



Neutral Citation Number: [2024] EWHC 2498 (KB)

Case No: QB-2022-001260

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2024

Before :

MR JUSTICE SHELDON

Between :

(1) AFAN VALLEY LIMITED (in Administration)	<u>Claimant</u>
and Ors	
- and -	
(2) LUPTON FAWCETT (a firm) and Ors	<u>Defendants</u>
(7) METIS LAW	
(8) METIS LAW PARTNERS LLP	

Mr James Pickering K.C., Mr Paul O'Doherty (instructed by Hewlett Swanson) for the Claimants

Mr Daniel Saoul K.C. (instructed by RPC) for the Second Defendant

Mr Ben Hubble K.C., Mr Michael Bowmer (instructed by Keoghs) for the Seventh and Eighth Defendants

Hearing dates: 12 July 2024

Approved Judgment

This judgment was handed down remotely at 09.30am on 8 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SHELDON

Mr Justice Sheldon :

1. On 23 April 2024, I handed down judgment with respect to two applications: (i) the application by 43 Claimants to amend their Particulars of Claim against their former solicitors: Lupton Fawcett LLP ("LF"), Metis Law Ltd and Metis Law Partners LLP (collectively "Metis"); and (ii), the application by LF to strike out the Particulars of Claim and/or to dismiss the claim against the firm by summary judgment: see [2024] EWHC 909 (KB). With respect to (i), I refused the Claimant's application for permission to amend against LF and Metis. With respect to (ii) I allowed the application to strike out and dismiss by summary judgment the claim against LF.
2. Before hand down, I distributed a draft judgment to the parties subject to an embargo and invited them to seek to agree an order as to consequential matters. No agreement could be reached and so a further hearing was listed to consider those matters. That hearing took place before me on 12 July 2024.

Permission to appeal: no jurisdiction

3. One matter that I did not consider at the hearing was whether the Claimants should be given permission to appeal against my judgment. I had already ruled that I had no jurisdiction to consider that matter. I told the parties that I would explain the reasoning for making that ruling at a subsequent date.
4. My reasoning is as follows: the hearing at which I handed down my judgment (which was carried out remotely, without the need for the parties' attendance) was not adjourned so as to consider whether to grant permission to appeal. I had not been asked to adjourn the hearing by the Claimants and did not adjourn that hearing of my own motion. I had not been notified by the Claimants that they would be seeking permission to appeal. In the circumstances, my powers are constrained by CPR 52.3(2)(a) as explained by the Court of Appeal in *McDonald v Rose* [2019] EWCA Civ 4 at [21(4)]:

"If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal".

Consequential matters: costs

5. The consequential matters that I did have jurisdiction to determine related to costs: (i) the costs of the strike out/summary judgment application; (ii) the costs of the Claimants' amendment application with respect to LF; (iii) the costs of the Claimants' amendment application with respect to Metis; (iv) the balance of LF's costs; (v) the costs of the extension of time application to serve the fifth Amended Particulars of Claim; and (vi) the costs incurred as a result of the adjournment of the hearing before Freedman J ("the Adjournment Costs"). I shall set out the parties' submissions with respect to these matters, and then explain my decision.

The parties' submissions

6. With respect to (i) *the costs of the strike out/summary judgment application*: the Claimants submitted that LF was entitled to 50% of its costs as, although the application

had been successful, LF had failed on a large number of issues which formed a considerable part of the evidence and correspondence and took up significant time at the oral hearing before me in February 2024: Mr Pickering KC, for the Claimants, focussed specifically on the causation in fact point, the *ex turpi causa* argument, and the limitation points.

7. LF submitted that it was entitled to all of its costs as it had been the successful party. This included the costs of the amendment application (point (ii) below), on the basis that various iterations to the Particulars of Claim were made by the Claimants to respond to deficiencies in their pleadings that LF had pointed out. However, if the Court was minded to make any adjustment from the normal rule, an award of 90% of its costs was appropriate. In summary, LF contended that the vast majority of costs were expended on matters where it was successful. The causal nexus point was the biggest issue in evidence and in the oral arguments and was decisive of the strike out/summary judgment. On limitation, following the issuance of the application to strike out/summary judgment, the Claimants conceded that they had asked for £15 million too much. As for the wrongly sued Defendants (D1, D3-6), the fact that they should not have been sued had been raised with the Claimants since February 2023. Although the Claimants agreed not to sue some of the Defendants in August 2023, it was only after the strike out/summary judgment application was issued that the Claimants conceded on the remainder. LF had knocked out the amendments with respect to the SRA warning notices, and the allegation that LF should have scrutinised the accounts. It was accepted that LF did not win on all of the factual causation points, but this was immaterial. As for the argument on *ex turpi causa*, this did not take up much time at the oral hearing and did not require evidence.
8. LF sought an interim payment of 60% of its costs on account. The Claimants contended that the percentage sought was too high; that the amount claimed for costs incurred by LF was excessive: in written submissions provided after the oral hearing, Mr Pickering KC sought to break down LF's costs as £212,550.30 for the Claim; £24,162.50 for wasted costs of the adjournment; and £525,469.20 for the application costs. Mr Pickering KC submitted that the interim payment amounts should be reduced by a further 25%. Mr Saoul KC agreed with the breakdown of costs, but disputed the contention that a further reduction should be made for the interim payment. He pointed out that no particularised objection had been made as to the quantum of LF's costs.
9. With respect to (ii) *the costs of the Claimants' amendment application with respect to LF*: the Claimants submitted that they were entitled to all of their costs of the amendment application. Virtually all of the amendments would have been allowed had the claim not been struck out/summarily dismissed, and most of the amendments were resisted. Where LF accepted some amendments, this was done late in the day. The Claimants submitted that a large part of the oral hearing before me in February 2024 was spent on the amendments.
10. LF rejected these submissions and (as already stated) submitted that the costs of the amendment application should be considered as part of the assessment of the strike out/summary judgment application which it had succeeded on. In any event, some of the amendments sought by the Claimants related to the causal nexus/scope of duty argument which LF had won on. Some of the amendments were consented to. As for the Green documents, concessions were made about these at the hearing by the Claimants so they would have needed to replead in any event. At the oral hearing, the

Claimants had withdrawn the claim for lost profits, which was significant. Also, the Claimants accepted that their amended case on causation was in some respects unviable, accepting that Mr Woodhouse would never have given instructions to LF to write to the FCA in different terms to those actually written by LF.

11. On the general principles that the Court should adopt, Mr Pickering KC and Mr O’Doherty, for the Claimants, referred me to *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] EWCA Civ 535; *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020; and *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2017] EWCA Civ 1032 at [41], and submitted that:
 1. the Court may make different orders for costs in relation to discrete issues, and should consider doing so where a party has been successful on one issue but unsuccessful on another issue;
 2. the Court may make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party’s costs of that issue; and
 3. it is no longer necessary for a party to have acted unreasonably or improperly before he can be required to pay the costs of the other party of a particular issue on which he has failed.

12. Mr Pickering KC and Mr O’Doherty also made the following points:
 - i) there is no requirement that an issues based costs order should only be made in an exceptional case but there does need to be a reason, based on justice, for departing from the general rule. The extent to which the costs of a particular issue are to be disallowed are for judicial discretion “by reference to the justice and circumstances of the particular case”: *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.3)* [2013] 1 W.L.R. 548 at [47] and [49];
 - ii) the reasonableness of taking failed points can be taken into account, and the extra costs associated with them should be considered: *Antonelli v Allen*, The Times, 8 December 2000, unreported; *Sycamore Bidco Ltd v Breslin* [2013] EWHC 583 (Ch);
 - iii) where the circumstances of the case require an issues based order in the form of an order expressed by reference to the costs of the issue, that is what the judge should make;
 - iv) if there are practical difficulties making an issue-based order, the judge should consider, where practicable, an order expressed as a percentage or with reference to a distinct period of time (pursuant to CPR 44.2(7)): *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC) at [72(iv)]; and
 - v) in any litigation, in particular complex commercial litigation, a winning party is likely to fail on one or more issues in the case. The mere fact that the successful party was not successful on every last issue does not, of itself, justify an issue-

based costs order: *J Murphy & Sons Ltd v Johnson Precast Ltd (No.2)* [2008] EWHC 3104 (TCC).

13. Mr Saoul KC, for LF, contended that I should not make an issues based order. He submitted that the Court of Appeal had reminded first instance judges that respect has to be had for the “follow the event” starting point and that this should not be too readily departed from: see e.g. *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 at [62]. Furthermore, Mr Saoul KC submitted that:
 - i) The mere fact that a successful party has succeeded on some, but not all, issues does not always amount to sufficient justification for departure: see, *F&C Alternative Investments* [2012] EWCA Civ 843 per Davis LJ at [47-49].
 - ii) In any litigation, especially complex commercial litigation, any winning party is likely to fail on some issues: *HLB Kidsons v Lloyd’s Underwriters (Costs)* [2007] EWHC 2699 (Comm) at [11].
 - iii) The Court should “avoid an unduly finely detailed division of issues and sub issues when deciding what costs order to make”: *F&C Alternative Investments v Barthelemy* [2011] EWHC 2807 (Ch) at [19].
 - iv) The Court must always be astute to exercise its discretion on costs to reflect the “overall justice of the case” and to give “real weight” to the fact that one party has been successful overall: *HLB Kidsons* at [10].
14. With respect to (iii) *the costs of the Claimants’ amendment application with respect to Metis*: Metis submitted that they were entitled to their standard costs, subject to detailed assessment, and not ‘reasonable’ costs as had been suggested by the Claimants. Metis requested that the costs order should include ‘for the avoidance of doubt: (a) their costs of attending the whole hearing; (b) their costs of dealing with consequential matters; (c) their costs of addressing the jurisdiction issue; and (d) their costs of dealing with the extension of time point. Metis also submitted that they should be entitled to an interim payment on account of their costs in the sum of £250,000, inclusive of VAT. This was said to be 54.2% of their costs to date and was therefore lower than the 60% rate that is usually ordered for payment on account. They were also entitled to interest on those costs at the commercial rate of 2% above base rate before the judgment, and then at the judgment rate from three months after this consequential hearing. Metis sought to justify the amount of costs that they had incurred on the basis that the Claimants’ proposed amendments sought to introduce a substantial claim (seeking damages in the amount of £56 million) for breach of trust, which had to be approached with the utmost seriousness. They were entitled to their costs of both counsel attending all of the hearing before me in February 2024. The hearing had been listed as a combined hearing of the applications with respect to LF and with respect to Metis, and it would have been unworkable for their legal representatives to dip in and out of the hearing. In addition, Metis submitted that they were entitled to the costs of the consequential hearing itself as they were the successful party; as well as with respect to the submissions on whether this Court had jurisdiction to entertain an application for permission to appeal.
15. The Claimants submitted that the specific order sought by Metis that the costs award should include the costs of attending the whole of the hearing of 7 to 9 February 2024 was a matter for detailed assessment. If, however, the Court wished to deal with the

matter now, the Claimants submitted that the fees claimed were extraordinarily high. Metis played a minor role in a 3 day hearing. Of course, Metis' legal representatives were entitled to attend the whole hearing if that is what their clients wanted them to do, but the costs consequences of that decision should not be borne by the Claimants. A fair sum for their attendance would be £100,000 and not the £365,582.50 claimed. With respect to Metis' costs of the consequential matters, this was something to which they were entitled in any event, and it was not necessary for this to be expressly included in the order. The Claimants did not dispute that Metis were entitled to the judgment rate of 8%, commencing 3 months after the judgment following the consequential hearing.

16. With respect to (iv) *the balance of LF's costs*: the Claimants did not dispute that LF was entitled to its residual costs. It was contended, however, that there should not be any separate costs award for the discontinued Defendants. LF contended that the costs of the discontinued Defendants should be recovered.
17. With respect to (v) *the costs of the extension of time application to serve the fifth Amended Particulars of Claim*, the Claimants submitted that the Defendants should pay the costs of the extension of time application, to be split evenly between them. The fifth amendment was necessitated by the *Woodhouse* judgment: *Northern Powerhouse Developments Ltd (In Liquidation) v Woodhouse* [2023] EWHC 3124 (Ch). This judgment came out on 20 December 2023. The Defendants were notified that the Claimants wanted to put in a draft to include these matters and were asked to agree to a consent order for an extension of time so that this could be dealt with. Metis were not being asked to agree to the draft amendments, but for an extension of time only. It would have been disproportionate for the Claimants to have had to make two amendments to the Particulars of Claim: first by adding in the amendments based on the Green documents (for which permission had been given by Freedman J), and then to make amendments based on the *Woodhouse* judgment.
18. LF submitted that the Claimants should pay the costs of this application because of the way the Claimants conducted themselves; alternatively, the costs should be wrapped up in the costs of the application to amend. A deadline for an amendment to the Particulars of Claim had been set by Freedman J, working back from the date of the hearing in February 2024. It was entirely reasonable for LF to require the Claimants to produce the amendments based on the Green documents by the prescribed time.
19. Metis contended that they should be entitled to their costs. Freedman J did not make any provision for an amendment of the Particulars of Claim that related to Metis. When told that amendments would be sought that related to them, Metis wanted sight of the proposed amendments before agreeing to the extension of time. Metis say that this was a reasonable position to take.
20. With respect to (vi) *the Adjournment Costs*, Freedman J had ordered that Metis would be entitled to their costs of the adjourned hearing, but left open who should pay those costs. Metis was neutral as to who should pay their costs.
21. LF submitted that the Claimants should pay both the Metis costs and its own costs that had been wasted by the adjournment. LF had been successful in defeating the claims and so should not have been in the litigation at all. The documents which lay behind the request for the adjournment – the Green documents – made no difference. They were

just background to the claim, and were not very significant, substantial or far-reaching as had been suggested by the Claimants when the adjournment was sought. Furthermore, the Claimants only had themselves to blame for the late production of the Green documents. LF should not be liable for Metis' costs as the hearing could have gone ahead against Metis even if not against LF. If LF has to pay the Claimants' costs of the adjourned hearing, there should not be payment on account as the Claimants' costs, which were in the region of £127,000, were said to be extremely high.

22. The Claimants submitted that they should be entitled to their costs of the adjournment, and LF should pay Metis' costs, as the adjournment was the responsibility of LF. LF had in its possession the Green documents which necessitated the adjournment and could have obtained a waiver of privilege in those documents from the third party – Mbi Consulting (UK) Limited (“MBi”) -- much earlier in the proceedings. Further, the Claimants argued that it would have been inappropriate for them to have asked MBi to waive privilege in their documents. Furthermore, the Green documents were significant, and did not go to the issue which led to the strike out/summary judgment (the pound in and pound out point).
23. With respect to the question of interest on Metis' costs of the adjournment, the Claimants disagree that Metis are entitled to interest at the judgment rate for the period from Freedman J's order. Freedman J decided that costs should be reserved. Further, it was submitted by Mr Pickering KC that Metis is not trading, and there was no obligation on the insured to pay the insurers which would justify the payment of any interest to the insurers. In any event, interest at 1% over base rate would be the appropriate rate, and not 2%. Otherwise, it was suggested that the award of interest would be penal, when it should be compensatory. Metis disagreed with this analysis. In the draft Order submitted to the Court, Metis had sought pre-judgment interest from the date of payment of each relevant invoice at the rate of 2% above base. Mr Saoul KC adopted Metis' submissions on interest generally, insofar as applicable to the First to Sixth Defendants' claim for costs.

Discussion

24. It seems to me that it would be artificial to separate out points (i) and (ii); and so, I will consider them together. There are a number of reasons for this. First, the decision made on the strike out/summary judgment application was on the assumed basis that all of the amendments were allowed: that is, putting the Claimants' case at its highest. I have dismissed the claim against LF and so the proposed amendments to the Particulars of Claim fall away in any event. Second, it is clear from the correspondence between the parties that the legal point on which LF succeeded – the no loss point – was one which had been telegraphed to the Claimants from very early on. The Claimants were well aware, therefore, that the entire claim was vulnerable to being dismissed and so the work on the amendments may have been futile. Third, whilst the Claimants (through Mr Pickering KC) did spend significant time during the hearing before me in February 2024 going through the various amendments and explaining the different iterations, much of that time involved providing the Court with the necessary background to understand the nature of the claim that was being brought by the Claimants against LF. Fourth, insofar as it is necessary to do justice or mitigate against injustice to the Claimants from considering the two matters together, this can be done by setting the costs award at the appropriate point.

(i) the costs of the strike out/summary judgment application and ii) the costs of the Claimants' amendment application with respect to LF

25. In deciding (i) and (ii), my starting point is that LF was the successful party with respect to both applications. The claim against LF was struck out and summary judgment entered against the Claimants, and the application for permission to amend against LF was dismissed. In the circumstances, the general rule as set out at CPR 44.2(2)(a) is that “the unsuccessful party will be ordered to pay the costs of the successful party”, although a different order can be made. In determining whether to follow the general rule or whether to make a different order, I am guided by CPR 44.2(4)-(7), and the case law that was drawn to my attention by the parties, as set out above.
26. In my judgment, LF should not be awarded all of its costs, but it should receive a large proportion of those costs. LF was the overall victor and it had telegraphed to the Claimants early on the very point on which the strike out/summary judgment application was successful. Nevertheless, it would be inappropriate for LF to be awarded all of its costs as this would not reflect the overall justice in this case. There were points on which LF lost at the hearing before me in February that were not merely legal arguments that required little in the way of evidence or submissions (there was only such example: the *ex turpi causa* argument which took up a short amount of time in argument, both in writing and orally before me), but were matters that were wholly independent of the successful no loss argument and put the Claimants to significant cost and effort in preparing witness evidence and written argument. Those matters also engaged the parties in significant periods of time at the oral hearing: this was particularly the case with respect to the factual causation argument, an argument which also required careful consideration of the judgment of HHJ Jackson in the claim against Mr Woodhouse.
27. In deciding what adjustment should be made from the 100% starting point, I am guided by the observations of Sales J (as he then was) in *F&C Alternative Investments* [2011] EWHC 2807 (Ch) at [5], that the authorities caution against “overly finely detailed analysis when deciding questions regarding costs orders”. I will not, therefore, carry out a mathematical exercise to determine, or estimate, what time was spent on each of the various issues, and will not make an issues based costs order. That would, in this case, be inappropriate in terms of the use of Court time as it would be very difficult to identify the precise amount of time (and cost) spent on each of the various issues. Furthermore, it would not reflect the overall justice in this matter given that the entirety of the claim was dismissed on a point that had been foreshadowed early on in the correspondence, and the amendments to the pleadings were ultimately not necessary; and the evidence relating to the causal nexus/no loss point was to a considerable extent intertwined with the evidence on other matters, and it would have been necessary to draw much of the evidence to my attention in any event.
28. In an attempt to meet the overall justice in this case, and acknowledging the considerable success that LF had overall, it seems to me that a reduction of 25% is appropriate. This reflects the fact that whilst the Claimants won, on a number of issues, there were a number of points within the various heads of argument where they had been successful on which they did not succeed (e.g. not all of the factual causation points were won by the Claimants).

29. Accordingly, I will order that LF should be entitled to 75% of its costs of the strike out/summary judgment application, including the costs of dealing with the amendments and the Claimants' application to amend.
30. With respect to an award of interim payments pursuant to CPR 44.4(8) (which provides: "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"), there is no good reason not to make such an order here. It has not been suggested that LF would not be good for repayment of the monies if an appeal against my judgment was allowed. As for the amount of the interim payment, Mr Saoul KC asked for 60% of LF's costs. I consider that a departure should be made from this percentage as, given the amount of the costs that have been incurred, there is a possibility that LF's costs will be reduced significantly on detailed assessment. I do not consider that there should be a 25% reduction from the usual percentage, but a reduction to 50% would be appropriate. I will order, therefore, that the Claimants pay 50% of LF's costs as an interim payment.

(iii) the costs of the Claimants' amendment application with respect to Metis

31. With respect to issue (iii), the costs of the Claimants' amendment application with respect to Metis, there is no dispute that Metis are entitled to their costs. In my judgment, the award of Metis' costs will necessarily include the costs incurred in dealing with consequential matters, and that includes dealing with the question of jurisdiction for an appeal from my judgment. I will include them in the order for the avoidance of doubt or confusion at the detailed assessment of costs stage¹. IAs for whether specific mention needs to be made for the costs of Metis' attendance at the hearing in February 2024, that is a matter that should properly be dealt with on detailed assessment by the costs judge. Metis should be entitled to interest on these costs at the judgment rate three months after the date of this judgment.
32. As for interim payment on account of Metis' costs, there is no good reason not to order payment of a reasonable sum on account of costs. What is reasonable here should reflect the possibility that Metis will not be able to recover the full costs of both of their counsel attending the three days of hearing in February, and their costs may be reduced significantly on detailed assessment. It seems to me, therefore, that an order for interim payment of 50% would be more appropriate.

(iv) the balance of LF's costs

33. With respect to issue (iv), the balance of LF's costs, I see no reason why LF should not be entitled to all of these costs (insofar as there are any that are not already embraced by the costs that I have awarded for issues (i) and (ii) above), subject to detailed assessment: that should include dealing with the consequential matters, and will therefore include the costs of dealing with the issue of whether this Court retained jurisdiction to grant permission to appeal. LF should also be entitled to an order for interim payment of 50% of these costs (and any others that are awarded to LF).

¹ The parties asked me to include these costs in the order in submissions made after a draft of this judgment was shared with them.

34. There should also be costs payable to the discontinued Defendants. These were defendants who the Claimants chose to sue but then discontinued against. There is no reason to depart from the usual rule that they are entitled to their costs on discontinuance.

(v) the costs of the extension of time application to serve the fifth Amended Particulars of Claim

35. With respect to issue (v) the costs of the extension of time application to serve the fifth Amended Particulars of Claim, that should be borne by the Claimants both as against LF and Metis. It was the Claimants who required the extension of time, as they had not factored into the directions made by Freedman J the possibility that they may need to make further amendments arising from the Woodhouse judgment. The Claimants must have been aware, however, that judgment in that case might be promulgated before the strike out hearing: the *Woodhouse* case (in which Mr O'Doherty appeared) was heard from 10 to 20 November 2023.
36. The reasons given by each of the Defendants for not consenting to the extension were reasonable ones: for LF, there was no reason why the Green amendments could not have been provided by the time set by Freedman J; for Metis, they were entitled to see what the amendments were before agreeing to the extension of time. Further, as it transpired, the amendments made by the Claimants were of no consequence: I dismissed their applications to amend against both sets of Defendants.

(vi) the Adjournment Costs

37. With respect to (vi) the Adjournment Costs, I consider that the Claimants should bear the costs thrown away by both LF and Metis.
38. With respect to LF, the reasons why the Claimants should pay the costs thrown away by the adjournment are as follows. First, the trigger for the adjourned hearing was the disclosure by LF of certain documents relating to Mr Green. Whilst those documents were in the possession of LF, the firm took the reasonable view that it could not disclose those documents given that they were the subject of legal professional privilege belonging to a third party, MBI, and so they were justified in not disclosing the documents initially. The Claimants had been told on a number of occasions that contact should be made with MBI to see if they would waive the privilege. There is no evidence before the Court to suggest that the Claimants made contact with MBI to ask them to waive privilege. There is no explanation as to why the Claimants did not make contact with MBI. To that extent, therefore, the Claimants were the authors of the adjournment.
39. Second, as it turned out, the adjournment application did not assist the Claimants in progressing the claim. The claim was struck out/summarily dismissed. Further, the amendment application as against LF was dismissed. Third, as explained in my judgment following the February 2024 hearing, the Green documents would have been background material which would inform already pleaded causes of action, but would not have amounted to a fresh cause of action. In the circumstances, whilst material, the Green documents did not substantively progress the pleaded case made by the Claimants.

40. With respect to the costs thrown away by Metis, these should be paid by the Claimants as, for the reasons already explained with respect to LF, the Claimants were responsible for the adjournment being required. In addition, it was the Claimants' choice not to proceed with the hearing of their application to amend against Metis. In principle, that hearing could have gone ahead. I appreciate that for pragmatic reasons, the Claimants decided not to proceed with that course of action and Metis was prepared to agree to that approach so long as they were protected on costs. Nevertheless, that was a choice made by the Claimants, and LF should not bear the price of that choice. The parties are agreed that a payment on account for 50% of these costs should be ordered, as summary assessment could not be carried out².
41. With respect to interest, I see no reason why Metis should not be entitled to the rate of 2% above base rate with respect to the costs thrown away. Mr Pickering KC could point to no authority for the proposition that a party's insurers could not recover interest, even where the party was not trading. Indeed, this was contrary to the decision of Akenhead J in *Fosse Motor Engineers Ltd v Conde Nast and National Magazine Distributors* [2008] EWHC 2527 (QB) at [10] where he stated:
- “I consider that, as a matter of principle, and as a matter of commercial reality, the court does have a discretion to allow interest on costs for a successful party where those costs have been incurred by the successful defendant's insurers. It is a facet of modern commercial life, and certainly in connection with buildings and occupation of buildings, that arrangements are made for insurance, and it would be commercially a very odd state of affairs where the court could not take into account the commercial reality, which is that it is the defendants' insurers in this case which has actually funded the defence of the claim and the court has clearly a wide discretion. It seems to me, in those circumstances, that it is open to the court to allow interest on costs expended by a successful party's insurers.”
42. With respect to interest more generally, the Defendants had sought, in their draft Order, interest (a) from the date of payment of each relevant invoice until 12 July 2024 at the rate of 2% p.a. over the Bank of England base rate from time to time; (b) thereafter at the rate prescribed by the Judgments Act 1838. These terms are standard for commercial disputes, and I see no reason in principle why should not be ordered with respect to each of the Defendants³.

² This was also agreed by the parties in submissions made after a draft of my judgment was shared with them.

³ The parties made further submissions about interest after the draft judgment was handed down. The Claimants suggested that the Defendants had not made submissions about pre-judgment interest at the hearing on 12 July 2024. However, pre-judgment interest was sought by the Defendants in the draft Order before the Court, and at the hearing on 12 July 2024 the Claimants did not take issue with the principle that pre-judgment interest is awardable to compensating parties. The form of Order sought by the Defendants with respect to interest from the payment of invoices is standard for commercial disputes: the Claimants have not disputed that, and have not contended that there is any reason in principle for such an Order not to be made.

Conclusion

43. For the foregoing reasons, therefore, I will make an order reflecting the decisions set out above.