Case 44
Bates and Others

v

Post Office Ltd

[2019] Costs LR 857

Neutral Citation Number: [2019] EWHC 1373 (QB)
High Court of Justice, Queen's Bench Division
7 June 2019

Before:
Fraser J

Keywords:
costs budgeting, detailed assessment, group litigation, payments on account

Headnote

In group litigation, where preliminary issues had been determined, it was wrong to make no orders as to costs until the very end of the litigation by reserving them. A judge's discretion extended to the ability to make an order for immediate payment of costs of a party who had been successful in a package or raft of issues. It followed that it would not be consistent with the principles of CPR 44 and 46.6 to reserve common issues which had been resolved already in a judgment going centrally to the first head of relief sought as a declaration. The presence of litigation funding would not sway the decision one way or the other since in most cases cash flow would be a relevant consideration for litigants. For these reasons it was not appropriate to reserve the costs and instead there would be an order for payment of the common costs of the preliminary issues: on the facts that would be for 90% of

the budgeted costs subject to the costs management order and 60% of the incurred costs to ensure that there was no likelihood of any overpayment. Those costs would be paid on the standard not the indemnity basis. An application that the budgeted costs should not be subject to detailed assessment would be refused. It was for the costs judge to decide whether there was a good reason to depart from the budget: costs budgeting was not intended to replace detailed assessment.

Cases Cited

Austin v *Miller Argent (South Wales) Ltd* [2011] EWHC Civ 928
de Jongh Weill v *Mean Fiddler* [2003] EWCA Civ 1058
Elvanite Full Circle Ltd v *AMEC Earth & Environmental (UK) Ltd* [2013] 4 Costs LR 612; [2013] EWHC 1643 (TCC)
Excalibur Ventures LLC v *Texas Keystone Inc and Others* [2015] EWHC 566 (Comm)
Henry v *News Group Newspapers Ltd* [2013] 2 Costs LR 334; [2013] EWCA Civ 19
Hislop v *Perde*; *Kaur* v *Committee (for the Time Being) of Ramgarhia Board Leicester* [2018] 4 Costs LO 515; [2018] EWCA Civ 1726
Kastor Navigation Co Ltd and Another v *Axa Global Risks (UK) Ltd and Others*; *The "Kastor Too"* [2004] 4 Costs LR 569; [2004] EWCA Civ 277
MacInnes v *Gross* [2017] 2 Costs LR 243; [2017] EWHC 127 (QB)
Mars UK Ltd v *Teknowledge Ltd* [1999] 2 Costs LR 44
Perriam v *Wayne* [2011] EWHC 403 (QB)

Judgment (No. 5) "Common Issues Costs"

Fraser J:

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Introduction

1. These proceedings are being conducted pursuant to a group litigation order ("GLO") made on 22 March 2017 by Senior Master Fontaine. This judgment is the latest in the series, and is consequential upon the first substantive judgment dealing with what the parties referred to as the "Common Issues". That is called Judgment No. 3 "Common Issues" and is at [2019] EWHC 606 (QB). The other judgments are at [2017] EWHC 2844 (QB) (Judgment No. 1, dealing with the listing of trials and hearings in the group litigation); [2018] EWHC 2698 (QB) (which is Judgment No. 2, and deals with an application by the Post Office to strike out the lead claimants' evidence for the Common issues trial); and [2019] EWCH 871 (QB) (Judgment No. 4, dismissing a recusal application by the Post Office seeking to remove me as managing judge and to abandon the Horizon Issues trial then underway). Judgment No. 4 was handed down on 9 April 2019. The Post Office sought to appeal my decision in Judgment No. 4. I refused the Post Office permission to appeal to the Court of Appeal, and in an order of 9 May 2019 the Post Office's application for permission to appeal was dismissed by Coulson LJ. Detailed reasons were provided in respect of that refusal.

2. The issuing by the Post Office of the recusal application on 21 March 2019 caused significant disruption to the Horizon Issues trial which had started on 11 March 2019, and to the group litigation as a whole. Matters that were consequential upon the handing down of Judgment No. 3 on the Common Issues were, originally, programmed to be dealt with after the Horizon Issues trial had ended. The Horizon Issues trial has not yet resumed and will now only do so on 4 June 2019, when the expert evidence will be called, the final trial date now being 2 July 2019. Upon dismissing the recusal application, I listed this hearing to take place on 23 May 2019 to deal with costs and other matters consequential upon Judgment No. 3 that had resolved the Common Issues.

3. At that hearing, the Post Office made an application for permission to appeal Judgment No. 3 in respect of numerous grounds of appeal both of law, what was said to be procedural irregularity, and fact. I refused that application, gave brief reasons orally at the time, and these are amplified in written reasons for refusal. These are necessary in order to accompany Form N460 for the assistance of the

Court of Appeal if, or when, the Post Office lodges its appeal and application for permission to appeal.

4. I also heard a number of different applications for costs. I gave the results of those applications to the parties at the time on 23 May 2019, together with brief oral reasons, but explained that I would provide more detailed reasons in writing shortly. These are those reasons.

The Costs of the Recusal Application

5. These were sought by the claimants on a summary assessment, and on the indemnity basis (of which further below). They were agreed by the Post Office shortly before the hearing and the Post Office agreed to pay the claimants the sum of £300,000 in respect of these. Further detail is contained in the terms of a consent order. The Post Office's own costs of the recusal application in their schedule of costs submitted for the hearing on 3 April 2019 were in excess of £212,000 (which included £34,165 for its solicitors, and £174,815 for its counsel). This means the total costs expended by both parties on that application were in excess of £500,000. The Post Office did not seek any of their own costs, and the recusal application is now finally determined including all consequential matters.

Whether the Costs of the Common Issues Should Be Reserved

6. The Common Issues trial, which resolved the 23 different Common Issues between the parties relating to the contractual and agency relationship of SPMs under the different contracts used by the Post Office between 2000 and 2017 (namely the SPMC, Modified SPMC and NTC) was tried between 7 November and 6 December 2018. They are self-contained matters of both fact and/or law and affect all the different claimants in the group litigation, although not all of the claimants contracted on all of the three different contracts.

7. The Post Office's primary submission on costs is that an order should be made reserving those costs. The claimants, on the other hand, seek an order in their favour at this stage in the litigation, with certain consequential matters such as the basis of the assessment, and a payment on account of detailed assessment.

8. The Post Office submits that I ought to reserve the costs, and also that to do otherwise would evidence or suggest that I had pre-determined the ultimate outcome of the litigation in the future. This

latter submission was not to be found in its written skeleton argument for the hearing on 23 May 2019. It was made for the first time in oral submissions. The Post Office therefore submitted, in express terms, that to make an order in respect of the costs of the Common Issues trial now (rather than at the very end of the litigation, some years hence) would demonstrate a pre-determination as to the overall outcome of the litigation. The exact phraseology used by counsel in advancing this submission is worth setting out:

> "the court can't be sure that things will happen in the future that will affect and alter its view about incidence of costs. It simply cannot do so. If it does so now, in my submission as a matter of principle, that would evidence a predetermination or would go towards suggesting the court has reached a view about matters as to how things are going to pan out in the future."

9. I am troubled by this submission, since it seems to me to echo the approach adopted when the Post Office made its recusal application. This is notwithstanding what was explained in considerable detail in Judgment No. 4, and also in detail by the Court of Appeal when it refused to grant permission to appeal in relation to that judgment. This is specifically addressed in the detailed explanation given by Coulson LJ in his 17 pages of the Reasons for Refusal of Application for Permission to Appeal against Judgment No. 4 ("the Court of Appeal reasons") which explained why he was refusing permission to appeal Judgment No. 4.

10. I am concerned also that inherent in this submission by the Post Office is a veiled or implied threat which mirrors the approach adopted by the Post Office on the recusal application, namely that in adopting a course of action in the face of opposition by the Post Office (here, making a costs order now, as opposed to reserving costs orders for later) runs the risk that the Post Office will say that the overall outcome of the litigation (or other future issues) has already been decided. That, categorically, is not the case. I explained at [30] of Judgment No. 3 that the Post Office was attempting to put the court *in terrorem*, and Coulson LJ made essentially the same point at [48] of the Court of Appeal reasons, although in relation to a different submission by the Post Office on a different topic. It is somewhat surprising that, having only very recently been provided by the Court of Appeal with these detailed reasons, the Post Office should now

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(again) be suggesting pre-judgment if its preferred way in the litigation is not adopted.

11. More substantively, I cannot accept that, as a matter of principle, making a costs order now evidences or suggests that the court has formed a pre-determined view about the outcome of the group litigation. It is entirely conventional for costs orders to be made at an interlocutory stage or, where litigation is dealt with in stages, for the costs of those stages to be addressed as the litigation proceeds, rather than only at the very end of the litigation and all at once. Sometimes it will not be appropriate to make costs orders before the end of the litigation; other times it will be. It will depend on the circumstances of each given case. If a costs order is made, rather than costs being reserved, that does not evidence pre-judgment; it will, instead, merely reflect the fact that the court considers it appropriate that a costs order is made at that point in time. I consider it unarguable that deciding a costs application now, either in this group litigation or any litigation, could sensibly be interpreted as pre-judging the outcome of the litigation as a whole.

12. In the present case, I make it clear (once again) that I have no such pre-determined view on any matters yet to be fully tried. I have already, in Judgment No. 4, at [268] and [269], expressly stated that I considered submissions by the Post Office's solicitors that it was "too soon to tell whether any claimant will be successful" (as well as that the claimants had not been wholly successful in Judgment No. 3) accurately reflected the outcome of Judgment No. 3. That remains the case. I do nonetheless consider that it is appropriate that I consider whether to make a costs order now, without any concern that to do otherwise than to reserve the costs, will give the appearance or evidence of prejudgment which the Post Office (yet again) suggests.

13. The Post Office's other submissions for the most part concentrated on an analogy between common issues in group litigation and preliminary issues in non-group cases. It was said that the Common Issues resolved in Judgment No. 3 were akin to preliminary issues. I do not consider that to be an entirely apt analogy. I consider that group litigation is different to the hearing of preliminary issues. Even if I am wrong about that, in some cases which concern preliminary issues, the court may make orders for payment of the preliminary issues trial costs without contravening principle.

14. Based on the decision of Coulson J (as he then was) in *Perriam*

v *Wayne* [2011] EWHC 403 (QB), which was an appeal from a decision in the Leeds County Court, the Post Office submitted that the case was authority for the following point:

> "One is that failure or success of preliminary issues at an earlier stage is not an event, so far as Mr Justice Coulson is concerned in that case, that they be costs in case. There is nothing in the rules, in my submission, that simply says because something is part of group litigation that some other rule should apply."

15. I do not consider that to be a sound submission and I reject it. I do not consider that preliminary issues in a non-group case can be used as a useful analogy in group litigation for common issues in any event. Further, there *are* rules that reflect the different provision for costs in group litigation. These were ignored by the Post Office entirely until I brought them to their attention during the hearing.

16. CPR Part 44 deals with costs generally, headed "General Rules about Costs". CPR 44.2 explains the basis of the court's discretion as to costs, and identifies within it the general approach, explaining that "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party". CPR Part 44.2(3) states that the general rule does not apply to certain family proceedings. The provisions of CPR Part 44 are very well known. The court has a wide discretion.

17. CPR Part 46 is headed "Costs – Special Cases" and CPR Part 46.6 expressly deals with costs where the court has made a group litigation order. That is the case here. CPR Part 46.2 deals with costs orders in favour of, or against non-parties, and has detailed notes dealing with (for example) the position of litigation funders. The position regarding litigation funders, and whether they are what is called "pure funders", is not relevant for the costs orders sought now, although (as will be seen below) the claimants argued that the fact that funders were involved should be taken into account when considering the justice of the appropriate order. However, the existence of CPR Part 46.6 makes it clear that group litigation generally is seen as being a special case.

18. CPR Part 46.6(5) requires the court, if making an order about costs in relation to any application or hearing which involved one or more GLO issues, and issues relevant to individual claims, to direct the proportion of the costs that relate to each. This is because of the

particular way in which the court tries claims in group litigation. For the avoidance of doubt, all of the Common Issues were GLO issues and so the proportion that I direct referable to those is 100% as GLO issues. I consider that the rule requires me to make that order in any event.

19. The notes at CPR 46.6.2 make it clear that the courts are entitled to devise new procedures adapted to the circumstances of particular group litigation. I do not consider that it is necessary to do so in this case, due to the nature of the costs orders sought in respect of the Common Issues trial. However, the court has power to do so to reflect the justice of the case in group litigation. Were it otherwise, the court could potentially find itself hamstrung in dealing with group litigation cases justly. The analogy used by the Post Office repetitively through the costs hearing was to consider what would, or should, happen in respect of costs had the court been dealing with all of the claims together in one large trial. However, in my judgment, such a submission is wholly unrealistic. Regardless of the likelihood of such a scenario in group litigation generally (in my judgment not likely) that was not the case management approach adopted here, and it was not even the case management approach contended for by the Post Office at the first CMC before me. It is of no assistance in considering what the correct costs order should be here, when the 23 Common Issues were dealt with first, and separately.

20. Further, in my judgment, relying on other first-instance cases, in particular cases dealing with preliminary issues, and trying to adapt what has been said on the facts of those other cases about the correct order for costs in this case, is not helpful either. The exercise for the court in this litigation is to consider the proper exercise of the discretion, and how it should be exercised here, on these particular facts. The approach adopted in entirely different cases on entirely different facts is not likely to be of enormous assistance.

21. The most relevant points are as follows. Group litigation is likely to be considerable in scale. That is simply stating the obvious. In *Alyson Austin* v *Miller Argent (South Wales) Ltd* [2011] EWHC Civ 928 Jackson LJ stated:

> "the decision whether to make a GLO is a matter for the court's discretion. The making of a GLO commits both the parties and the court to the allocation of substantial resources to the conduct of group

> litigation. The court will not make a GLO before it is clear that there is a sufficient number of claimants, who seriously intend to proceed and whose claims raise common or related issues of fact and law."

22. The procedures available to the court in terms of case management of group litigation are wide, and it is not possible to specify in advance what these will be because each different group action will be so different from the others. The approach to costs must reflect the case management adopted in each case; the particular issues and how they are dealt with by the court; and there is no strait jacket into which the approach to such costs orders must be forced.

23. Not all claimants may succeed in any group litigation generally; in some, perhaps no claimants will succeed. Some individual claimants in any group litigation may be likely to fail. Some issues, which are termed common issues and also GLO issues in the White Book and the cases, will benefit the whole group of claimants. Others will not, and these are called individual issues in CPR Part 46.6. The Post Office relied extensively upon its analogy of *all* the issues for *all* the claimants being tried in one large trial. Given that is not what has been adopted here, and given the way the litigation has unfolded to date, such an approach would undoubtedly favour a war of attrition in the litigation, as resolution of the issues would (or could) effectively come down to who had the deepest pockets. I do not consider that to be the approach enshrined in the Civil Procedure Rules. It could also safely be said that it is what group litigation should be seeking to avoid.

24. One important point about group litigation generally is that it may be some years before all (or even any) of the claims are resolved finally in terms of liability, causation and quantum. That is certainly the case in this litigation. Before the disruption caused to the Horizon Issues trial, no claims were likely to be finally resolved (and even then only a very small number) until some time in mid-2020. Whether that timescale remains feasible given the delay caused by the recusal application has not yet been addressed.

25. This latter point about timing is an important one, in my judgment. The rationale for the Post Office seeking to have me reserve the costs is said to be that greater knowledge of who has in fact won (and by extension, by how much) will be much clearer after further trials. That is true in one sense, but applied rigidly it would mean that no costs orders would (or on the Post Office's submissions, should) be

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made until the very end of the litigation, some time in the uncertain future. I do not consider that is the correct approach.

26. The Common Issues that were resolved in Judgment No. 3 go centrally to the first head of relief sought as a declaration in the particulars of claim. They also govern the entire basis of the contractual relationship between the different sub-postmasters and sub-postmistresses ("SPMs"), who are the claimants in the group litigation, and the Post Office. They were packaged as a separate and distinct group of issues at an early stage and the exact drafting and selection, though guided and assisted by the court, was effectively done by the parties themselves. They are the foundation of the parties' contractual relationships.

27. In my judgment, it would not be consistent with the principles included in CPR Part 44, CPR Part 46.6, or even the overriding objective in CPR Part 1.1 itself, to reserve the costs of the Common Issues. CPR Part 1.1(2)(a) requires the court, in order to deal with a case justly and at proportionate cost, to ensure that the parties are on an equal footing. The claimants would not be on an equal footing with the Post Office, a publicly funded body, if I reserved the costs of the Common Issues trial until the very end of the litigation.

28. I take comfort from the dicta of Lightman J in *de Jongh Weill* v *Mean Fiddler* [2003] EWCA Civ 1058, at [29]. I refer to this case because both parties have addressed extensive submissions, both oral and written, on this authority. The issue on that appeal was identified in the following terms:

> "The issue raised on the claimant's appeal as to costs is whether the judge's exercise of discretion refusing to make an immediate order for costs in favour of the claimant in respect of the trial of the issue of liability and postponing any order in respect of such costs until after the trial of remaining issue was clearly wrong or so flawed to be open to challenge."

29. The dicta at [33] featured heavily in the costs hearing; the claimants argued that the passage was taken out of context by the Post Office, and the Post Office relied upon it to justify my reserving the costs. However, in my judgment the important passage is within [32] where the judgment says:

> "Whilst in the exercise of his discretion the judge could have made, *and*

> *indeed might well have been expected to make, an immediate order for the payment to the claimant of the costs of the trial of the issue of liability* or at least a proportion of those costs (leaving the question of entitlement to the remainder over until later), with some hesitation I reach the conclusion that on this appeal it is not possible to say that the judge's decision was clearly one which he was not entitled to reach." (emphasis added)

30. The reason for identifying that passage is that it makes it clear, not only that a judge's discretion extends to the ability to make an immediate order for payment of costs to a successful claimant who has been successful on a package or raft of issues, but in some circumstances the judge might, as it is put in the emphasised passage, even be expected to make such an order.

31. I certainly do not consider that it would be wrong in principle to make such an order for costs now, rather than reserving them as the Post Office seeks. I have a broad discretion, and in the exercise of that discretion I decline to reserve the costs and will go on to consider the next applications by the claimants, which only arise in the event that I decided not to reserve the costs. I do not however consider that the presence of litigation funding should sway this decision one way or the other. I agree with Mr Cavender that the presence of such funding should not put a claimant in a better position vis-à-vis the correct stage in litigation at which costs should be addressed, compared to a non-funded party. However, regardless of who is funding litigation, a funder or an individual litigant, cash flow is a relevant consideration for most litigants. It is a consideration that might weigh less heavily upon publicly funded bodies such as the Post Office, but even such entities are likely to be concerned to some extent with cash flow.

32. I should also make it clear that my usual approach in this group litigation, when dealing with the other separate trials of GLO issues to come – the Horizon Issues trial underway, the Further Issues trial later in 2019, and others – will be to deal with the costs of each trial if possible upon conclusion of each trial. This is not to fetter my discretion going forwards; each such situation, and each application, will be considered separately at the time on the relevant specific facts and matters in question. However, in this group litigation, given its subject matter, scope and likely time scale, I will consider making such costs orders as are necessary on an ongoing basis where this is

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possible, fair and always considering the proper exercise of the court's discretion.

Who Should Pay the Costs of the Common Issues and in What Proportion

33. The parties are agreed that the claimants were broadly more successful than the Post Office. The Post Office's skeleton argument said that the claimants "had the better of the issues" and that phrase sums up the overall result rather aptly.

34. There were 23 Common Issues and the Post Office succeeded on seven of them. Of course, a strict arithmetical approach is neither possible nor desirable.

35. As I explained in Judgment No. 4 between [266] and [269] the claimants were not 100% successful. It is also too soon to say if individual claimants will ultimately prevail in the litigation overall. The starting point is, in my judgment, and this has in fact already been made clear in Judgment No. 4, that the claimants were not 100% successful, and therefore I have to decide: should I reflect that lack of success in a percentage adjustment to their recovery?

36. The claimants submit that there should be no percentage reduction, even though they accept that it is undoubtedly the case that the Post Office was successful on some of the issues. I consider the claimants' position unrealistic. Although it could be said that Common Issue 1, the finding on the relational nature of the contracts, was one of the more important, and that success by the claimants on that potentially outweighs some of the lack of success on other less central issues, all of the issues were to some extent important. It is important when considering all the different Common Issues, that one does not imagine that because seven of them were resolved in the Post Office's favour, that these seven can simply be taken as a mathematical or arithmetical assessment of the overall total of 23. Many of the Common Issues interlocked, some overlapped, some were more important than others, and I have decided that the only sensible way to reflect this is to make an approximate percentage adjustment downwards from the 100% which a wholly successful claimant would expect to recover.

37. In doing that, I am adopting an approach which is not only the modern practice but was effectively approved at [149] of *Kastor Navigation Co Ltd* v *AXA Global Risk (UK) Ltd* [2004] EWCA Civ

277. At [149] in the judgment of the court delivered by Rix LJ he states:

> "there was nothing wrong in principle with an order which resulted in the successful party having to pay the unsuccessful party a substantial proportion of its costs. The 'winner takes all' principle no longer applies."

38. The question in that case was whether the judge had applied the right approach. That was a fact specific exercise on the circumstances in that case.

39. I have decided that the correct approach in this case is to make a percentage reduction to the claimants' recovery of their costs; I then have to decide what the correct percentage reduction is.

40. The percentage reduction in this case has to reflect, in my judgment, two different particular features of this case. One is the degree of success of the Post Office on some of the Common Issues; but in addition to that, I also consider that the way the Post Office conducted the trial should also be considered in the exercise of the discretion provided to me and the proper exercise of CPR 44.2. The Post Office put facts in issue at the beginning and during the Common Issues trial which, in my judgment, it plainly ought not to have done, and which extended the length of the trial significantly. By this I am referring to the way that the Post Office challenged the claimants in terms of how its business in fact worked overall in terms of branch accounting.

41. These disputed facts dealt, for example, with the options available to SPMs generally at the end of branch trading periods; the meaning given within the Post Office to the term "settled centrally" in terms of losses shown on Horizon; and how Horizon operated at a branch level (not in its computing architecture) in terms of how items disputed by an SPM could, or could not, be dealt with by that SPM. They are not specific isolated facts on individual cases that would affect only one or two SPMs, or one or two of the lead claimants. They were facts that went to the general way that the Post Office operated and its relationship with its SPMs. They were central to the dispute, particularly in relation to the Common Issues dealing with agency and the status of branch accounts. The Post Office's approach was to challenge those matters robustly and consistently in cross-examination of the different lead claimants, and that had the effect of requiring a

detailed factual enquiry during the trial – indeed, with almost every lead claimant – which ought not to have been necessary. In the event, by the end of the trial, a more complete picture had emerged and what the Post Office had put so centrally in issue during its consistently robust cross-examination turned out not to be controversial at all. The meaning of "settle centrally" was shown in internal Post Office documents to equate to "legally responsible for", rather the diametrically opposite to the way the case was put for at least two weeks of the trial. One example is at para 43(3) of the Generic Defence, which pleaded that "Raising a dispute causes a block to be placed on the value of the shortfall that has been transferred to the Subpostmaster's personal account with Post Office. The blocked value is not (and is not treated as) a debt due to Post Office." This simply was not correct, and the Post Office's own witnesses confirmed that disputed sums *were* treated as debts unless something else was done. Further, there was no "dispute" button on the Horizon screen available to SPMs. Each SPM effectively had no option but to accept the figures provided to him or her at the end of a Branch Trading Period. These points were in issue for a large part of the Common Issues trial, and should never have been. I wish to make it clear that my view of this is confined to what could be called systemic or general facts going to the Post Office systems. I am not penalising the Post Office for challenging facts that went to the individual lead claimants themselves.

42. I consider that those two factors, the increase in the trial complexity and length due to the way that the Post Office put facts relating to the Horizon system in issue, and also the issues upon which the Post Office succeeded, should both be considered together in arriving at the correct percentage reduction of the claimants' costs, and taken account of, when assessing the percentage the claimants should recover by way of their costs of the Common Issues.

43. Taking those matters into account, considering all the facts of the case, applying my detailed knowledge of it as the managing judge of the group litigation and as the judge who heard the trial, and taking account of all the circumstances of the Common Issues trial, I am satisfied a modest adjustment is justified to the recovery of the claimants' costs to reflect those factors.

44. The Post Office has suggested a reduction of 30%. In my judgment, that is too great a discount; although to be fair, that figure

was arrived at without consideration of the point I have made concerning the way the trial was conducted by the Post Office in terms of facts being put unnecessarily in issue. The suggested percentage is also (very approximately) the percentage expression of 7/23, in other words the arithmetic result of the proportion of the Common Issues upon which the Post Office succeeded. Mr Cavender realistically accepted that it was an impressionistic exercise and that different tribunals or different people looking at the factors might come up with different percentages. That is no doubt correct. Taking account of all the factors of this case, in my judgment, the claimants should have their costs subject to a 10% reduction to take account of the features that I have identified.

Should the Costs Be Assessed on the Standard or on the Indemnity Basis

45. I now turn to the basis of assessment. The claimants seek costs to be assessed on the indemnity basis. Rather curiously, they only seek them up to the date of 13 April 2018, with costs on a standard basis thereafter. The Post Office identifies that this is an unusual approach, and the date for the different bases of assessment is simply arbitrarily chosen by the claimants as the date of the costs management order.

46. The principle upon which indemnity costs will be ordered is well known. It is most usefully set out in the recent judgment of *Hislop* v *Perde* [2018] EWCA Civ 1726. In that appeal, Longmore, King and Coulson LJJ considered two appeals together and gave further guidance on the issue of when indemnity costs should be awarded.

47. The general principles for an award of indemnity costs are as follows, taken from the judgment of Coulson LJ in that case at [36]:

> "a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable 'to a high degree'. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight.
>
> b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs."

48. Some of the submissions on behalf of the claimants relate to the way the Post Office conducted the Common Issues trial. I have already taken into account the Post Office's approach in terms of the evidence,

and how it challenged facts it ought not to have challenged, in arriving at the percentage. It would, in my judgment, be wrong to take account of that twice, which would undoubtedly amount to "double counting". In my judgment, it was more appropriate to take account of that in arriving at the correct percentage reduction. So far as the Common Issues trial is concerned, in my judgment, the correct order is for costs to be assessed on the standard basis. Each trial however is different, and applications by either side for costs on either a standard or indemnity basis will each be dealt with separately on their individual merits at the time.

49. It is not therefore necessary for me to consider the point of principle raised by the Post Office as to the curious situation here, where a party seeks an assessment on an indemnity basis up to a particular date, that date simply being chosen not by reference to anything that the paying party did or did not do as at that date, but by reference to the date of the costs management order.

50. I am therefore going to order the detailed assessment necessary to be performed on the standard basis for all the costs, both the incurred costs and those subject to the costs management order, what were referred to as "the budgeted costs" in the hearing. The claimants' expenditure on costs is lower than the costs approved in the cost management order. I deal with detailed assessment further below.

Interim Payment on Account

51. I turn therefore to the correct amount to be ordered to be paid by the Post Office on account to the claimants.

52. There was a cost management order made in this case dealing with all the Common Issues costs from 13 April 2018, taking account of all the relevant modern principles, and this order was reached after a Costs Management Hearing which ended up taking three days in total.

53. The principles concerning costs to be paid on account are in fact most usefully encapsulated in a decision, again of Coulson J (as he then was) in *MacInnes* v *Gross (No. 2: Costs and Consequential Matters)* [2017] EWHC 127 (QB). Between [19] and [18] the correct approach is identified when one is considering an interim payment on account of costs. These continue:

> "[23] There was no dispute between the parties that I should make an interim order on account of costs. However, there was a significant

difference between the parties as to the amount of that order. The first defendant's approved costs budget was in the sum of £570,000. He originally sought an interim payment of £605,000, being 95% of the approved costs budget (£540,000) together with an additional £65,000 to reflect the fluctuations in exchange rate and interest. During the oral submissions, the latter figure was reduced to £30,000 to reflect interest only, so that the first defendant asked for the sum of £570,000 as an interim payment on account of costs.

[24] The claimant proposed a payment on account of just £375,000. This was principally because the claimant argued that the first defendant would not necessarily recover the amount of his costs budget at the detailed assessment stage. At one point during his submissions, Mr Mansfield said that, when the costs are assessed by the costs judge, that assessment 'will start from scratch'. He also said that in any event the first defendant had incurred considerably more than the figure in his approved costs budget. It appears that the first defendant's costs are now said to be £956,279.06.

[25] I reject Mr Mansfield's submission on the materiality of the costs budget figure. In my view, the first defendant's approved costs budget is the appropriate starting point for the calculation of any interim payment on account of costs. CPR 3.18 makes plain that, where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, 'the court will … not depart from such approved or agreed budget unless satisfied that there is good reason to do so'. The significance of this rule cannot be understated. It means that, when costs are assessed, the costs judge will start with the figure in the approved costs budget. If there is no good reason to depart from that figure, he or she is likely to conclude the assessment at the same figure: see *Silvia Henry* v *News Group Newspapers Ltd* [2013] EWCA Civ 19.

[26] One of the main benefits to be gained from the increased work for the parties (and the court) in undertaking the detailed costs management exercise at the outset of the case is the fact that, at its conclusion, there will be a large amount of certainty as to what the likely costs recovery will be. One consequence is that, for the purposes of calculating the interim payment on account of costs, the starting point will almost always be the payee's approved costs budget."

54. He then goes on to say at [27]:

> "[27] So when making an interim payment on account of costs in a case with an approved costs budget, the days of the educated guesswork identified by Jacob J in *Mars UK Ltd* v *Teknowledge Ltd* [1999] 2 Costs LR 44 are now gone. Instead the court can be confident that there is a figure for costs which, because it has already been approved, is both reasonable and proportionate."

55. In this case the costs management order was not made until 13 April 2018. So the costs fall to be considered in two different tranches. One is the costs of the Common Issues trial from 13 April 2018 to date. The claimant has explained and provided information demonstrating in broad terms that the sum of £3.1 million has been incurred, that figure being exclusive of VAT.

56. I have to take account of the fact that I have only ordered 90% of the costs of the Common Issues to be recoverable by the claimants. Therefore, using figures without VAT and without the 1% budgeting costs (though I will expect those arithmetic exercises to be agreed by the parties and included in the order) I award as a payment on account from the Post Office to the claimants in respect of the Common Issues from 13 April 2018 a figure which is £3.1 million multiplied by 90%, which is £2.79 million. To that figure should be added VAT and the 1% figure that I have identified.

57. I then come on to deal with incurred costs as at 13 April 2018 attributable to the Common Issues, in other words the incurred (as opposed to the future budgeted) costs as at that date. The total I am told by the claimants is £3.284 million in approximate terms. The claimants have sought an interim payment of 60% of that figure on the basis that on a standard assessment they would not expect to recover the full amount. I have in fact ordered only 90% of their costs to be recoverable and so a necessary reduction will have to be made to that.

58. A point arose in the submissions lodged by the Post Office's solicitors that Common Issues costs could only run from the date that the Common Issues were ordered, which was the date of the first CMC. The point is that there can be no allowance for any Common Issues costs prior to the making of that order. It is also said that a precise figure is required for the work on the Common Issues as at the date of the first CMC.

59. Mr Cavender for the Post Office points out that no information

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has been provided from the claimants in response to those submissions, which were lodged on 29 March 2019, and it is for the claimants to demonstrate what the costs were as at that date. He submits that this is a strong point in the Post Office's favour because what he described as a lacuna in information ought not to be held against the Post Office. He submits it could potentially lead to difficulties in the future if the payment on account to the claimants is in excess of the amount to which upon detailed assessment the claimants might be entitled.

60. That submission has a little less force when the current position is that the Post Office is objecting to a detailed assessment commencing now. That timing point was in issue, but has rather gone away during the course of the hearing itself. But even taking the submission at face value, Mr Warwick for the claimants explained that about £2 million worth of work was done between the date of the first CMC and 13 April 2018 and almost the entirety of that work, he says, must have been work on the Common Issues because the Horizon Issues had not at that point been identified.

61. Taking all of that into account, these are the sorts of points I find that ought, can and no doubt will be taken on a detailed assessment. I have to decide the figure for an interim payment on account of costs for those incurred costs prior to 13 April 2018 attributable to the Common Issues. I am not fixing the amount with precision and finality.

62. Taking 90% of the £3.284 million to reflect my costs order and then applying the 60% figure which Mr Warwick accepted should be applied, and performed at my request in court, one arrives [at] a figure of £1.77 million. I round these up to the round tens of thousands of pounds for the purposes of these payments on account. I am confident that the 60% reduction that was originally proposed by the claimants is more than sufficient to ensure that there is no overpayment likely in this case. The precise figure for the claimants' costs will be arrived at either by agreement, or upon a detailed assessment on the standard basis.

63. I therefore order a payment on account to the claimants for that period of £1.77 million. To that figure has to be added VAT and the 1% budgeted amount. Neither VAT nor the 1% should be rounded up to the nearest £10,000 because there will be arithmetically calculated figures to the nearest pound. Just to be clear, the amounts that I have

ordered as payments by the Post Office to the claimants on account of the claimants' costs of the Common Issues are £2.79 million on account for budgeted costs together with VAT and the 1%; and £1.77 million for incurred costs up to 13 April 2018, together with VAT and the 1%. The overall total, excluding VAT and the 1% figure to which I have referred, is £4.56 million. Those amounts do however have to be added, and the parties can agree the arithmetic between them.

Detailed Assessment of the Claimants' Costs of the Common Issues

64. Although at one point the claimants sought an order that detailed assessment of their costs be commenced immediately, that application was withdrawn during the hearing. Given the claimants in any event are to obtain the benefit of the interim payments detailed above, whether a detailed assessment were to commence now, or later in the litigation, became a matter for the Post Office. Their counsel made it clear that they sought no particular order in this regard that detailed assessment commence immediately. Accordingly, this disappeared as an issue that required resolution by the court. If the parties were to agree, of their own volition, to commence the process of detailed assessment of the claimants' costs (which process has costs implications of its own) then the detailed assessment could commence whenever such agreement were reached. Even though this is group litigation, I am not minded to impose the process of detailed assessment upon the parties now, in the absence of either party requesting it.

65. One point that did prove contentious however, after the hearing of 23 May 2019 and during preparation of this judgment containing detailed reasons for the orders made, was whether all of the claimants' costs should be subject to detailed assessment, or just those that were incurred prior to the making of the costs management order on 13 April 2018. This only arose when the parties were seeking to agree the precise terms of the actual order made by me on 23 May 2019. The Post Office maintained that detailed assessment should be included for all of the claimants' costs, because all of the claimants' costs were to be subject to detailed assessment. The claimants argued that the order actually made did not require detailed assessment of its budgeted costs, and no detailed assessment should be ordered of those costs. Both sides lodged written explanation[s] of their respective positions by email, explaining why an order in agreed terms had not been produced.

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66. I enquired whether either party wished to have a short further hearing for oral submissions on this point, which had not been argued before me on 23 May 2019. In so far as the point was raised at all, it was only implicitly and by reference to what budgeted costs represented, and how the budgeted figures could and should be used for payments on account. Neither party sought a further hearing and both sides were content for me to resolve the point based on their written submissions.

67. The submission made by the claimants that their budgeted costs should not be subject to detailed assessment is, in my judgment, a bold one. It arises, I consider, from a misunderstanding of what a "payment on account" is for, or means, or perhaps more accurately, upon what event costs are being paid "on account". A certain lack of precision crept into the parties' respective submissions on costs generally. I have dealt at [14] above with the Post Office's submission (which I rejected) that there were no special rules concerning costs for group litigation; that submission was incorrect, and there are. This particular submission by the claimants is also incorrect, and overlooks the provisions of CPR 44.6, which clearly states that "where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of the costs or (b) order detailed assessment of the costs by a costs officer". The effect of making an order in the terms sought by the claimants would be that there would be neither summary, nor detailed, assessment of the claimants' budgeted costs at all.

68. Neither party asked me to make a summary assessment of the claimants' costs of the Common Issues trial, and if one party had done so unilaterally, I would have rejected such a request for obvious reasons. The costs of a major trial that took many months to prepare, and several weeks in court, are wholly unsuitable for summary assessment. Had all the parties jointly asked me to do so, I would have taken some persuading, but a consensual request would have been considered in a different light.

69. Further, seeking a payment "on account" implicitly (if not expressly, by the use of the term "on account") seeks or includes within it the concept of a further, final order, in respect of what the costs definitively are. That would conventionally be reached at the end of a detailed assessment (absent agreement). That is performed by a

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costs officer or costs judge. It is not the same as arriving at a figure for the payment upon account.

70. The claimants agree that at the hearing of 23 May 2019 an "order [was] made for an interim payment on account of both budgeted and pre-budgeted costs and the amounts in which that was ordered". The phrase "on account" makes it clear what was being ordered. Without any assessment, the question could be posed "on account of what?"

71. The claimants also submitted, after the hearing when this disagreement was ventilated, that "while budgeted costs are ordinarily subject to detailed assessment, the costs judge may only depart from the approved budget if there is good reason to do so: CPR rule 3.18. Save to the extent the claimants' incurred costs were a little less than the approved budget (c.£300,000 – 10% under budget), no good reason was made apparent at the hearing." Two points arise from that. Firstly, it is for the costs judge to consider departures from the approved budget, and whether there is a good reason. Although I am sure that a trial judge can indicate his or her views on costs incurred, budgeted costs, and any good reasons, I do not consider that either the presence or absence of good reasons in this case was argued before me, nor do I consider that I expressed any view on the matter on 23 May 2019. Budgeted costs are considered, for the purposes of detailed assessment, in different categories and different phases of the trial. The approach on 23 May 2019 was to consider the overall total of costs incurred for the budgeted period, and the budgeted amount only. No further argument, or consideration, was given to the matter.

72. Finally, costs budgeting – and the dicta in the authorities make this clear – is not intended to replace entirely either detailed or summary assessment. In *MacInnes* v *Gross* [2017] EWHC 127 (QB) Coulson J (as he then was) stated, in a passage already quoted above:

> "[25] I reject Mr Mansfield's submission on the materiality of the costs budget figure. In my view, the first defendant's approved costs budget is the appropriate starting point for the calculation of any interim payment on account of costs. CPR 3.18 makes plain that, where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, 'the court will … not depart from such approved or agreed budget unless satisfied that there is good reason to do so'.

> *The significance of this rule cannot be understated. It means that, when costs are assessed, the costs judge will start with the figure in the approved costs budget. If there is no good reason to depart from that figure, he or she is likely to conclude the assessment at the same figure*: see *Silvia Henry* v *News Group Newspapers Ltd* [2013] EWCA Civ 19.
>
> [26] One of the main benefits to be gained from the increased work for the parties (and the court) in undertaking the detailed costs management exercise at the outset of the case is the fact that, at its conclusion, there will be a large amount of certainty as to what the likely costs recovery will be. *One consequence is that, for the purposes of calculating the interim payment on account of costs, the starting point will almost always be the payee's approved costs budget.* Another consequence is that the court assessing the interim payment can ignore the fact that, as here, there may have been significant expenditure on costs by the payee above the budget figure: any increase is a matter for the costs judge and the relatively onerous burden of recovering more than the budget figure is on the payee: see *Elvanite Full Circle Ltd* v *AMEC Earth & Environmental (UK) Ltd (No. 2)* [2013] EWHC 1643 (TCC)." (emphasis added)

73. In *Excalibur Ventures LLC* v *Texas Keystone Inc and Others* [2015] EWHC 566 (Comm) at [15] to [22] Christopher Clarke J (as he then was) considered payments on account and the concept of the "irreducible minimum" for a payment on account, and stated at [23] the following:

> "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." (emphasis added)

74. The passages emphasised in the two authorities above only make sense if they are read, as in my judgment they must be, as dealing with a payment of costs *on account* of a detailed assessment. Costs budgeting did not create a "third way", ignoring the requirements of CPR 44.6. Finally, the notes at CPR 3.18(1) make this clear by stating:

> "This rule explains the effect which costs management should have when, on the conclusion of proceedings, one party is awarded costs

against another and the amount of those costs cannot be agreed *and so they fall for assessment by the court*."

That assessment must mean either summary, or detailed, assessment.

75. I therefore consider that detailed assessment is required of the costs that the claimants have been awarded, both before and after the date of the costs management order. This should be included in the order itself reflecting what was ordered on 23 May 2019. However – and even this seemed to be controversial – separate paragraphs should be included in the order drawn up, one dealing with the payment on account of the costs incurred prior to the costs management order, and another dealing with the budgeted costs. This is because the costs judge will only be assisted by having the different amounts of costs, one subject to the costs budgeting regime and the other before that, identified clearly. The exercise of detailed assessment will also be performed differently in respect of costs that were included in the costs management order.

76. The court is usually assisted by the parties themselves, particularly when represented by many counsel, drafting the order themselves in agreed wording. It should be rare that disputes over the actual wording occur. I would therefore be grateful for an order in agreed terms to be submitted for my approval.

Cost Effective Conduct of the Litigation

77. The parties were ordered, prior to my appointment as managing judge, to engage in costs reporting to the court whenever their costs increased by £250,000. I approved, in para 14 of the fourth CMC order dated 5 June 2018, a request by both the parties that this reporting threshold be increased to £500,000, as their costs were increasing at such a rate that the lower incremental required reporting to the court more often than they wished.

78. I have expressed concerns on different occasions before about cost effective conduct of this litigation. Those concerns have simply increased during the course of 2019. The most recent notification from the Post Office's solicitors to the court in respect of costs was on 13 May 2019. That notified the court that the Post Office's own costs had, as at that date, exceeded £12,800,000. Since that date, the Post Office has agreed to pay the claimants £300,000 in respect of the claimant's costs of the recusal application, although the figure of £212,000 in respect of the Post Office's own costs of that failed

application will (or should be) included within the £12,800,000. On any view, the Post Office's own costs will now be in excess of £13 million. The claimants' costs are also high. In a letter dated 5 June 2019, therefore after the costs hearing but before the handing down of these reasons, the claimants' solicitors notified that the total of their costs now exceeded £12.6 million, although that will be ameliorated to the extent of the interim payments on account to the claimants I have ordered of £4.56 million above plus VAT and 1%, which the Post Office has 21 days to pay. Both sides are therefore spending similar sums by way of costs, and both sides' costs are of a high level.

79. The group litigation is part of the way through the Horizon Issues trial, and even though that trial has been interrupted in circumstances that have been well canvassed, during a trial is not the time for a detailed discussion with the parties about the level of their expenditure on litigation costs, even though that trial started on 11 March 2019. However, once that trial is over, the parties should be prepared for a further and detailed costs management discussion with the court. Costs of this order cannot pass without comment.

Patrick Green QC, *Henry Warwick*, *Ognjen Miletic* and *Reanne MacKenzie* (instructed by Freeths LLP) appeared for the claimants.

David Cavender QC, *Jamie Carpenter* and *Gideon Cohen* (instructed by Womble Bond Dickinson LLP) appeared for the defendant.

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