Neutral Citation Number: [2024] EWHC 384 (Ch)

Case No: PT-2023-BRS-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 22 February 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

Chedington Events Ltd	**Claimant**
- and -	
(1) Nihal Mohamed Brake	**Defendants**
(2) Andrew Young Brake	
- and -	
Diana Rebecca Cawley	**Third Party**

- -
- -

William Day (instructed by **Stewarts Law LLP**) for the **Claimant**
The First Defendant in person and for the **Second Defendant**
The Third Party in person

Consequential matters dealt with on paper

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

……

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 16:30 pm on 22 February 2024.

HHJ Paul Matthews :

INTRODUCTION

1. On 25 January 2024 I handed down my judgment on the further consideration of an interim third-party debt order ("TPDO") originally made on 26 July 2022. That judgment is available under neutral citation number [2024] EWHC 101 (Ch). The interim order was made, on the application of the claimant, to secure part payment of an earlier costs liability of the defendants towards the claimant. That costs liability amounted (ultimately) to £700,000. The debt alleged to be due from the third party to the defendants was £25,000. The defendants and the third party said that there was no debt due, and that the sum of £25,000 had been paid as advance rent for the use of a small "holiday let" residential unit in a barn at the third party's property.

Procedure

2. The parties agreed that the witnesses should be cross-examined on their witness statements. I set aside 26-27 September to deal with the further consideration. However, the defendants decided that they also wished to argue a preliminary point of law, and also applied to strike out parts of the claimant's evidence in support of the TPDO. I dealt with both of these matters on 26 September 2024. As to the former, I held that it was not possible to reach any conclusion in advance of hearing the witnesses and finding the facts. As to the latter, I struck out some parts of the evidence as irrelevant, and held that other parts should be treated as submissions. On the following day the witnesses were cross-examined on their statements, and I was addressed on the law and the facts.

Substantive decision

3. In the event I found that the story about payment of advance rent was untrue, and that the sum of £25,000 had been paid to the third party to be held to the order of the defendants. However, I further found that the sum of £25,000 had been reduced by payments to others made by the third party at the request of the defendants, leaving a balance of just £7,755.04 remaining due. I decided to make the interim order final, but only in that reduced sum. The judgment was handed down remotely, in the absence of the parties. Accordingly, I invited written submissions on consequential matters, which I have received and considered. This is my judgment on those consequential matters.

PERMISSION TO APPEAL

4. I record here that the defendants indicated that they would not seek permission to appeal from me at first instance. Instead, they would ask the Court of Appeal directly. That is their choice, though it runs contrary to the recommendation of the Court of Appeal: *P v P* [2015] EWCA Civ 447, [63]-[70]. So, I do not have to deal with the question of permission to appeal. However, as part of the written submissions made on consequential matters (taking the place of the adjourned hand-down hearing), the defendants asked me to extend time for filing their appellant's notice at the Court of Appeal under CPR rule 52.12(2). The claimant argued that I had no power to do so. Nevertheless, I held that I had such power, because the written submissions took the place of the hand-down hearing or its adjournment. On 6 February 2024, I exercised that power so as to extend time to file an appellant's notice in relation to my decision

of 25 January 2024 to 21 days after the date on which I give my decision on the consequential matters. This judgment contains that decision, and so the period of 21 days runs from the day it is handed down.

COSTS

Costs rules

5. I deal next with the question of costs. There are three aspects relevant, or said to be relevant, in the present case. First, there are the general rules for costs in civil litigation. Second, there is a special provision relating to the case where a judgment creditor is awarded costs on an application for a final TPDO. Thirdly, there is a regime of fixed recoverable costs, which the defendants say applies to this case. I shall describe each of them briefly.

General

6. First, under the general law, costs are in the discretion of the court: see the Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). If the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order, and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

7. If the general rule applies, it requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, [143], Rix LJ (giving the judgment of the Court of Appeal) said that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue". As a general proposition, the courts prefer to make costs orders covering the entire claim (even if then extending only to a proportion of costs), rather than issue-based costs orders. But it is clear that the court may still make an issue-based order if it considers that this better meets the justice of the case. The court may also make a costs order against a non-party in special cases.

CPR 71.11

8. Second, in relation to costs in the context of a TPDO, there are other provisions which the defendants submit are relevant. CPR rule 71.11 says:

> "If the judgment creditor is awarded costs on an application for an order under rule 72.2 or 72.10 –
>
> > (a) he shall, unless the court otherwise directs, retain those costs out of the money recovered by him under the order; and
> >
> > (b) the costs shall be deemed to be paid first out of the money he recovers, in priority to the judgment debt."

9. In the present case, the claimant's application for a TPDO was made under rule 72.2. So the rule applies to this case. I referred to it briefly in *Brake v Guy* [2022] EWHC 1911 (Ch), [8], though in a different context. The defendants say that the effect of rule 72.11 here is that the court's power to award costs to a judgment creditor in relation to a TPDO is usually limited to payment out of the funds ordered to be recovered by that creditor under the TPDO, and that

> "it would be a departure from the normal rules to award costs under CPR part 44".

10. I reject this submission. CPR rule 72.11 is not a separate code on costs for the TPDO context, and does not provide a source of power for the court to *award* costs in TPDO cases. Costs are still awarded under Part 44. Rule 72.11 relates to a specific point about *payment* of the costs awarded (under Part 44) *to a judgment creditor*. That rule means that in such a case the costs can in effect be added to the judgment debt, and so paid out of the recovered fund. But the rule does *not* mean that, if the fund is exhausted by the judgment debt, no costs can be awarded to the judgment creditor. The rule adds to the judgment creditor's security. It does not reduce its rights.

Fixed recoverable costs

11. Third, in their (final) reply submissions, the defendants also refer to the fixed recoverable cost ("FRC") provisions in CPR Part 45. An extended FRC regime was introduced on 1 October 2023. FRCs now extend, for example, to many personal injury cases. But the regime existed before then, and in particular it applied to non-complex cases which were short-lived because the defendant admitted the claim from the beginning, or the claimant obtained a judgment in default or otherwise without opposition, or a judgment obtained was enforced without opposition or other difficulty. It is that (pre-existing) part of the regime that is said to be relevant here. Thus, the rules which are relevant to this case were more or less the same under the old regime as under the new.

12. Until 1 October 2023, former rule 45.1 relevantly provided:

> "(1) This Section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of legal representatives' charges.
>
> (2) This Section applies where –
>
> […]
>
> (g) a judgment creditor has taken steps under Parts 70 to 73 to enforce a judgment or order … "

13. Former rule 45.8, headed "Fixed enforcement costs", then referred to a table (Table 5) containing the following entries:

> "On the making of a final third party debt order under rule 72.8(6)(a) or an order for the payment to the judgment creditor of money in court under rule 72.10(1)(b):

If the amount recovered is less than £150:	one half of the amount recovered
otherwise:	£98.50".

14. Since 1 October 2023, the rules are now rules 45.16 and 45.23. These relevantly provide:

> "45.16.(1) In any case to which this Section applies, unless the court orders otherwise, the only costs allowed in respect of a legal representative's charges are those specified in this Section.
>
> (2) This Section applies where—
>
> […]
>
> (g) a judgment creditor has taken steps under Parts 70 to 73 to enforce a judgment or order … "
>
> […]
>
> 45.23. Table 7 shows the amount to be allowed in respect of legal representatives' costs in the circumstances mentioned. … "

The relevant entries in Table 7 are identical to those in the table under rule 45.8 under the previous regime. The fixed cost therefore is £98.50 under the new regime as under the old.

15. It will be seen that for the purposes of the present case there is no relevant difference between the FRC rules before and after 1 October 2023. That means that it is not necessary to consider which regime applies to our case, where the interim TPDO was obtained before, but the final TPDO was obtained after, the change of regime. In both cases, the rule restricting a judgment creditor successfully obtaining a final TPDO to fixed costs is subject to the phrase "unless the court orders otherwise". The question is whether the court should "order otherwise" in the present case.

16. Guidance was given in the decision of Akenhead J in *Amber Construction Services Ltd v London Interspace HG Ltd* [2007] EWHC 3042 (TCC). This was a decision on the same phrase in the former regime. There had been an adjudication between the parties in relation to a demolition and building contract. Under the adjudication, the claimant contractor had been held entitled to some £64,000 plus VAT, interest, and the adjudicator's costs, from the defendant. The claimant was not paid by the due date, and threatened High Court enforcement proceedings. The defendant said the adjudicator had had no jurisdiction, that the claimant's claim had been substantially reduced by the adjudicator, and that the defendant had an overtopping counterclaim.

17. The claimant issued enforcement proceedings, and also an application for summary judgment. The TCC judge gave directions and fixed a hearing of the summary judgment application for a month's time. Three days later the defendant filed an acknowledgment of service admitting the full claim. It thereafter claimed that the claimant was limited to £100 fixed recoverable costs, because the claim had been paid in full (together with

the £100) within 14 days of the service of the particulars of claim (see the then rule 45.3).

18. Akenhead J said:

> "23. … it is clear that the Court retains a discretion to 'order otherwise'. Thus, in appropriate cases, the Court retains its discretion to order such costs as are appropriate. That said, the fixed cost regime applies, so to speak, in default if the Court does not otherwise order. CPR 45 recognises that many sets of proceedings brought in Court will be in the nature of debt collection exercises. Many such claims will not involve the use of independent solicitors but will be handled internally by the claimants in question. In many such cases the claimants will not incur significant costs and may well not want to incur further costs arguing that they are entitled to more than the fixed amounts. CPR 45 applies amounts and formulas to determine what the fixed costs are in any case. Thus, in a claim such as the present, where the value of the claim exceeded £5,000, the fixed cost is £100."

19. The judge went on to say:

> "25. However, in this case, it is wholly appropriate for the Court to exercise its discretion to order costs at a greater level than the costs fixed by CPR 45. My reasons are as follows:
>
> (i) This Court has recognised the importance of a summary and prompt procedure to secure enforcement of adjudicators' decisions properly reached.
>
> (ii) In this case, some four weeks elapsed after the issue of the adjudicators' decisions before the enforcement proceedings were issued.
>
> (iii) In their letter dated 17 October 2007, the Claimant's solicitors gave very clear warning that, unless the sum due under Mr Price's decision was paid promptly, proceedings would be commenced without further notice.
>
> (iv) In correspondence, the Defendant's solicitors made it clear in effect that they would not pay primarily because, they argued, the adjudicator did not have jurisdiction. They were thus putting forward an apparently comprehensible defence to any enforcement proceedings
>
> (v) Even in the 'without prejudice save as to costs' letter, it was made clear that the offer did not recognise that the sum which Mr Price had decided was due was payable.
>
> (vi) It can have come as no surprise that proceedings were issued. A party which makes a 'without prejudice save as to costs' offer is not entitled in some way to have it responded to or to assume that threatened proceedings against it will or might be withheld. It

would be different if the without prejudice correspondence had revealed some agreement by which the Claimant undertook, at least temporarily, not to issue proceedings. That is certainly not the case here.

(vii) The Defendant's argument that the Claimant has acted 'secretively' in incurring substantial costs in preparing for its without notice application and its proceedings in general is without foundation. Glovers wrote in terms on 17 October 2007 that, if the amount due pursuant to Mr Price's decision was not paid promptly, proceedings would be commenced in the High Court without further notice. The Defendant obviously knew that Glovers were involved and they knew, because they had been so warned, that proceedings could be commenced at any time without further notice, particularly given that its solicitors had put forward a potential defence, and it must or should have appreciated that significant costs could be incurred if High Court proceedings were issued. They could have ascertained, as was likely, that, if the proceedings were commenced in the TCC, the TCC practice as contained in their Guide would or could be followed. That is exactly what happened.

(viii) The procedure, set out in paragraph 9.2 of the TCC Guide (Second Edition, First Revision, October 2007), appears to have been followed substantially by Glovers. The Part 7 Claim Form needed to be accompanied by Particulars of Claim and the Part 24 application needed to be accompanied by a witness statement which exhibited, at least, the construction contract and the relevant adjudication documents. This procedure is now the norm for adjudication enforcement proceedings.

(ix) It is inevitable in those circumstances that the costs will exceed by a very substantial amount the fixed costs called for in CPR 45.

(x) It would not be fair to limit a successful claimant which complied with the steps called for in the Rules and the Guide. The Claimant was justified in issuing proceedings and a Part 24 application following a threatened defence and an unqualified admission on the part of the Defendant after issue."

20. The FRC for a final TPDO is appropriate for what Akenhead J calls "debt collection exercises". These will include cases where there is no dispute that there is a debt due from the third party to the judgment debtor, and where there is no substantive opposition to the making of the final TPDO. In the present case, however, the whole process has been fought tooth and nail by the defendants. Every possible obstacle has been thrown in the way of the claimant. Because every step has been vigorously challenged, the claimant has been required to deal with each procedural step fully and carefully. As a result, counsel has been fully involved.

21. In fairness to the defendants, I should say that these are not new tactics on their part. The claimant has not been taken by surprise. And I make clear that, as a matter of

procedural law, the defendants are entitled to challenge the steps taken by the claimant to enforce its judgment if they consider that they have grounds. If they are right, and the claimant is not entitled to the final order, that is all well and good. But, as Scarman LJ once said, in a quite different context, if you "act out the part of Hampden, you have got to be right": *R v Reid* [1973] 1 WLR 1284, 1289. So, if they are wrong, and have put the claimant to considerable expense to obtain the order it sought, then the court is likely to "order otherwise", and make an order for the payment of substantive costs under Part 44. That is this case, and in light of the procedural history, and indeed all the circumstances, I will indeed "order otherwise".

One event or two?

22. At the conclusion of the hearing on 26 September 2023, although I expressed my conclusion that the defendants' preliminary point did not succeed, I reserved the costs of the hearing that day, pending my decision overall. The claimant served separate statements of costs for each of the two days. It wishes me to deal separately with the costs of the two days. It says that the hearings were the product of separate applications, and would lead to separate orders. It also says that the advantage of treating the two days as separate events is that the costs of each can be the subject of summary assessment (*cf* CPR PD 44 para 9(2)). The defendants resist this course, saying that the division of the two days between the preliminary point, the strike-out, the cross-examination and the final submissions was simply a matter of court scheduling. The third party does not take a position on this aspect of the matter.

23. The strike-out application was concerned with the evidence put before the court for that further consideration, and the preliminary point was an attempt to deal with the whole matter summarily (though in the event it did not have that effect). Without the further consideration hearing, the other two aspects would not have happened. So all of the matters with which I dealt were part of the further consideration required of the interim TPDO. I note from the claimant's costs statements that counsel charged a single fee for the hearings on both days, albeit divided up between the two days. And, as stated above, I handed down a single judgment on the whole matter on 25 January 2024. On the face of it, therefore, the two days dealt with a single event, namely, deciding whether to make the interim TPDO final. I accept that one consequence of treating the two days as separate events would be that the costs of each could be the subject of summary assessment. But I do not think that that can have any real weight in deciding whether there is one legal event for costs purposes, or several.

24. The argument for a single event is strongest in relation to the preliminary issue, because that was, as the defendants pointed out, just a matter of timetabling. It was not a preliminary issue dealt with a long time before the remainder, thereby potentially saving costs. Here, by the time the issue was considered, the costs had already been incurred for the whole matter. And it was an issue (joint creditors) which would be raised however the matter was timetabled. By contrast, the strike-out application was not a *necessary* issue in the further consideration of the TPDO, even though it dealt with the evidence to be used in that consideration. But it was dealt with all together and helped the court to reach its decision on the TPDO. In my judgment the costs of the preliminary point and the strike-out should be treated together as part of the costs of the final TPDO. That does not of course prevent the court from making an issue-based order (under rule

44.2(6)(f)), but it means that *prima facie* at least it is unsuitable for summary assessment.

Whether to make a costs order at all

25. I begin my consideration of the costs issues by asking myself whether it is right to make a costs order at all. In my judgment it is, because the TPDO application is a matter of some substance and importance to the parties, and significant legal costs appear to have been incurred, and both the claimant and the defendants ask for their costs (the defendants only in relation to the strike-out). So, I will make a costs order, and the general rule will therefore apply, *unless* there is a good reason not to apply it.

Successful party

26. That means I need to ask myself who was the successful party for the purposes of the general rule. The claimant says that it was (though it accepts that it did not win on every point). The defendants say that the claimant is not, and that, subject to having their costs of the strike-out application, there should be no order as to costs for the first day, and the limit under rule 72.11 should apply to the second (although I have already said that I am against the claimants on that). The third party also says that there should be no order as to costs.

27. In my judgment, overall, the claimant was clearly the successful party. It sought a final TPDO, and it obtained one. This was for much less than it had asked, but it was for the whole remaining balance which I held to be due from the third party to the defendants at the time of the interim order. Moreover, the order was objected to in principle and in total, and the matter had to be argued and decided. I accept that the defendants succeeded in having part of the claimant's evidence struck out, but that was the extent of their success.

Disapplying the general rule

28. I must next ask myself whether there is a good reason not to apply the general rule in CPR rule 44.2(2)(a), that the unsuccessful party pay the costs of the successful. The defendants say that there is. They point to their partial success in the strike-out application. They point to the fact that the claimant asked for an order for payment of £25,000, but obtained an order for payment of only £7,755.04. They also point to an offer which they made to the claimant on 19 September 2023 to pay it £2,705.04. The third point is of little or no weight, given that the claimant has done significantly better than the offer made. The second is of limited weight, given that the claimant pursued the debt of £25,000 which it believed to exist, and which I have held did exist, but which by the time that the interim order was made had, unknown to the claimant, been reduced by payments out at the defendants' direction.

29. There is more weight to be given to the first point. But the sensible and appropriate way to reflect that is to reduce the overall proportion of costs payable to the claimant, under rule 44.2(6)(a). The claimant itself proposed a reduction in claimed costs for the hearing on 26 September 2023 of 50%, in order to reflect the fact that the defendants' application to strike out succeeded in part. The total stated for the claimant's costs for the first day is £3,362. This represents only a small part of the claimant's stated total costs for the two days, which (as I set out later) were either £38,249.30, or £52,069.70,

depending on which statement is looked at. On a broad-brush approach, I will therefore order the defendants to pay 90% of the claimant's total costs of the TPDO application (including the costs of the preliminary issue and the strike-out).

Position of the third party

30. I next consider the position of the third party. She is not a party to the underlying claim or claims. Her liability to the *defendants* is an asset upon which the successful *claimant* can partially execute its judgment. Ordinarily such a third party would not be ordered to pay the claimant's costs of obtaining a TPDO. But third parties are nevertheless susceptible to orders to pay costs in litigation to which they are not parties, by virtue of the wide jurisdiction conferred by section 51(1) of the Senior Courts Act 1981. This in part provides that

> "the court shall have full power to determine by whom … the costs are to be paid".

31. In *Aiden Shipping Co. Ltd v Interbulk Ltd* [1986] AC 965, Lord Goff (with whom the whole House agreed) held that this conferred jurisdiction on the court to make costs orders against non-parties. He added (at 980F):

> "In the vast majority of cases, it would no doubt be unjust to make an award of costs against a person who is not a party to the relevant proceedings. But, as the facts of the present case show, that is not always so."

32. In *Brake v Guy* [2022] EWHC 1911 (Ch), I made an order that a third party (not this third party) against whom a TPDO had been made pay the applicant's costs. I said this:

> "14. In ordinary circumstances, where an interim TPDO is made, and is subsequently made final, the third party who takes a neutral stance would not be ordered to pay the successful judgment creditor's costs. Indeed, it may be that the third party playing an entirely neutral role would be able to obtain an order for the payment of any costs to which it was put in taking part in the application and in complying with the order of the court …
>
> […]
>
> 16. It may also be noted that a third party which is a lawful UK deposit taker (but no other third party) is entitled to deduct a prescribed sum, currently £55, from the relevant debt by way of administrative expenses: Senior Courts Act 1981, section 40A. And, where an interim TPDO is made, but subsequently is *not* made final, and instead is discharged, the third party who made a proper objection (*eg* because it was not a debtor at all) would normally expect a costs order in its favour against the judgment creditor, in accordance with the general rule under CPR rule 44.2(2)(a).
>
> […]
>
> 19. … The third party did not at any time after receipt of the interim TPDO on 4 April 2022 until the position statement of 9 May 2022 indicate that in its view there was *not* a debt due from itself to Mr Brake. In particular, it did not comply

> with CPR rule 72.6(4) (which is expressly designed to deal with this kind of objection) or CPR rule 72.8(1) (dealing with evidence to support any objection). Instead, it waited until the day before the hearing (which had been listed for only 30 minutes on the basis that there would be no objection from the third party) to put forward a number of substantive arguments as to why the interim order should not be made final. The third party was far from neutral. The further application for an injunction was an obvious (and indeed successful) response to the only real objection belatedly made to the TPDO … "

33. In the present case the claimant asks that the third party be made jointly and severally liable with the defendants for costs. The third party was certainly not neutral. She descended into the arena, joining with the first defendant in telling me a story (which I found to be untrue) as to why there was no debt due. There were other untruths too. In these circumstances I consider that it is right that she be jointly and severally liable with the defendants for the costs order which I will make, and also for any order for payment on account of such costs.

Basis of assessment

Law

34. The next question with which I must deal is that of the basis of assessment. The claimant says it should be on the indemnity basis so far as concerns the costs of the 27 September. The defendants resist this, and say it should be on the standard basis. The leading authorities are the well-known decisions of the Court of Appeal in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879*, Kiam v MGN* [2002] 1 WLR 2810, and *Excalibur Ventures llc v Texas Keystone Inc (No 2)* [2017] 1 WLR 2221.

35. The test which comes out of the *Excelsior* case is often described in the words "something which takes the case out of the norm." Lord Woolf MR said (at [32]) that that was the critical requirement. In the *Kiam* case, Simon Brown LJ said (at [12]) that it is necessary for there to be conduct not only unreasonable but unreasonable to so pronounced a degree as to merit an award of indemnity costs. In *Excalibur Ventures*, at [21], Tomlinson LJ (with whom Gloster and David Richards LJ agreed) said:

> "21. … To award costs on an indemnity scale is a departure from the norm and one therefore looks for something, whether it be the conduct of the relevant party or parties, or the circumstances of the case, which takes the case outside the norm … "

36. More recently, there is the helpful analysis of Hildyard J in *Hosking v Apax Partners LLP* [2019] 1 WLR 3347, where the judge said (*inter alia*):

> "43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are: (1) the making of serious allegations which are unwarranted and calculated to tarnish the commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to

> drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."

Application to facts

37. The claimant relies on a number of features of this case to justify assessment on the indemnity basis. In summary, these are (i) the debt was generated by an attempt to hide £25,000 from the claimant's feared attempts to recover costs; (ii) the debt so generated was not disclosed by the defendants, in breach of the freezing order; (iii) the evidence for the *ex parte* application for the interim order had to be carefully prepared; (iv) the hearing for further consideration did not come on for 18 months (it is said because of the defendants' actions), and they and the third party then co-ordinated untruthful evidence; (v) that untruthful evidence required the production of detailed reply evidence; (vi) it also required an abnormal hearing with cross-examination on witness statements; and (vii) the defendants meanwhile engaged in protracted and tendentious correspondence with the claimant's solicitors, driving up costs.

38. It also relies on two offers to settle the TPDO application. One, on 8 September 2023, was open, seeking £7755.75 plus £7500 as a contribution to costs. The other, on 19 September 2023, was without prejudice save as to costs, seeking £2,755.04 plus £12,500 as a contribution to costs. Neither was a Part 36 offer, with statutory consequences. Both were refused. The defendants and the third party offered to pay £2,755.04 only.

39. I accept that this was an unusual TPDO application and hearing. But that in itself does not justify indemnity costs. What it does justify (as I have already said) is an award of costs under rule 44.2, exceeding the usual FRC. None of the actions said by the claimant to justify indemnity costs would generally do so as part of an ordinary claim. Defendants sometimes have very weak defences, they come to court as litigants in person, and they lose. Sometimes the successful cause of action against them is based on their past lies. Sometimes they lie in giving evidence. Considerable effort (and cost) may have to be spent by the claimant to overcome these lies, and to establish the truth. Sometimes defendants correspond with the claimant overmuch, or at too great a length, and time and cost have to be spent by the claimant in dealing with it. Parties sometimes do not accept offers which, in hindsight, are seen to have been bargains. However much I may regret it, and wish that everyone always obeyed the law and told the truth, none of this is out of the norm in modern litigation. This is a case for costs on the standard basis.

Payment on account of costs

Law

40. Because there will have to be a detailed assessment of costs in this case, I must now consider whether there should be, and if so the amount of, any payment on account of costs. CPR rule 44.2(8) provides that:

> "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".

41. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ, sitting as single judge of the Court of Appeal, said:

> "22. It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'…
>
> 23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

42. The purpose of the provision for payment on account is to enable more perfect justice to be done to those who will be entitled to something on detailed assessment but who are necessarily kept out of their money. I see no reason in the present case for not exercising the power in favour of the claimant. However, in considering the quantification of the amount to be ordered, there are a number of points to deal with.

Multiple statements of costs

43. The first such point is the existence of the second statement of costs for the 27 September 2024. The second statement is for a significantly higher sum, but the reason for filing and serving it is not well explained in the written submissions. The claimant's first written submission simply calls it "a further updated statement". The second written submission says that the first was prepared before the hearing, and the second afterwards. The second is therefore more accurate, dealing with costs actually incurred rather than merely estimated. There is no rule that a receiving party has only a single opportunity to state what its costs were, or by serving such a statement is making some kind of election. The question is whether the paying party has had a sufficient opportunity to deal with the figures claimed. In the present case, I am satisfied that that is so.

Charge rates

44. The second point is that of the charge rates applied to the fee-earners of the claimant's solicitors. The rates claimed in the first costs statement (for 26 September) are:

> 1. Ian Gatt KC Partner (Grade A) £775.00
>
> 2. Harry Spendlove Senior Associate (Grade B) £580.00
>
> 3. Bradley Meads Senior Costs Associate (Grade B) £350.00

45. The rates claimed in the second costs statement (for 27 September) are:

> 1. Ian Gatt KC Partner (Grade A) £736 (from May 2023 £775).

2. Harry Spendlove Senior Associate (Grade B) £550 (from May 2023 £580).

3. Frances Baird Senior Associate (Grade B) £580.

4. Oliver Ingham Associate (Grade C) £403 (from May 2023 £425).

5. Mary Read Associate (Grade C) £400.

6. Bradley Meads Senior Costs Associate (Grade B) £350.

46. With the exception of the figures for Bradley Meads (the senior costs associate) these figures significantly exceed the official guidelines approved by the Master of the Rolls. They were recently increased on 1 January 2024. The guideline rates before and after the increase for London 1 (the rate for the heaviest work in the solicitors' geographical location) were:

- Grade A: originally £512, now £546;
- Grade B: originally £348, now £371;
- Grade C: originally £270, now £288.

47. There is a question as to whether London 1 is the appropriate guideline rate. In *Brake v Guy* [2022] EWHC 1911 (Ch), [47]-[50], a case concerning an application for a final TPDO in relation to the second defendant, I applied the London 2 rate to the costs incurred by the claimant. The relevant guideline rates before and after 1 January 2024 are the following:

- Grade A: originally £373, now £398;
- Grade B: originally £289, now £308;
- Grade C: originally £244, now £260.

Although I do not decide the matter, on the face of it, it does not seem likely that the work done on the present TPDO application was significantly heavier than that needed for the earlier TPDO application. Both were out of the ordinary (which is why the claimant is not restricted to FRCs), but neither, it seems to me, looks like the heaviest kind of commercial litigation.

48. I do not overlook the fact that it is possible to justify a higher rate on assessment, but I emphasise that the burden of so justifying lies on the receiving party: *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466; *Athena Capital Services SICAV v Secretariat of State for the Holy See* [2022] EWCA Civ 1061. The submissions on each side make much and little respectively of the legal work needed for the claimant to deal with this application. Since I am not dealing with the assessment myself, it seems to me that I ought to proceed on the basis for now that the guideline rates, or something close to them, will be applied, but I do bear in mind the possibility that a higher rate may be applied. I am looking for the reasonable sum to award, and not for scientific precision according to a formula.

London solicitors

49. Thirdly, the defendants also criticise the claimant for instructing City of London litigation solicitors to deal with the enforcement of an existing costs order by way of a TPDO. They refer to the decision of the Court of Appeal in *Wraith v Forgemasters Ltd* [1988] 1 WLR 132. This case was referred to me in *Axnoller Events Ltd v Brake* [2021] EWHC 2362 (Ch), where I said this:

> "6. The Guy Parties have instructed London solicitors, who are inevitably more expensive than provincial solicitors. But *Wraith v Sheffield Forgemasters Ltd* shows that that by itself does not make their retainer unreasonable when it comes to assessing the costs as between the parties. In that case Mr Truscott had instructed a small firm of London solicitors (ATC) to act for him in a county court case after he became dissatisfied with his previous solicitors (MFC). The judge in the county court said it was unreasonable for him to do so because their charging rates were higher than those of local solicitors. The Court of Appeal allowed an appeal by Mr Truscott.
>
> 7. Kennedy LJ (with whom Waite and Auld LJJ agreed) said (at 141):
>
> > 'The following are matters which, as it seems to me, the judge should have regarded as relevant when considering the reasonableness of Mr. Truscott's decision to instruct A.T.C. (1) The importance of the matter to him … (2) The legal and factual complexities, in so far as he might reasonably be expected to understand them … (3) The location of his home, his place of work and the location of the court in which the relevant proceedings had been commenced. (4) Mr. Truscott's possibly well-founded dissatisfaction with the solicitors he had originally instructed, which may well have resulted in a natural desire to instruct solicitors further afield, who would not be inhibited in representing his interests. (5) The fact that he had sought advice as to whom to consult, and had been recommended to consult A.T.C. (6) The location of A.T.C., including their accessibility to him, and their readiness to attend at the relevant court. (7) What, if anything, he might reasonably be expected to know of the fees likely to be charged by A.T.C. as compared with the fees of other solicitors whom he might reasonably be expected to have considered.'
>
> 8. In the present case I consider that the retainer of the London solicitors was reasonable. The property the subject of the Possession Claim is worth several million pounds, and the Guy Parties have been kept out of possession for the best part of three years. The facts of the case are complex, and parts at least of the claim are legally complex. The matter is being tried in the High Court rather than the county court, albeit in Bristol rather than London. This is the regional centre for High Court work relating to the location of the properties concerned."

50. The context of the present costs dispute, though closely related to the earlier case, is necessarily different. It is the enforcement of an existing costs order by means of a TPDO. I must therefore consider afresh whether the instruction of a City firm such as Stewarts Law LLP can be justified here. The defendants say not. They say that nothing in this TPDO application (as a form of enforcement) was sufficiently complex to

warrant the instruction of a central London firm. It sought an order in relation to an alleged debt of £25,000 in respect of a costs liability of £700,000, though by the time it came to be argued the claimant must have known that the maximum recoverable was less than £8,000. They further say that it was not necessary for the claimant to have continuity of solicitor service. In this case it was neither reasonable nor proportionate to use Stewarts for this purpose. A Bristol firm (at National 1 rates) would have done.

51. The claimant says (correctly) that this issue has been considered and decided before in the wider litigation, as in *Axnoller Events Ltd v Brake* [2021] EWHC 2362 (Ch), and in *Brake v Guy* [2022] EWHC 1911 (Ch). And, in the latter case, costs were assessed on the London 2 rather than London 1 basis. But it also says that it has taken account of the difference between London 2 and National 1 rates, by voluntarily discounting the claimed costs from the headline figures, by 50% in relation to 26 September, and either 80% (indemnity basis) or 65% (standard basis) in relation to 27 September. However, for the purpose of deciding what is a reasonable sum to award on account of costs, I have to look, not at any discounts that may be offered, but at the costs actually claimed.

52. So, the question is whether the claimant was justified in employing Stewarts to deal with this TPDO application instead of (say) a Bristol firm. If this had been an ordinary TPDO application in an ordinary piece of civil litigation, the question would not have arisen, because the FRC would probably have been applicable. But it is not. It is extraordinary litigation on a grand scale, most of the proceedings in which (I remind myself) were started by the defendants, and in most of which they have been unsuccessful. Only the Possession claim was started by the claimant, and in that it has been wholly successful. At the outset, when the defendants had (literally) millions of pounds to spend, and money appeared to be no object on either side, everything that was done that could be done, either to advance or to resist whatever claim happened to be in question at that moment.

53. That attitude has persisted even though the defendants now have fewer resources. They have pulled in their horns and now instruct lawyers on a restricted basis, most of the time acting for themselves. The first defendant is a remarkable litigant in person, highly intelligent, fluent and articulate. She has managed rapidly to absorb legal techniques and is able to locate and deploy relevant legal materials to a degree unusual in a lay person. She has therefore been able to continue the litigation in a highly aggressive manner which has been labour-intensive for the claimant to deal with. I am in no doubt that any newly instructed firm for the claimant would have to spend a great deal of time (and therefore cost) in getting up to speed, even in relation to the enforcement of existing orders. Moreover, I think that only a sophisticated and well-resourced firm (wherever it was situated) would be able to cope with the first defendant's style of litigating. The instruction of counsel in this TPDO application would have been necessary in any event.

54. Given (i) the lengthy and complex background to the present application, (ii) the considerable judgment debts outstanding from the defendants to the claimant, and (iii) the defendants' propensity shown in recent applications to make it as difficult as possible for the claimant to identify assets and make recoveries, it was reasonable for the claimant to embark on the (out of the ordinary) application, involving cross-examination on witness statements, to establish the existence of a debt falsely denied by the defendants to exist. The retainer of Stewarts for that purpose, as the London firm

with all the background knowledge and relevant specialist skills, was also reasonable. However, in my judgment the guideline rate applicable to this case is London 2 rather than London 1, just as it was in *Brake v Guy* [2022] EWHC 1911 (Ch), and for similar reasons.

Application to facts

55. As I have said, the claimant served two separate statements of costs, one for the hearing on each of the 26 and 27 September 2023. The latter was updated by a further statement served on 1 February 2024. The statement for 26 September 2023 said that solicitors' costs of £2,362 and a counsel's fee of £1,000, a total of £3,362, had been incurred in respect of that day's hearing. The original statement for 27 September 2023 said that solicitors' costs of £23,612.30, counsel's fee of £11,000, and court costs of £275, a total of £34,887.30, had been incurred in respect of the hearing for that day. However, the later statement of 1 February 2024, substituting the statement for the hearing on 27 September 2023, stated that the costs of that day were £33,625.30 for solicitors, £13,750.00 for counsel, and £1,332.40 for other disbursements (court fees, transcript and travel costs), making a total of £48,707.70, nearly £14,000 more than the first costs statement. Nevertheless, as I have said, the claimant is not in law limited to what the first statement says, as long as the defendants have had, as I think they have had, a reasonable opportunity to deal with the second statement.

56. So, the total costs stated to have been incurred over the two days were £52,069.70. However, both in its statements of costs and its written submissions, the claimant has voluntarily limited its claim to costs to £1,681 for 26 September, and £38,000 (if on the indemnity basis) or £31,000 (if on the standard basis) for 27 September. This is a reduction of 50% in relation to 26 September, and either 80% or 65% in relation to 27 September. So the total costs claimed are £39,681 or £32,681. I have held that the basis of assessment should be the standard basis. So the total claim is for £32,681.

57. As to solicitors' costs, if the London 2 guideline rates before 1 January 2024 are applied to the time recorded for each Stewarts' fee earner on the costs statements for both 26 and 27 September 2023, the total comes out at a little over £20,000. I discount that by 10% to reflect the 90% costs order, so arriving at a figure of £18,000 or so. As to counsel's costs, the total fees charged for both days are £14,750. Frankly, that seems too high for counsel of 2016 call. I think the appropriate figure is £10,000, which I discount by 10% to £9,000.

Proportionality

58. Next, I stand back and ask myself whether it would be appropriate in due course to assess costs at £27,000 (or more) for an application for a TPDO to recover a debt of £25,000 at most, but ultimately only £7,755.04. CPR rule 44.3(5) provides:

> "Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;

> (d) any additional work generated by the conduct of the paying party,
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance; and
>
> (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness."

59. In *Kazakhstan Kagazy plc v Zhunus* [2015] EWHC 404 (Comm), The successful party made an application for a payment on account of costs. Leggatt J (as he then was) said:

> "12. … these proceedings are an instance of what is often euphemistically described as 'hard fought litigation' in which neither side shows any sense of moderation. The claims are based on allegations of dishonesty and the amounts of money involved are very large. Some of the allegedly fraudulent transactions in issue are of considerable complexity. Both sides have many lawyers working on the case …
>
> 13. In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants.
>
> 14. Where, as here, the court is not actually assessing the amount of costs to be recovered and has nothing like the level of information that could be required on a detailed assessment, there is additional reason to be conservative. The fact that the total costs claimed are very high cannot by itself be allowed to increase the sum awarded as an interim payment. I am sure that the costs claimed by the main group of defendants are neither reasonable nor proportionate. By what factor they should be discounted, however, to arrive at a reasonable and proportionate amount can only properly be determined by a detailed assessment.
>
> 15. For present purposes the approach that I intend to follow is a necessarily approximate one of estimating the recoverable amount in broad terms based on my knowledge of this case and of the issues raised by the applications and also drawing on such experience as I have of the costs of commercial litigation from

> summarily assessing and awarding payments on account of costs in other cases. I will then discount this figure to reflect the margin of error in my estimate and the principle that an interim payment should err on the side of awarding less than is ultimately likely to be recovered."

60. The present case factually different from that one. It is not in itself about "very large sums of money". It *is* about the recovery of a modest amount of money from the defendants as part of a much larger liability owed by them to the claimant. It is not a case where *both* sides have many lawyers working for them, although one does. It is emphatically, however, a case of "hard fought litigation" in which "neither side shows any sense of moderation".

61. Nevertheless, I respectfully consider that there is good sense in what the judge says in the *Kazakhstan* case. In particular, I am looking for the "lowest amount which [the claimant] could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances". Here that would not sensibly be higher than the maximum amount to be recovered. Indeed, in my judgment, it will usually be significantly less. In the present case I estimate that sum at £20,000. By the time they realised that a lot less was likely to be left, they were already committed. Although criticisms are made by the defendants of the amounts of time recorded by the solicitors, and these will also be considered at the stage of detailed assessment, I consider that it is unlikely that the costs will be assessed at lower than that figure.

Conclusion on payment on account

62. Accordingly I will order the sum of £20,000 to be paid by the defendants and the third party to the claimant on account of costs. I do not say that it is impossible for the claimant to achieve more on detailed assessment. I merely say that in my judgment this seems to me to be a reasonable sum to award under CPR rule 44.2(8). The usual rule (CPR rule 44.7) is that orders for the payment of costs are to be complied with in 14 days. The third party asks for 28 days, on the ground that it seems to be a very short time to organise funds. But she provides no supporting evidence of what she would need to do in her case. On the material before me, therefore I see no reason to depart from the general rule.

INTEREST

Law

63. The claimant claims interest from the defendants and the third party on the sum to be paid under the TPDO by the third party to the claimant, pursuant to section 35A of the Senior Courts Act 1981. This relevantly provides:

> "(1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—

> (a) in the case of any sum paid before judgment, the date of the payment; and
>
> (b) in the case of the sum for which judgment is given, the date of the judgment.
>
> […]
>
> (4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs.
>
> […]
>
> (7) In this section 'plaintiff' means the person seeking the debt or damages and 'defendant' means the person from whom the plaintiff seeks the debt or damages … "

64. The claimant accepts that this is a novel point, not covered by authority. The question is whether "cause of action" in section 35A(1) covers an application for a TPDO. It refers to legal dictionary definitions of that phrase, and also to the statement by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, 242-243, that

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

Submissions

65. The claimant submits that an application for a TPDO falls within that definition. The remedy is the TPDO itself. The factual situation is the existence of the judgment debt coupled with the debt owed by the third party to the judgment debtor. It further says that the word "entitles" in Diplock LJ's statement encompasses discretionary remedies, and is not confined to cases where the court has no discretion. The purpose of section 35A is to compensate the claimant for being deprived of the use of the money which it should have had, measured by reference to the cost of borrowing that money.

66. The defendants submit that an application for a TPDO is not a cause of action against the third party. They also refer to reg 7(2) and (6) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020. That provision prevents a creditor from taking certain steps (including requiring a debtor to pay interest on a moratorium debt) during a moratorium period. In the present case there was a moratorium in force for a considerable amount of the relevant time. They submit that ordering interest under section 35A would be inconsistent with the 2020 Regulations.

Discussion

67. In my judgment, the defendants are right to say that an application for a TPDO is not a cause of action against the third party. It is a form of execution or *enforcement* of the *remedy* awarded to the claimant (*ie* an order to pay a sum of money, or to pay damages as assessed or to be assessed) in respect of an underlying cause of action (*eg* breach of contract or the tort of negligence). It is not itself the remedy. Unlike the claim to interest

on the cause of action *before* it is adjudicated upon, the occasion for a TPDO arises only *after* judgment has been given. In my judgment, section 35A interest is confined to the former situation.

68. Moreover, there seems no good reason why the third party should be burdened with interest on the debt of the judgment debtor, on which interest will ordinarily be running by virtue of section 17 of the Judgments Act 1838. In any event, section 35A does not enable a claimant to seek interest on a debt where interest already runs: see section 35A(4). Apart from special cases like reg 7 of the 2020 Regulations (which did not exist in 1981), interest would continue to run on judgment debts, and so section 35A could have no application anyway. I do not therefore need to deal with the defendants' argument about the potential inconsistency between section 35A and the 2020 Regulations, and do not do so.

STAY PENDING APPEAL

Submissions

69. The final matter is the question of a stay pending appeal. In their first submission, the defendants pointed out that, on 22 January 2024, the Court of Appeal had acceded to an application for a stay of the order for damages and costs of the quantum trial pending determination of the question of permission to appeal, conditionally on the defendants' compliance within 7 days with CPR rules 6.23-6.24 (provision of the defendants' address for service). They ask for a stay of my order on the same terms. The claimant does not oppose this, subject to one exception. This concerns the sum of £5,244.01, apparently received by the defendants by way of repayment of overpaid tax. The claimant says that this is a "windfall" and the defendants cannot have been depending on this in order to pursue an appeal. Thus, requiring the defendants to pay that sum to the claimant would not stifle the appeal.

Discussion

70. I see the theoretical attraction of the claimant's argument, and but am not persuaded by it. The defendants are restrained by a freezing injunction from dissipating their assets. If they can persuade the appeal court that they have sufficient merits to pursue an appeal against the TPDO, they should be able to do so without having to part with everything that they do not immediately need. The injunction is sufficient protection for the claimant in the meantime. I will therefore stay my order as against the defendants pending determination of their application for permission to appeal, once again conditionally on the defendants' compliance within 7 days with CPR rules 6.23-6.24 (of course, if they have by now complied with those rules, then the condition falls away). The third party does not ask for a stay, and therefore I do not need to consider her position further.

CONCLUSION

71. For the reasons given above, I will order that the defendants and the third party jointly and severally pay 90% of the claimant's costs of the entire application dealt with on 26 and 27 September 2023 on the standard basis. I will also order that the defendants and the third party jointly and severally pay to the claimant within 14 days the sum of £20,000 on account of costs liability. I will not order interest against the third party on

the sum to be paid under the TPDO. Finally, I will stay my orders as against the defendants (alone) pending determination of the defendants' applications for permission to appeal, conditionally on the defendants' compliance within 7 days with CPR rules 6.23-6.24.