Neutral Citation Number: [2024] EWHC 1348 (Comm)

Claim No. LM-2023-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Date: 05/06/24

Before :

John Kimbell KC
(sitting as a Deputy High Court Judge)

- -

Between :

(1) ANA TOMIC **Claimants**
(2) JENS-PETER STEIN

- and -

(1) THE RESIDENCES BY DAMOOR LIMITED **Defendants**
(2) ANTHONY JAMES CAMILLE COTRAN

- -

Jonathan Selby KC (instructed by **Withers LLP**) for the **Claimants**
Helen Galley (instructed by **Penman Sedgwick**) for the **Defendant**

Hearing date: 12 April 2024

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APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 5 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

John Kimbell KC sitting as a Deputy High Court Judge:

Introduction

1. On 1 February 2023 I made an order ('**the Order**') dismissing the Claimants' application for a freezing injunction. As part of that order, the Second Defendant ('**Mr Cotran'**) gave an undertaking to the Court ('**the Undertaking**'). The terms of the Undertaking were agreed between counsel as follows:

> "The Second Respondent (personally and in his capacity as a director of the First and Third Respondents) undertakes that 50% of the net proceeds of sale of 50 Dewhurst Road, London (for the avoidance of doubt, "net" includes net of all and any fiscal liabilities of the Third Respondent such as corporation tax liability resulting from the sale) shall be deposited into an account in his name at QIB (UK) plc and shall not be removed from England and Wales, or in any way disposed of, dealt with, or have their value diminished save that this undertaking shall not:
>
> 1) Prohibit the Second Respondent from spending up to £7000 a week towards his ordinary living expenses, including, but not limited to (to the extent that such expenses fall within the scope of the Second Respondent's ordinary living expenses): (1) rent and/or a contribution towards rent of Flat A, 42 Claydon House, Chelsea Waterfront, Waterfront Drive, London SW10 0DD; (2) his children's school fees or a contribution to them, plus any reasonable sums invoiced to the Second Respondent in respect of legal advice and representation.
>
> 2) Prohibit the Respondents from dealing with or disposing of any of the above proceeds of sale or sums standing to the credit of the above Q.I.B (UK) plc account attributable to such proceeds of sale in the ordinary and proper course of their business (including, but not limited to, to the extent that the transaction otherwise falls within the ordinary and proper course of their business, the purchase of a replacement residential property in the United Kingdom for the Second Respondent and his family).

> The Respondents may agree with the Applicants' legal representatives that the above spending limits should be increased for one-off payments or generally (consent in relation to any request to increase not to be unreasonably withheld) or that this undertaking should be varied in any other respect, but any agreement as aforesaid must be in writing (which includes for the avoidance of doubt an exchange of emails). There shall be liberty to apply to the court in the event of any dispute arising in connection with this undertaking."

2. By an application notice dated 17 October 2023, the Claimants applied for orders to confirm and secure compliance with the Undertaking ('**the Application**'). The Claimants had become concerned because Mr Cotran had failed to respond to a series of letters sent by the Claimants seeking reassurance that the Undertaking had been complied with.

3. One part of the Application (the provision of a statement) was resolved shortly before CCMC on 24 November 2023. A second element (disclosure of bank statements) was dealt with by consent just before a hearing scheduled to take place on 13 December 2023. The remaining issues were supposed to be dealt with at a hearing on 1 March 2024 but that hearing was vacated because of a failure by the Claimants' solicitors to file a hearing bundle on time. The hearing of the remaining issues was re-listed before me for half a day on 12 April 2024.

4. By 18.43 on Thursday on 11 April 2024, the parties had agreed a modified undertaking ('**the Modified Undertaking'**) which I approved that evening. The key provisions in the Modified Undertaking were:

> "The Second Defendant (personally and in his capacity as a director of Damoor Limited) undertakes to the Claimants and the Court as follows:
>
> 1)All monies currently deposited in Damoor Limited's bank account at QIB (UK) plc (sort code 40-64-24, account number 10037849) ("**the Monies**") shall be forthwith transferred to the Second Defendant's solicitors, Penman Sedgwick LLP.

> 2)The Second Defendant will not withdraw any of the Monies from his solicitors' account other than for the purposes of funding the Second Defendant's costs and disbursements of these proceedings….
>
> 7) The Second Defendant will instruct Penman Sedgwick LLP and any solicitors who may be subsequently instructed by the Second Defendant in these proceedings:
>
> > 7.1) by 4pm on 19 April 2024, to notify the Claimants' Solicitors whether or not the transfer provided for by paragraph 1 above has taken place; and
> >
> > 7.2) not to release any of the Monies other than for the purposes of funding the Second Defendant's costs and disbursements of these proceedings;
> >
> > and
> >
> > 7.3) not to release any of the Monies to enable the Second Defendant to meet his living expenses;"

The other parts of the Undertaking which I have omitted were various fortifications to protect the Claimants in the event that Penman Sedgwick ceased to act for Mr Cotran.

The Three Schedules

5. As a result of the agreement on the terms of a Modified Undertaking, the only remaining issue to be dealt with was costs. The Claimants sought a total of £58,529.50 under three separate costs schedules ('**the Schedules**'):

Schedule No.	**Hearing**	**Amount**
1	17 October 2023	£9,420
2	13 December 2023	£7,621
3	12 April 2024	£41,488

6. A cost schedule submitted on behalf Mr Cotran referred only to costs incurred in relation to the 12 April 2024 hearing in the sum of £14,427.50.

7. I was sent a 30 page skeleton by Mr Selby KC on behalf of the Claimants. This included a four page schedule of payments made by Mr Cotran while he was engaged by the Claimants. Ms Galley's skeleton for the Defendants ran to 18 pages. The parties spent half a day making submissions on costs. I was referred to:

    a. A 486 page CMC Bundle;

    b. A 493 page Application Bundle, which had been prepared for the hearing listed 1 March 2024;

    c. A 212 page Supplemental Bundle for 12 April hearing

    d. A 27 page bundle of supplemental correspondence.

    e. A 145 page authorities bundle.

Factual Background

8. The Claimants claim that they have been ripped off by Mr Cotran, their former friend. Mr Cotran's company, the First Defendant, ('**DRL**') had been employed by the Claimants to carry out extensive renovation works at 20 Upper Phillimore Gardens, a residential property owned by the Second Claimant. Mr Cotran invoiced the Claimants via DRL for substantial payments, totalling around £1.8 million said to be in respect of the building works. The Claimants claim that around half of the sums paid by them was diverted and used for Mr Cotran's own personal benefit. Their case is that the value of the work ultimately carried out was around £956k less than the amount paid by them to DRL. In these proceedings, the Claimants are seeking to recover the over-payment. Mr Cotran denies that any money was 'diverted' and says that the value of the work done

corresponds to the sums received. Both parties have instructed expert surveyors in support of their respective cases as to the value of the work done.

9. Mr Cotran's involvement with the building works ceased in September 2022 when he fell out with the Claimants.

10. Having learnt of Mr Cotran's plans to sell his family home at 50 Dewhurst Road the Claimants applied for a freezing order in respect of the sale proceeds. It was this application which led to the Order and Undertaking. The reasons are set out in my Approved Judgment of 20 January 2023. The family home was owned by the Third Defendant ('**Damoor**') of which Mr Cotran and his wife are the sole 50/50 shareholders. Damoor had an account with the Qatari Islamic Bank ('**QIB**').

11. Following the sale of the home, the net proceeds of £1,893,700.59 were paid into Damoor's account at QIB ('**the QIB Account'**) and not an account in the name of Mr Cotran, as required by the Undertaking.

The Application Notice

12. The original application notice dated 17 October 2023 contained three parts:

    a. Part (a) sought an affidavit from Mr Cotran confirming that he had complied and would continue to comply with the Undertaking. Mr Cotran eventually provided a response as part of a witness statement dated 23 November 2023 sent to Court the day before a CCMC took place ('**Cotran 1**').

    b. Part (b) sought disclosure of bank statements for the QIB Account. This part of the application was due to be heard at a hearing on 13 December 2023 but the day before the hearing Mr Cotran agreed to provide the statements on terms that

the costs of the hearing were reserved. A consent order dated 12 December 2023 was agreed.

c. Part (c) of the application notice, sought an order that the balance of the sale proceeds held at the QIB Bank be paid into an escrow account. It was this part of the original application which remained in issue until 11 April when the Modified Undertaking was agreed.

13. In support of the Application, the Claimants relied upon:

a. A first witness statement of Mr Moruzzi dated 17 October 2023 ('**Moruzzi 1**').

b. A second witness statement of Mr Moruzzi dated 7 December 2023 ('**Moruzzi 2**').

14. Mr Cotran's evidence in response to the Application as it developed overtime comprised:

a. Cotran 1.

b. An affidavit dated 21 December 2023 ('**Cotran 2**').

c. A witness statement dated 29 February 2024 ('**Cotran 3**').

The legal basis for the Application

15. The legal basis for the Application was not in dispute. The Undertaking contains an express liberty to apply provision "*in the event of any dispute arising in connection with this undertaking*". The power invoked by the Claimants is that contained in Section 37 of the Senior Courts Act 1981.

16. Section 37 of the Senior Courts Act 1981 provides:

> "(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
>
> (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
>
> (3) The power of the High Court under subsection (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction."

17. Mr Selby submitted that Section 37 jurisdiction can be invoked for the purposes of enforcing an undertaking. He referred me to *Koza Limited v Koza Altin Isletmeleri* [2020] EWCA Civ 1018 ('*Koza*'), at paragraphs 66 and 78. As Popplewell LJ stated:

    a. The Court takes the undertaking as its starting point; it does not revisit whether the undertaking was properly given: see *Koza* [69] –[73].

    b. The Court does not have to try the issue as to whether or not the undertaking has been breached. It proceeds upon a criterion of sufficient arguability and does what is necessary to "police" the undertaking: see *Koza* [79] and [80].

His submission was not challenged by Ms Galley and I accept it.

The Submissions

18. Mr Selby's submission in summary was that the Claimants are entitled to have their costs in the Schedules summarily assessed on an indemnity basis because:

a. By 11 April when the Modified Undertaking was agreed, the Claimants had been wholly successful in all three parts of their original application (described above).

b. Mr Cotran had behaved unreasonably in that he deliberately ignored questions put to him in correspondence and refused to provide the QIB Account statements until the eve of the December hearing.

c. Mr Cotran admitted breaching the Undertaking in a number of respects. He accepted that he had to repay money which he ought not to have taken from the QIB Account.

d. There was a good arguable case of dishonesty in respect of the diversion of money claim and that he had misled the Court about his intention to remain resident in the UK.

19. Ms Galley submitted, in summary, that the appropriate costs order was 'costs in the case' because:

a. Whilst Mr Cotran had admitted breaching the Undertaking, he had explained how it had come about and apologized. He had offered to take steps (and had in fact taken steps) to restore the balance on the QIB Account as if there had been no breach.

b. There had been some unattractive blanking in correspondence by Mr Cotran but he had been acting for a considerable period as a litigant in person and after taking legal advice he had provided the Claimants with the bank statements they had had asked for.

c. The conditions which the Claimants had sought to impose in relation to the escrow account were unreasonable and Mr Cotran had been justified in refusing them. The Modified Undertaking which was ultimately agreed had in substance been offered as early as 28 February 2023.

d. The Claimants had taken a very aggressive and oppressive approach throughout.

e. The Claimants had pursued and then abandoned a bad point in suggesting that Mr Cotran's legal expenses were included in the cap in the Undertaking rather than being in addition.

f. Costs had been wasted by the vacation of the 1 March hearing which was entirely due to the Claimants.

The relevant discretion

20. Although I was not directed to them, I remind myself of the relevant rules. The key provision is to be found in CPR 44.3 and 44.4:

> **44.3**(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 must have regard to all the circumstances, including—
>
> (a)the conduct of all the parties;
>
> (b)whether a party has succeeded on part of his case, even if he has not been wholly successful;
>
> …
>
> (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 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 his case or a particular allegation or issue; and

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

44.4—(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs—

(a)on the standard basis; or

(b)on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 48.3 sets out how the court decides the amount of costs payable under a contract)

(2) Where the amount of costs is to be assessed on the standard basis, the court will—

(a)only allow costs which are proportionate to the matters in issue; and

(b)resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.5)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where—

> (a)the court makes an order about costs without indicating the basis on which the costs are to be assessed; or
>
> (b)the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,
>
> the costs will be assessed on the standard basis.

21. As to whether the assessment ought to be on the standard or indemnity basis, I have had regard to the note at 44.3.8 – 9 in the 2024 White Book and in particular to the following passage:

> "In Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ 879 … the Court declined to give detailed guidance as to the principles to be applied by judges intending to make orders for costs on the indemnity basis, taking the view that they should not strive to replace the language of the rules with other phrases and that the matter should be left so far as possible to the discretion of judges at first instance (at [38] per Waller LJ). The Court held that the making of a costs order on the indemnity basis would be appropriate in circumstances where: (1) the conduct of the parties or (2) other particular circumstances of the case (or both) was such as to take the situation "out of the norm" in a way which justifies an order for indemnity costs (at [31] per Lord Woolf LCJ and [39] per Waller LJ)."

Analysis

22. In broad terms the application of the basic test in CPR Rule 44.3(2) is quite straightforward. In the Application the Claimants sought three things: (1) an explanation of what had happened to the proceeds of sale (2) disclosure of the QIB bank statements (3) a transfer of the remaining proceeds into an escrow account. All three elements have now been conceded.

23. The Application was also made on the basis that it was appropriate for the Court to "police" the Undertaking because the Claimants believed that the Undertaking was being breached. Had Mr Cotran responded to the requests for information and reassurance that

the Undertaking had been complied with then the Application would either have not been made at all or quickly resolve. That is, however, not what occurred. Mr Cotran's needed three attempts (in Cotran 1 – 3) to explain what had happened to the money covered by the Undertaking and even then the information provided was far from easy to follow. He had to admit that he had acted in breach of the Undertaking. Even the bank statements when disclosed were not straightforward because they had been redacted in such an untransparent way.

24. Notwithstanding the Claimants' success when looking at matters in the round, in my judgment, it is nevertheless appropriate to take each of the periods covered by the Schedules in turn and to ask whether the costs claimed in each should be awarded in whole or in part.

Schedules 1 and 2

25. The period covered by these two schedules starts with a letter dated 20 June 2023 and ends with 13 December 2023.

26. In the letter dated 20 June 2023 from LK law to Healys, under the heading "The January Undertaking and further matters" the Claimants asked the following:

> "We refer to the undertaking provided by Mr Cotran in January 2023, set out in the Schedule to Deputy Judge John Kimbell KC's Order sealed on 1 February 2023 (the "January Order"). Our clients are concerned to ensure that the undertaking is being properly complied with. Those concerns were heightened in the light of your clients' willingness to breach the Disclosure Order by not paying the costs ordered against them by the deadline in the Disclosure Order or in a timely manner.

> Accordingly, please confirm by way of bank statement evidence:
>
> 27.1 That Mr Cotran is still complying with his undertaking to the Court set out in Schedule A of the January Order;
> 27.2 The current balance remaining of 50% net sale proceeds deposited at Mr Cotran's account at QIB (UK) plc (the "Deposited Amount"); and
> 27.3 The current total removed from the Deposited Amount to cover permitted diminishments as set out in sub paragraph (1) and (2) of Schedule A of the January Order (the "Permitted Diminishments")."

27. In my judgment, this is an entirely reasonable and innocuous request. It ought to have been capable of being answered quickly in correspondence by stating: (1) whether or not the Undertaking was being complied with in general terms (2) obtaining details of how much had been paid into the relevant account after the sale (3) how much had been transferred out and for what purpose (4) and confirming that those payments out were permitted by the terms of the Undertaking. Mr Cotran was not at this time acting in person and the necessary instructions and bank statement ought to have been capable of being obtained by Healys without delay.

28. Healys did not respond to this request at all. Accordingly on 21 July 2023, LK law chased for a response. As an alternative to receiving the information about money in and money out, LK law indicated that they would be content if Healys were to provide:

> "confirmation that you have seen the relevant evidence and that Mr. Cotran is complying with the undertaking"

29. In my judgment this was a reasonable and measured approach which suggests the Claimants were genuinely interested in being reassured that the Undertaking was being complied with and trusted Healys to provide confirmation of this.

30. Thereafter both the Claimants and the Defendants instructed new solicitors. Withers LLP (Withers) now acting for the Claimants asked the new solicitors acting for the Defendants (Mischon de Reya) when the queries about compliance might be answered. No response was received. Withers chased for an answer on 23 August 2023.

31. By September 2023 Mr Cotran had reinstructed Healys. Withers chased again for an answer on the Undertaking but again no answer was received.

32. On 20 September 2023, Withers sent a further letter to Healys in which they expressed their disappointment about the continuing lack of any response and threatened to make an application under the liberty to apply provision in the Order.

33. The Claimants did not make an application immediately but instead sent two further chasers on 25 September 2023 and 29 September 2023. In the letter dated 29 September 2023, a final deadline of 6 October 2023 was suggested.

34. No substantive response was received. On 3 October 2023, Withers received a notice of change stating that Healys was no longer acting and that Mr Cotran was now acting in person.

35. Withers accordingly issued the Application on 17 October 2023. The Application was supported by Moruzzi 1.

36. Mr Cotran did not respond to the Application. He did send a two-page letter to Withers on other aspects of the case on 6 November 2023. In their response, Withers reminded Mr Cotran that their queries about compliance with the Undertaking communicated since June had not been dealt with.

37. In November 2023, Mr Cotran began making allegations of deceit and dishonesty against the Claimant in relation to stamp duty. In the course of this correspondence, Mr Cotran referred to the Undertaking and the requested bank statements. He said:

> "[T]he Undertaking does not allow you the privilege of my Bank Statements. These are all tactics to prolong this litigation for your firm's own financial gain, hence why you find it necessary for three of your colleagues to be copied in all emails"

The CCMC

38. Mr Cotran attended the CCMC on 24 November 2024 in person. The day before the CCMC, Mr Cotran filed Cotran 1. This dealt with a number of matters which had arisen in correspondence. For the first time, Mr Cotran provided some information about the proceeds of sale and compliance with the Undertaking.

> 1.1 Following the completion of the sale of 50 Dewhurst Road, £1,893,700.59 was deposited into a nominated account at Qatar Islamic Bank (QIB). My 50% share of the proceeds from the sale of our property, net of tax, were left in the nominated QIB Account.
> 1.2 Part of the terms of the Undertaking Order allowed £7,000 a week to cover my living expenses.
> 1.3 Part of terms of the Undertaking Order allowed funds in the nominated account to be used to cover legal fees.
> 1.4 I was advised that the value of tax owed, taking into consideration the sale of the Company's only asset, was £230,000.
> 1.5 At the time of writing this Witness Statement an estimated £294,000 has covered my living expenses of which £7,000 a week was made available to cover such expenses.
> 1.6 At the time of writing this Witness Statement it is estimated that £156,000 has been spent on legal fees.
> 1.7 The balance in the QIB Account is £267,000.

> 1.8 The balance will continue to deplete by up to £7,000 per week on living expenses and legal fees
> where needed and I anticipate no funds in the QIB Account by March/April 2024.

39. The information provided in Cotran 1 was far from full or accurate. It made no mention, for example of a transfer out of the QIB to Mr Cotran's account of £500,000. At the CCMC, in addition to directions for trial, the Court ordered there to be a hearing in relation to the second and third parts of the Application. This was listed for an hour on 13 December 2023.

40. In anticipation of that hearing, the Claimants filed Moruzzi 2. This responded to the information provided in Cotran 1 but also dealt with other matters not connected to the Undertaking, including disclosure and the winding up of DRL and the stamp duty allegations.

41. The hearing was subsequently vacated because Mr Cotran agreed to provide the QIB statements. Costs were reserved to a hearing of the balance of the application. Mr Cotran subsequently decided to produce Cotran 2 in the form of an affidavit. The purpose was said to be

> "in order to give full and frank information to the Court in relation to compliance with an undertaking which I gave to the Court voluntarily on 20 January 2023"

The Affidavit exhibited a four page statement of account for Damoor showing a credit of £1,894,918 being the net proceeds of sale and then a series of transactions leaving a balance of £214,172 as at 18 December 2023.

42. Cotran 2 stated that:

    a. The QIB Account is not an account in his name.

    b. Mr Cotran did not have an account at the QIB.

c. That Mr Cotran had transferred £500,000 from the account to his own bank. This was said to cover 78 weeks of living expenses at £7000 per week. This period was Mr Cotran's estimate of how long the proceedings would last.

d. A transfer out of "roughly" £230,000 to another account to cover corporation tax and a transfer of 50% of the net amount to his wife had been made.

e. The account had been used to pay legal expenses.

43. What Cotran 2 did not reveal was that the statement exhibited had been redacted in such a way as to remove all reference to two of the transfers. The redaction was not of the usual type so that it was possible to see that how many transactions had been redacted and the sums involved in each. The existence of this redaction was not revealed until 29 February when Cotran 3 was filed. Cotran 3 also revealed that he had on any view exceeded the £7000 a week cap. It was only in Cotran 3 that Mr Cotran suggested that to correct the overspend, he would cease to withdraw any further sums for a period of 16 weeks.

Decision on Schedules 1 and 2

44. The summary of events above makes depressing reading. In my judgment, Mr Cotran's conduct in relation to the Undertaking has been unreasonable to a high degree and meets the Excelsior test of being out of the normal run of litigation in a way that justifies assessment of the costs in Schedule 1 and 2 on the indemnity basis for the following reasons:

a. It was unacceptable and unreasonable for Mr Cotran and his then solicitors to completely ignore reasonable requests for information about the proceeds held pursuant to the Undertaking and for reassurance that it had been complied with.

b. No explanation was ever offered as to why no response was provided to any of the nine letters sent.

c. Mr Cotran did not admit (until Cotran 3) that he had acted in breach of the Undertaking in a number of respects including making deductions in excess of the generous weekly cap of £7000.

d. He has never explained why he failed to provide the information about the QIB Account when it was first requested. When he did respond in Cotran 1 and 2, the information was not full or frank. It took three attempts to reveal the extent of the breaches.

e. The purported explanations for the breaches were in my judgment wholly unconvincing. The fact that it had been overlooked by Mr Cotran when the Undertaking was provided that he did not have an account at QIB, the fact that QIB charged high fees for individual withdrawals and the fact that certain expenses such as school fees fell due on a termly rather than weekly basis were not good explanations for his conduct let alone excuses. The Undertaking contained within it a flexible mechanism not only for allowing one-off payments by agreement (such as for school fees) also for other variations to deal with practical issues as they arose. All that was required was an exchange of emails.

f. Well before the Claimants' first enquiry in June 2023, Mr Cotran's solicitors ought to have contacted the Claimants and explained that he did not have an account with QIB so the Undertaking could not be complied with according to its terms and proposing a practical solution to that problem. Further it should have been obvious that a unilateral £500,000 lump sum withdrawal by Mr Cotran based on a prediction of how long the litigation was going to take was not an acceptable step to take without either the consent of the Claimants or the permission of the Court.

g. The refusal to provide a copy of the QIB Account bank statement until the eve of the hearing in December was also unreasonable. A copy of the statement ought to have been provided as a matter of course given the terms of the Undertaking and in the interests of transparency. It was all the more obvious that it needed to be provided by October / November in the light of the failure to respond to the initial correspondence.

45. As to the amounts claimed, I consider Mr Moruzzi's hourly rate of £835 to be unreasonably high. It was also unnecessary for him to have spent so much time on his

two witness statements. They should have been prepared by an assistant for him to approve. I do not consider that it was reasonable or proportionate to brief Mr Selby for the 1 hour hearing on 13 December. A junior would have been more than capable of dealing with that hearing. Accordingly, I summarily assess the costs on the indemnity basis under Schedule 1 as £7,000 and under Schedule 2 as £4,000.

Schedule 3

46. By the time that Cotran 3 was served, the Claimants finally had almost complete information about what had happened to the proceeds of sale. Mr Cotran had instructed new solicitors and Ms Galley made the suggestion of transferring the remaining sums into an account of Mr Cotran's solicitors as early as 28 February 2024. The correspondence dealing with the terms of the Modified Undertaking was reasonable. In my judgment, the criterion for an assessment of costs on the indemnity basis does not apply for the costs sought in Schedule 3. Although it might well be said that the mess was all of Mr Cotran's own making, he clearly realised that he needed to give a fuller explanation than he had done in either Cotran 1 and Cotran 2 and to apologize for the breach. This he did in Cotran 3. He also took active steps to return the account to the state it would have been in but for his breach. His new legal team took a constructive and reasonable approach. Accordingly, the costs claimed in Schedule 3 ought to be assessed on the standard basis.

47. In my judgment the sum which it is appropriate to award to the Claimants in respect of the period covered by Schedule 3 is £10,000 for the following reasons:

    a. I accept Ms Galley's submission that the terms of the escrow agreement proposed by Withers were unreasonable and oppressive. For Withers as solicitors on the record for other party to be able to pay itself for policing the remaining sums and for Mr Cotran to have to apply to them for permission to make withdrawals would be a highly unusual situation which the Court would be highly unlikely to have sanctioned. Although at the time Withers made the proposal that they act as escrow holder, Mr Cotran was not represented by

solicitors, in my view, any escrow proposal should have involved the account being in the hands of a neutral third party.

b. The Claimants ought to have accepted Ms Galley's proposal made by email on 28 February 2024. The details and necessary fortifications ought to have been agreed in correspondence without the need for any further hearing.

c. The point taken by the Claimants and not dropped until 15 March 2024 that sums expended in respect of legal services were covered by the cap was a very bad one. This would be a very unusual type of order and in fact the cap in the Undertaking was agreed by reference to Mr Cotran's then current levels of expenditure (albeit before Withers were instructed for the Claimants).

d. Crucially in terms of proportionality, at the latest by the time Cotran 3 was received, it ought to have been clear to the Claimants that the entirety of remaining sum in the QIB Account were realistically going to be consumed by legal expenses. However the remaining proceeds were secured (whether by escrow or otherwise), the stark reality was that whatever the form of the escrow account agreed, it served no useful practical purpose for the Claimants. The trial had been fully cost budgeted at the CCMC and it ought to have been clear that the remaining sums (even when the admitted overspend was repaid) were going to be used up in legal expenses. It was never going to provide a pool to enforce against in the event of success at trial. A full blown pursuit of the Application after the end of February was accordingly in my judgment disproportionate.

e. The Claimants' skeleton filed for the hearing strayed far beyond the bounds of what was necessary to deal with the remains of the Application. It made detailed allegations (including a detailed four page schedule) about the underlying merits of the claim and made allegations about Mr Cotran which the Court was never going to be able to decide as part of the Application. Although, the skeleton was prepared before the terms of the modified Undertaking were agreed, it ought to have been confined to describing the extent of the breaches of the Undertaking and what was reasonably necessary and proportionate to remedy the situation.

f. There was no need to instruct a silk to deal with what remained of the Application. When the 1 March hearing was stood out due to the Claimants'

failure to file a bundle in time, the reasonable thing in light of Cotran 3 to minimise any further time and costs in respect of the Application and instead to concentrate on the real issues in the case and preparation for trial. Instead bundles with a total content in excess of 1000 pages were submitted to Court.

g. Nevertheless, the Claimants reasonably incurred costs in January and February prior to the service of Cotran 3 trying to work out what had happened to the sums subject to the Undertaking based on Cotran 1 and 2 and how serious the breaches had been. Even after that they were entitled to take time to consider Cotran 3 and to incur some costs in negotiating a modified undertaking in correspondence which was not ultimately achieved until 11 April 2024.

Conclusion

48. For the reasons given above, I summarily assess the costs that Second Defendant is to pay the Claimants arising from and incidental to the Application as £21,000.