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Case No: BR-2021-000191

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Royal Courts of Justice

7 Rolls Buildings
London EC4A 1NL

Date: 19 May 2022

Before: DICCJ Greenwood

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF HASSAN ALI MAKKI

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

HASSAN ALI MAKKI

Applicant

- and -

BANK OF BEIRUT S.A.L.

Respondent

- -

Dr Riz Mokal (instructed by Mishcon de Reya LLP) for the Applicant

Mr Stephen Robins QC (instructed by Howard Kennedy LLP) for the Respondent

Hearing date: 27 April 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand down is deemed to be 19 May 2022 at 4.00pm.

Introduction

1. On 13 April 2022, I handed down my substantive judgment in respect of Mr Makki's application under rule 10.4 of the Insolvency (England and Wales) Rules 2016 for an order setting aside a statutory demand dated 10 June 2021 and served on him by the Respondent, the Bank of Beirut S.A.L. In essence, for the reasons given, I decided that the demand should be set aside under rule 10.5(5)(a) because there is a "*genuine triable issue*" in respect of the claim being pursued against the Bank by Mr Makki in Lebanon. This is my further judgment in respect of various consequential matters, in particular:

    1.1. the incidence and basis of assessment of costs; and,

    1.2. whether there should be a payment on account of costs under CPR 44.2(8), and if so, in what sum.

2. Unless otherwise stated, I will continue to use the terms defined in my previous judgment; the two are to be read together.

Events Subsequent to the Substantive Judgment

3. Since my judgment was handed down, the parties have taken a number of steps giving rise to further disputes between them, and that affect the issues before me.

4. First, as follows, Mr Makki claims to have discharged the Makki Debt; the Bank disputes that claim.

    4.1. By letter dated 20 April 2022, Mr Makki provided the Bank with six cheques, four of which were four of the BOBSAL Cheques in US Dollars and Euros, endorsed by Mr Makki in favour of the Bank. Together, those cheques are said by Mr Makki to cover the principal amount of the Makki Debt in full, plus £8,469.80 of interest. The

remaining two cheques, in US Dollars amounting to the GBP equivalent of about £10,095, were drawn on Mr Makki's account with Byblos Bank, in favour of the Bank. Together they are said to cover the remainder of the interest on the principal amount of the Makki Debt. On behalf of the Bank, a Mr Jad Khairallah, described as a lawyer, endorsed the notification of receipt with handwritten text stating (in translation, so I am told) "*We have received the contents of these papers and we refuse this offer and deposit due to its conflict with the legal rules and provisions*."

4.2. Appearing before me on behalf of the Bank, Mr Stephen Robins QC explained that the Bank does not accept Mr Makki's claim to have discharged the Makki Debt, because, in summary: (i) the alleged payment was made in the wrong currency; (ii) Mr Makki has not reduced the amount of his claim in the Lebanese Proceedings to take account of the endorsed cheques delivered to the Bank; and (iii) Mr Makki's new contention, that he is able to obtain value from the Bobsal Cheques by endorsing them in favour of third parties (including the Bank itself) is inconsistent with his contention in the Lebanese Proceedings (at least, as re-stated by Mr Robins) that the Cheques are "*essentially worthless*" in his hands.

4.3. Suffice to say, Mr Makki does not accept the Bank's arguments, and there is therefore a dispute between them as to whether or not the Makki Debt has been discharged. I am not asked to decide that dispute.

5. Second, the Bank has issued an application ("**the Set-Off Application**") for an order under CPR 44.12(1), which provides: "*Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either: (a) set off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or (b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay*".

6. By that Application, the Bank seeks an order for the set off of any costs liability of the Bank to Mr Makki in the present proceedings, against the Makki Debt (in other words, Mr Makki's liability to the Bank pursuant to the costs order made by Southwark Crown Court

on 5 March 2021, under s.19 of the Prosecution of Offences Act 1985). In summary, the Bank submits that it would be wrong for it to have to pay any costs to Mr Makki now, in circumstances where Mr Makki has not himself paid the Makki Debt.

7. Plainly, the Bank's Set-Off Application and Mr Makki's claim to have discharged the Makki Debt, are very closely connected. Accordingly, it was agreed by the parties (a sensible agreement, that I was content to endorse, and if necessary, to order):

   7.1. that the Set-Off Application should be adjourned generally, with liberty to the parties to restore it, on notice; and,

   7.2. that in the meantime, pending its determination, there should be a stay of any costs order made in the present proceedings against the Bank in favour of Mr Makki, at least to the extent of any actual payment in favour of Mr Makki (rather than, for example, of any associated procedures, such as assessment, which can continue as far as necessary).

Detailed Assessment

8. It was also agreed that any costs awarded in favour of Mr Makki should be subject to detailed rather than summary assessment, and again, for the following reasons I was willing to agree.

9. The first reason is (as Dr Mokal described it) the "*practical impossibility of signing off on the bulk of Mr Makki's cost*s".

   9.1. Mr Makki was represented by Cadwalader, Wickersham & Taft Solicitors until 20 December 2021. Subsequently he has been represented by Mishcon de Reya. Without waiving Mr Makki's privilege in any respect, Dr Mokal told me that "*Mr Makki is now in dispute with Cadwalader*". I was told nothing about the nature or terms of that dispute, or when or how it might be resolved.

   9.2. Mr Makki has filed three cost statements totalling £207,324.

9.2.1. The first, for £78,561.50, was for the hearing before CICCJ Briggs on 9 August 2021. It is a draft, unsigned document prepared by Cadwalader. Mishcon de Reya cannot sign it, and because of the dispute with Mr Makki, neither is it currently possible to obtain Cadwalader's signature.

9.2.2. The second, for £84,653.50, is for Cadwalader's costs between 9 August 2021 and 20 December 2021, the date at which they came off the record. This is another draft document, albeit one prepared by a costs draftsman who has analysed the invoices received by Mr Makki. Again, Mishcon cannot sign it and neither is it currently practicable to obtain Cadwalader's signature and approval.

9.2.3. The third, for £44,217, relates to the final hearing of the application before me on 3 March 2022, and is signed by Mishcon de Reya.

9.2.4. Further costs have been incurred since the hearing on 3 March 2022, in the sum (set out in correspondence) of £5,570.

10. The second reason is that Mr Makki's costs exceed £100,000. They are too substantial to be dealt with summarily (as was the case in, for example, *Les Abassadeurs Club Ltd v Albluewi* [2020] 4 WLR 88 (QB)). In that regard, Mr Robins submitted that Mr Makki's costs (or at least, the aggregate sum of the three costs statements) were "*extraordinarily large*", that they give rise (on the Bank's case) to a large number of issues, and that as a result, a detailed assessment is appropriate.

11. In the circumstances, I agree that summary assessment is inappropriate, and I am willing to order a detailed assessment.

The Incidence of Costs

12. Broadly, in my previous judgment, at [3], I identified four issues.

12.1. On what date was the Demand served on Mr Makki?

12.2. If it was served on 14 or 17 June 2021, and therefore Mr Makki's application was made out of time, should time be extended?

12.3. Is it necessary, for a claim to comprise a "*counterclaim, set-off or cross demand*" for the purposes of Rule 10.5(5)(a), that there be mutuality in respect of the parties' contending rights or claims?

12.4. Was there a "*genuine triable issue*" in respect of the Makki Claim currently being pursued in Lebanon, or do those Proceedings – as the Bank argued – stand no reasonable prospect of success?

13. Mr Makki was successful in respect of each issue, and accordingly, Dr Riz Mokal (who again appeared before me on behalf of Mr Makki) submitted that the Court should follow the "*general rule*", as set out in CPR 44.2(2), and order the Bank to pay Mr Makki's costs.

14. Of course, the Court has a discretion in respect of costs, and although Mr Robins accepted that Mr Makki was the successful party, he submitted on the Bank's behalf that there are nonetheless good reasons in the present case to depart from the general rule. In essence, his argument was that as a result of Mr Makki's claim to have discharged the Makki Debt, as explained above, the third and fourth issues identified at [8] above, "*have now become moot*", and that Mr Makki's arguments on those issues "*have now effectively been abandoned by* [his] *change of position*". Mr Robins therefore submitted that costs incurred by Mr Makki in respect of the third and fourth issues were thrown away, and the Bank ought not to be ordered to pay them. He suggested that Mr Makki's costs should be reduced by 80%. As he put it, "*if Mr Makki had adopted from the outset the position that he had paid the Crown Court Costs Order, the principal issue raised by the Set Aside Application would have been entirely different, i.e., as to whether the delivery of the six banker's cheques to the Bank constituted payment of the Crown Court Costs Order. The third and fourth issues identified in paragraph 3 of the Judgment would not have arisen for decision at all.*"

15. In this regard, I do not accept Mr Robins' submissions, to any extent. It may be right to say that different issues would have arisen had Mr Makki sought to discharge the Makki Debt before the hearing of his application, and it may (or may not) be right to say that his subsequent claim to have done so by delivery of endorsed Bobsal Cheques is inconsistent with the way in which he puts his case in the Lebanese Proceedings (a point which I should say, was wholly disputed by Dr Mokal). In my judgment however, none of that is remotely relevant: there were four issues before me; each was fully argued; in respect of each, I decided in favour of Mr Makki. There was no application for permission to appeal, and it was not suggested that any submissions in the present proceedings were improperly advanced on Mr Makki's behalf; I am not asked to revisit any of the issues I decided. Neither the (hypothetical) possibility that the application would have proceeded differently had Mr Makki previously sought to pay the Makki Debt (on which the Demand was based) nor the possibility that his claim now to have done so is somehow inconsistent with his continuing case in Lebanon, has any bearing on what was in fact argued before me, and what I decided; the history cannot be re-written. In the circumstances, Mr Makki was entirely successful, and I will order the Bank to pay his costs.

The Basis of Assessment

16. Mr Makki sought an order that his costs be assessed on the indemnity rather than the standard basis; the Bank disagreed.

17. As to the relevant legal principles in this respect, there was no difference of any substance between the parties' submissions.

18. Indemnity costs will be awarded where there is "*something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs*": *Excelsior Commercial and Industrial Holdings Ltd v Aspden* [2002] CP Rep 67, at [39] per Waller LJ.

19. The indemnity basis differs from the standard basis in two respects. In *Excelsior Commercial and Industrial Holdings* Ltd, Lord Woolf LCJ said at [15]:

"*The differences are two-fold. First, the differences are as to the onus which is on a party to establish that the costs were reasonable. In the case of a standard order, the onus is on the party in whose favour the order has been made. In the case of an indemnity order, the onus of showing the costs are not reasonable is on the party against whom the order has been made. The other important distinction between a standard order and an indemnity order is the fact that, whereas in the case of a standard order the court will only allow costs which are proportionate to the matters in issue, this requirement of proportionality does not exist in relation to an order which is made on the indemnity basis. This is a matter of real significance. On the one hand, it means that an indemnity order is one which does not have the important requirement of proportionality which is intended to reduce the amount of costs which are payable in consequence of litigation. On the other hand, an indemnity order means that a party who has such an order made in their favour is more likely to recover a sum which reflects the actual costs in the proceedings*".

20. The key question is whether there are grounds to justify the different approach entailed by an order for indemnity costs, and in particular, that justify preventing the paying party from taking points on proportionality (meaning that, necessarily, the paying party is exposed to the risk of paying costs in a sum disproportionate to the case).

21. By way of example, indemnity costs have been awarded:

    21.1. where "*a party embarks on or brings upon itself and pursues litigation of the magnitude of this litigation in such circumstances and suffers a resounding defeat, involving the rejection of much of the evidence adduced in support of its case*" (*Amoco (UK) Exploration Company v British American Offshore Ltd* [2002] BLR 135 per Langley J at [1]);

    21.2. where there has been "*the pursuit of a speculative claim involving a high risk of failure or the making of allegations of dishonesty that turn out to be misconceived*" (*Balmoral Group Ltd v Borealis (UK) Ltd* [2006] EWHC 2531 (Comm) per Christopher Clarke J) at [1]);

21.3. where the claim has been "*an extraordinarily high-risk strategy*" and "*Micawber-ish in the hope that something might turn up*" (*IPC Media Ltd v Highbury-Leisure Publishing Ltd* [2005] EWHC 283 (Ch) per Laddie J at [24]); and

21.4. where there has been a "*combination of intrinsic weakness in the case advanced, lack of consistency in the basis on which it was advanced in an effort to keep the case going and a significantly high level of costs and commercial disruption*" (*National Westminster Bank plc v Rabobank Nederland* [2008] 3 Costs LR 396 per Colman J at [25]).

22. In my judgment, with those principles in mind, this is a case in which assessment of Mr Makki's costs on the indemnity basis is appropriate. My reasons are as follows.

23. The courts have long emphasised (as it was put in *In Re Kirkman-Moeller* [2005] BPIR 1136 at [10]-[11], by Lindsay J) that prospective insolvency proceedings are "… *a particular area where it is especially familiar to parties that to go ahead … without a judgment or without a truly clear debt is a risky matter. It is perhaps more emphasised in the context of company winding up petitions than it is in the similar (but not wholly similar) proceedings in bankruptcy, but the notion is a familiar one and, as I have mentioned, Mr. Registrar Nicholls warned of that risk, quite rightly, in June 2004*." Unfounded allegations of insolvency are particularly likely to cause prejudice to those against whom they are made.

24. Furthermore, it is an abuse of what is a class remedy, to use or attempt to use insolvency proceedings to enforce a debt. As was said by CICCJ Briggs in *Go Capital Ltd v Phull* [2020] BPIR 819, 831-2, at [50]:

> "*I would add that during submissions I asked Mr Lewis* [counsel for the company which had served the statutory demand] *why the Company had brought bankruptcy proceedings. He responded that it was a quick and inexpensive way to enforce the debt. The courts have stated many times that there are important differences between insolvency proceedings and an ordinary civil action. First, insolvency proceedings are*

class actions designed to secure distribution of an insolvent's assets pari passu between all creditors. They are not merely a debt collection process. The primary purpose of the proceedings is to enable an independent person to ascertain and preserve the debtor's assets and to achieve that pari passu distribution. Secondly, unlike ordinary civil proceedings, the presentation of a petition has the effect that any disposition of property made without the consent of the court by a person who is subsequently adjudicated bankrupt is void. Insolvency proceedings should not be used as a method of enforcement. Where they are so used the petitioner faces the prospect of an adverse indemnity costs order."

On the evidence before me, this was a not in case in which the Bank truly entertained the belief that Mr Makki is insolvent – indeed, on its own case, he is entitled to procure payment to himself of the sum held by CBL in Lebanon which very significantly exceeds the amount of the Makki Debt.

25. The central issue of substance in the present case was whether or not Mr Makki's claim against the Bank, currently the subject of the Lebanese Proceedings, raises a "*genuine triable issue*". I remind myself that having discontinued the Private Prosecution (and as further set out at [53] of my previous judgment) Mr Makki began those Proceedings on 1 March 2021, and that a precautionary seizure of certain of the Bank's assets was ordered by the competent Beirut court on 24 March 2021, before service of the Bank's Demand. Even before then, the Bank was aware (as it said in its correspondence with the CPS in November 2020) that similar issues to those raised by Mr Makki were being litigated in Lebanon. On 30 November 2021, having heard submissions from both parties, Head Judge Anani of the Beirut Court's Enforcement Division rejected the Bank's appeal against the precautionary seizure, and delivered what appears to have been a fully reasoned judgment in favour of Mr Makki.

26. To succeed on Mr Makki's application, the Bank would have had to persuade me that despite the fact and progress of the Lebanese Proceedings, Mr Makki's claim does not raise a "*genuine triable issue*". Accordingly, before me on 3 March 2022, Mr Heylin (then appearing for the Bank) submitted that the "*summary procedure*" before Judge Anani did

not "*really delve into the merits and should be approached with extreme caution*". He submitted that the decision is "*essentially meaningless*" because the matter will ultimately be determined on appeal by the Lebanese Court of Cassation. However, in the absence of any (permitted) expert evidence of Lebanese law, and in the context of prospective bankruptcy proceedings (and the comparatively summary procedure appropriate to such proceedings) this was, in my judgment, a wholly unrealistic and high-risk endeavour: in my view, the Bank's Demand was more in the nature of an attempted debt enforcement in the sense referred to above by CICCJ Briggs. Moreover, I remind myself that there having been no permission to rely on expert evidence, much of Mr Airut's detailed evidence (which Mr Makki and his advisors nonetheless had to consider and react to) was inadmissible, as set out at [56] and [57] of my previous judgment.

27. In response, whilst of course accepting that the Bank had lost in respect of the issue concerning Mr Makki's cross claim, Mr Robins submitted that its loss was no more or less than an ordinary feature of ordinary litigation, in which the mere fact of defeat does not (as in principle I accept) justify an award of indemnity costs. I do not accept that characterisation of the outcome or the proceedings – in the circumstances set out in my previous judgment at [68], and as I have said above, the Bank's case that Mr Makki's claim in Lebanon is without substance was hopeless, and in the context of a prospective bankruptcy petition, ought not to have made and persisted in. That it was, is sufficient to justify the award of indemnity costs.

28. Finally in this respect, I should add that Mr Makki also relied on the fact of the Bank having referred (in connection with his evidence about the date on which the Demand came to his attention) to his previous conviction for contempt of court in 2005 (discharged 8 years ago, in 2014) and having described him (in consequence of that conviction and his conduct in respect of it) as, amongst other things, "*Mr Makki the fraudster*" and a "*man willing to lie and cheat in proceedings to obtain his desired result*".

29. Although the events referred to by the Bank took place some years ago, in a different context, and although I held that in the absence of cross-examination I was not willing to disbelieve Mr Makki's evidence, I do not, on balance, consider this to be a circumstance

justifying or adding weight to Mr Makki's claim to indemnity costs. There was an issue concerning the date of service (and therefore the weight to attach to Mr Makki's evidence) and the events relied on by the Bank did take place. Whilst ultimately therefore I attached no real significance to Mr Makki's 2005 conviction, the Bank's reference to it is not something in its conduct of the application which takes the case out of the norm such as to justify an order for indemnity costs.

Payment on Account

30. Finally, pursuant to CPR 44.2(8), Mr Makki sought an order for payment of a reasonable sum on account of his costs (which I have now decided he should be awarded, without reduction, on the indemnity basis).

31. As explained in The White Book 2022, Vol.1, at [44.2.12]:

31.1. the determination of "*a reasonable sum*" involves the court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the costs judge in the detailed assessment proceedings.

31.2. the court has to guard against the risk of being drawn into costly and time-consuming satellite litigation.

31.3. there is no rule that the amount ordered to be paid on account should be the irreducible minimum of what may be awarded on detailed assessment: *Gollop v Pryke* [2011] 11 WLUK 783 per Warren J. The preferable test is to make a reasonable assessment of what is likely to be awarded.

32. In this respect, Mr Makki submitted that the Bank should be ordered (albeit subject to the agreed stay explained above, pending the outcome of the Set-Off Application) to make a payment of £103,662, being 50% of the total presumptive figure of £207,324 (comprising the sums above at [9]).

33. In response, Mr Robins submitted that (even leaving aside the agreed stay) there is "*good reason*" (within the meaning of CPR 44.2(8)) not to order payment of a sum on account of Mr Makki's costs (and certainly not in the sum sought) essentially for two reasons:

    33.1. first, that because of the extant Makki Debt (itself in respect of costs, but owed by Mr Makki, in the principal sum of £205,606) and because he might lose in the Lebanese Proceedings, the Court cannot presently be satisfied that Mr Makki will ultimately be a creditor on a net basis; and,

    33.2. second, that because, as explained above, there are no signed (and therefore no valid, rule compliant) statements of costs in respect of the periods during which Mr Makki was represented by Cadwalader, the court cannot know what, if anything, is or will be due to Cadwalader, and therefore cannot (without offending the indemnity principle) order payment on account of those (alleged) costs.

34. As to the first of those arguments, Mr Robins cited the decision of O'Farrell J in *Royal Parks Ltd v Bluebird Boats Ltd* [2021] EWHC 3040 (TCC). In that case, previously, there had been separate judicial review proceedings between the same parties, in which a costs order had been made in favour of the Defendant. In the subsequent TCC proceedings before O'Farrell J, a costs order was made in favour of the Claimant. The Claimant applied for a payment on account pending detailed assessment. The Judge said that the court had two options, it "*must either ignore the judicial review costs order completely, or carry out some form of rough calculation to assess what the position might look like following an assumed netting off process*". She held that the second option was correct, because it would be wrong to ignore the judicial review costs order: "*If the court were to ignore the judicial review costs order, the claimants would be entitled to seek a much larger sum on account in these proceedings than has been sought. For reasons of fairness, the claimants have accepted that the sum on account should be based on the net position. The court agrees*".

35. On this basis, Mr Robins submitted that as a matter of principle I should look at the position on a net basis, but that as matters stand, because I cannot be satisfied that <u>any</u>

net sum will ultimately be payable to Mr Makki, there is good reason for declining to award an interim payment.

36. I do not accept that argument. In the *Royal Parks Ltd* case, there were two costs orders, neither of which had been satisfied, by reference to which the Judge was able to conduct an approximate "*netting off process*". By contrast, in the present case, Mr Makki claims to have discharged the Makki Debt altogether – in that respect, he claims to owe the Bank nothing. Whether he is right about that will be decided in due course on the Bank's Set-Off Application. This is not therefore a case in which I can currently conduct any process of "*netting off*", even approximately, but it is a case in which that process will in due course take place.

37. In my judgment, in the circumstances, and subject to what is said below, the proportionate and most convenient course is not to refuse to make any order at all, but is to make an award of interim costs in a certain sum (as the Judge who heard and determined Mr Makki's application, and has closest connection with it) subject to the agreed stay. On the determination of the Bank's Set-Off Application, if Mr Makki succeeds, the stay can be lifted; if he fails and the Bank succeeds, it can be continued; in any event, it can be varied. The court hearing the Set-Off Application would nonetheless be relieved of the task of determining a reasonable sum under CPR 44.2(8).

38. This however leads to the question of deciding the appropriate, reasonable sum, and to Mr Robins' second submission, set out in summary at [33] above.

39. As to that, in summary, Dr Mokal made a number of submissions.

40. First, he drew a distinction between the assessment of costs and the making of a costs order on the one hand, and requiring the paying party to make payment pursuant to the costs order on the other. He said, and I agree, that the indemnity principle is not breached upon either assessment or the making of a costs order, so long as payment under that order only occurs in compliance with the indemnity principle.

41. Thus, for example, the court may summarily assess the costs of an interim application in favour of a party which has a conditional fee agreement with its solicitors, notwithstanding that its liability to pay has not yet arisen (where, for example, success is defined as obtaining an award of damages, rather than success at an interim hearing). In those circumstances, *Cook on Costs* at [27.9] suggests that the correct ("*uncomplicated and proportionate*") procedure is to assess costs but order that they be paid only on receipt of a written notice confirming that the liability has arisen, thus ensuring that the indemnity principle is not breached.

42. Similarly, in the context of a detailed assessment, *Cook* states, at [29.20], that "*If, as sometimes occurs, the bill certificates are not signed prior to a detailed assessment hearing taking place, the court will at the very least, not allow a final costs certificate to be produced until the certificates have been signed. This will prevent any enforcement of the sums allowed on assessment*."

43. Second, Dr Mokal submitted that although a failure to produce a duly signed costs statement is a breach of paragraph 9.5 of PD 44, the court must (under paragraph 9.6) in order to decide what order to make as a result of that failure, first determine whether there is a reasonable excuse for its occurrence. In any event, he submitted, and I agree:

    43.1. that non-compliance does not affect the court's jurisdiction either to order or assess costs, but goes instead to the court's discretion;

    43.2. that the court should respond proportionately to non-compliance: see *Macdonald v Taree Holdings Ltd* [2001] 1 Costs LR 147 (Ch), 153, [23] (Neuberger J); confirmed by May LJ (sitting as a single judge in a hearing for permission for a second appeal) [2001] EWCA Civ 312, [13], [15], [17]. Thus, to take an example, in *Tribe v Elborne* [2021] EWHC 1252 (Ch), in which cost statements were not served in time, Deputy Master Raeburn found that there was no "*reasonable excuse*" for this failure (at [10]), but nevertheless followed Neuberger J's approach in *Macdonald v Taree Holdings Ltd* and found that the paying party had by then "*had an opportunity to make out its case in opposition to the statement of costs and that it had not suffered*

prejudice" (at [13]). The costs were summarily assessed and the paying party was ordered to pay within 14 days.

44. He also submitted that Mr Makki does have a reasonable excuse for his failure to serve compliant costs statements because of his dispute with Cadwalader.

45. In the circumstances, he argued that ultimately, the critical point is whether or not the court has an adequate basis (such as an unsigned statement, or copies of invoices for example) on which to make an assessment of the likely amount of Mr Makki's recovery in respect of Cadwalader's alleged costs, in order to fix and award payment of a "*reasonable sum*" under CPR 44.2(8); that it would be disproportionate to refuse to make an award because of his (excusable) non-compliance with paragraph 9.5 of PD 44; and that I should therefore proceed to fix a sum on the assumption that the detailed but unsigned costs statements are substantially correct, whilst at the same time ordering (in addition to the agreed stay) that payment not be made until receipt by the Bank's solicitors of written notice, duly signed by a solicitor, confirming that Mr Makki has a liability to Cadwalader of at least £x under the terms of his fee arrangement with Cadwalader, and that the indemnity principle is not breached. He submitted that I should only attribute a value of zero to Cadwalader's costs (and therefore make no award) if I estimate that to be the likely level of Mr Makki's recovery in relation to such costs, but that there is nothing in the evidence to support that outcome.

46. Whilst, as I have said, I do not disagree with the substance of Dr Mokal's submissions about the relevant principles, and whilst I also agree that Mr Makki appears to have had a reasonable excuse for his failure to produce compliant costs statements, I do not agree with his suggested conclusion. In the present case, in the absence of compliant statements, I am not willing to fix and award a sum on account of the costs, if any, that Mr Makki might be or come to be liable to pay Cadwalader.

47. As explained above, I have been told nothing about the nature or scope of the dispute between Mr Makki and Cadwalader. I have no means of assessing how or when it might be resolved, or on what terms. I therefore have no reliable evidence of either the ultimate

amount of Mr Makki's liability to Cadwalader, or its composition. It might transpire that Mr Makki is not liable to pay anything, or is liable in the full sum included in the unsigned statements, or in some other sum/s. The composition of his ultimate liability might differ from that of the sums stated in the unsigned statements.

48. As noted above, it was in part for these reasons that Dr Mokal himself submitted that a detailed assessment of costs in this case would be appropriate – the "*practical impossibility*" of producing signed costs statements making summary assessment unsuitable. For the same reasons, it seems to me that this is not a case in which it is possible to fix the amount of an interim award - there is "*good reason*" not to do so. Neither do I accept Dr Mokal's suggested solution - that the court should fix a sum but make payment subject to future production of a statement that Mr Makki is liable to pay "at least £x" – since apart from anything else, the composition of the ultimate £x on the one hand, and of the aggregate sum of the unsigned statements on the other, might be quite different. That suggested solution would deprive the Bank of the opportunity to make submissions about the recoverability of the £x; potentially, it would be to fix a sum on one basis (without reliable evidence), and justify its payment on a different (but presently unknown) basis. It would also be somewhat crude in that a liability to Cadwalader of marginally less than £x, would extinguish completely the Bank's liability to make payment on account.

49. Having said that, I am willing to award (subject to the stay) a sum on account of the costs due from Mr Makki to Mishcon de Reya. In that regard I have a signed statement in the sum of £44,217, and I am told of costs subsequent to the hearing before me, in the sum of £5,570. Taking account of the submissions made by Mr Robins in his skeleton argument in respect of the solicitors' claimed hourly rates and the significant time spent on attendances, but without taking account of issues of proportionality, it seems to me that a reasonable sum would be £25,000.

50. Furthermore, in respect of the periods during which Mr Makki was represented by Cadwalader, and without making any order in this respect, I do not intend to preclude Mr

Makki, if he is otherwise able to do so, from making a future application for payment of a sum on account.

Summary

51. In summary therefore, I will order, in addition to setting aside the Demand:

51.1. that the Bank shall pay Mr Makki's costs of the application, to be assessed on the indemnity basis, subject to a detailed assessment if not agreed;

51.2. that the Bank shall make payment under CPR 44.2(8) of £25,000 within 14 days;

51.3. that (if otherwise this has not been ordered) the Bank's Set-Off Application be adjourned generally with liberty to restore on notice;

51.4. that pending the determination of the Set-Off Application, or further order in the meantime, payment of costs and of the sum awarded under CPR 44.2(8), should be stayed.

52. I would ask that a minute be produced, and if possible agreed.

Dated 19 May 2022