisted the claim against them in the tort of conspiracy;
 - iii) it was not reasonable for the Judgment Defendants to defend the claim on the particular basis that they did.
35. In terms of the pre-action correspondence, following the events of April 2016 which are set out in the Main Judgment at paragraphs 53-58, on 5 May 2016 the Claimants' solicitors wrote to Mr Junaid in a letter headed "Notice of Claim". The Claimants' solicitors enclosed a copy of their letter of 12 April 2016 (see paragraph 183 of the Main Judgment) and stated that each of the proposed Defendants had, by their actions, caused the franchise business at Gold Street to breach its obligations to Pepe's. They enclosed a draft claim form and stated that the correspondence should be treated as a letter of claim under the Practice Direction on Pre-action Conduct. The letter concluded:

"Whilst our client does not wish to bring this claim if it can be avoided, you have failed to respond or address the issues. Accordingly we await hearing from you with your urgent proposals to compensate our client and make good the breaches which have occurred. Alternatively please let us have the points in your defence.

This matter is urgent and we anticipate you will require urgent independent legal advice.

You must take action.

Kindly acknowledge receipt.”

Mr Junaid did not respond to that correspondence or to a subsequent letter enclosing draft particulars of claim. The claim was then issued and served on 6 July 2016.

36. The other Judgment Defendants had already engaged solicitors by this point, who had been involved in arranging the meeting of 27 April 2016 (see paragraph 58 of the Main Judgment). Those solicitors sent correspondence on 12 May and also on 4 July (after the draft particulars of claim had been received) containing bare denials of the allegations made by the Claimants, but not otherwise setting out the other Judgment Defendants' cases. The second of those letters concluded:

“Our clients believe that Mr Qureshi has considerably misinformed / misguided your clients in relation to this claim. They strongly deny any wrongful interference and conspiracy and intend to defend your proposed claim and will substantively respond to your claim and particulars if and when the claim is issued.”

37. The Practice Direction on Pre-action Conduct provides:

“3. Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to—

- (a) understand each other's position;
- (b) make decisions about how to proceed;
- (c) try to settle the issues without proceedings;
- (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
- (e) support the efficient management of those proceedings; and
- (f) reduce the costs of resolving the dispute.”

It goes on to state, in respect of proposed defendants, that they should respond to pre-action correspondence within a reasonable time and that, “The reply should include confirmation as to whether the claim is accepted and, if it is not accepted, the reasons why, together with an explanation as to which facts and parts of the claim are disputed...”

38. Mr Junaid did not respond to the pre-action correspondence at all. No explanation has been provided for that. The other Judgment Defendants did not set out why they did not accept the Claimants' proposed claim and nor did they provide any explanation of the facts upon which they proposed to dispute the claim. Again, no explanation has been provided for that. I consider that the Judgment Defendants' failure to engage with the Claimants' pre-action correspondence in accordance with both the letter and spirit of the pre-action protocol was unreasonable conduct in the circumstances. Had they done so then, for example, the extensive CPR Part 18 requests and responses might not have been necessary at all and the litigation might well have proceeded in a clearer, more focused and speedier manner than it did. In this regard I do not differentiate between Mr Junaid, who failed to respond to the pre-action

correspondence at all, and the other Judgment Defendants, who sent the barest of denials.

39. I also do not consider that it was reasonable for the Judgment Defendants to have defended this claim on the bases to which I referred at paragraphs 111-112 of the Main Judgment. In the case of Mr Junaid, his contention that he was not involved in the running of the Gold Street Pepe's franchise after his resignation as a director of Food Trends was flatly contradicted by the contemporaneous documentary evidence. In the case of the Mr Adib, Mr Hasib and Mr Razi, their claims never to have even seen, or read, the franchise agreement between Pepe's and Food Trends were incredible and were wholly undermined by the contemporaneous documentary evidence. In my judgment, the Judgment Defendants acted unreasonably in defending the claim on these bases.
40. I accept the Claimants' submission that they were successful on a significant issue in the claim, that of liability for procuring a breach of contract. But, equally, the serious allegations levelled at all the Defendants in respect of the alleged conspiracy against the Claimants failed in their entirety. So too, subject to a negligible award of damages, did the Claimants' case on quantum. In terms of the Claimants' success on liability one of their three pleaded bases, I consider this merits a proportionate reduction in the amount of costs awarded to the Judgment Defendants. Whilst I recognise that there is no rule that a successful party should be deprived of their costs even if they lost on one or more issues, and that successful parties often do not succeed on every issue in a case (see e.g. *In re Elgindata Ltd (No. 2)* [1992] 1 WLR 1207 at 1214), in my judgment it is appropriate to take the Judgment Defendants' failure on this aspect of liability into account in this case because a central element of their defence of this issue on the facts was, in each of their respective cases, the matters to which I have referred in the preceding paragraph of this judgment.
41. Nevertheless, it must be remembered that not only did the Judgment Defendants succeed on two of the three pleaded bases of liability – including, importantly, the claim against them in the tort of conspiracy – but that the Claimants' case on quantum was defeated to such an extent that they only recovered less than one per cent of the sum that was claimed at trial. Notwithstanding the Claimants' success on that issue of liability, it is the Judgment Defendants who are properly to be regarded as the successful parties when the claim is considered overall and, in my judgment, they are entitled to a substantial costs order in their favour.
42. In all the circumstances, I consider that there should be a deduction from the costs awarded to the Judgment Defendants to reflect the matters to which I have referred. I bear in mind, however, that the general rule is that, as they are successful parties, the entirety of the Judgment Defendants' costs should be paid by the Claimants. The significance of the Claimants' success on one aspect of their case on liability and their criticisms of the Defendants' conduct, insofar as they are justified, is not so great, in my judgment, as to merit a very substantial adjustment from the position that applies under the general rule. In my view, the costs associated with the aspect of liability on which the Judgment Defendants failed overlapped substantially with the costs of those aspects on which they won – indeed, as Mr Strelitz noted at paragraph 15.3 of his written submissions, it is practically impossible to separate out the Defendants' evidence between the three elements of the Claimants' claim (conspiracy, unlawful interference and procuring a breach of contract). The Defendants were required to give evidence about their actions over a substantial period of time in order to deal with all the various bases of the claim and not just that on which they failed.

Moreover, the Judgment Defendants succeeded on the two causes of action which required the establishment of a higher degree of culpability on their part, i.e. an intention to injure the Claimants' business. Therefore, in my judgment, any reduction in the amount of costs payable to the Judgment Defendants, as the successful parties overall, which reflects the Claimants' success on liability in respect of the tort of procuring a breach a contract should be relatively modest.

43. This is not a case in which costs orders ought to be made on an issue-by-issue basis; rather, then amount of costs payable to the successful parties should be reduced to reflect the matters to which I have referred. In my judgment, the appropriate reduction in the costs payable to the Judgment Defendants to reflect the matters to which I have referred above is 20 per cent. Accordingly, I will order that the Claimants pay 80 per cent of the Judgment Defendants' costs of the claim, to be assessed on the standard basis if not agreed.
44. I should add that I do not consider that either side's offers to settle, as set out at paragraph 23 above, are properly to be characterised as unreasonable. In particular, I do not consider that the Judgment Defendants' failure to make any offers better than their 'drop hands' offer should result in them being penalised, whether at the initial stage of determining who the successful parties are or, having done so, when deciding what order to make. Indeed, the Judgment Defendants' offer of a 'drop hands' settlement, made just under two years before the trial, was much closer to the ultimate outcome of the litigation; although the offers made by the Claimants were to accept around one-third of the level of damages ultimately sought at trial, plus their legal costs. I do not consider that the Claimants acted unreasonably in putting forward such offers, unpalatable though they were to the Defendants. Whilst aspects of the Claimants' arguments on quantum ultimately suffered from a lack of evidence, I do not accept, as the Defendants contend, that the Claimants exaggerated their claim to such an extent that the offers they put forward should be regarded as unreasonable ones.
45. Finally, I note that the parties made reference to a number of other matters relating to the conduct of the litigation in their written submissions on costs but those are not, in my judgment, matters of such weight as to affect the conclusion which I have reached above. In particular, the Defendants criticised, at some length, the extensive CPR Part 18 requests made by the Claimants, the responses to which were not deployed at all during the course of the trial. But I do not consider that these criticisms of the Claimants' conduct by the Defendants assist me in determining the appropriate costs order in circumstances where it is the Judgment Defendants who are to be regarded as the successful parties. The strength of those criticisms is not, in my judgment, so significant as to cause me to alter the view that I have reached above about the appropriate departure from the general rule in these circumstances. I also note that following the extensive procedural wrangling over the Claimants' Part 18 requests and the Defendants' responses, which I will not set out here, the ultimate order on the Claimants' application, made by Master Thornett, was that costs should be in the case. That order was not appealed by any of the Defendants; I do not, therefore, accept Mr Welch's submission that the Claimants should now pay the entirety of the costs of that application in any event. That submission should have been, but was not, advanced by way of an appeal against Master Thornett's order.
46. The Defendants, and in particular Mr Coulter on behalf of Mr Junaid, also criticised the way in which the Claimants' case was put in cross-examination and the Claimants' reliance on the evidence of Mr Qureshi. I do not, however, consider that

these matters amount to conduct on behalf of the Claimants which should affect the overall amount of costs awarded in these circumstances. The Claimants were, in my judgment, entitled to put their case at trial in the way that they did and to rely on Mr Qureshi's evidence. That I rejected the Claimants' case in conspiracy and many of the allegations made against the Defendants, as well as much of the evidence of Mr Qureshi, is sufficiently reflected by my decision as to which side is the successful party in this litigation and my decision to award the Judgment Defendants their costs but to deduct a proportion, for the reasons already given above.

47. Nor do I consider, to the extent that it is relevant, that the amount claimed in damages by the Claimants was deliberately exaggerated. Mr Munir Hussain's belief that the closure of the Northampton Pepe's store had damaged the Pepe's brand was, in my judgment, one that was genuinely held. It was, however, unsupported by the evidence and in my view there were elements of the claim which were misconceived – that is, the claims in respect of the potential second store in Northampton and the additional marketing spending, to which I referred at paragraphs 227-257 of the Main Judgment. But I do not consider that the claim was deliberately or dishonestly exaggerated. Mr Strelitz referred me to the judgment of Coulson J in *Barber v BDW Trading Ltd* [2011] EWHC 2489 (TCC) at [41-42] for the proposition that it is usually only where the exaggeration of a claim is deliberate that a claimant is ordered to pay the defendant's costs. But, as it is the Judgment Defendants who are properly to be regarded as the successful parties for the purpose of the general rule in CPR 44.2(2), the issue of whether the Claimants' claim was deliberately exaggerated or not assumes a somewhat lesser significance than it would have done if the Claimants had been the successful parties in this case. Again, I do not consider that this issue should alter the outcome that I have already set out.

Conclusion

48. The costs of the Claimants' application of 5 March 2019 will be in the case.
49. As to the costs of the claim generally:
- i) the Claimants will pay the costs of Mrs Razi and of Infiniti, to be assessed on the standard basis if not agreed;
 - ii) the Claimants will pay 80 per cent of the Judgment Defendants' costs, to be assessed on the standard basis if not agreed.
50. The Defendants are litigants in person, albeit they have been represented by counsel instructed directly. The Defendants were not, therefore, required to file costs budgets and have not done so (see CPR 3.13(1)). The Third to Ninth Defendants have not requested a payment on account of their costs and I have no information before me about what costs have been incurred on their behalf. In Mr Coulter's written submissions, a payment on account of Mr Junaid's costs in the sum of £75,000 was requested. No explanation was provided for the figure given. I decline to order any payments on account of costs in the absence of any information about the overall level of costs incurred by any of the Defendants or any form of costs schedule enabling me to decide what a reasonable sum by way of a payment on account of their costs would be. In my judgment, that constitutes a good reason not to order a payment on account of costs at this time (see CPR 44.2(8)).