Case No: SC-2021-BTP-000082

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 23/11/2021

Before :

COSTS JUDGE ROWLEY

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Between:

Ulrike Green (Mother and Personal Representative of Jill Alison Green, Deceased)	**Claimant**
-and-	
Generali France Assurances	**Defendant / Part 20 Claimant**
- and -	
John Kimmins	**Part 20 Defendant**

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Paul Kay (instructed by **Trethowans LLP**) for the **Defendant / Part 20 Claimant**
Andrew Roy (instructed by **Shakespeare Martineau**) for the **Part 20 Defendant**

Hearing dates: 17 September 2021

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Approved Judgment

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

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Costs Judge Rowley:

Background

1. On 31 March 2010 a road traffic accident occurred in the south of France which resulted in the passenger of one car, Jill Green, being fatally injured and the driver of that car, John Kimmins, suffering severe injuries such that he became a protected party in the subsequent proceedings. The driver of the other vehicle, Alexis Pinel, was fortunate enough to suffer little or no injury.

2. Mr Kimmins brought proceedings in the High Court against Mr Pinel's insurers, Generali France Assurances ("Generali") in 2012 under reference number HQ12X01399 ("the Kimmins Proceedings"). The mother of Jill Green also brought proceedings against Generali on behalf of her daughter's estate. It would appear these were commenced in the County Court on 24 January 2013 and those proceedings were transferred to the High Court (under reference number HQ13X02979) ("the Green Proceedings") on 5 April 2013.

3. Generali filed a defence to the Kimmins proceedings but did not bring any counterclaim in respect of the minor damage caused to its insured's vehicle. It also filed a defence to the Green Proceedings prior to the transfer to the High Court.

4. On 7 November 2013, both claims came before Master Eastman in the Queen's Bench Division. He directed that the two cases should be managed and tried together (although not formally consolidated). He ordered that liability should be tried before quantum and gave numerous directions in relation to liability. He also gave permission to Generali to issue and serve an additional claim under Part 20 against Mr Kimmins and for Mr Kimmins to serve a defence to that additional claim.

5. The drivers of the vehicles disputed liability for the accident. Their legal and insurance teams took the sensible approach of seeking to resolve Ms Green's claim without prejudice to any ultimate determination of liability. I do not have any details of the extent of Ms Green's claim but it seems that it was resolved by the acceptance of a Part 36 offer made in April or May 2014. No formal order was made in respect of that claim and it appears that Ms Green's costs were also resolved without any formal proceedings. Payment was made to the Green estate on a 50-50 basis by Generali and Mr Kimmins' insurers.

6. From the bundle provided to me, it would seem that offers to apportion liability between Generali and Mr Kimmins were made almost as soon as the Green claim was resolved. The parties ultimately agreed liability on a 75/25 basis in favour of Generali. This agreement was recorded in an order dated 4 March 2015 in the Kimmins Proceedings. That order included a recital confirming that the original payments to Ms Green would be adjusted between the parties so as to reimburse Generali for the sum that it had effectively overpaid. The order also recorded that Generali were to pay Mr Kimmins' costs on the issue of liability.

7. It took a further two years for the parties to agree quantum in respect of Mr Kimmins' claim. This was recorded in a consent order dated 30 August 2017. Paragraph 5 of that order stated that Generali would pay Mr Kimmins' "costs of the action". No challenge was made by Generali to the principle of Mr Kimmins being entitled to the costs of his

proceedings notwithstanding that he had only recovered 25% of the full value of his claim.

8. At this point, all that remained was to tie up the additional claim commenced by Generali in accordance with Master Eastman's order in 2013. Paragraph 5 of that additional claim stated as follows:

> "Accordingly, insofar as the Defendant is found liable in respect of the Claimant's claim, the Defendant claims as against the Third Party a contribution and/or a contribution amounting to an indemnity under French law, alternatively pursuant to section 1(1) Civil Liability (Contribution) Act 1978, in respect of such liability and to be entitled to its costs of defending the claim and bringing this Additional Claim against the Third Party, on the grounds that the Third Party is liable to the Claimant in respect of the same damage as the First Defendant."

9. The claimant's claim in the Green Proceedings having been resolved and the third party (i.e. Mr Kimmins) having contributed 75% of the claimant's claim including costs, Generali therefore sought its costs of the additional claim from Mr Kimmins. Generali submitted a without prejudice schedule to Mr Kimmins but the parties disagreed as to the extent of the costs recoverable by Generali and negotiations ran aground. Finally, Generali made an application for an order to the court and that was dealt with by consent in an order dated 22 February 2019 in the following terms:

> "1 Judgment is entered in favour of the Part 20 Claimant against the Part 20 Defendant both in respect of its contribution claim and in respect of its damage claim on a 75/25 basis.
>
> 2 The Part 20 Claimant having succeeded against the Part 20 Defendant both in respect of its contribution claim and its damage claim the Part 20 Defendant shall meet the Part 20 Claimant's costs of the Part 20 claim to be assessed if not agreed on the standard basis.
>
> 3 The Part 20 Defendant shall pay the Part 20 Claimant's costs of this Application in any event to be assessed if not agreed on the standard basis."

The dispute

10. Since the parties agreed a consent order to conclude the Part 20 claim, it is only to be expected that the parties accept that Generali's costs of the Part 20 claim are payable by Mr Kimmins. The dispute between the parties is as to the extent of the costs which can be claimed within that order. As Mr Kay, who appeared on behalf of Generali described it, there are essentially two tranches of costs claimed in the bill of costs. One relates to the Part 20 claim itself (including the application which generated the consent order).

11. The second relates to Generali's investigation of liability which it seeks by virtue of the additional claim and which, as set out above, included a claim for its own costs in

defending the Green Proceedings. Generali accept that some of the investigation into liability was as a result of Mr Kimmins' claim and that since it agreed to pay Mr Kimmins' costs of that claim, it cannot claim those investigation costs. In the time-honoured fashion, a moiety has been sought by simply claiming half of the solicitors' costs and counsel's fees involved within the bill to reflect defending liability in the Green Claim. It is this second tranche which Andrew Roy of counsel, who appeared on behalf of Mr Kimmins, says is not recoverable under the terms of the order or indeed in accordance with the relevant case law.

The law

12. When considering what order to make as to costs, a judge is to have regard to CPR 44.2. Sub-paragraph 6 of that rule deals with situations where an order for costs is to be made which does not provide one party with all of their costs of the proceedings. Various possibilities arise and, at (6)(f), costs may be awarded which relate only to a distinct part of the proceedings. Such an order is often described as an issues-based order. In sub-paragraph (7), the rules specifically caution the judge against making such an order, if it is practicable to do so, by instead awarding a proportion of a party's costs or making the order limited to a certain period of time. Where a judge makes an issues-based order, it is often the precursor to a dispute as to the assessment of the costs since it is notoriously difficult, and in any event always extremely time-consuming, to divide work done on various issues between work for which a party has a costs order from work for which he does not.

13. The circumstances in which such a 'part' order for costs is made are many and varied. An obvious example is where a claim and counterclaim are made and both are successful to some extent. Alternatively, it may be the case that there are distinct strands of a claim that are made and the claimant only succeeds on some of those strands and the defendant succeeds on the others.

14. Where this type of situation occurs, the costs judge (and often judges further up the judicial ladder) have to grapple with the principle of how to deal with dividing the costs as well as the quantum of such costs.

15. The starting point is the House of Lords decision in Medway Oil and Storage Company Ltd v Continental Contractors Ltd and Others [1929] AC 88 which overturned the Court of Appeal's decision earlier that year. The Court of Appeal described the proper principle on taxation as being an elastic one which did not bind the taxing master to any set formula but, on the contrary, allowed him ample latitude so as to do substantial justice in every case.

16. The House of Lords, however, took a different view in respect of the costs that were 'common' between the claim and counterclaim. A claimant who succeeded on their claim would receive their costs as if there had been no counterclaim. A defendant who had succeeded on the counterclaim would only receive the costs which had been occasioned by it in addition. This was described by the House of Lords as a principle which was not only intelligible but capable of being easily applied by the taxing master.

17. The House of Lords accepted that, although this approach would operate justly in most cases, it might seem to be a hard principle and that on some occasions it may be thought to lead to a harsh result. Viscount Haldane, who gave the lead judgment in the House

of Lords, said that, where an apparently harsh result might work out, *"the remedy is to apply at the trial for special directions as to issues and details."* The advantage of the principles extolled by the House of Lords was said to be a definite one and which lifted the subject out of the somewhat vague regions of apportionment.

18. Essentially the same approach applies where a party has the costs of an issue but otherwise is paying their opponent's costs of the proceedings. The opponent will receive the general costs of those proceedings and it is only any additional costs in respect of the relevant issue which can be claimed by the otherwise losing party and which equally must be removed from the bill of the otherwise successful party (see e.g. Cinema Press Ltd v Pictures and Pleasures Ltd [1945] KB 356, CA.)

19. Mr Roy's submissions set out these general propositions in some detail. Mr Kay accepted that Medway Oil applies to a claim and counterclaim and that the result can be unfair. He said that the existence of the Medway Oil approach led Generali to paying Mr Kimmins' costs of his proceedings notwithstanding that Mr Kimmins had agreed to bear the larger proportion of blame.

20. Mr Kay's argument was that the facts in this case did not demonstrate that there was a claim and counterclaim. Instead, there was an additional claim in the Green Proceedings which sought a contribution from Mr Kimmins in respect of damages and costs claimed by the Green estate, together with a modest damage claim in respect of Generali's insured vehicle. In his written submissions, Mr Kay described there being three separate, cross claims brought by the three parties.

21. As part of his submissions on the law, Mr Roy referred me to the Court of Appeal decision in Parkes v Martin [2009] EWCA Civ 883. There, an appeal was brought against the order for costs made by the trial judge following a finding that the claimant had been 65% to blame for the accident. The trial judge concluded that in addition to receiving 35% of the full value of his damages, the claimant should receive 35% of the full value of his costs in respect of liability.

22. During the submissions on costs, the defendant's advocate in Parkes referred to the existence of a putative claim by the defendant arising out of the accident. The parties had agreed to deal with the question of liability solely based upon the claimant's claim and so no counterclaim was issued. The defendant's advocate said that if there had been a formal claim and counterclaim then the judge could have awarded costs to each party in respect of their claims. Alternatively, Medway Oil was authority for the proposition that the claimant should receive the great majority of the costs but that would be likely to represent an injustice absent a special direction. As such, the judge's conclusion to allow the claimant only approximately 1/3 of his costs pointed to the judge have decided to reflect the existence of a putative counterclaim since otherwise, in the absence of any offers made by the defendant, the claimant was bound to have received an order for 100% of his costs.

23. Rimer LJ, giving the lead judgment in the Court of Appeal, clearly had some reservations as to whether the trial judge had indeed taken the counterclaim into account. Nevertheless, he concluded that the trial judge had done so and made specific reference to the defence advocate's reference to the counterclaim standing "by the wayside." If the trial judge had been ignorant of the counterclaim, Rimer LJ considered

that it would have been open to the court to set aside the order and re-exercise the discretion. In the circumstances, however, the court upheld the trial judge's order.

24. From this decision, Mr Roy drew the proposition that the counterclaim does not have to be a formal counterclaim for the court to take it into account. In the circumstances of Parkes, it was a question of taking it into account in the order for costs.

25. I am being asked to take the additional claim into account, not in making an order, but in determining the scope of the order agreed by the parties. The additional claim was brought by Generali in the Green Proceedings against Mr Kimmins. As such, it is not a direct cross claim against Mr Kimmins as would be the case if a counterclaim had been brought in the Kimmins Proceedings. Nevertheless, if Mr Roy's analysis is correct, it seems to me that the additional claim is in at least as good a position as the putative claim in Parkes where, as far as I can see, no proceedings had been brought at all in respect of it.

Submissions

26. As I have indicated above, Mr Roy spent a good proportion of his time setting out the law relating to this area. He also went through the chronology of events. He pointed out that there was no order for costs in respect of the Green Proceedings under which Generali could recover any costs because the only order in respect of that claim was Ms Green's deemed order by virtue of accepting a Part 36 offer.

27. There was also no order for costs in Generali's favour in respect of the Kimmins Proceedings because the order clearly stated that the costs award was for Generali to pay Mr Kimmins his costs of the proceedings.

28. This left solely the Part 20 "additional" claim and in Mr Roy's submission that only related to the costs in bringing the claim against Mr Kimmins. He submitted that the order was to be interpreted in a straightforward fashion as covering the bringing of the Part 20 Claim. On the face of it, it did not also allow for the costs of the defence of the Green Proceedings.

29. In Mr Roy's submission, Generali had not obtained an order for costs which was as wide as the claim for relief in the additional claim. Whilst that relief had sought costs in respect of defending the Green Proceedings, the order for costs actually agreed between Generali and Mr Kimmins contained no such reference.

30. Finally, the Part 20 Claim did not have to be a formal counterclaim for it to be taken into account in respect of Mr Kimmins. It was a counterclaim in substance if not form and that was sufficient in accordance with Parkes.

31. As I have also outlined above, Mr Kay did not accept that this was a case where there was a claim and counterclaim. He relied upon the three paragraphs of the order concluding the Part 20 Claim. He said that, since judgment had been entered in his client's favour and it had been recorded that the success was both in respect of its contribution claim and its damage claim, the order for costs in respect of the Part 20 Claim covered both aspects. The contribution claim covered the first tranche of costs regarding defending liability and both the contribution and the damage claims entitled Generali to the costs in respect of the additional claim.

32. In his written submissions, Mr Kay said the following:

> "Generali were unable to bring a claim against Mr Kimmins in the English Court as Mr Pinel is a French citizen, and because he was mercifully uninjured in this serious accident (for which Mr Kimmins was three quarters at fault). Had they been able to and had he beaten Mr Kimmins to the punch by issuing proceedings first then would the Part 20 Defendant not now object to an assertion that they were entitled only to the costs their counterclaim and no costs in respect of investigating liability, notwithstanding that this would more properly align with natural justice since Mr Kimmins was held largely responsible for the accident? The Claimant will submit that it is for exactly this reason that the matter was progressed by the issuing of an additional claim by Mr Pinel/Generali."

33. In his oral submissions, Mr Kay confirmed that Generali appreciated they could not recover costs against Mr Kimmins in the Kimmins Proceedings. They sought to avoid the effect of Medway Oil by not bringing the counterclaim in the Kimmins Proceedings but instead bringing the additional claim in the Green Proceedings. Mr Kay said that this was therefore not the same situation as in Parkes, although it was not made entirely clear on what basis he sought to distinguish that decision. In reply, Mr Roy made essentially the same point when indicating that Generali had not explained why Medway Oil could be distinguished in this case.

Decision

34. I reserved my decision in order to consider the succinct but cogent submissions made by the respective advocates. Mr Roy's submissions followed the line of authority stretching back to Medway Oil. With the assistance of the Parkes decision, he made it very difficult for Generali to argue that the additional claim brought against Mr Kimmins was not a counterclaim by any other name.

35. On the other hand, the relief sought by Generali in its additional claim was for a contribution to the Green Proceedings and for any losses of its insured. The order at the end of that claim ordered Mr Kimmins to meet the costs of the Part 20 Claim as a whole and expressly recorded that both the contribution claim and the damages claim had succeeded.

36. I am required by the case of Cope v United Dairies (London) Limited [1963] 2 QB 33 to interpret an order for costs, where necessary, but not to rewrite it. The 2019 Order clearly enables Generali to claim costs which relate to the contribution claim as well as its insured's damage claim. As such, in principle it could cover both tranches of the costs as described by Mr Kay. But that is not the end of the matter.

37. The parties and their legal and insurance teams took the common approach in dealing with claims arising out of the accident of seeking to settle the passenger's claim first since she could not possibly be to blame. Indeed, given that it appears that her claim was rather more modest than Mr Kimmins' claim, this traditional approach would be the obvious one.

38. It seems to me that the parties' submissions here have tended to follow the same course. For example, Mr Roy described the Green Proceedings as being "the primary claim". It is apparent from the chronology that I have set out and from a consideration of, for example, Counsel's fee notes, that the Kimmins Proceedings were first in time and in a simple Medway Oil sense, should be described as the primary claim with the Green Proceedings following on a few months later.

39. It is also clear from the written and oral submissions of Mr Kay that the advice obtained from Charles Dougherty QC by Generali included a decision not to bring a counterclaim against Mr Kimmins but to bring contribution proceedings in the Green Proceedings. As Mr Kay candidly described it, it was an attempt to get round the Medway Oil hurdle of being the bringer of a counterclaim where liability is shared by the two drivers.

40. In Medway Oil, there was no possibility of the work done in relation to liability being attributable to any claim other than the claim and counterclaim brought in those proceedings. As such, a circumstance where the benefit of the liability investigations may be spread across two different proceedings is not considered. It is for this reason that I do not think Mr Roy's analysis necessarily gives a complete answer to Generali's claim.

41. Instead, this case raises a novel point about the interaction between the Medway Oil approach to claim and counterclaim with the traditional splitting of work done between more than one claim where the work has benefitted both proceedings. I have not found this point easy and I am unaware of any direct authority upon it.

42. Generali were faced with the prospect of two sets of proceedings. If they had in fact been successful in both proceedings, then work done on the question of liability would usually have been split between the bills of costs for those two proceedings. If they were only successful in one set of proceedings then they would claim a proportion of the costs. In essence that is what has been done here by the claiming of half of counsel's fees in the Part 20 claim.

43. The work in relation to liability was initially done only in respect of the Kimmins Proceedings and that work ought not to be divided between the two claims. But once the Green Proceedings were on foot, it would be a natural approach for Generali to divide the work on liability between those two proceedings.

44. This division may be a natural approach but in the circumstances of this case, allowing it to be shared would lead to an absurd result. The proportion of work on liability done in the Kimmins Proceedings could not be claimed against Mr Kimmins under the Medway Oil principle. The other portion of the same work done could only ever be claimed against Ms Green if a successful defence was mounted in the Green Proceedings given that there was no counterclaim. No such defence was mounted.

45. As such, Generali cannot claim any of their liability costs against either Mr Kimmins or Ms Green in the proceedings brought by them. Generali's approach is instead to seek from Mr Kimmins the costs in the Green Proceedings which could not be claimed against Ms Green (rather than the costs against Mr Kimmins in his own proceedings).

46. It seems to me that this is an absurd result and as such cannot be the proper construction of Generali's entitlement to costs under the 2019 order. I take the view that the only

sensible construction of the order is that its scope is in fact only sufficient to provide for the additional costs of the Part 20 claim to be recovered from Mr Kimmins.

47. This is so, notwithstanding the ‘success’ of the two elements of the Part 20 claims recorded in the 2019 order. I have said above that the order on its own terms would justify costs being sought in two different tranches. But it seems to me that regard must be had to the other orders made in the proceedings so as to place the 2019 order in its proper context in order to interpret it. In my judgment, it simply cannot be right that costs regarding liability which Generali cannot claim against Mr Kimmins in the proceedings between them can be resurrected by the circuitous route devised by Generali. I appreciate that the half of the costs incurred which are sought are strictly speaking those which might have been claimed from Ms Green, rather than Mr Kimmins, but that seems to me to do no more than highlight the artificiality of the approach.

48. In my view, the better way to interpret the 2019 order, given the other orders made, is to treat it as if the Part 20 Claim was simply a counterclaim to the claim brought by Mr Kimmins in the Kimmins proceedings. The costs incurred in dealing with liability fall foul of the Medway Oil principle. As such, they cannot be claimed against Mr Kimmins and it is only the additional, procedural costs of bringing a Part 20 Claim which can be claimed against him. This is so notwithstanding how Generali have sought to divide the work between the claims brought against it.

49. Consequently, in relation to point 2 of the points of dispute, I find for the paying party.