

Priory Courts
33 Bull Street
Birmingham
B4 6DS

24th January 2012

BEFORE:

MR RECORDER CAMPBELL

BETWEEN:

HFO Capital Limited

Claimant

-and-

Mr Roland Wegmuller

Defendant

APPEARANCES:

For the Claimant:

Miss Margiotta
(instructed by Turnbull Rutherford, London)

For the Defendant:

Mr Turner
(instructed by Messrs Watsons Solicitors, Llandudno)

APPROVED JUDGMENT
including
Approved Judgment on Claimant's Applications
and
Approved Judgment on Costs in the Case
and
Discussion / Proceedings after Judgment

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MR RECORDER CAMPBELL:

1. This is a claim brought by the claimant for monies allegedly owed by the defendant under a credit agreement regulated by the Consumer Credit Act 1974. It is claimed that the credit agreement was made between Barclaycard and the defendant in about June 2006. It involved the provision of a credit card by Barclaycard to the defendant.
2. It is claimed that the debt was assigned from Barclaycard to the claimant and in this action the claimant claims the principal sum of £7,246.06 plus contractual interest.
3. This has been listed before me as a one day Fast Track trial of the entire action. No doubt it was allocated to the Fast Track because of the amount involved and the time estimate that had initially been put forward by the parties. However, by the time that the papers were fully prepared to trial and transferred overnight (last night) from Northampton County Court to Birmingham County Court, it was clear to both parties, and indeed to me, that the complexity of this case was such that if I were to try the entirety of the action, it would take considerably more than one day.
4. Only this morning, I was provided with two lengthy, detailed and very helpful, skeleton arguments, bundles of authorities running to over two hundred pages, and a bundle of contractual and other documents running to nearly two hundred pages too. For that reason, I was invited by the parties to try one preliminary issue today, namely the enforceability of the credit agreement.
5. That invitation was extended to me on the grounds that if I were to try this preliminary issue, it may mean the end of the case. Alternatively, it would enable the parties to take stock and proceed further if so advised. So at the invitation of the parties, and because of the clear lack of time, earlier today I agreed that I would try the preliminary issue of the enforcement of the agreement.
6. It is the defendant's case that this credit agreement is not enforceable on the grounds that all of the prescribed terms within the meaning of the Consumer Credit Act 1974 were not contained in the document signed by the defendant.
7. It is common ground that the only document signed by the defendant was a Barclaycard application form signed with the date of 25th March 1996, to be found at page 41 of the trial bundle. It is a very poor copy of the document and parts of it have been blacked out for reasons that no one has been able to explain. Perhaps the other striking feature is that there is no evidence before me from anyone, either from the claimant or Barclaycard of other similar documents from the time for me to make a comparison, or any evidence of Barclaycard's system back in 1996. Miss Margiotta has rightly submitted to me that I should not be too critical of the claimant in this regard and I should bear in mind how difficult it is to obtain such evidence so many years after the event, and I have to say I have some sympathy with Miss Margiotta in this respect particularly as she points out to me these matters were only raised by way of criticism from the defendant relatively recently. However, as against that, I have to deal with this matter on the evidence before me. In the respects that I have identified that evidence is somewhat inadequate.
8. It is submitted by the defendant that if all of the prescribed terms are not contained in the document itself, then that is fatal to the enforceability of the agreement, and it would not be sufficient if, for example prescribed terms were sent a few weeks later with the credit card, which is what the defendant suggests may have been the way that the terms and conditions

were provided. I therefore have to make a finding of fact on the balance of probability as to whether the prescribed terms and conditions were contained in that document.

9. I have to make a finding of fact in the context of the relevant law, to which I have been most helpfully referred by both counsel in this case by their informative skeleton arguments and also by way of oral submissions. I turn to that law now.
10. I start at section 61 of the Consumer Credit Act 1974 that provides as follows:

“(1) A regulated agreement is not properly executed unless—

- (a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner,”*

And stress is laid there by the defendant on the need for the document itself to contain all the prescribed terms.

11. I have been pointed to certain guidance on what is meant by the phrase *“a document in the prescribed form itself containing all the prescribed terms”*, and I have been referred to the case of *Emma Carey v HSBC Bank [2009] EWHC 3417* and it is the judgment of His Honour Judge Waksman QC, sitting as a Judge of the High Court in a case of first instance. I am told by counsel, and I have no reason to suspect that this is wrong, that the principles set out in that case have been followed in other subsequent cases, including cases of higher authority. His Honour Judge Waksman QC said this in relation to the agreed principles in this area (see paragraph 173):

“173. The parties in Carey have helpfully agreed the following principles. The fourth one was added by Mr Uff, with their agreement. No other party takes issue with them. The OFT has formulated the matter in a slightly different way but accepts these principles are close to its position.

(1) It is not sufficient for the piece of paper signed by the debtor merely to cross-refer to the Prescribed Terms without a copy of those terms being supplied to the debtor at the point of signature;

(2) A document need not be a single piece of paper;

(3) Whether several pieces of paper constitute one document is a question of substance not form. In particular a physical connection between several pieces of paper is not necessary in order for them to constitute one document;

...

(5) Accordingly, where the debtor's signature and the Prescribed Terms appear on separate pieces of paper, the questions of whether those pieces of paper together constitute one document is a question of substance and not form.”

At paragraph 174, His Honour Judge Waksman QC said:

“174. As a matter of law, those principles appear to me to be correct, in the context of s61.”

12. So, what are the Prescribed Terms that must be contained in the document as so defined in section 61(1)(a) of the Consumer Credit Act 1974 and in *Carey*?
13. I now turn to the Consumer Credit (Agreements) Regulations 1983. It is common ground that these were the Regulations in force in relation to this credit agreement and set out in Schedule 6 are various Prescribed Terms that must be included and the three relevant ones here are under Clauses 3, 4 and 5:

“Credit Limit

3. *Agreement for running-account credit.* *A term stating the credit limit or the manner in which it will be determined or that there is no credit limit.*

Rate of interest

4. *Agreement for –* *A term stating the rate of any interest on the credit to be provided under the agreement.*

Repayments

5. *Consumer credit agreements.* *A term stating how the debtor is to discharge his obligations under the agreement to make the repayments, which may be expressed by reference to a combination of any of the following – ...”*

And “*the following*” deals with the repayment.

14. I pause there for a moment. It is worth noting that none of those three terms is actually visible on the copy application form document in the bundle that was signed by the defendant on 25th March 1996.
15. As to the effect of a failure to comply with those statutory obligations, I turn now to section 65(1) of the Consumer Credit Act 1974 that provides:

“An improperly-executed regulated agreement is enforceable against the debtor or hirer on an order of the court only”.

16. However, it does not rest there because there was important additional statutory material on this point that was in place in relation to this particular credit agreement (though since repealed), because by Section 127(3) of the Consumer Credit Act 1974 it was provided that:

“The court shall not make an enforcement order under section 65(1) if section 61(1)(a) was not complied with unless a document, whether or not in the prescribed form of complying with the regulations under section 60(1) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer whether or not in the prescribed manner.”

17. In other words, the Court is precluded from making an order granting relief from the infringement of the statutory conditions as to the enforceability if **all** of the prescribed terms that I have identified above were not contained in the signed document itself.

18. So moving to the factual issue itself, I start briefly with a matter upon which I have received some submissions, namely the burden of proof. In submissions the defendant conceded that there was a prima facie case established by the claimant that there was a credit agreement in place and therefore the evidential burden of proving the index factual issue is upon the claimant. I was referred to a first instance case in the County Court of *HFO Services Limited v Kirit Patel*. It was decided by His Honour Judge Platt on 20th May 2009. Of course, I accept that this is a first instance decision and is therefore only persuasive. Nevertheless, I found the judgment of His Honour Judge Platt to be persuasive in that way and I would wish to take the same approach.
19. His Honour Judge Platt said at paragraph 19:

“Therefore, in my judgment, when the defendant wishes to rely on section 65, several consequences flow. First, it is not sufficient for him simply to allege that the agreement is not properly executed. He must specify the particular breach or breaches of the Regulation on which he relies. The burden of proving that the agreement has been properly executed then rests with the claimant. It is his obligation to put before the Court evidence which he considers sufficient to satisfy the Court on this issue.”
20. Miss Margiotta on behalf of the claimant indicates that she has not had an opportunity to consider or reflect upon the law in this area, because the above case was only produced by the Defendant this morning, and she wishes to reserve her position. But she did indicate also that she accepted that it was for the claimant to show the necessary factual matter on the balance of probabilities.
21. On this factual issue, I have read and heard evidence on the claimant’s side of the case from Mr Jonathan Titherley, who is a litigation paralegal for the claimant’s solicitors. I have read his two statements and heard him give evidence. On the defendant’s side, I have read the two witness statements of the defendant, Roland Wegmuller. I have also read numerous documents, the principal ones being the application form signed by the defendant on 25th March 1996 (to which I have already referred). Another document of relevance is a current a blank standard form of Barclaycard’s terms and conditions put in the bundle by the claimant, to be found at pages 43 and 44, and it is worth noting that on that standard blank form, the relevant prescribed terms are included. Of course, the issue for me is whether those terms and conditions were contained in the actual document that was signed.
22. I have already observed that it is disappointing and makes it difficult for the Court without further evidence from Barclaycard, and Mr Titherley says, and I entirely accept Mr Titherley’s evidence, that his client asked for this information but for whatever reason, it was not forthcoming, and therefore there are no similar documents of the time to compare with this one. So although I accept Mr Titherley’s evidence generally, he was unable to give any direct evidence on whether the application form actually contained the prescribed forms, whether on the front, back or anywhere else.
23. Mr Wegmuller gave evidence on the matter. In his witness statement, he set out the general circumstances in which he came to sign this agreement. He said that about six months after he had come to the United Kingdom from Spain, he saw an advertisement in a magazine and he recalled completing the document and posting it back to Barclaycard. He said he recalled that the application was in the form of a glossy style fold-out pamphlet. In his witness statement he said he recalled there was no other documentation with the application form; certainly, there was no separate booklet of terms like those the claimant has produced in the course of these proceedings.

24. Mr Wegmuller was honest enough to concede that he had certain difficulties with his recollection of exactly what was on the form. This is perhaps not surprising given that he was referring back to his recollection of some sixteen years ago, and it is true to say that there were some slight fluctuations in his evidence that were quite properly referred to by Miss Margiotta in her submissions. Nevertheless, his evidence taken as a whole, and that is how I have to view it, was really to the effect that whilst he could not categorically say that there were no further textual items on the document, either on the front or on the back, he did not believe that there were significant additions to the document, and he did not believe that there were the prescribed terms on the document for example on the back or in the blacked-out spaces of it.
25. The impression that I formed of Mr Wegmuller was that he was a man who was doing his best to give a truthful and accurate recollection of what he saw, and as I say, he conceded that it would be difficult to be absolutely precise on that. But in general terms, I was satisfied that he was a credible witness.
26. Miss Margiotta on behalf of the claimant has made a number of submissions to support her proposition that on the balance of probabilities it is likely that the prescribed terms were on the form. If I may summarise her submissions in particular those I regard as her strongest ones.
27. Firstly, she submits that Barclaycard are and were a reputable large-scale organisation who had in 1996 a legal department and a compliance department and therefore, in effect, it is inherently unlikely that they would make the mistake of sending out an application form in a magazine without the prescribed terms stipulated in the Regulations to which I have referred, particularly as the Regulations has been in force for a number of years at that time.
28. That is a perfectly proper point for Miss Margiotta to make. However, it seems to me that it would be wrong for me to place too great a reliance upon that, particularly as one knows that there have been numerous more recent examples where financial institutions of similar size have on occasions made errors in terms of compliance with their financial services obligations.
29. Secondly, and this is also a good and proper point to be made on behalf of the claimant, if one actually looks at the form that was signed by Mr Wegmuller, difficult though it is to make out, one part that is plain if one looks carefully, and Mr Wegmuller agreed this, is that he did sign a caption stating that:

“This is a Credit Agreement regulated by the Consumer Credit Act 1974. Sign only if you wish to be bound by the terms of the agreement.”
30. Miss Margiotta submits that this sentence having been signed by the defendant (and it is not suggested by the defendant that he had difficulties with the English language, although he is of course of Swiss nationality originally), the likelihood is that there would have been “some” terms and conditions somewhere on that document otherwise he would not have signed this. However, the mere fact that there may not have been such terms and conditions on the face of the document may not necessarily have been a critical factor in the decision whether or not to sign this application form. The evidence that he gave was that what was at the forefront of his mind was obtaining a credit card, rather than the detail of the terms and conditions, which of course is something of a two-edged sword.
31. In my judgment, those were the strongest submissions. However, I do not accept that those factors are conclusive.

32. I am satisfied on the balance of probabilities that the application form signed by the defendant did not contain the three prescribed terms to which I have referred, and I come to that conclusion principally for these reasons.
33. Firstly, I look at the document itself; the application form. That is the best evidence that the claimant has been able to provide in terms of the documentation. Quite simply, there is no reference whatsoever to any of those three prescribed terms that are required. It is submitted that I should infer that it is more probable than not that they would have been there, either in the blacked-out areas or on the back. I am afraid there is quite simply insufficient evidence to enable me to draw that inference. And I repeat that matters may have been very different if further and better evidence had been produced, either from the claimant or Barclaycard, as to what the position was back in 1996. We do not have that evidence and I have to deal with the evidence that is before me.
34. The second real reason why I find in favour of the defendant on this issue is that in general terms I accept his evidence as I have set out, and having heard him give evidence today I found him to be a credible witness.
35. Mr Turner on behalf of the defendant made various other submissions associated with the standard terms and conditions on the blank documentation. I did not find those submissions of such force as his others and they did not play a major part in my conclusion.
36. I am satisfied on the balance of probabilities that the requisite prescribed terms and conditions were not contained in, on or together with the document that was signed by the defendant, and therefore I conclude that this is a credit agreement that cannot be enforced.
37. Before I leave this matter, just for the avoidance of doubt and clarity, given that Miss Margiotta has indicated, in a slightly equivocal submission, that she wishes to reserve herself on the burden of proof, I hereby indicate that it would have made no difference to my ultimate conclusion upon whom the burden of proof lay because the result would have been the same in either event.

End of judgment

1 **MR RECORDER CAMPBELL:** Mr Turner, does - -

2 **MR TURNER:** Your Honour, yes, the appropriate order in light of
3 Your Honour's findings would be for the claim to be dismissed.

4 **MR RECORDER CAMPBELL:** Yes.

5 **MR TURNER:** With the claimant to pay the defendant's costs. It is
6 listed as a Fast Track trial.

7 **MR RECORDER CAMPBELL:** Yes.

8 **MR TURNER:** And there are schedules available. I don't know
9 whether Learned Friend and I could have five minutes?

10 **MR RECORDER CAMPBELL:** Yes.

11 **MR TURNER:** And we can at least narrow the issues or perhaps go
12 further than that.

13 **MR RECORDER CAMPBELL:** Yes. Of course you may have that time. Miss
14 Margiotta, in terms of the substantive orders, do you disagree with what Mr Turner has
15 submitted.

16 **MISS MARGIOTTA:** I don't disagree, Your Honour. On that issue, which
17 was a preliminary issue, it is that it's to be dismissed. My instructions as to costs, I given the
18 amount and it was under a Conditional Fee Agreement, they should go up for a detailed
19 assessment.

20 **MR RECORDER CAMPBELL:** Yes. In terms of - - I haven't looked at the schedule,
21 Mr Turner. I haven't looked at the schedule, but in terms of the submission as to the
22 Conditional Fee nature of it, is Miss Margiotta not right, that given it's a Conditional Fee
23 Agreement that it ought to go off?

24 **MR TURNER:** No, Your Honour, she's not. A huge number of Fast
25 Track trials that I have dealt with are under a Conditional Fee Agreement.

26 **MR RECORDER CAMPBELL:** Yes.

27 **MR TURNER:** But could I take some instructions because according to
28 the Rules - -

29 **MR RECORDER CAMPBELL:** Yes.

30 **MR TURNER:** If there is to be a detailed assessment, the Court's
31 obliged to consider the question of a payment on account of costs.

32 **MR RECORDER CAMPBELL:** Yes.

33 **MR TURNER:** So it might be that there's a figure that my instructing
34 solicitors will be happy with as a payment on account.

1 **MR RECORDER CAMPBELL:** Yes.

2 **MR TURNER:** Because clearly because of the complexity of the case,
3 there's going to be some issue as to costs - -

4 **MR RECORDER CAMPBELL:** Yes.

5 **MR TURNER:** In any event.

6 **MR RECORDER CAMPBELL:** Yes. It seems to me that it would be appropriate for me
7 to rise for five minutes to see whether anything - -

8 **MR TURNER:** I may be able to forestall that problem

9 **MR RECORDER CAMPBELL:** Yes.

10 **MR TURNER:** If the amount of any payment on account of costs can't
11 exceed a reasonable proportion of what's likely to be awarded.

12 **MR RECORDER CAMPBELL:** Yes.

13 **MR TURNER:** In other words, there must be no danger of over-
14 payment.

15 **MR RECORDER CAMPBELL:** Of course.

16 **MR TURNER:** Bearing in mind this has run to trial and the complexity
17 that it is, those instructing me would be happy with a detailed assessment if there were a
18 £10,000 payment of account of costs.

19 **MR RECORDER CAMPBELL:** Perhaps instructions can be taken now.

20 **MISS MARGIOTTA:** I would have to take instructions on that and as to
21 whether there was any - -

22 **MR RECORDER CAMPBELL:** Yes. Well, instructions can be taken on that. Is it
23 likely that the answer to that can be obtained...?

24 **MISS MARGIOTTA:** Hopefully, yes.

25 **MR RECORDER CAMPBELL:** Yes. I shall rise for five minutes. Just before I go, is
26 the - - have you sent in your schedule of costs? I'll have a look at it while - -

27 **MR TURNER:** They were filed at Northampton before [inaudible]

28 **MR RECORDER CAMPBELL:** They're probably in here. I shall take this out and have
29 a look at them.

30 *Adjournment*

31 **MISS MARGIOTTA:** Your Honour, I have a couple of applications to make
32 before dealing with the issue of costs.

1 **MR RECORDER CAMPBELL:** Yes.

2 **MISS MARGIOTTA:** The first relates to what is appropriate. I agree that
3 earlier I said that striking out the claim was [inaudible] - -

4 **UNIDENTIFIED:** [inaudible]

5 **MISS MARGIOTTA:** Sorry, dismissing. Sorry, dismissing the claim.
6 [inaudible] Dismissing the claim was the appropriate avenue.

7 **MR RECORDER CAMPBELL:** Yes.

8 **MISS MARGIOTTA:** However, upon further consideration of your judgment and
9 discussion with my instructing solicitors, it would be my submission that a stay of the
10 proceedings would be the best course forward. The reason for this is that I note within your
11 judgment, within, just towards the end, you say “there was insufficient evidence to enable
12 you to draw the inference on the evidence available. Matters may have been very different if
13 that evidence were available to the Court.” Now obviously you did hear from Mr Titherley
14 today that efforts were made and no response was given. In my submission, given that it’s a
15 matter of that particular application, maybe a comparison could be, further efforts could be
16 made or someone from Barclays could be brought to Court in relation to that. The claimant
17 should be given the opportunity to make those kinds of inquiries and I would suggest a period
18 of stay for two months. If of course at the end of that two months, the claimant is no further
19 on, that doesn’t change the position and the judgment that you have given. However, if after
20 that period of say two months they have been able to either get hold of a comparative
21 application form or perhaps there was a photocopy of that side of the application form that
22 Barclays were able to provide, or there is a statement from somebody from Barclaycard in
23 relation to the system in place in 1996, then that may change the position in your judgment.
24 Of course, that is a matter for you and I make the application that instead of a dismissal, a
25 stay of proceedings to enable that to happen should occur.

26 If you are minded to continue on the path of dismissal of the claim, it is my instructions to
27 seek permission to appeal against that, the reasons being that there is a fact well made in
28 relation to the inferences that Your Honour has said he is unable to draw in the case, and of
29 course in relation to the fact that terms of some kind were referred to it’s the submission that
30 the evidence of Mr Wegmuller in this respect cannot have been credible and therefore an
31 error of fact was made.

32 Further and better particulars of appeal may be made at a later date, but I do make that
33 application today before you. I note in the CPR in relation to fresh evidence on appeal, at
34 52.11.2, the case of *Ladd v Marshall*, the guidelines there for an appeal court to take into
35 account, which it would be my submission you could consider in relation to the stay, are that
36 the evidence could not have been obtained with reasonable diligence for use at trial, and of
37 course reasonable diligence has to include proportionality and you have both submissions and
38 evidence in relation to that. So in order to get this evidence from Barclays, it would require
39 going over and above what the reasonable diligence would be.

40 The second point would be that it would have an important influence on the result of the case,
41 although not necessarily decisive, and having heard from Your Honour and directed the
42 Court’s attention to what was said in your remarks, it may have had an effect and you say the
43 position may have been very different.

1 **MR RECORDER CAMPBELL:** Yes.

2 **MISS MARGIOTTA:** And the final point is that “*the evidence must be such as is*
3 *presumably to be believed ... it must be apparently credible, although ... not*
4 *incontrovertible.*” Again, if this is something that comes from Barclaycard, the original
5 lender in this case, it would be my submission that this would be credible evidence to put
6 before the Court and of course it would up for Mr Wegmuller at that point to make any
7 submissions he should like.

8 It may be that this piece of paper comes back and it still does not have the prescribed terms,
9 in which case of course we are rather stuck with that. But if that’s not the case and the
10 original lender does have something which says “In 1996 we sent out a mailshot in a
11 magazine; here’s what we sent”, and that does have the prescribed terms in it, then of course
12 that dramatically would alter the judgment that Your Honour has given today, and indeed the
13 claim. So in those circumstances, and to save the costs of an appeal perhaps on that point if
14 the evidence were obtained later, in my submission a stay now would enable later costs and
15 then in terms of case management and the overriding objective, that would be the best way
16 forward.

17 **MR RECORDER CAMPBELL:** Mr Turner, I don’t think I need to trouble you on either
18 of those applications.

MR RECORDER CAMPBELL:

1. I have to deal with two applications made on behalf of the claimant and I shall take them in turn.
2. The first application made by the claimant is this. On the preliminary issue that I have just decided, I reached a conclusion on the relevant factual scenario that meant that the credit agreement was unenforceable. It had been agreed between both counsel a few minutes ago that in those circumstances, the appropriate order would be for the claimant's action to be dismissed.
3. However, Miss Margiotta on behalf of the claimant has considered the matter further with the paralegal attending her and now submits that the appropriate order that I should make is not that it be dismissed, but that it should be stayed for this reason; it had been noted that in my judgment I pointed out that there was a lack of evidence that was put forward by the claimant, and in particular identified what I regarded as perhaps a surprising and striking absence of evidence from Barclaycard. It is now suggested that I should stay the matter so that an opportunity is given for that further evidence to be obtained by Barclaycard.
4. It would be quite wrong for me to entertain any such application. Had the claimant wished or been able to provide that evidence from Barclaycard, then the claimant **ought** to have produced it for **this** trial and not another proposed trial with consequential additional costs, and it is simply not good enough to suggest, as Miss Margiotta has, that the reason that the claimant did not produce that better evidence was because of issues of proportionality, yet now that the claimant has lost the case it should have a further opportunity to provide better evidence.
5. So I am afraid that that application must be dismissed.
6. The second application made by claimant is for permission to appeal, and the essence of that submission is that the finding of fact is incorrect because in effect Mr Wegmuller, the defendant, was not credible.
7. I am not prepared to give permission to appeal. My decision was based upon a finding of fact that was based upon the evidence that I saw and heard before me. I heard Mr Wegmuller give evidence. I made allowance for the fact that there were fluctuations in his evidence and that he had difficulties of recollection, which were not surprising, but I concluded that in general terms he was a credible witness whose evidence I accepted.
8. I repeat that there was a lack of proper clear documentation, for whatever good reason there may or may not have been on the Claimant's side of the case.
9. In my judgment, there is no realistic prospect of success and therefore I will not grant permission to appeal.

End of judgment

1 **MISS MARGIOTTA:** Thank you, Your Honour.

2 **MR TURNER:** Your Honour, Learned Friend does not have
3 instructions to agree to a £10,000 payment on account of costs.

4 **MR RECORDER CAMPBELL:** Yes.

5 **MR TURNER:** So I, on behalf of the defendant, effectively offer her
6 two choices.

7 **MR RECORDER CAMPBELL:** Yes.

8 **MR TURNER:** Whichever she would prefer. The first is that a £10,000
9 payment on account of costs with a detailed assessment, and the second, and obviously it's a
10 matter for the Court.

11 **MR RECORDER CAMPBELL:** Yes.

12 **MR TURNER:** So that everyone understands what I'm saying, the
13 second is a summary assessment. Does Your Honour have a White Book?

14 **MR RECORDER CAMPBELL:** I didn't bring my own White Book because normally
15 my experience of this Court is that there's always one available. I think the resident judges of
16 this Court has the Civil Court Service but [inaudible]

17 **MR TURNER:** [inaudible] if Your Honour looks at page 1335.

18 **MR RECORDER CAMPBELL:** Yes.

19 **MR TURNER:** That should be the costs practice direction.

20 **MR RECORDER CAMPBELL:** Yes.

21 **MR TURNER:** And Your Honour will see there, at 13.2, paragraph
22 13.2 of the costs practice direction.

23 **MR RECORDER CAMPBELL:** Yes.

24 **MR TURNER:** That the Court should make a summary assessment if
25 the costs, where there's been a Fast Track trial which is finished with in the day.

26 **MR RECORDER CAMPBELL:** Yes.

27 **MR TURNER:** So that's the first point. If Your Honour then goes over
28 to 14.1, which is at page 1338, the mere fact that there's a Conditional Fee Agreement is not
29 a reason for the failure to perform a summary assessment of costs.

30 **MR RECORDER CAMPBELL:** Yes.

31 **MR TURNER:** So the ordinary rule, unless there are good reasons to
32 the contrary, is that there should be a summary assessment today.

33 **MR RECORDER CAMPBELL:** Yes, yes.

1 **MR TURNER:** At page 1580, there's a useful - - it's almost a practice
2 direction, but it's really just guidance. It's actually guidance. 1580.

3 **MR RECORDER CAMPBELL:** Is this [inaudible]

4 **MR TURNER:** No, it's just to drive home the point.

5 **MR RECORDER CAMPBELL:** Yes.

6 **MR TURNER:** The mere fact that there are additional liabilities does
7 not mean that the Court should shy away from a summary assessment - in points 2 and 3 at
8 the top of that page. So unless there are exceptional circumstances, the Court should perform
9 a summary assessment today.

10 **MR RECORDER CAMPBELL:** Yes.

11 **MR TURNER:** I would [inaudible] unless the Court is minded to make
12 a payment on account, and in that regard I would invite Your Honour to turn to page 1288.

13 **MR RECORDER CAMPBELL:** Before we go there, from the matters to which you've
14 referred my attention - of course I'll hear submissions from Miss Margiotta - the guidance
15 appears to be that I should have a summary assessment.

16 **MR TURNER:** Yes, that's right. So in effect, with, frankly, if there's
17 summary assessment, all costs will be payable within fourteen days.

18 **MR RECORDER CAMPBELL:** Yes.

19 **MR TURNER:** So we are offering that crumb of comfort to the
20 claimant.

21 **MR RECORDER CAMPBELL:** Yes.

22 **MR TURNER:** That they are [inaudible]

23 **MR RECORDER CAMPBELL:** Rather than going into what I would do if I decide not
24 to do a summary assessment, I would ask now for the submissions from the paying party as to
25 the appropriate course. Are you submitting against me making a summary assessment?

26 **MISS MARGIOTTA:** Indeed, Your Honour, yes, I am. Effectively, I'm not
27 in a position today to go through all of the bits and pieces and the specific attendances on
28 opponents and other parties and other matters that have been put forward in the schedule of
29 costs today. My instructing solicitor is a paralegal at the firm; he's the person sitting behind
30 me. He's not in a position to do it. I understand from reading the numerous correspondence
31 between the parties that there are disputes in relation to the attendances on opponents in
32 letters. A number of Part 18 requests were made at various points. It would be the
33 submission in relation to those, those could have been dealt with in one Part 18 request and
34 they didn't need to be dealt with in the volume that they were. As a result of that, there's a
35 dispute in relation to the letters that were sent. We don't have the specific time spent on each
36 of those before the Court; just a general number. In addition to that, we don't have the
37 specific amount of time spent on the defence, and Your Honour will of course note there's a
38 number of issue that are raised on the defence, including a significant amount which would

1 have been dropped today. My skeleton had some sixteen issues raised in it. Upon speaking
2 to Learned Friend today, in this particular Court [inaudible] appear there would have only
3 been four issues which would have been [inaudible] sorry - -

4 **MR TURNER:** Your Honour, I made certain concessions because of
5 constraints on time estimate.

6 **MISS MARGIOTTA:** Time estimate.

7 **MR TURNER:** So we could be pragmatic. That's why I [inaudible]
8 deal with all issues. That does not mean those points were improperly made in the defence.

9 **MR RECORDER CAMPBELL:** All right.

10 **MISS MARGIOTTA:** All right, well in that case, Your Honour, points being taken
11 which were still pursued or still being pursued up to the point of dismissal included the
12 claimant's case being sufficiently pleaded, proving validity of the assignment, proving a
13 credit licence complaint, proving a Section 136 [inaudible] compliant notice, proving that
14 written and/or verbal demands were made, proving the contractual entitlement to interest,
15 proving what that rate of interest was, and of course that required a significant amount of
16 work by both parties, which in my submission, given what were the real issues of this case,
17 were unnecessary. That would therefore have added a significant amount to the bill of costs
18 which was put forward today, and again we don't have a detailed breakdown on exactly how
19 much work and how time was spent in relation to each of those issues.

20 The particulars of claim for the principle sum is worth just over £7,000 and plus the interest,
21 Your Honour, £12,000. Learned Friend has informed me that including the 100% success fee
22 they seek, their costs are over £34,000. Now, I appreciate this matter was taken under a
23 Conditional Fee Agreement, and of course that's something that we were put on notice of, but
24 there does have to be some element of proportionality in relation to this, and in my
25 submission the sum of £34,000, whether or not on a CFA, which is treble the amount of the
26 claim up to today's date including disbursements, is disproportionate, and therefore detailed
27 assessment is necessary in order for the Court to give a proper account and what is
28 proportionate in relation to the case.

29 Unfortunately, I'm not in a position, and my instructing solicitor has informed me he won't
30 pay, or won't agree to pay, the £10,000 on account. That's the position I'm in today, so - -

31 **MR RECORDER CAMPBELL:** Right, well, all right, all right. I'm conscious of the
32 time. Mr Turner, in terms of - - it does seem to me that you're absolutely right, that the
33 ordinary rule is that I should summarily assess the costs, and that was what I was proposing
34 to do. However, the essence of the submissions made by Miss Margiotta is that there are
35 going to be quite a lot of disputes, more than the ordinary case, that require to be done justice
36 to, if I can put it in that way. It does seem that that may well be right, so moving on to your
37 second default submission, if I can - -

38 **MR TURNER:** In that case, Your Honour, the appropriate order then
39 would be for the claimant to pay the defendant's costs, to be subject to detailed assessment in
40 default of agreement.

41 **MR RECORDER CAMPBELL:** Yes.

1 **MR TURNER:** And we then move onto the next question, which is
2 when a successful party has a costs order in their favour - -

3 **MR RECORDER CAMPBELL:** Yes.

4 **MR TURNER:** - - their costs are going to be assessed; they are going to
5 receive a sum. They are being kept out of their costs money when the assessment - -

6 **MR RECORDER CAMPBELL:** Yes, yes.

7 **MR TURNER:** Should there be a payment on account? And in that
8 regard, I'd refer Your Honour to page 1288 of the White Book.

9 **MR RECORDER CAMPBELL:** It be made plain that this is something that is not going
10 to be consented to.

11 **MR TURNER:** Yes.

12 **MR RECORDER CAMPBELL:** So you're inviting me to order it.

13 **MR TURNER:** Yes.

14 **MR RECORDER CAMPBELL:** Yes.

15 **MR TURNER:** And Your Honour will see there's a considerable
16 section on payment on account of costs there. If Your Honour looks in particular on page
17 1290.

18 **MR RECORDER CAMPBELL:** Yes.

19 **MR TURNER:** If I could just scuttle across Learned Friend to look at
20 the paragraph.

21 **MISS MARGIOTTA:** Yes [inaudible]

22 **MR TURNER:** The second paragraph on that page, the general rule is
23 that there should be payment on account. But of course it should not exceed a reasonable
24 proportion of the amount likely to be recovered.

25 **MR RECORDER CAMPBELL:** Yes.

26 **MR TURNER:** Now if Your Honour then turns to the statement of
27 costs.

28 **MR RECORDER CAMPBELL:** Yes.

29 **MR TURNER:** Your Honour will see that the profit costs of those
30 instructing me, and these are the base profit costs, and incidentally I would just point out
31 kindly in terms of proportionality Learned Friend was wrong to have referred, with the
32 greatest of respect, to refer to the fee inclusive of additional liabilities. It's the base costs
33 which are taken into account.

34 **MR RECORDER CAMPBELL:** Yes.

1 **MR TURNER:** But for the purpose of considering what is likely to be
2 recovered and therefore a reasonable sum to allow as a payment on account, of course the
3 success fee to some extent is likely to be recovered. So we have £14,323.90 x 2 plus it's a
4 100% success, plus 20% because there's VAT - £34,377.36. So the amount claimed under
5 the bill, for profit costs alone, is £34,377. There are then disbursements on top, although I
6 will accept [inaudible] my fee will be capped for the hearing at the Fast Track level.

7 **MR RECORDER CAMPBELL:** Just remind me, what is that?

8 **MR TURNER:** It will depend on what's on the claim form, the claim
9 form isn't entirely important.

10 **MR RECORDER CAMPBELL:** Yes.

11 **MR TURNER:** It's my reference to the amount claimed. It's probably
12 going to be £1,035, I would guess. But it doesn't matter; the point is this – if you were to put
13 £1000 on that £34,000, if you put nothing on it, £10,000 is a very modest proportion, and the
14 likelihood of the defendant, on detailed assessment, producing a bill of £35,000 plus, less
15 than anything close to £10,000 is extremely remote.

16 **MR RECORDER CAMPBELL:** Yes.

17 **MR TURNER:** So it's, in my submission, quite a modest request so far
18 as a payment on account is concerned.

19 **MISS MARGIOTTA:** As to paragraph 2 on page 1290, yes it says that in
20 general an interim order for payment of costs prior to assessment should be made, but the
21 Court has to take into account all of the circumstances, including in the case the unsuccessful
22 parties wish to appeal. Now, I appreciate that you have turned down both my application to
23 stay today, and my application for permission to appeal.

24 **MR RECORDER CAMPBELL:** Yes.

25 **MISS MARGIOTTA:** But I can confirm that my instructing solicitors are
26 likely to want to appeal, particularly if they are able to obtain the fresh evidence, which in my
27 submission would be admissible to be - -

28 **MR RECORDER CAMPBELL:** But they must do whatever they, as ever they see fit.

29 **MISS MARGIOTTA:** Indeed, Your Honour. So that's something for you to take into
30 account. The relative financial position – of course, the claimant in this case is a large
31 organisation. There's no assertion made to they won't be able to pay the costs when it is
32 eventually assessed, and there's no allegation made they're going to run off and not make any
33 provision. And the overriding objective that you have to deal with cases justly, I appreciate
34 again we've gone through the preliminary issue today, but you heard me in relation to
35 summary assessment – there is a very large dispute about the proportionality of the costs in
36 this case, and exactly what was set forward and what was claimed by the other parties. Even
37 if they got a £14,000 base cost, it's a significant amount of money and it's still higher than
38 the amount claimed.

39 Just taking a couple of points, 14 hours on documents when they look a bit thin to me, to be
40 an excessive number – sorry, 28.9 hours on documents. Attendance on parties was 14.2.

1 28.9 on documents seems a significant amount of time to be spending what is essentially
2 boiling down to a defence and two witness statements. Of course, there is consideration of
3 documents et cetera, but 28.9 plus another 1.1 plus 0.5 – they're not going to get anything
4 near that figure, in my submission, when it comes to the detailed assessment of costs. And
5 that's just one example I'm highlighting to you right now.

6 So in terms of payment on account of costs, I appreciate that it says in general interim costs
7 order should be made, but the amount sought by the defendant in the case of £10,000 is a
8 significant amount of money. It's higher than, in my submission, they may receive at the
9 end. I appreciate there is the CFA percentage to be taken into consideration as well. If you
10 were minded to make any payment on account today, it would be my submission that perhaps
11 disbursements could be awarded in relation to counsel's fees as I understand on the basis of
12 the CFA it's not payable until the end. But perhaps, and Mr Wegmuller has had to put the
13 instructing solicitors in funds for counsel today, so perhaps that figure could be paid on
14 account so that he's not out pocket there. But as [inaudible] actually Mr Wegmuller himself,
15 not the instructing solicitors - -

16 **MR RECORDER CAMPBELL:** No.

17 **MISS MARGIOTTA:** - - out of pocket at this point

18 **MR RECORDER CAMPBELL:** No.

19 **MISS MARGIOTTA:** That may be one way round it. That's just a tentative
20 suggestion.

21 **MR TURNER:** Your Honour, I don't know if [inaudible] but I have
22 just worked it out. £10,000, if you take off the counsel's fee which is fixed under the rules,
23 £1,000, not even adding VAT, if you take off the 100% success fee, and if you take off the
24 VAT, that's asking for £3,750 profit costs, Your Honour. That's what [inaudible]

25 **MR RECORDER CAMPBELL:** Right.

26 **MR TURNER:** The chances of the claimant reducing the figure down
27 to that are, well, virtually non-existent.

28 **MR RECORDER CAMPBELL:** Yes.

MR RECORDER CAMPBELL:

1. In terms of the costs of this matter, it is a Fast Track case. My initial inclination was to summarily assess the costs. However, I have been persuaded by Miss Margiotta that there are some serious disagreements with regard to the costs that properly require a detailed assessment. So I am not going to make that Order.

2. The Costs Order that I will make is that the claimant pay the defendant's costs, to be the subject of a detailed assessment in default of agreement.

3. I am next asked, in those circumstances, by the claimant to make an interim award on account towards the defendant's costs. I have been referred in particular to the notes in the White Book starting at paragraph 44.3.50. In particular, to a paragraph the first few sentences of which set out the principles very helpfully in the following terms:

“In general, an interim order for payment of costs prior to assessment should be made, but the Court has to take into account all the circumstances in the particular case, including the unsuccessful party's wish to appeal, the relative financial position of each party and the Court's overriding objective to deal with cases justly.”

4. Of course, I bear in mind that the defendant has won the case and that the ordinary rule is that there should be a summary assessment of costs. I bear in mind that notwithstanding the refusal of my permission to appeal, that it is still the wish of the claimant to appeal and I do take that into account.

5. I have paid close regard to the defendant's statement of costs and I do take into account the possibility that some of the claimant's arguments will succeed with a base cost of over £14,000; those may be knocked down to a degree. But I have to bear in mind that this was a complicated case in which both sides put an enormous amount of work in. I have already alluded earlier to the fact that it was allocated to the Fast Track initially, but it certainly would not have surprised me if, after all the evidence had been obtained, it had been reallocated, and I certainly gave thought this morning as to whether I ought to reallocate it, having regard to its complexity and length.

6. There is a CFA uplift. I am told it is 100%. That may be challenged to a certain extent, but this was a hard fought case to trial and in my judgment there is bound to be some significant uplift on that. And then there is VAT; that would bring the claim for costs up to £33,377-odd, and there are disbursements on top.

7. Even if I take into account those being dramatically knocked down, I accept the submission that Mr Turner has made that there is no prospect of those costs, in a case like this, dipping beneath the £10,000 mark, and so the Order that I make is that the claimant pay to the defendant, on account of the defendant's costs, the sum of £10,000. And that must be paid within the next fourteen days,

End of judgment

1 **MR RECORDER CAMPBELL:** That's the ordinary [inaudible]

2 **MR TURNER:** By the 7th of February.

3 **MR RECORDER CAMPBELL:** 7th of February.

4 **MR TURNER:** 4.00pm.

5 **MR RECORDER CAMPBELL:** Yes.

6 **MISS MARGIOTTA:** Your Honour, I am conscious that the claimant is a large
7 organisation and that the usual would be fourteen days.

8 **MR RECORDER CAMPBELL:** No.

9 **MISS MARGIOTTA:** But I would perhaps ask for twenty-eight days. I appreciate
10 that might be pushing it a little bit, but given that Mr Titherley's unable to tell me whether or not
11 fourteen days is okay, I wouldn't want the claimant to go into default on that. Or if not twenty-
12 eight, then at least twenty-one.

13 **MR RECORDER CAMPBELL:** Well, you're point about being a financial organisation
14 should not get in the way of paying a cheque promptly. But given the difficulties you're under, I
15 am prepared to accede to your request to the limited extent of extending it to twenty-one days.
16 When will that take us to?

17 **MR TURNER:** The 14th.

18 **MISS MARGIOTTA:** Thank you, Your Honour.

19 **MR RECORDER CAMPBELL:** Is there anything else?

20 **MISS MARGIOTTA:** No, Your Honour.

21 **MR TURNER:** I am asked whether Your Honour has formally pronounced
22 the claim dismissed.

23 **MR RECORDER CAMPBELL:** Yes.

24 **MR TURNER:** I'm sure it is implicit, as we've gone on to deal with costs
25 and the - -

26 **MR RECORDER CAMPBELL:** I think it was probably, I'll give you your White Book back,
27 but it's probably more than implicit because there was an application to challenge it.

28 **MR TURNER:** Oh, yes [inaudible]

29 **MR RECORDER CAMPBELL:** I hope not. For the avoidance of doubt, the Order will be:

30 1. The claimant's claim is dismissed;

31 2. The Order for costs;

32 3. The Order for payment of account of those costs; and (and this should be part of the Oder)

33 4. Permission to appeal refused.

34 Is there anything else?

1 **MR TURNER:** Not from the defendant, Your Honour, no.

2 **MR RECORDER CAMPBELL:** Right, thank you. And I would again like to thank both
3 counsel for the very great assistance that I received in this matter, which was of some
4 complication. Not necessarily to go before any Costs Judge, but it seems to me that when one
5 looks at the amount of fees that both counsel will be receiving today, they have certainly earned
6 their money on this particular case.

7 *End of hearing*