Neutral Citation Number: [2021]EWHC 2776 (QB)

Case No: QB-2019-003882

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2021

Before :

MR JUSTICE CAVANAGH

- -

Between :

MAGRET THOMAS AND OTHERS	**Claimants**
- and -	
PGI GROUP LIMITED	**Defendant**

- -
- -

Richard Hermer QC, Benjamin Williams QC and Kate Boakes (instructed by **Leigh Day**) for the **Claimants**
Charles Dougherty QC, Nicholas Bacon QC and Ognjen Miletic (instructed by **Hogan Lovells**) for the **Defendant**

Hearing date: 22 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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Mr Justice Cavanagh:

Introduction

1. This is my reserved judgment in respect of one of the matters upon which I heard argument at a Costs and Case Management Conference ("CCMC") that was held in these proceedings on 22 September 2021. I gave oral rulings during the hearing on the other matters of case management which I was asked to decide, and so I will not deal with those matters in this judgment.

2. The main matter with which this judgment is concerned is the Defendant's application for a Costs Capping Order ("CCO"), under CPR 3.19, which would have the effect of limiting the future costs recoverable by the Claimants, if the Claimants succeed in these proceedings, to £150,000 (or thereabouts). In the alternative, the Defendant invites me to set the costs budget for the Claimants, for the remainder of these proceedings, at about £150,000. The Defendant's primary submission, however, is that I should make a CCO limiting the Claimants' recoverable future costs to £150,000.

3. When I refer in this judgment to "CCOs", I mean CCOs under CPR 3.19. Costs Capping Orders in judicial review proceedings, though sharing the same name as CCOs under CPR 3.19, are a completely different animal. They are governed by ss 88 to 90 of the Criminal Justice and Courts Act 2015. There can also be Costs Capping Orders in arbitral proceedings. This judgment is not concerned with the two other forms of CCOs.

4. This application raises novel and potentially important points of law and practice. So far as the parties are aware, this is the first time that a party has made an application for a CCO in the eight years since the costs budgeting regime was introduced on 1 April 2013. Furthermore, it is common ground that the amount of the CCO that is sought by the Defendant is a small fraction of the minimum legal costs that will be necessary for the Claimants to incur if this matter were to proceed to trial. Indeed, as I will explain, I am satisfied that, in practice, the effect of the making of a CCO in the sum of £150,000 will, in all likelihood, be that the Claimants will have to discontinue the proceedings. The Defendant does not shrink from acknowledging that this may be so, but says that this is not a reason to refrain from making a CCO. The Defendant accepts also that CCOs should only be made in an exceptional case, but, for reasons that I will explain, the Defendant submits that this is such an exceptional case.

5. I was accompanied at the hearing on 22 September 2021 by Costs Judge Simon Brown, who sat with me as an assessor. Judge Brown has great experience in costs matters. As I told the parties I would do, I have conferred with Judge Brown in relation to the issues in this matter. I am very grateful to Judge Brown for his assistance. Judge Brown has indicated that he is in agreement with my decision.

6. The Claimants were represented before me by Mr Richard Hermer QC, Mr Benjamin Williams QC, and Ms Kate Boakes. The Defendant was represented by Mr Charles Dougherty QC, Mr Nicholas Bacon QC, and Mr Ognjen Miletic. The bulk of the arguments on the costs issue were presented by Mr Williams QC and Mr Bacon QC. I am grateful to all counsel for their helpful submissions, both oral and in writing.

The proceedings

The parties, and the issues in the proceedings

7. The Claimants in these proceedings are 31 Malawian women who are or were employed by a Malawian-domiciled company, Lujeri Tea Estates Limited ("Lujeri"), to work in tea or macadamia nut plantations. The plantations are located in the Southern Region of Malawi. 10 of the 31 Claimants allege that they were raped by male managers, overseers or colleagues. Some allege that they have contracted HIV or have given birth to the children of their abusers. The other Claimants claim that they were subjected to sexual assault, sexual harassment, and/or other types of sexual discrimination by male employees of Lujeri. Many of the Claimants have been abandoned by their partners after their allegations came to light.

8. The Defendant is the parent company of Lujeri. It is domiciled in England. At the relevant times, it had three employees. The Claimants allege the Defendant owed a duty of care to them on the basis that it promulgated relevant policies, standards and guidelines, that it exercised supervision and control over Lujeri, and/or that it held itself out as exercising such supervision and control. The Claimants further allege that the Defendant breached that duty of care and that they suffered loss and damage as a result. The Claimants also contend that the Defendant breached their rights under the Malawian Constitution and the Malawian Gender Equality Act 2013.

9. The Defendant denies that it owed a duty of care to the Claimants, because, it says, it did not exercise operational supervision and control over Lujeri to the extent necessary to give rise to such a duty of care. The Defendant further denies that it is liable to the Claimants under the Malawian Constitution or the Gender Equality Act 2013.

10. A trial of Common Issues relating to liability is to be listed for 3-4 weeks on the first available date after 23 May 2022. At the CCMC on 22 September 2021, I identified two Lead Claimants for this purpose, Virginia Harry and Ayida Mpanga. The Common Issues include issues of legal principle consisting of (1) whether the Defendant owed a duty of care to the Claimants under Malawian law to take all reasonable steps to prevent them from suffering foreseeable harm in the workplace as a consequences of the types of mistreatment, sexual harassment and assaults up to and including rapes, and if so what was the scope and standard of that duty of care, and was it breached?; (2) whether the Claimants have a good claim on the basis that the Defendant breached the Claimants' constitutional rights under the Malawi Constitution; and (3) whether the Defendant can be liable in these circumstances for breaches of the Malawi Gender Equality Act 2013.

11. The other purpose of dealing first with lead cases is so that a representative sample of issues relating to individual circumstances can be addressed by the court, so as to give a steer which will enable the remainder of the cases to be dealt with by ADR, or at least to give the best chance that this will be possible. The Common Issues hearing will therefore also deal with the factual allegations made by the two Lead Claimants.

12. It is common ground between the parties that the claims must be determined in accordance with Malawian law. This applies both to the liability issues and to the assessment of damages, if the Claimants succeed on liability.

The likely level of damages that the Claimants will recover, if successful, and the Claimants' other objectives in bringing these proceedings

13. It is also common ground that the damages that the Claimants will receive, if they succeed, will, by English standards, be relatively modest. The cost of living and wage rates in Malawi are much lower than they are in the United Kingdom, and the Defendant estimates that, even if the Claimants were to succeed in their claims, the very most that they could expect to recover would be approximately £10,000 each, or about £310,000 altogether, although the Defendant considers that it is more likely that the compensation would be only about half that sum. The Claimants do not accept the estimated figures put forward by the Defendant, but they accept that the financial compensation that they can expect to receive if they are successful will indeed be relatively modest and will be very substantially lower than their own legal costs, let alone the legal costs of both sides. However, the Claimants say that these proceedings are not all about money. They seek to hold the Defendant to account for very serious alleged sexual misconduct by male Lujeri employees and wish to establish that they were telling the truth when they say that their rights were abused, so that they can restore their reputations. In addition, they want to bring to light, through legal action, systemic human rights abuses which they say have been suffered by female plantation workers in Malawi at the hands of their male managers and overseers, and the alleged chronic failure of companies to address these abuses and bring them to an end. This is in the hope that it will lead to reforms to the ways in which plantations in Malawi are operated and managed. I will refer to these non-financial objectives, globally, as "vindication".

Discontinuation of the proceedings against the other Defendants

14. When these proceedings were commenced, Lujeri and another subsidiary company of the Defendant, Thyolo Nut Company Limited ("Thyolo Nut"), were also named as Defendants, on the basis that they are vicariously liable for their male employees' actions. The Claimants have discontinued the proceedings against both Lujeri and Thyolo Nut. The claims against Thyolo Nut were discontinued when it was realised that none of the Claimants was employed by that Company. As for Lujeri, the company contested jurisdiction under CPR 11, on the basis that the natural forum for the claims against Lujeri was Malawi, and the Claimants could obtain substantial justice in Malawi. In March 2021, the Claimants indicated in correspondence with the Defendant that they would discontinue the proceedings against Lujeri on the basis that they were unlikely to be in a position to resist the jurisdiction application. The claims against Lujeri were subsequently discontinued.

15. The Defendant points out that it is still open to the Claimants to take proceedings against Lujeri (and, indeed, the Defendant) in Malawi.

The costs order in favour of Lujeri

16. In an order made in the first CCMC in these proceedings on 26 June 2021, and following the discontinuance of the proceedings against Lujeri, Stacey J ordered that the Claimants must pay the costs *"exclusively attributable to the claims against* [Lujeri], *including the costs of the Jurisdiction Application, but excluding the costs of the arguable case issue".* These costs are yet to be assessed. The Defendant contends that the recoverable costs will be nearly £900,000. The Claimants contend

that they will be very considerably less than this. At first sight, both Judge Brown and I consider that the Defendant's estimate appears to be very high, but we do not need to form a firm view on the matter. At any rate, there is a strong possibility that Lujeri's costs will exceed the maximum damages that the Claimants are likely to obtain if they are successful in this litigation.

17. The Defendant submits that the costs owed by the Claimants to Lujeri must be set off against any damages awarded against the Defendant, pursuant to CPR 44.14(1), and that this means that any damages award that is made in favour of the Claimants will be swallowed up and extinguished by the costs which the Claimants owe to Lujeri. The Claimants dispute this, saying that, depending on the evidence that in due course emerges as to the Defendant's control of Lujeri, they will argue that they are entitled to an indemnity from the Defendant in respect of Lujeri's legal costs (e.g. via a **Sanderson** or **Bullock** order). The Claimants also point out that if these proceedings are settled, it will not necessarily be the case that they will have to pay Lujeri's legal costs.

18. It is not necessary, for the purposes of this costs application, that I reach a firm view on the question as to whether the Claimants will be liable to pay Lujeri's legal costs from any damages to which they eventually become entitled. Indeed, it is better that I do not do so, since I have not heard full argument on the point. Suffice it to say, for the purposes of the costs issues, that it was not seriously disputed by the Claimants' counsel that the damages that they are likely, collectively, to recover, if they are successful in these proceedings and do not have to pay Lujeri's costs, will be in the region of several hundred thousand pounds, and so will be a relatively small percentage of the Claimants' own anticipated legal costs of the proceedings, let alone the anticipated legal costs of both parties. A rough working estimate, for present purposes (on the basis of current costs budgets which, in the case of the Claimants, is yet to be approved), is that the likely total damages may be significantly less than 10% of the total anticipated costs and probably something in the region of 5-15% of the Claimants' legal costs. There is, moreover, a real possibility that any costs award in favour of the Claimants will be reduced to nil by Lujeri's costs.

19. As I have said, the Claimants emphasise that the proceedings may settle, in which case the sums that they receive may be different from their likely recovery if the matter goes to trial, and an agreement may be reached to waive Lujeri's costs as part of any future settlement. In my view, however, I must decide the costs issues on the premise that the cases will go to trial. I should not be influenced in the costs decisions by the possibility that the cases might settle, especially as I have no idea whether this is a real possibility or how likely it might be, and I have no idea what the terms of a settlement might be. Indeed, I accept the Claimants' submission that, when reaching decisions on the CCO and the costs budget, I should do so on the basis that the matter will proceed to trial and that the Claimants will be successful in their claims. It will only be if this happens that a CCO or a costs budget for the Claimants will have any relevance.

The Defendant accepts that the Claimants' claims are arguable, and that there are no grounds for striking out the Claimants' claims, whether as an abuse of process or on any other basis

20. The Defendant has never, at any stage, disputed that there is jurisdiction for these claims to be brought in England and Wales. As the Defendant is domiciled in England, this is put beyond doubt by Article 4.1 of the Recast Brussels Regulations (Regulation (EU) No 1215/212 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters (Recast)):

> "I. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

21. Pursuant to Part Three of the EU/UK Withdrawal Agreement, this Regulation continues to apply to any proceedings, such as these, which had already been commenced at the end of the Brexit transition period on 31 December 2020.

22. At an earlier stage in these proceedings, the Defendant applied to strike out the Claimants' claims and/or for summary judgment on the claims in the Defendant's favour. This application was made on the basis that the particulars of claim disclosed no reasonable grounds for bringing the claims. This application was subsequently withdrawn. Accordingly, the Defendant has, throughout, accepted that England and Wales is a proper forum for the Claimants' claims against the Defendant, and now accepts that the Claimants' claims are arguable and that there is no proper basis for striking out the Claimants' claims. In his submissions on behalf of the Defendant, Mr Bacon QC stressed several times that the Defendant does not contend that these proceedings are an abuse of process.

The costs of the proceedings

23. Each of the parties has filed and served a costs budget, using Precedent H, in accordance with CPR PD 3E, paragraph 4. The costs budgets were filed in August 2021. The Claimants have incurred costs up to the date of the costs budget in the sum of £1,664,178.76. The Claimants' costs budget for future costs up until the end of the trial of the Common Issues and the liability issues relating to the Lead Claimants, on the basis that there will be two Lead Claimants, is £1,513,628. This means that the Claimants' estimate of their total costs for the proceedings (not including remedies, or the trial of factual issues relating to the 29 Claimants who are not Lead Claimants) is £3,177,806.76. The Defendant does not dispute that the reasonable future cost for the Claimants of preparing this case for trial will be very substantial. In their Precedent R, in response to the Claimants' Precedent H, (and subject to the Defendant's contentions which are dealt with in this judgment) the Defendant offered to accept future costs for the Claimants of £1,363,877 (this was on the basis that there would be four Lead Claimants).

24. As for the Defendant's future costs, the costs budget in the Defendant's Precedent H was £1,991,860 (though this was on the basis that there would be four Lead Claimants). The Claimants have accepted this figure. The Defendant's Precedent H said that the costs expended to date are about £750,000 and, if there are to be two Lead Claimants (as there are) their future proposed costs budget is £1,750,000. It follows that the estimated total costs that the parties will expend if this case proceeds to the trial of the Common Issues and Lead Claimants' cases, on the basis of the costs incurred so far and the proposed cost budgets, is in excess of £5.6 million.

In practice, the Defendant is unlikely to recover any substantial costs, and perhaps will not recover any costs at all, regardless of the outcome of the proceedings

25. If the Defendant obtains a CCO against the Claimants, this will not affect the Defendant's future costs budget, the amount of which the Claimants have accepted. This means that the Claimants' recoverable future costs would be limited to £150,000, whereas the Defendant's recoverable future costs would be £1,750,000. There would therefore, in theory, be a huge imbalance in the parties' recoverable costs. However, the Defendant submits, and I accept, that in practice this is illusory. As these are claims for personal injuries, the Claimants are entitled to Qualified One-Way Costs Shifting ("QOCS") under CPR 44.13. This means that, unless the Court orders otherwise, the costs recoverable by the Defendant from the Claimants, regardless of outcome, will be no more than the aggregate amount of any order for damages and interest made in favour of the Claimants (CPR 44.14). Accordingly, even if the Defendant successfully defends these proceedings (so that there is no award of damages or interest in favour of the Claimants), it is highly likely that the Defendant will not in practice recover its costs from the Claimants. In any event, it is inconceivable that they would have the funds to pay any costs award (beyond any damages that they receive), or that the Defendant would seek to enforce a costs award in its favour, beyond the amount of the damages, if any. The Defendant is under no illusion about this.

If a CCO is made, it is likely that the Claimants will have to abandon their claims

26. As I have said, if a CCO is made, it will limit the Claimants' recoverable future costs to a little over 10% of their costs of litigating these claims to the end of the Common Issues stage, even on the Defendant's estimate. In practice, the effect of making a CCO in these terms (or of setting a costs budget in the amount of £150,000) is likely to be to force the Claimants to discontinue these proceedings. The Claimants say that they have no other means of funding these proceedings. They are very poor and have no financial resources of their own. It may not be possible to find any lawyers who would be prepared to act pro bono for the Claimants. In reality, in all likelihood, it will only be possible for the Claimants to proceed with this litigation if their legal team has the prospect of recovering their costs from the Defendant if the claims are successful (or if there is a settlement).

27. The Defendant does not concede that this is necessarily the case. However, the Defendant says that, in any event, this would not be a good reason to refrain from making a CCO. The Defendant submits that it is not reasonable or proportionate for the Claimants to proceed with this litigation, and that, if the Claimants are unable to find legal representatives who are prepared to represent them for a maximum of £150,000, that is a clear sign that this litigation should go no further.

The Claimants could still bring their claims against Lujeri and against the Defendant in Malawi, instead of bringing them against the Defendant in England

28. Whilst not disputing that the Claimants are entitled to bring these proceedings against the Defendant in England, the Defendant submits that it is still open to the Claimants to bring proceedings in Malawi against Lujeri, their former, or, in some cases, their current, employer, and, indeed, against the Defendant. The Defendant submits that it would be more appropriate for the Claimants to bring their claims against Lujeri, in

Malawi, especially as such claims would be advanced on the simple and straightforward basis of vicarious liability, rather than on the basis of a more complicated claim against the UK-domiciled parent company.

29. I accept that, in theory at least, the Claimants can still bring their claims against Lujeri, and, indeed, against the Defendant, in Malawi (unless there are any limitation issues in Malawi, of which I am unaware – Mr Williams QC did not contend that any claims the Claimants might have in Malawi would be time-barred.)

30. The Defendant submits that Malawi is the natural forum for the dispute. It is the residence of the Claimants and the alleged perpetrators. Their primary languages are not English. The applicable law is the law of Malawi, and a Malawian court would be familiar with the cultural and social context in which the plantations operated. By dropping their challenge to the jurisdictional objection taken by Lujeri, the Defendant says, the Claimants have accepted that they can obtain substantial justice in Malawi. If they took proceedings against Lujeri in Malawi, the damages that they would recover would be assessed by the same principles of Malawian law as will apply if they are successful in their proceedings against the Defendant in England.

31. Furthermore, legal costs in Malawi for litigation of this type would be very much lower than in England. The Defendant has provided a witness statement from a senior Malawian lawyer, Ms Ottober, who estimated that the total legal costs of bringing four Lead Cases in Malawi would be MWK 226,924,482.28, equivalent to £202,000. The legal costs for two Lead Cases would be somewhat lower. Ms Ottober referred to a recent case in the Malawian High Court concerning 18 claimants' allegations of very serious sexual assaults by police officers, **The State v The Inspector General of Police (ex parte MM & Otrs) Cause No.7 of 2020**, was MWK 255,684,112, equivalent to just under £228,653. Ms Ottober said that this costs award had caused a considerable stir in Malawian legal circles, on the basis that the costs award was regarded as excessive, and that this reinforced her conclusion that the total costs of proceedings in Malawi would be in the low hundred thousands of pounds. Whilst the Claimants do not accept the figures put forward by Ms Ottober, there was no dispute that the costs of litigating in Malawi are very much lower than the costs in England and Wales.

32. On behalf of the Claimants, Mr Williams QC submits that the Claimants are entitled to bring these proceedings in England. The fact that the Claimants have accepted that they would be unlikely successfully to resist a jurisdictional challenge to the English proceedings against Lujeri does not mean that they accept that it would be preferable to bring their proceedings in Malawi. The legal and evidential threshold for a submission that parties domiciled in another country will not be able to obtain substantial justice in that country is high. In **Altimo Holdings and Investment Ltd v Kyrgyz Mobile Tel Ltd** [2011] UKPC 7; [2012] 1 WLR 104, Lord Collins said:

> "Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required."

33. Mr Williams QC submits that even if the Claimants cannot surmount the "no substantial justice" threshold for the purposes of their claims in England against

Lujeri, this does not mean that the Claimants have any real confidence in obtaining justice in Malawi. They point out that the Defendant and Lujeri are powerful and influential businesses, whilst they are poor local women. They say that there has been no example as yet of a claim being brought in Malawi by a plantation worker against the plantation, in which allegations of this type were made. Moreover, there are advantages in bringing the proceedings in England. Mr Williams QC also said that the High Court in England now has considerable experience of multiple claims being brought here by individuals domiciled abroad, who are claiming a breach of duty of care by the parent company of a company that was domiciled in the foreign country.

The submissions on behalf of the Defendant

34. On behalf of the Defendant, Mr Bacon QC submits that a party to legal proceedings, and especially a claimant, should only be entitled to recover costs that are proportionate to the litigation, and are reasonable. He says that, in the present case, the most that the Claimants can expect to obtain, altogether, is something in the region of £150,000-£300,000. In fact, he says that, given the set-off of Lujeri's costs, the realistic recovery is nil. He submits that it is not proportionate and is not reasonable, in those circumstances, for the Claimants to engage in litigation which is potentially going to involve the Claimants in incurring over £3m in legal costs, and the Defendant in incurring over £3.5m in legal costs, most of which will be irrecoverable regardless of the outcome of the proceedings. In those circumstances, he submits, a CCO should be made which ensures that the Claimants will not recover any future costs beyond those that are proportionate.

35. Mr Bacon QC acknowledges that there are circumstances in which there may be non-financial objectives which make it reasonable and proportionate for a party to engage in litigation, even if the legal costs exceed the potential damages. He accepts that vindication is a valid consideration. However, he submits that what makes the present case exceptional is that the Claimants have an alternative means of obtaining vindication which would be vastly less costly for all concerned. This would be by suing Lujeri in Malawi, on the basis that Lujeri is vicariously liable for its male employees. Mr Bacon QC submits, as I have said, that the fact that the Claimants withdrew their opposition to Lujeri's jurisdictional challenge to the claim against Lujeri in England and Wales shows that the Claimants accept that they could obtain substantial justice against Lujeri in Malawi. This means that the Claimants have a way of obtaining vindication which does not involve bringing proceedings in England. Indeed, he submits, Lujeri is the more appropriate Defendant, as it was the employer of the Claimants and the men whom they allege abused them. If the Claimants brought proceedings in Malawi, they could obtain the same damages that they will obtain in England, if successful. The Claimants can also sue the Defendant in Malawi, if they wish.

36. It follows, Mr Bacon QC submits, that it is not reasonable nor proportionate for the Claimants to bring their proceedings in this jurisdiction, at huge cost. They could obtain, in effect, the same relief in Malawi at a small fraction of the cost. In other words, they do not need to pursue this litigation in England in order to obtain the damages and vindication that they seek. It is this feature, he submits, that makes this case "exceptional" for the purposes of a CCO, and which justifies a CCO in the sum of £150,000. Any more than that would be disproportionate, especially given the amount of costs that have already been incurred.

37. Furthermore, Mr Bacon QC submits, the Court should limit the future recoverable costs of the Claimants, if they choose to continue with their proceedings in England, to the costs that they could have recovered if they had brought proceedings in Malawi. He says that this is a further, related, reason for imposing a CCO in the sum of £150,000.

38. Mr Bacon QC submits that the appropriate course of action for the court in a case such as this is to make a CCO. He submits that the stark reality facing the court is that total costs of £6.5 million (or whatever sum is costs budgeted) will be incurred, and court resources expended, for the benefit of the lawyers only (though he makes clear that he does not intend any personal criticism of the Claimants' legal team).

39. Mr Bacon QC further says that this is an appropriate case for a CCO because costs budgeting or detailed assessment would not deal with the matter sufficiently.

40. As for costs budgeting, he submits that a CCO will provide greater certainty for the Defendant than costs budgeting. Also, CCOs involve a greater focus on the interests of justice and a more general assessment of the risk of disproportionate costs that costs budgeting and, therefore, they more naturally accommodate consideration of the unique fixed reference point of alternative proceedings in the natural forum.

41. As for detailed assessment, he submits that it is unreasonable to expect the Defendant to wait until the end of the action to find out what its costs liability will be. The Defendant needs to know now that the greatest exposure it faces, in respect of the Claimants' future costs, is £150,000. It is not sufficient to leave the issue to be dealt with at the end of the proceedings when the costs of the proceedings fall to be assessed. The only way that this can be done, satisfactorily, is by means of a CCO. Put bluntly, he submits that this litigation should be put out of its misery, and the Defendant should not be required to expend a very large sum of money in order to defend pointless proceedings, in the hope that, at the very end of the process, and if the Claimants succeed, the Costs Judge will disallow most of the Claimants' costs.

42. However, if the Court is not inclined to make a CCO, Mr Bacon submits in the alternative that the Court should set the Claimants' costs budget at £150,000.

The submissions on behalf of the Claimants

43. On behalf of the Claimants, Mr Williams QC submits that this is a (lightly) disguised attempt to strike out these proceedings on the basis that they are an abuse of process, or that England is a forum non conveniens. Given that the Defendant has accepted that there are no valid grounds for striking out these proceedings, or disputing jurisdiction, it would be wrong for the court to permit the Defendant, in effect, to obtain a strike-out by means of a CCO. Moreover, he submits that the CCO regime is, nowadays, effectively otiose in light of the costs budgeting regime.

44. In addition, Mr Williams QC submits that it is not open to the Court to impose a CCO at a figure which is lower than the figure which is the minimum amount which it would cost the Claimants to pursue these proceedings to their conclusion on the Common Issues and the Lead Claimants' cases. The purpose of a CCO is to prevent extravagant spending on costs, not to prevent a party from spending the minimum necessary because the court does not think that the litigation is worth the candle. He

submits that the amount of a CCO can never be less than the minimum figure necessary for pursuing the litigation to its end.

45. In the alternative, even if it is permissible for the court to use the CCO regime to impose a limit on future costs which is lower than the minimum amount which would enable the party to proceed to trial, Mr Williams QC submits that this is not an appropriate case to impose such a limit. Mr Williams QC submits that none of the three requirements that are imposed by CPR 3.19 before a CCO can be made is satisfied in this case (I will set out these requirements in the next section of this judgment).

46. Mr Williams QC emphasises that the Defendant accepts that the Claimants' claims in this litigation are not an abuse of process. In those circumstances, the court should not, he says, use the CCO regime as a way, indirectly, of striking out the proceedings. Moreover, even though the likely level of damages is substantially below the costs of the proceedings, this does not mean that it is disproportionate to carry on. The Claimants complain of some of the most serious abuses that it is possible to imagine. They are entitled to vindication, even if the legal costs will dwarf the potential compensation.

The relevant rules relating to costs

47. S 51(1) of the Senior Courts Act 1981 provides, in relevant part:

> "51. **Costs in civil division of Court of Appeal, High Court and county courts**
>
> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> …
>
> (b) the High Court;
>
> …
>
> shall be in the discretion of the court."

CCOs

48. CCOs are provided for by CPR 3.19, which states, in relevant part:

> **"Costs capping orders – General**
>
> (1) For the purposes of this Section—
>
> (a) 'costs capping order' means an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made; and

(b) 'future costs' means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.

….

(4) A costs capping order may be in respect of –

(a) the whole litigation; or

(b) any issues which are ordered to be tried separately.

(5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –

(a) it is in the interests of justice to do so;

(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and

(c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –

(i) case management directions or orders made under this Part; and

(ii) detailed assessment of costs.

(6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –

(a) whether there is a substantial imbalance between the financial position of the parties;

(b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;

(c) the stage which the proceedings have reached; and

(d) the costs which have been incurred to date and the future costs.

(7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –

(a) there has been a material and substantial change of circumstances since the date when the order was made; or

> (b) there is some other compelling reason why a variation should be made."

49. CPR 3.20(2)(b) provides that an application for a CCO must be accompanied by a budget setting out – (i) the costs (and disbursements) incurred by the applicant to date; and (ii) the costs (and disbursements) which the applicant is likely to incur in the future conduct of the proceedings. CPR 3.20(3)(a)(i) provides that the Court may direct any party to the proceedings to file a schedule of costs in the form set out in paragraph 3 of Practice Direction 3F – Costs capping.

50. CPR PD 3F – Costs Capping states, in relevant part:

> 1.1 The court will make a costs capping order only in exceptional circumstances.
>
> 1.2 An application for a costs capping order must be made as soon as possible, preferably before or at the first case management hearing or shortly afterwards. The stage which the proceedings have reached at the time of the application will be one of the factors the court will consider when deciding whether to make a costs capping order.
>
> ***Costs budget***
>
> 2 The budget required by rule 3.20 must be in the form of Precedent H annexed to this Practice Direction.
>
> ***Schedule of costs***
>
> 3 The schedule of costs referred to in rule 3.20(3) –
>
> (a) must set out –
>
> (i) each sub-heading as it appears in the applicant's budget (column 1);
>
> (ii) alongside each sub-heading, the amount claimed by the applicant in the applicant's budget (column 2); and
>
> (iii) alongside the figures referred to in subparagraph (ii) the amount that the respondent proposes should be allowed under each sub-heading (column 3); and
>
> (b) must be supported by a statement of truth.
>
> ***Assessing the quantum of the costs cap***
>
> 4.1 When assessing the quantum of a costs cap, the court will take into account the factors detailed in rule 44.5 and the relevant provisions supporting that rule in the Practice Direction supplementing Part 44. When considering a party's budget of the costs they are likely to incur in the future conduct

> of the proceedings, the court may also take into account a reasonable allowance on costs for contingencies."

51. The reference to rule 44.5 in PD 3F, paragraph 4.1, is out of date. It is plain, in my view, that it is a reference to what is now CPR rule 44.4. The rules in CPR 44 were renumbered after the Jackson Reforms were implemented in 2013.

CPR 44

52. General rules relating to the assessment of costs are set out in CPR 44.

53. CPR 44.3 provides, in relevant part :

> (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> ….
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
>
> (Factors which the court may take into account are set out in rule 44.4.)
>
> (3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.
>
> (4) Where –
>
> (a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or

> (b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,
>
> the costs will be assessed on the standard basis.
>
> (5) Costs incurred are proportionate if they bear a reasonable relationship to –
>
> (a) the sums in issue in the proceedings;
>
> (b) the value of any non-monetary relief in issue in the proceedings;
>
> (c) the complexity of the litigation;
>
> (d) any additional work generated by the conduct of the paying party,
>
> (e) any wider factors involved in the proceedings, such as reputation or public importance; and
>
> (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness."

54. CPR 44.4 provides:

> (1) The court will have regard to all the circumstances in deciding whether costs were –
>
> (a) if it is assessing costs on the standard basis –
>
> (i) proportionately and reasonably incurred; or
>
> (ii) proportionate and reasonable in amount, or
>
> (b) if it is assessing costs on the indemnity basis –
>
> (i) unreasonably incurred; or
>
> (ii) unreasonable in amount.
>
> (2) In particular, the court will give effect to any orders which have already been made.
>
> (3) The court will also have regard to –
>
> (a) the conduct of all the parties, including in particular –
>
> (i) conduct before, as well as during, the proceedings; and
>
> (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

> (b) the amount or value of any money or property involved;
>
> (c) the importance of the matter to all the parties;
>
> (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
>
> (e) the skill, effort, specialised knowledge and responsibility involved;
>
> (f) the time spent on the case;
>
> (g) the place where and the circumstances in which work or any part of it was done; and
>
> (h) the receiving party's last approved or agreed budget.
>
> (Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)"

Costs budgeting

55. CPR 3.12 and 3.13 provide that, unless the Court agrees otherwise, the parties in all multi-track cases in which the sum in issue is less than £10 million must file costs budgets. CPR 3.12(2) provides that:

> "(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings (or variation costs as provided in rule 3.15A) so as to further the overriding objective."

56. CPR 3.15 provides, in relevant part :

> "(1) In addition to exercising its other powers, the court may manage the costs to be incurred (the budgeted costs) by any party in any proceedings.
>
> (2) The court may at any time make a 'costs management order'. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—
>
> (a) record the extent to which the budgeted costs are agreed between the parties;
>
> (b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;

> (c) record the extent (if any) to which incurred costs are agreed.
>
> (3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.
>
> On an assessment of the costs of a party, the court will have regard to the last approved or agreed budget, and may have regard to any other budget previously filed by that party, or by any other party in the same proceedings. Such other budgets may be taken into account when assessing the reasonableness and proportionality of any costs claimed."

57. CPR 3.18 provides, in relevant part :

> 3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –
>
> (a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;
>
> (b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so;…"

58. CPR PD 3E states that the costs budget must be filed and exchanged in the format set out in Precedent H, which is annexed to the Practice Direction. The other parties may agree the proposed budget or may make comments on it in a document entitled a "budget discussion report" (usually referred to as "Precedent R") (CPR 3.13(2)). It is then for a judge to set the budget.

The overriding objective

59. Rules 1.1 and 1.2 of the CPR provide as follows:

> "1.1
>
> (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
>
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

Application by the court of the overriding objective

1.2

The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule …"

The application for a CCO

60. CPR 3.19(5) provides that there are three preconditions which must each be satisfied before a CCO is made. These are that (1) it is in the interests of justice to make a CCO, (2) there is a substantial risk that without a CCO costs will be disproportionately incurred, and (3) the court is not satisfied that the risk of disproportionate costs can be adequately controlled by costs budgeting or a detailed assessment. If these preconditions are met, the Court is not bound to make a CCO: it has a discretion to do so.

61. As paragraph 1.1 of PD 3F makes clear, CCOs are exceptional. They have always been extremely rare. They were introduced, with effect from 6 April 2009, by the Civil Procedure (Amendment) Rules 2008. To the extent that they ever had a heyday, that heyday came to an end on 1 April 2013, with the introduction of reforms to the CPR to implement the recommendations of the Final Report of the Jackson Review into Civil Litigation Costs of December 2009 ("Jackson"). The amendments to the CPR following the Jackson Review included the introduction of costs budgeting which, in the view of many, has rendered CCOs otiose. Since 1 April 2013, so far as the industry of counsel has managed to identify, there has not been a single case of a CCO being made under CPR 3.19.

62. CCOs are not popular with legal writers. For example, the author of *Friston on Costs* (3rd ed), §13.04, rather wonderfully observes that 'Costs management has done for [costs capping] what video did for the radio star' and says that it is 'an almost entirely

impotent jurisdiction' where it is difficult to envisage 'even hypothetically' that any costs capping order would now be made. Both the author of *Friston on Costs* and the authors of *Cook on Costs* recommend the abolition of CCOs on the basis that they add to the over-complication of the rules on costs, for no positive benefit. See *Friston* at §13.05 and *Cook* at §17.02.

63. The fact that not a single CCO has been made for more than eight years is not, of itself, a reason to decline to make a CCO in the present case. CPR 3.19 has not been withdrawn, even though it now sits alongside the rules providing for costs budgeting. But it serves to emphasise their exceptional nature.

64. It is easy to see why CCOs have fallen out of use following the introduction of costs budgeting. Both CCOs and costs budgeting provide parties with a relative degree of certainty, well in advance of trial, about their likely exposure to the other party's costs if they were to lose. But, in comparison to costs budgeting, a CCO is, as Mr Bacon QC puts it, a "blunt instrument." Costs budgets have advantages in that, inter alia, they break down the work by phases (this facilitates settlement of costs in the event of settlement of the damages claim). Further, good reason has to be established to reduce a budgeted sum for each phase downwards if that phase has been completed. It is hard to see how, in a normal case, a CCO would be preferable to costs budgeting. One of the pre-conditions for a CCO is that the court must not be satisfied that the protection against disproportionate costs cannot be effected by costs budgeting. It is difficult to envisage circumstances in which a CCO can provide protection against disproportionate costs which cannot better be provided by costs budgeting.

65. However, Mr Bacon QC submits that this is such a case, primarily because a CCO is, he says, suited to a case in which the argument for a cap on costs at the level sought comes down to a single issue, namely the availability of alternative proceedings in the natural forum (i.e. Malawi).

66. I will deal in turn with the question whether each of the three preconditions for a CCO has been met in this case, but I will take them in a different order from the order in which they are set out in CPR 3.19(5). I will begin with the question whether there is a substantial risk that without a CCO costs will be disproportionately incurred.

(1) Is there a substantial risk that without a CCO in the sum of £150,000 costs will be disproportionately incurred?

67. Strictly, this conflates two issues. The first is whether a CCO should be made at all, on the basis that costs will be disproportionately incurred if it is not. The second is whether, if a CCO should be made, it should be made in the sum of £150,000. As for the latter question, the quantum question, CPR PD 3F, paragraph 4.1, requires the court to take account of questions of proportionality, and, in particular, the factors set out in CPR 44.4 (though paragraph 4.1 refers to CPR 44.5, it is clear that the text was not updated in 2013 and the reference should be to CPR 44.4).

68. In fact, in my view, these two issues can only sensibly be dealt with together. The real issue is whether I should accede to the Defendant's application for a CCO in the sum of £150,000. This requires me to decide whether recoverable costs in excess of £150,000 for the Claimants would be disproportionate.

The parties' arguments

69. At the heart of the Defendant's submission on proportionality is the contention that it would not be proportionate to permit the Claimants to accrue more than £150,000 in further costs in this litigation, even if that means that it will not be possible for the Claimants to prepare this case for trial and then to argue it. The Defendant submits that such a costs cap is appropriate because the potential financial benefit for the Claimants from the litigation is very small, compared to the costs, and may well be nil, and because they have a very much cheaper way of obtaining vindication, namely through suing Lujeri in Malawi. If this was done, the recoverable costs in Malawi would be very much lower than they are in England, and would be around £150,000.

70. In response, the Claimants submit that costs capping pre-quantifies a party's recoverable costs under a subsequent costs order (see CPR 3.19(a)). The least that the receiving party will be entitled to is costs on the standard basis. The Claimants point out that there is no issue as to jurisdiction and that the Defendant has accepted that it has no substantive grounds on which to strike out the Claimants' claims. It follows, contend the Claimants, that there is no basis for contending that it would be disproportionate for the Claimants to recover at least the minimum costs that are required for them to litigate their claims effectively in the High Court. Mr Williams QC submits that there is no power under the CPR to cap the Claimants' costs at less than the level required for them to litigate their claims effectively in the High Court, or for the court to fix costs at a lower sum than they would be likely to recover if their costs were subject to a standard basis assessment.

71. I should add that the Claimants submit that, even if they are wrong about this, the three preconditions for a CCO are not satisfied, and/or the court should not exercise its discretion to grant a CCO. Mr Williams QC submits that the Claimants are entitled to proceed in this jurisdiction, and these claims are about far more than money. It is a mistake to assess the value of the claims by reference to the sums that the Claimants are likely to recover, and it is wrong to assess the benefits of vindication on the false assumption that they can obtain vindication much more cheaply in the Malawian courts, if they chose to do so.

Discussion

72. For the reasons set out below, in my judgment, the Claimants are right that it would not be appropriate, having regard to the principle of proportionality, to cap the costs at a figure that is less than the minimum costs that are required for them to litigate their claims effectively in the High Court. It follows that there is no substantial risk that, without a CCO in the sum of £150,000, costs will be disproportionately inccurred. It follows in turn that this precondition for a CCO is not met.

73. One part of the Claimants' submissions raises an important point of legal principle. Mr Williams QC submits that it is not permissible, under the CPR, to fix costs at a lower sum than the party would be likely to recover if its costs were subject to a standard basis assessment, which, he says, is the level required for the party to litigate its claims effectively in the High Court. Put another way, a "proportionate" level of recoverable costs can never be less than the amount that is required by the party to litigate its claims effectively. If he is right about this, then this would provide a knock-out blow to the Defendant's submissions on cost capping. As I have already

said, I accept that a CCO of £150,000 or thereabouts would mean that the Claimants could not litigate their claims effectively (or, probably, at all) in this litigation. It is far less than the amount that they require to litigate their claims effectively.

74. I will briefly summarise the issue of legal principle at the end this judgment, but I do not have to decide it, because, even assuming, in the Defendant's favour, that there may in theory be cases in which the minimum sum required for a Claimant to fight the case would be disproportionate, because the costs are out of proportion to the potential benefits to the Claimant of the litigation, this is not such a case.

75. In the present case, it will not be disproportionate for the Claimants' costs to be budgeted at a figure which represents the amount that is necessary for them to proceed to litigate this case.

76. The starting point is that the Claimants are entitled to bring these proceedings against the Defendant in this jurisdiction. The Defendant has never suggested otherwise and it is clear, pursuant to Article 4 of the Recast Brussels Regulation, that the Claimants are so entitled. Furthermore, the Defendant accepts that the Claimants' claims are arguable.

77. The Defendant submits that, nonetheless, it will not be proportionate for the Claimants to spend what is necessary to proceed with these claims in this jurisdiction because the potential damages are far less than the legal costs, and the Claimants can obtain the vindication that they seek by commencing fresh proceedings in Malawi, either against Lujeri alone or against Lujeri and the Defendants. In other words, the Defendant contends that the costs in excess of £150,000 will be disproportionate because the game, if played in England, is not worth the candle.

78. I do not accept that submission.

79. It is true that the potential damages that the Claimants may recover are very much lower (perhaps by a factor of 10 or more) than the costs that will be incurred by the end of these proceedings, but, in the particular circumstances of this case, that does not mean that the costs will be disproportionately incurred. The sums that are likely to be recoverable, though small by English standards, are very significant for poor Malawian plantation workers, and they may indeed be life-changing. I accept the Claimants' submission that in any event, the Claimants' objectives in bringing these proceedings are not entirely, or even principally, about money. They claim to have been abused sexually, including, in many cases, by rape. They say that this was a chronic problem in the plantations run by Lujeri. They say that this was the result of a systematic failure by the Defendant to use its powers and influence to control the behaviour of male managers and overseers and to ensure that these abuses did not take place on the plantations. I am satisfied that the Claimants' legitimate desire for personal vindication, and for the acceptance by the Court that they were abused in the way that they allege and that the Defendant is liable for this treatment, coupled with a legitimate desire to use the court proceedings as a way of shining a light on these practices and promoting reforms in the future, mean that future costs that are substantially in excess of the damages at issue will not be disproportionately incurred. The importance of the matter to the parties is a relevant consideration, in relation to proportionality (see CPR 44.4(3)(c)).

80. I should emphasise that the Claimants' allegations are untested and that the Defendant contends that, even if these abuses did occur, the Defendant is not liable for them, but the fact remains that it is not disproportionate for the Claimants to decide to spend a substantial sum in these proceedings.

81. The Defendant accepts in principle that vindication considerations may render it proportionate to spend substantial sums in litigation, even if the damages at issue are small. But, the Defendant says, what makes this case exceptional is that the Claimants have another, vastly less expensive, way of obtaining vindication and of bringing the abuses to the attention of the wider world. This would be by suing Lujeri, or Lujeri and the Defendant, in Malawi. The Defendant says that, if this were done, then the Claimants can expect a fair hearing, the same determination of the issues on their merits as will take place in England, and the same assessment of damages. They will also obtain the same vindication in Malawi as they would if they succeeded in England, and proceedings in Malawi would be much more convenient, as both the Claimants and their alleged abusers live in Malawi, the court is more likely to speak the same language as them, and the court will be familiar with the customs and social norms of the areas in which these events took place.

82. I am unable to accept the argument that the proceedings in England are disproportionate because the Claimants could have sued Lujeri in Malawi. The fact remains that they are entitled to choose to sue Lujeri's ultimate parent company in England. The Defendant accepts that the Claimants' claim in England is arguable, and that it is not liable to strike-out as being an abuse of process or to being stayed on the basis of forum non conveniens. The Claimants are entitled to take the view that they prefer to bring their proceedings in England. Whether or not their concerns about bringing legal process in Malawi are justified or not, they are entitled to bring these proceedings in England. The Defendant, too, has an interest in vindicating its reputation, though it is understandably reluctant to have to spend millions of pounds to do so.

83. I have also considered whether the proceedings are disproportionate because they involve Claimants who live many thousands of miles away from England. Might it be said that, regardless of the importance of the proceedings to the Claimants, to plantation workers in Malawi, and the public in Malawi, the matter is not of public importance to the courts of England and Wales and that valuable court time should not be taken up by litigation involving events in a different continent? In my judgment, the answer is clearly "no". The courts in this jurisdiction very frequently deal with disputes, in the commercial field, and in other fields, that have little if any connection with parties domiciled in England and Wales or with events in this country. A matter can be of public importance even if the events with which it is concerned took place in a different country. In any event, in the present case, one of the parties, the Defendant, is domiciled in England. It is a matter of public importance in this country whether a company that is domiciled here is in breach of a duty of care to workers on plantations in Malawi, owned by a subsidiary company. CPR 44.3(5)(e) states that the extent to which a claim is in the public interest is a matter to be taken into account when considering proportionality.

84. On behalf of the Defendant, Mr Bacon QC pointed out that there have been instances of cases being struck out as an abuse of process because the recoverable damages and vindication were minimal when compared to the overall costs of pursuing the claim.

Mr Bacon QC referred to **Jameel v Dow Jones and Co** [2005] EWCA Civ 75; [2005] QB 946, the Court of Appeal was concerned with a libel claim against a US newspaper in relation to an article published on the internet which was accessed by only five subscribers in England. The Court of Appeal struck out the claim as an abuse of process. Lord Phillips of Worth Maltravers said, at paragraphs 54 and 69:

> "54…..An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice…."
>
> ….
>
> "69. If the claimant succeeds in this action and is awarded a small amount of damages, it can perhaps be said that he will have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication will be minimal. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick."

85. Mr Bacon QC also referred to **Sullivan v Bristol Film Studios Ltd** [2012] EWCA Civ 570; [2012] EMLR 27. The Claimant was a hip-hop artist who did not like the video that a production company had made of one of his songs. He claimed £800,000 on the basis that the video had damaged the marketing potential of his song. The claim was transferred to the Chancery Division and the multi-track. A judge assessed the maximum possible recovery at £50, and struck out the claim as an abuse of process. The Court of Appeal upheld the strike out. At paragraph 29, Lewison LJ said:

> "29… The mere fact that a claim is small should not automatically result in the court refusing to hear it at all. If I am entitled to recover a debt of £50 I should, in principle, have access to justice to enable me to recover it if my debtor does not pay. It would be an affront to justice if my claim were simply struck out. The real question, to my mind, is whether in any particular case there is a proportionate procedure by which the merits of a claim can be investigated. In my judgment it is only if there is no proportionate procedure by which a claim can be adjudicated that it would be right to strike it out as an abuse of process."

86. At paragraph 40, Etherton LJ said:

> "40. For my part, I would emphasise that the disproportion justifying the strike out of Mr Soloman's claim is not merely between the likely amount of damages he would recover if

> successful in the proceedings and the litigation costs of the parties. It includes consideration of the extent to which judicial and court resources would be taken up by the proceedings. That was the approach rightly taken by the Deputy Judge, who said in [27] of judgment that the proceedings would involve a large amount of court time and would cost a great deal of money to argue and would be a disproportionate use of the court's resources and unfair to the defendant."

87. In my judgment, these authorities do not assist Mr Bacon QC in his application for a CCO. They establish that there can be cases in which the disproportionate nature of the proceedings means that the claim should be struck out as an abuse of process. However, the Defendant does not suggest that this is such a case. In his skeleton argument, Mr Bacon QC said that "it is not part of [the Defendant's] case that the claims should be struck out on the grounds that they amount to an abuse of process." Once this concession was (rightly) made, these authorities do not support the Defendant's case. If the proceedings are truly disproportionate, then they should be the subject of an application to strike them out as an abuse of process. Neither **Jameel** nor **Sullivan** lends any support to the contention that the CCO regime should be used in a case such as the present. In my judgment, the Claimants are right that it is wrong in principle for a party to use the CCO regime, in effect, as a proxy for the abuse of process jurisdiction. Similarly, it would be wrong for the court to impose a CCO in order to punish a party who has lawfully brought proceedings in this jurisdiction because the court thinks that they should have issued their proceedings in a different jurisdiction.

88. The Defendant further submits that it would be in the interests of justice to impose a CCO which is limited to the costs that the Claimants could expect to recover if they brought their proceedings against Lujeri in Malawi. I reject this argument. The Defendant expressly acknowledges, in its skeleton argument, that "The Claimants are entitled to seek vindication of their rights in an available jurisdiction of their choosing." I agree. In those circumstances, however, I do not see any reason why the interests of justice should limit the Claimants' recoverable costs to the costs that they would have recovered if they had chosen a different jurisdiction. This would be to penalise the Claimants for choosing England over Malawi. It would also, in effect, mean that the court would be applying the costs rules that apply in Malawi to proceedings that are properly brought in England.

(2) The interests of justice

89. In my judgment, this application also fails to satisfy the requirement that a CCO must be in the interests of justice.

90. All of the considerations, set out above, which led me to the conclusion that there is no substantial risk that without the CCO, costs will be disproportionately incurred, are also reasons why it would not be in the interests of justice to impose a CCO.

91. Moreover, I think that it is highly significant, in this regard, that the imposition of a CCO would almost certainly have the effect of forcing the Claimants to abandon their claims. If the Defendant considered that the various reasons put forward by the Defendant meant that the continuation by the Claimants of these proceedings would

be an abuse of process, then the Defendant should have persisted with its strike out application. However, given that the Defendant has abandoned the strike out, has accepted explicitly that the proceedings are not an abuse of process, and has never challenged the proceedings on a forum non conveniens basis, I do not think that it would be right to impose a CCO which would have exactly the same consequences for the Claimants as a strike out or a stay of proceedings. The reasons why this is not an appropriate case for a strike out are all reasons why this is not an appropriate case for a CCO.

92. In addition, so far as the interests of justice are concerned, it is also relevant, in my view, that a CCO would lead to a gross inequality of arms. Even if the Claimants were able to struggle on with a CCO of £150,000, it is clear that the Defendant's resources are far greater. They have proposed a budget that would involve them spending more than ten times as much. The requirements of the interests of justice are reflected in the overriding objective, which provides, at CPR 1.2(a), that courts should,

> "ensure that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence"

93. It is also worth noting that this is not a case in which a wealthy Claimant is deliberately pursuing a low-value claim, at great expense, in order to harass the Defendant, or to cause as much unnecessary cost to the Defendant as possible. Rather, this is a case in which extremely poor Claimants are pursuing a relatively low-value claim for a number of legitimate reasons, only one of which is the prospect of damages.

94. I can understand that the Defendant is unhappy that it will have to pay the Claimants' costs if the Claimants succeed, but the Claimants will not have to pay the Defendant's costs if the Claimants' claims fail. However, this is a function of the QOCS rules, and it is not a reason to impose a CCO on the Claimants.

(3) Will the risk that costs will be disproportionately incurred be controlled by costs budgeting or by a detailed assessment?

95. Once again, this precondition is not met. As stated above, in the general course of events it is highly unlikely that a CCO would be better than costs budgeting at controlling disproportionate costs. Mr Bacon QC submits that what makes this case different is that the reason why the Defendant says that a CCO is appropriate is a single discrete point: it comes down to the proposition that there is a cheaper and more convenient way of obtaining the relief the Claimants seek via proceedings in Malawi. He says that if I accept this argument then it would be more efficient to impose a CCO and, in effect, send a clear and emphatic signal at this stage that the Claimants cannot expect to recover future costs in excess of £150,000. As I have not accepted this argument, it follows that there is no advantage in making a CCO. In any event, however, I think that it will be extremely unlikely in future that this third precondition will be met, as costs budgeting is a more sophisticated and nuanced way of setting a costs figure than a CCO.

Other authorities relied upon by the parties

96. Both Mr Bacon QC and Mr Williams QC drew my attention to a number of other authorities. I have left them until now because none of them was directly on point and, in particular, none of them addressed specifically whether a CCO should be imposed if the minimum reasonable costs of taking the matter to trial substantially exceeded the costs which were proportionate to spend in light of the nature and objectives of the litigation.

97. I will deal with the authorities in turn, albeit only relatively briefly.

Solutia UK Ltd v Griffiths and others [2001] EWCA Civ 736

98. In this case, the Court of Appeal addressed an issue which arose in the case about the appropriateness of the claimants in a personal injury case concerned with a leak from a chemical plant in Wrexham using London Solicitors, Messrs Leigh Day (as it happens, the Claimants' solicitors in the present case). The claims were settled on the basis that there would be a detailed assessment of costs if not agreed. The Defendant challenged the Claimants' costs on the basis that it was not reasonable to incur the costs of London solicitors. The costs judge disallowed the additional costs on the basis that the claims did not require the services of specialist London solicitors. The Deputy High Court judge and the Court of Appeal allowed the Claimants' appeal. Mr Bacon QC observed that at paragraph 25 of the judgment, Sir Christopher Staughton pointed out that, during oral argument, two of the judges in the Court of Appeal had described costs of £210,000 when the amount that was recovered for the claimants was £90,000 as "ludicrous".

99. In my judgment, the **Solutia** case is of no relevance to the present case. It was a different case, on very different facts. It was decided before the Jackson reforms. The Solutia case did not involve issues of vindication and public importance such as arise in the present case.

Tidal Energy Ltd v Bank of Scotland plc [2014] EWCA Civ 847 and Black and others v Arriva North East Limited [2014] EWCA Civ 1115

100. These cases are the only occasions on which the Court of Appeal considered CCOs under CPR 3.19.

101. As for **Tidal Energy**, the subject matter of the appeal was very different from the present case and the judgment of Arden LJ, who gave the judgment of the Court, does not shed any light on the issues that I have to decide. In **Tidal Energy**, the Claimant took proceedings against the Defendant bank to recover a sum of just over £217,000 which had been paid into the wrong account and which could not be recovered. The Claimant sought a CCO with a view to ensuring that it would not have to pay the costs of leading counsel that the Defendant had chosen to instruct for the appeal (because the claim had wider implications for the Defendant's business). The Court of Appeal declined to impose a CCO, because it was satisfied that the risk of disproportionate costs could be adequately controlled by the detailed assessment of costs. There was no occasion for the Court of Appeal to give more general guidance about CCO, or to express a view about the value of CCOs in light of the costs budgeting regime which had just come into force.

102. In **Black**, the Appellant was pursuing an appeal to the Court of Appeal in a discrimination claim against public transport providers. She had obtained legal expenses insurance in the sum of £50,000 and she applied for a CCO of the Respondents' costs in that sum. It was submitted that if the CCO was not made she would not be able to proceed with the claim, as ATE insurance was no longer available for this type of claim, and also that the claim was of general public importance. The Court of Appeal declined to make a CCO. At paragraph 11, Christopher Clarke LJ said that it was not the function of CCOs to remedy the problems of access to finance to litigation.

103. **Black** is of no relevance to the present case. It was a case in which an impecunious party sought a CCO against the other party. That is not the position in this case.

The point of legal principle

104. The point of legal principle which is raised in the Claimant's argument is not specific to CCOs. The point relates to the meaning of "disproportionate" in the costs regime. In summary, the point of legal principle encompasses the following questions: (1) whether costs can ever be disproportionate, even though they are no more than the minimum costs which the party needs to spend in order to bring the case to trial; (2) if so, in what circumstances; and (3) again if so, how should a court decide what the proportionate figure should be? In particular, may a judge, on proportionality grounds, reduce a costs budget or impose a CCO, simply because the judge disapproves of the claimant's decision to proceed with the litigation, e.g. because the sum claimed is much smaller than the anticipated costs and there are no vindication issues?

105. As I have said, I do not need to decide this issue. Even if I assume, in the Defendant's favour, that the answer is "yes", I have concluded that this is not an appropriate case to impose a CCO of £150,000 on the basis of the grounds relied upon by the Defendant. Moreover, since this is potentially an issue of general public importance, I think that I should refrain from expressing any firm views on the point. It should wait for a case in which the point needs to be decided.

106. I will, however, briefly add that, in argument on this point, the parties drew my attention to the Jackson Report, paragraphs 7.22 and 7.23, CPR 44.3(2)(a), especially the last sentence thereof, and several authorities, including **Lownds v Home Office** [2002] 1 WLR 2450 (a case which set out the position prior to the 2013 changes); **Brian May and another v Wavell Group Limited and another** (HHJ Dight, Central London County Court, 22 December 2017, unrep., at paragraph 44); **Kazakhstan Kagazy plc and others v Baglan Abdullayevich Zhunus** [2015] EWHC 404 (Comm), per Leggatt J, at paragraph 13, and **West v Stockport NHS Foundation Trust** [2019] EWCA Civ 1220; [2019] 1 WLR 6157, at paragraphs 73 and 87-93. In addition, useful guidance can be found in a case which was not cited to us by counsel, **Ernst Malmsten v Lara Bohinc** [2019] EWHC 1386 (Ch); [2019] 4 W.L.R. 87, per Marcus Smith J, at paragraphs 48-58.

Setting a costs budget

107. The reasons which I have given for declining to impose a CCO in the sum of £150,000 are equally reasons why I decline to impose a costs budget in that amount.

108. On behalf of Judge Brown and myself, however, I wish to stress that it does not follow from this judgment that we accept that a costs budget should be set in the sum that the Claimants have set out in their Precedent H, or, indeed, in the sum that the Defendant has offered (in the event that its main argument failed). We will have to consider whether the proposed budgets are unreasonable and/or disproportionate on "normal" grounds, i.e. not on the grounds that were relied upon by the Defendant when seeking a CCO in the sum of £150,000. We have decided that cost budgeting is a matter that Judge Brown and I should deal with jointly.

Conclusion

109. For the reasons set out above, I refuse the Defendant's application for a CCO capping the Claimants' future costs at the sum of £150,000, or any other sum below the minimum sum required for the Claimants to litigate their claims effectively in the High Court.

110. The parties are invited to notify the Court whether they seek a further hearing before Costs Judge Brown and myself at which oral representations can be made about the costs budget, or whether the matter can be dealt with by way of written representations.

RULING ON THE COSTS OF THE APPLICATION FOR A COSTS CAPPING ORDER

Mr Justice Cavanagh:

1. On 19 October 2021, I handed down a written judgment in relation to the Defendant's application for a Cost Capping Order ("CCO"). The Defendant was seeking a CCO which would limit the Claimants' recoverable future costs to £150,000 (or thereabouts), or alternatively, for a costs budget to be set for the Claimants' future costs in the sum of £150,000. I will refer to this application as "the Costs Capping Application". The judgment followed an oral hearing on 22 September 2021, during which I sat with Costs Judge Brown. For the reasons given in my written judgment, I rejected the Defendant's application.

2. At paragraph 108 of the judgment, I said that:

> "108. On behalf of Judge Brown and myself, however, I wish to stress that it does not follow from this judgment that we accept that a costs budget should be set in the sum that the Claimants have set out in their Precedent H, or, indeed, in the sum that the Defendant has offered (in the event that its main argument failed). We will have to consider whether the proposed budgets are unreasonable and/or disproportionate on "normal" grounds, i.e. not on the grounds that were relied upon by the Defendant when seeking a CCO in the sum of £150,000. We have decided that cost budgeting is a matter that Judge Brown and I should deal with jointly."

3. Accordingly, whilst the Defendant's application for a CCO and/or for a costs budget for the Claimants of £150,000, has been rejected, Costs Judge Brown and I have yet to set the budgets for the parties' future costs. We have invited and received further written submissions from the parties in relation to the costs budgets, and a hearing has been fixed for 19 November 2021 at which the costs budgets will be set.

4. The parties have also filed written submissions in relation to the costs of the Costs Capping Application.

5. The Claimants have applied for the costs of the Costs Capping Application. They seek an order that the Defendant shall pay the Claimants' costs of and occasioned by the Costs Capping Application, to be subject to immediate detailed assessment on the standard basis if not agreed. The Claimants also seek a payment on account of costs in the sum of £30,000. The Claimants say that, in the alternative, they have no objection to an order for summary assessment, and suggest that, if the Court decides to deal with costs in this way, the assessment can be carried out at the same time as the costs budgeting exercise. The Claimants have not, as yet, filed a Costs Schedule in relation to the Costs Capping Application.

6. The Defendant submits that the costs of the Costs Capping Application should be reserved and then determined at the forthcoming hearing on the costs budgets. Alternatively, if a costs order is made in the Claimant's favour, the Defendant submits that there should be detailed assessment at the end of the proceedings, or, failing that, summary assessment of the Claimants' costs.

7. The parties agree that the costs in relation to the other matters of case management that were dealt with at the hearing on 22 September 2021 should be costs in the case.

Should the Defendant be liable for the Claimants' costs of the Costs Capping Application?

8. As I have said, the Defendant submits that I should postpone consideration of this issue until the costs budgeting hearing on 19 November 2021. The Defendant says that there was a significant commonality and overlap in its submissions regarding proportionality and how it should be applied in relation to a CCO and in relation to costs budgeting. Accordingly, the arguments in relation to

proportionality which was at the heart of the CCO application would have been raised and determined in any event as part of the costs budgeting exercise. Moreover, if there is a significant reduction in the Claimants' costs budget following completion of the budgeting exercise, it may be that the court deems it appropriate to reflect this in the order for costs.

9. In fact, I had already indicated, in directions that I gave on 15 October 2021, that I saw no reason to postpone a decision on the costs of the hearing on 22 September 2021 until after the costs budgeting determination. At that stage, the Defendant had indicated that it submitted that I should postpone this decision, but had not provided detailed submissions in support. In the circumstances, I have considered it appropriate to reconsider my view in light of the detailed submissions of the party and do not reject the Defendant's proposal simply because I had already indicated a view in my directions of 15 October 2021.

10. However, having considered the Defendant's submissions, I remain of the view that it is appropriate for me to take a decision on the question of principle as to whether the Defendant should pay the Claimants' costs of the Costs Capping Application at this stage, rather than wait until the end of the costs budgeting hearing. My decision is that the Defendant should be liable to pay the costs of the Claimants in relation to the Costs Capping Application.

11. The reason for my decision that the Defendant should pay the Claimants' costs of the Costs Capping Application is that the issue that was raised in that Application was discrete and entirely separate from the "normal" submissions that a party might make as regards whether a proposed costs budget was reasonable or proportionate. The Defendant's primary submission was that there should not be a costs budget for the Claimants' future costs at all, but that the court should impose a CCO instead. In the alternative, but very much as a subsidiary argument, the Defendant submitted that I should set a costs budget at £150,000, essentially for the same reasons that the Defendant relied upon in support of a CCO in the same amount. This was not part of the usual to-ing and fro-ing which the court might expect from parties to litigation who are disputing the other party's costs budget on the basis that the sums claimed were excessive and/or were more than was reasonably necessary to pursue the litigation and/or were disproportionate. This was not part of a normal costs budgeting exercise.

12. The argument that this was a suitable case in which to impose a CCO failed, and so did the argument that any cost budget for the Claimants in excess of £150,000 would be disproportionate in all of the circumstances of the case. Put bluntly, therefore, the Defendant lost the Costs Capping Application and I do not see any reason why the normal principle that costs should follow the event should not apply.

13. There is no reason to delay a decision as regards whether the Defendant should be liable for the costs of this issue until after the costs budgeting hearing. There is no significant overlap between the issues that were dealt with in the Costs Capping Application and the issues that will be dealt with at the forthcoming costs budgeting hearing. As the Claimants' counsel said in their written submission, the Defendant's proportionality argument as advanced at the 21 September 2021 hearing cannot be re-run for the costs budgeting exercise on 19 November 2021. The parties' submissions on whether the Defendant should pay the Claimants' costs of the Costs Capping Application have been fully set out in their written submissions (including Reply Submissions on behalf of the Defendant) and no purpose would be served by providing the parties with an opportunity to develop them further at the oral hearing on 19 November. Indeed, to do so would eat into the time set aside for costs budgeting and this would not be consistent with the overriding objective. There would be no reason why the decision on the costs of the Costs Capping Application would be affected by the outcome of the costs budgeting hearing on 19 November 2021.

The form of the order for costs

14. As I have said, the Claimants' primary submission is that there should be an order for immediate detailed assessment, with a payment on account of £30,000. I do not accept that this would be the appropriate order to make. Such a detailed assessment would take a considerable time and would involve the parties in incurring considerable additional expense. It would be a complicated exercise, because the Costs Judge would have to disentangle the cost relating to the Costs Capping Application from the costs arising from the general costs management issues and the general costs budgeting exercise. All of these are equally reasons why I do not favour a detailed assessment at a later stage. Moreover, I do not see why the Claimants should have to wait until the end of the proceedings for the costs of a discrete part of the proceedings in which they were successful.

15. This leaves a summary assessment of the costs of the Costs Capping Application. It is true that some

of the same complications as I have referred to in relation to a detailed assessment will arise in relation to a summary assessment, but not to the same extent, and, at least, the summary assessment will be made by the judges who had the benefit of dealing with the Costs Capping Application, rather than by a Costs Judge who may not have any familiarity with the matters in issue.

16. It follows that, in my judgment, it is in the interests of justice and in accordance with the overriding objective, for the Claimants' costs of the Costs Capping Application to be determined by summary assessment. It is not possible to do this now, because the Claimants have not yet provided a schedule of their costs of the Costs Capping Application. I will order, therefore, that the Claimants must file and serve a Schedule of the costs that it seeks in relation to the Costs Capping Application seven days before the hearing on 19 November. The summary assessment will then be dealt with at the hearing on 19 November. It is unfortunate that some of the time at this hearing will therefore be taken up by the summary assessment, but it is unavoidable and I hope and expect that the summary assessment will not take very long.

17. As I have decided to make a summary assessment of costs in a few weeks' time, it is not appropriate nor necessary to order a payment on account. In any event, I would have been disinclined to do so as the Claimants have not provided a Schedule of their costs and the Defendant had not had a reasonable opportunity to make submissions on the figure that was proposed.

18. In summary, therefore, I have decided that the Claimants should have their costs of the Costs Capping Application, to be determined by summary assessment at the hearing on 19 November 2021. I have amended the draft order that was helpfully provided to me by the parties so as to reflect this ruling.