Neutral Citation Number: **[2023] EWHC 2407 (Ch).**

Case No: **BL-2020-001543**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **13 September 2023**

Before:

Deputy Master Collaço Moraes

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Between:

(1) TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED **(2) STEPHEN HUNT** **(LIQUIDATOR OF TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED)**	**Claimants**
- and -	
(1) FIRST CURAÇAO INTERNATIONAL BANK N.V. **(2) JOHANNES ('JOHN') CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS**	**Defendants**

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Approved judgment

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Christopher Parker KC and Caley Wright (instructed by **Gowling WLG (UK) LLP**) for the **Claimants**
Andrew Scott KC and Barnaby Lowe (instructed by **Jones Day**) for the **First Defendant**
Andrew Fulton KC and Saul Lemer (instructed by **Quinn Emanuel Urquhart & Sullivan LLP**) for the **Second Defendant**

Hearing dates: **13th September 2023**

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RULING 1

Deputy Master Collaço Moraes **Wednesday, 13 September 2023**
(**15:46** pm)

DEPUTY MASTER COLLAÇO MORAES

Introduction

1. I have before me two applications. The first application in time is an application dated 22 June 2023 made by the claimants, seeking an order under CPR 3.12 rule (1)(a) that section 2 of the Civil Procedure Rules and Practice Direction 3D shall apply to this consolidated claim ("the CMO application").
2. The second application is made by the second defendant for security for costs, by an application dated 18 July 2023.
3. I have had, as far as representation and submissions are concerned, three detailed skeleton arguments from each of the parties which have been supplemented by oral submissions from Mr Parker KC appearing for the claimants; Mr Scott KC appearing for the first defendant; and Mr Fulton KC appearing for the second defendant.

Background

4. As far as the background is concerned, I will deal with that briefly, but it is important to have the background facts in mind in the context of the issue to be determined.
5. The first defendant is a commercial bank incorporated in the Dutch Antilles. The second defendant, Mr Deuss, is 79 or 80 years old. He was a de jure director from the first defendant's inception until about 30 May 2005 when he resigned as director, but the claimants contend that he remained a de facto director. He was the ultimate beneficial owner of the first defendant.
6. The first claimant is a member of the Transworld Group of Companies which were ultimately beneficially owned by the second defendant. The first claimant provided marketing services for the first defendant. Mr Hunt, the second claimant, is the liquidator of the first claimant.
7. As far as the claimants are concerned, they seek recovery directly, and by way of contribution, of sums in excess of £280 million and potentially up to £400 million. The claims arise from

allegations that many of the customers of the first defendant and the first claimant were engaged in Missing Trader Intra Community fraud ("MTIC fraud").

8. Those clients traded, using accounts held at the first defendant, large quantities of goods without paying the resultant VAT liabilities or retaining the means to do so, thereby breaching their fiduciary duties to act in the company's best interests and leaving them insolvent on account of unpaid VAT liabilities.

9. The claimants allege that in marketing to, and taking on such clients, the first claimant was simply implementing a strategy devised by the second defendant to take advantage of the profit from the MTIC fraud. The core of the allegation is that the first defendant and second defendant acted dishonestly over a period of two and a half years between 2004 and 2006 causing, allowing or otherwise assisting in the MTIC fraud.

10. Following raids by Her Majesty's - now His Majesty's - Revenue and Customs in September 2006, the first claimant ceased to carry out marketing or related activities for the first defendant. The first defendant was placed into emergency measures in October 2006, probably as a consequence of those raids.

11. The first claimant was dissolved in October 2010, but pursuant to a double-barrel order, was restored to the Register and wound up on a creditors' petition on 22 September 2014, with the second claimant being appointed liquidator on 17 November 2014.

12. On 5 February 2016, a letter before action was sent by solicitors for Mr Hunt, the liquidator of the first claimant, to the first defendant.

13. About a month later, on 9 March 2016, the first defendant issued a petition in the court of first instance in Curaçao against 96 defendants, including the second claimant. The relief sought in those Curaçao proceedings was negative declaratory relief on the basis that the first defendant was not liable to either of the claimants, because those liabilities were settled by settlement

agreements made between the first defendant and the liquidators of the individual companies which engaged in the MTIC fraud and which had account balances with the first defendant.

14. These consolidated claims were issued on 21 September 2020, and the Part 7 and Insolvency Act applications were consolidated on 28 April 2021. Service was effected of the consolidated proceedings on the first defendant on 21 May 2021 and on the second defendant on 6 September 2021.

15. Applications were made to stay the consolidated claims and to set aside part of the claim, but those were dismissed, save in respect of one respect, by Mr Justice Freedman on 31 October 2022.

16. As far as the statements of case are concerned, amended particulars of claim were filed in November 2022 and the defendants filed their respective separate defences on 24 February 2023. The claimants filed a single reply on 20 April 2023 and pleadings closed on that day.

17. As I have indicated, the CMO application, was issued on 11 May 2023 and the security for costs application of the second defendant, on 18 July 2023.

18. As far as the issue of security for costs is concerned, that was raised in correspondence by the first defendant as long ago as April 2018. The claimants, while disclosing that they had the benefit of ATE policy of £10 million in around August 2020, only provided limited details of the same in January of this year and provided the policy, probably in a redacted form, on 8 February 2023.

19. As far as the CMO application is concerned, the defendants have provided estimates of their costs in this claim.

20. As far as the second defendant is concerned, it produced a schedule attached to Quinn Emanuel's letter of 11 May 2023 showing total costs, both incurred and estimated, in the sum of £11,935,530. A second cost schedule was attached to East 3, a statement made on 18 July 2023, which presented a cost schedule in the total sum of £12,430,130.

21. A final and revised schedule was attached to East 4, a witness statement made on 23 August 2023, showing a total estimated costs and incurred costs of £11,698,383.79. I shall refer to that cost schedule as the "August schedule".

22. The last two schedules, including the August schedule, provided some of the detail of the assumptions underlying the schedule, which was broken down into the phases set out in Precedent H, but the assumptions provided do not provide all of the information that would usually be included in a Precedent H budget form.

23. As far as the first defendant is concerned, the first defendant produced a schedule of costs, attached to its instructing solicitor Jones Day's letter of 8 June 2023, showing incurred and estimated costs to the end of trial in the sum of £6,062,889.

24. As far as the first defendant's estimated schedule is concerned, it does provide a limited indication of the assumptions underlying the figures produced in that estimate. It is of note that the claimants have not provided an estimate of their costs of the claim and Mr Fulton KC, on behalf of the second defendant, suggests that that was done 'coyly'.

25. The next significant event occurred on 11 July 2023, when the claimants set out in their letter from its solicitors, Gowlings, of that date, two alternative proposals. The applications before me are really concerned with the first proposal. The first proposal was that if, (i) the cost management application was unsuccessful or (ii) the cost management application was successful, but the court disagreed with the claimants' submission that the defendants' cost budget should be used as a reference point from which to calculate security, the claimants would "subject to agreeing terms with the insurers [...] endeavour to procure [...] deeds of indemnity" for each of the defendants from the claimants' insurers an amount equal to 70% of the first defendant's estimated costs as set out in the letter from Jones Day, which I have referred to, dated 8 June 2023, to be paid in tranches.

26. There were negotiations between the parties in correspondence which culminated in the first defendant agreeing to that proposal, the first proposal, which I have outlined, subject to the parties, (i) agreeing acceptable deeds of indemnity and (ii) agreeing the terms of the consent order, putting those terms into effect, which the first defendant describes as "the Security Agreement".

27. The second defendant rejected both proposals. Nevertheless, the parties have been engaged in dealing with the terms of the proposed deeds of indemnity, the subject of the first proposal, and there is correspondence to that effect in the hearing bundle.

28. As far as security for costs is concerned, the second defendant is seeking security in the sum of £8,188,868.66 based on the August schedule. The security sought by the first defendants is 77% of its scheduled costs, namely £4,244,022.77, of course subject to the agreement on the first proposal I have referred to.

The evidence

29. The evidence filed includes, and I have read:

    a. the fifth witness statement of the first claimant dated 22 June 2023;

    b. the third witness statement of Mr East dated 18 July 2023 ("East 3");

    c. the second witness statement of Mr Travers dated 18 July 2023;

    d. the third witness statement of Mr Witts dated 9 August 2023 (Witts 3"); and

    e. the fourth statement of Mr East, dated 23 August 2023 ("East 4").

30. I have also been taken to the correspondence, which is included in a separate bundle and in the exhibits attached to the relevant witness statements.

The issues I am required to decide

31. In the context of the acceptance that the claimants in principle should provide security for costs and the agreement reached with the first defendant, the issues in respect of the two applications are:

a. should there be a CMO;

b. if so, should the quantum of security for costs be fixed by reference to budgeted costs of the parties as determined or agreed; and

c. if not, in respect of the second defendant's security for costs application, what is the quantum of security that the claimants should provide for the second defendant's costs?

32. As far as the position of the first defendant on security is concerned, I was told by Mr Fulton KC that I should deal with that issue after the delivery of my judgment.

The positions of the parties

33. The positions of the parties are as follows:

a. The defendants assert that the CMO application should be dismissed, and the court should proceed to deal with quantum for security of costs on the cost estimates provided;

b. The claimants assert that:

i. a CMO is necessary to enable the claimants to understand the extent of the costs risks against them and, if deemed appropriate, to obtain such further appropriate ATE cover as is necessary. The claimants assert that such an order is appropriate, given that while the claimants have litigation funding, the second claimant brings the claim as an individual, and in his capacity as an insolvency practitioner is obliged to act in the creditors' best interests, including by bringing this litigation if he is able to do so and it is appropriate to do so;

ii. if a CMO is made, then the claimants have agreed to provide security for costs in principle. The quantum of that security should be determined after the costs budgeting has been undertaken, which would make the process straightforward.

The approach to the applications in this judgment

34. Given that the outcome of the CMO application may be determinative how the security for costs application on the second defendant is to proceed, in my judgment, it is appropriate to deal with

that application initially, and that is how the parties dealt the applications in the oral submissions.

35. At the outset however, I should say before dealing with the CMO application, that in my judgment, the assessment or the determination of costs under a CMO is different in nature from that conducted for security for costs.

36. I was referred to a number of authorities. The principles are well known and established that, while there is a broad brush approach, the approach, if a CMO is made, is to proceed by way of a regime which involves budgets verified by statements of truth and to require the parties to produce a discussion document which highlights the disagreements and the agreements. While the level of scrutiny employed is a broad brush approach and not at the granular level involved in a detailed assessment, that procedural approach is different from that that takes place on a security for costs application, where there is no such fixed procedure, and the court's approach is a broad brush approach having regard to the relevant criteria set out in the authorities for determining such quantification.

The CMO application

The principles

37. As the claimants accept that in this consolidated claim costs management does not apply automatically, it is common ground, or at least not disputed, that the court has an unfettered discretion to make a CMO. That unfettered discretion is explicitly provided for in CPR 3.12(1)(e) and (3) and rule 3.15(2) which provide as follows:

"3.12(1)This section in practice direction 3D applies to all multitrack cases except

...

(e) where the court otherwise orders.

(1A) This Section and Practice Direction 3D will apply to any other proceedings including applications for the court orders.

(2) the purposes of cost 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 of costs as provided in rule 3.15(a) so as to further the overriding objective."

I need not spell out in this judgment the terms of the overriding objective as they are well known.

"3.15(2) The court may, at any time, make a 'cost management order'. Where cost budgets have been filed and exchanged, the court will make a cost management order unless it is satisfied that the litigation can be conducted justly and at a proportionate cost in accordance with the overriding objective without such an order being made."

38. CPR 3.15(2) confers upon the court an active cost management jurisdiction which is no doubt why paragraph 6.31 of the Chancery Guide encourages the parties to exchange costs budgets in cases in the Business and Property Courts in London.
39. The unfettered discretion was confirmed by Mr Justice Coulson, as he then was, in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] 1 All ER (Comm) 765. Mr Justice Coulson stated at paragraphs 27 to 28 that the court should "take into account all of the relevant material without prejudicing or making specific assumptions one way or the other".
40. As rightly pointed out by counsel for the first defendant, that discretion, whilst unfettered, must be exercised having regard to the overriding objective and the need to act justly, and the court is required to take into account certain factors.
41. Those factors then have to be weighed in the balance, depending on the facts of the case, and the discretion must be exercised on that basis.

Factors to be taken into account on an application for a CMO

42. The guidance given by Lord Justice Jackson extra judicially in the Harbour lectures, by Mr Justice Foskett in *Simpkin v The Berkeley Group Holdings Plc* [2017] 1 Costs LO 13, at paragraphs 28 and paragraphs 59 to 60, and by Mr Justice Nugee in *Sharp v Blank* [2015] EWHC 265 (Ch), at paragraphs 23 to 26 and 29, which has been explained and dealt with in other authorities I have been referred to, shows that the following factors should be taken into account in this claim when exercising the unfettered discretion.
43. It is important to note that those factors have to be considered in the context of this claim. That is an important aspect to bear in mind, for the defendants, in particular the first defendant sought to distinguish the outcomes in *Simpkin* and in *Sharp* on the basis of the facts relevant to that case. However, the guidance and the factors to be considered are of general application.
44. Those factors are as follows:
    a. knowledge of the financial position of the parties, including exposure to adverse costs to enable parties to manage risk and to provide a level playing field;
    b. controlling costs so as to:
        i. focus the attention of the parties on to costs from the outset; and
        ii. focus on the issues in the case and what is required in terms of disclosure, expert evidence and the other phases of litigation that inevitably attract large expenditure;
    c. fairness by setting out what is properly costs that are reasonable and proportionate;
    d. to avoid a legal catastrophe as a result of an adverse cost order; and
    e. proportionality of cost management.
45. In this case, the approach of the claimants is that proportionality as a general proposition is not relevant. The claimants assert that what is relevant on the issue costs, for the purposes of a cost management order, is the reasonableness of those costs.

46. It is correct that while costs might be reasonable and necessary, proportionality may trump reasonable and necessary costs, but the reverse does not follow. On that basis, I do not need to address in great detail the issue of proportionality in respect of costs of the claim, as that is a given as far as the claimants are concerned.

47. I should initially deal with one matter that was raised, which is that the value of the claim itself is a highly relevant factor when considering whether a cost management order should be made.

48. I will deal with that in detail under the heading "Proportionality".

49. In my judgment, while it is a factor to be taken into account, it is not a factor that necessarily carries the weight to trump other factors that must be taken into account.

50. I take the factors relevant to this particular application in turn.

Awareness of the financial position of the parties

51. Here, cost estimates have been provided by both the first defendant and the second defendant and to that extent, the claimants are aware of their exposure. However, both estimates involved significant expenditure on costs. In the case of the first defendant, it is £6,062,889 and the second defendant's estimate, in his latest August schedule is £11,698,383.79, making a total figure of about £17,700,000.

52. The claimants have not set out any estimate of their costs and while a simple comparison of cost estimates is not necessarily an indication of whether the costs are reasonable, in this case there is a significant discrepancy between cost estimates of the first defendant and the second defendant.

53. Whilst I accept that the claims against the first defendant and the second defendant are not identical, and it is obviously the case that the first defendant and the second defendant may play different roles in the conduct the defences to the claim, those differences, as explained in the evidence, do not appear to justify the significant differences between the two estimates. That strongly suggests that, at the very least, the second defendant's August estimate may be

significantly in excess of sums that would be recoverable on an assessment based on a reasonable assessment.

54. I accept the defendants are entitled: (i) to choose who they retain; (ii) to have separate representation; and (iii) in respect of concerns about reputation may consider expending more in costs in defending the claim, although the issue of reputation does not usually weigh heavily in respect of the reasonableness of costs, I accept it is a factor that is taken into account.

55. However, the costs, leaving aside the issue of proportionality, are those which are reasonable and necessary. In circumstances where the claimants' claim is in effect brought by an individual with litigation funding for the benefit of creditors of the first claimant, the need to know the real exposure to enable a claimant to take steps to deal with that exposure, whether by way of an appropriate ATE insurance or other funds, is a factor that weighs heavily in favour of making a CMO.

56. The defendants say, well, in this case, the second claimant is a sophisticated litigant who brings a commercial claim for commercial gain. However, the second claimant, brings the claim as an officer of the court and he will be personally exposed to the costs in that regard. Whilst he has litigation funding, he is in my judgment in a different category of litigant to that of the first and second defendants.

57. While the first defendant is in emergency procedures, which I am told is an equivalent to liquidation, it appears to be funded to the extent of being able to bring the Curaçao proceedings and also to apparently fund this litigation in a significant sum.

58. The advantage of a cost management order is that it provides a quantification of the potential liability that will enable the parties - and I say all the parties - to assess their financial position in respect of adverse costs orders, and enable them to take efficient and cost effective measures to cater to that risk, reducing expenditure on costs that might otherwise be incurred in the event that a reliance is simply placed on the cost estimates currently provided.

59. In that regard, in my judgment, a CMO will assist in providing a more level playing field.

60. While it is correct that the claimants have provisionally made arrangements, at least in respect of the first defendant's estimated costs in the form of the Security Agreement, cost management will bring certainty to the financial implications and consequently certainty for insurers and the level of premiums that have to be incurred.

61. It is said by the defendants that as far as this claim is concerned, this is a case where, given the allegations of dishonesty, if the claimants lost the claim, the likelihood, on the principles set out in *Clutterbuck v HSBC* [2015] EWHC 3233 (Ch), that there will be an indemnity costs order means that costs budgets in themselves will be irrelevant to the assessment of costs.

62. However, in this case, what needs to be catered for, as I indicated, is the real exposure or at least an ascertainment of that exposure with the certainty that can be achieved when one is looking forward in respect of the exposure to costs. Here, as the claimants have accepted that proportionality will not impact on the issue of cost budgets, the only issue as set out in CPR 44.3(2)(a) is the issue of whether costs are reasonable.

63. If cost budgets are assessed on the basis of reasonable and necessary costs, then what the claimants will have is a baseline of reasonable costs by agreement or approval of the court, which will enable the claimants to take a realistic view as to the exposure to adverse cost in the event of an adverse cost order being made on an indemnity basis.

64. The defendants also assert that the problem with cost budgeting is that it does not bring certainty because it can be revised and that it is forward-looking. That is correct, but where there is a cost management order, the costs then become subject to the rules of court and the oversight of the court. What is required for any variation of the approved budgets is a significant development in the litigation which has to be justified. That allows both the defendants and the claimants the opportunity to deal with changing circumstances as they develop in this litigation but subject to

that control. On the other side of the coin, when such revision is approved or agreed, then the claimants can take steps, having regard to the revised real exposure to costs that they face.

65. Finally, under this head, the fact that the second claimant and/or his firm will benefit significantly from any recoveries of up to 50%, if the claim is successful, as part of the remuneration policy approved by the creditors, does not in my judgment significantly affect the weight I place on this factor. Such arrangements are the consequence of current litigation funding in insolvency, and cost management is aimed at clarifying the downside. The point made by the defendants is that here you have a sophisticated claimant - that is, the second claimant - who has a high upside in terms of profit outcome based on a 50% return of recoveries. Consequently in considering this factor, I should consider the fact that he and/or his firm that supports him, should be prepared to fund any cover for the costs exposure having regard to the estimated schedules provided, regardless of the risk; (i) that those estimates might not be sufficient in terms of the actual expenditure that is incurred or the actual expenditure that is reasonably incurred and/or (ii) that it would involve wasted expenditure if it turns out that those estimates are in excess of reasonable costs.

66. However, what the defendants accept, or at least the second defendant accepts, is that for the purposes of this cost managing order application, the issue of any conflict between the personal benefit of the second claimant and that of his role as an officer of the court and as an insolvency practitioner acting as a liquidator, does not arise on this application.

67. In those circumstances, there is no reason, in my judgment, to conclude that that remuneration package affects the weight that should be placed on this factor.,

Controlling costs

68. This factor, in terms of controlling costs, controls the costs that are recoverable by the receiving party. I accept that the consequence of that is intended to be that the costs incurred by the receiving party are implicitly controlled due to the downside of recovery being limited to the

approved budgets. But the receiving party is allowed to spend such costs as it wishes, the court having determined what is, for the purposes of this claim, reasonable.

69. The reason for controlling costs is: (i) to avoid excessive or extravagant budgets; and (ii) to control the costs of the litigation. In this case, the defendants have provided costs estimates, but to paraphrase what Mr Justice Nugee said in *Sharp v Blank* at paragraph 36, they "provide less high quality information to enable the claimants to assess their continuing exposure to costs as the litigation progresses". The advantage of a cost management order is that it will provide such information and provide continued court control.

70. That such information and control is necessary in this claim is shown by examining:

    a. the estimates provided by the defendants; and

    b. the costs of today's hearing.

The defendants' estimates

71. The estimates are just that, estimates, and there is no provision for controlling any amendment to the same. The first defendant's estimates, while providing some key notes and assumptions, does not provide the detail that will be provided by costs budgets prepared in accordance with the Precedent H format.

72. The second defendant's August schedule does provide detailed assumptions akin to those that would be provided in costs budgets, but the detail of those assumptions does not provide all the information that one would expect in a Precedent H narrative.

73. In particular, in respect of the costs of witness statements, the narrative does not explain the number of witnesses to be called and/or the factual evidence that will be addressed. It is said in the evidence that that estimate is based on calling the second defendant and potentially other witnesses who have yet to be identified. In respect of trial preparation and the trial phases, the cost schedule does not have, which one would expect in a Precedent H, a narrative indicating the level of preparation required in respect of trial phase and/or during the course of the trial. Those

are narrative matters that would appear in a Precedent H, and in that respect, a CMO would assist in clarifying what costs are reasonable and exercise control to ensure necessary costs are budgeted which are at a reasonable level.

74. In respect of the second defendant's August schedule, that schedule may benefit from oversight. A cost management will result in benefits arising in five areas:

    a. In global terms, the estimated costs of the second defendant are twice that of the first defendant and on the evidence I have seen, that disparity does not appear to be adequately justified. Whilst case management directions, of the sort indicated by Mr Scott KC on behalf of the first defendant, might assist in reducing that discrepancy by directions to avoid duplication, it is unlikely, in my judgment, that case management directions can achieve that purpose without being dovetailed, either at the same time or sequentially, with cost management.

       In that regard, the discrepancy is explained on the basis that the second defendant will be discharging the heavier burden in the conduct of the case. It is said that in arriving at that August schedule, duplication was taken into account. If that is right, then one would expect that to be set out in evidence. It is something the second defendant relies on, and the absence of unnecessary duplication needs to be explained. Clearly, the second defendant can rely on privileged communications not to disclose that information, but such reliance on privilege seems odd, in the face of the acceptance that case management directions can be deployed to avoid such duplication. Such directions would require the reference to what is said to be privileged communications.

    b. The costs of the solicitors acting for the second defendant may benefit of an oversight having regard to the high hourly rates. The guideline rate, which I accept is simply a guideline rate, for an equivalent solicitor in respect of the partner who has conduct of the claim is £512 per hour. The charging rate of the solicitor who has conduct of the case on

behalf of the second defendant varies between £1,200 and £1,300 per hour. Even if you were to take into account the 30% discount that is offered on a broad brush approach, that does not take into account or justify why those costs are reasonable.

c. There are then the high costs of disclosure and of witness statements. A comparison of the level of those costs is set out in a table that appears at paragraph 37 of Witts 3, save that the figures in column 2 of that schedule should be revised for disclosure down to, as far as the second defendant is concerned, £1,368,512, a slight variation although not of great significance on witness statements and likewise in the trial phase from £1,461,844.73 to the figure of £1,454,000-odd.

In respect of those costs of disclosure and witness statements, the comparison with the first defendant's costs shows a significant discrepancy. That discrepancy does not appear to be justified from the factual issues that I accept were highlighted at a high level by Mr Parker KC on behalf of the claimants being five in number.

1. Were the MTIC companies engaged in the fraud?
2. Did the first claimant and the first defendant assist in the fraud?
3. Did the first defendant and the second defendant know of the fraud, the knowledge of the first defendant being imputed from the knowledge of the second defendant?
4. Is there a binding settlement agreement?
5. Are the claims barred by reason of the Limitation Act?

As far as those high level issues are concerned, Mr Scott KC on behalf of the first defendant accepted that those were high level issues, but says that they did not look at those issues from the practical point of view, for they concern events that took place a number of years ago, over a period of about two and a half years from 2004 to 2006.

While I accept there will be significant costs involved in dealing with those factual issues, the discrepancy between the figures of the first defendant and the second defendant on costs in respect of those particular phases, does not appear to be easily explainable simply on the basis of a different burden, particularly where it is accepted that the evidence, the main evidence in respect of both parties, will come from the second defendant and as far as disclosure is concerned, it is likely that the same documents will need to be considered by both the first defendant and the second defendant.

d. The costs of witness statements is said to be, as far as the second defendant is concerned, £1.126 million-odd. In the context of the New Practice Direction on Witness Statements, that appears to be an area of costs that may benefit from oversight of a cost management order.

e. There are then the costs of trial preparation and of the trial phases. In respect of those costs, it appears to be accepted by the second defendant that, in fact, those costs do not reflect the guidelines on reasonable costs that are outlined in the Guide to Summary Assessment of Costs as set out in paragraph 36, which provides:

> "*A proper measure of counsel's brief fee is to estimate what fee a hypothetical counsel, capable of conducting the case effectively, but unable or unwilling to insist on higher fees sometimes demanded by counsel of pre-eminent reputation, would be content to take on the brief fee; but there is no precise standard of measurement and the judge must, using his or her knowledge and experience, determine the proper figure."*

And the guidance refers to the case of *Simpsons Motor Sales (London) Ltd v Hendon BC* [1965] 1 WLR 112, which is a judgment of Mr Justice Pennycuick, as he then was. The evidence in Mr East's witness statement justifying or setting out the basis on which counsel's brief fee was ascertained, which was by agreement with the clerks of the

preferred counsel, does not appear, at the very least on its face, to meet that requirement of reasonableness set out in the guidelines.

75. Those issues, in my judgment, confirm that there is a need to focus on the issues in this case in terms of what is required: (i) for disclosure and (ii) expert evidence. It is accepted in respect of expert evidence that there will be at least four, possibly five experts and how those costs will be divided between the defendants, who in respect of the expert evidence, are likely to have an identity of interest.

76. Equally, those issues raise the same focus issues in respect of the phases of witness evidence and the two trial phases.

The cost of today's hearing

77. The four schedules of costs filed for today's hearing show that the total combined costs for the three parties is a sum in excess of £740,000. Those are incurred costs. They were costs that were anticipated, but do not form part of the estimates provided by the first defendant or the second defendant. Of course, as I indicated, the claimant provided no costs estimate.

78. These costs provide another factor to suggest that a cost management order in this case would be appropriate.

79. Finally, under this factor, it is my judgment that if there is to be a CMO, it should apply to the costs of all parties, and it would not be in accordance with the overriding objective for the court to make a cost management order, for example, only in respect of the costs of the claimants and the second defendant.

80. In my judgment, while there may be a jurisdiction to make a split cost management order in respect of certain parties, which is possible in the exceptional case of litigants in person, it is not something in this case that would be in accordance with the overriding objective.

81. I take on board the submissions of Mr Scott KC on behalf of the first defendant, that there is an agreement as far as security for costs is concerned, and that points to reasonableness of its costs.

But, in my judgment, that agreement was reached on a pragmatic basis, as is clearly set out in the letter making the proposals. It is unlikely, having regard to the overriding objective that if the costs in the first defendant's schedule of estimated costs are reasonable in amount, that the costs involved in going through the cost management process will be significant. Insofar as the claimants do not engage with requirements to act in a cooperative fashion and fairly in dealing with a costs budget supplied by the first defendant, then that failure by the claimants, if such be the case, will no doubt result in an adverse interim costs order.

82. This factor of controlling costs also feeds into the next factor, one of fairness.

Fairness

83. As far as the subject of fairness is concerned, the issue of fairness applies to all parties. That is to say, it is only fair that all three parties know what costs can be properly said be to reasonable. I accept however that this factor, in terms of weight, adds little to the factors already discussed.

Avoiding legal catastrophe

84. While this factor is relied upon by the claimants in respect of the result of an adverse costs order, the weight that needs to be attached to this factor does not add anything to the factors that I have already dealt with, and in particular the first factor, the awareness of the financial position of the parties.

85. While I accept that the benefit described by Lord Justice Jackson, in terms of avoiding legal catastrophe, are not of the degree of bankruptcy and involve the issue of whether or not it will involve an event that causes severe hardship to a litigant, it is a factor in this case that I conclude does not add a great deal of weight in favour of making a cost management order.

Proportionality of cost management

86. In respect to proportionality, judged by the criteria set out in CPR 43.4(3), I must have regard to, and take into account, what was said by Mr Justice Nugee in *Sharp v Blank* at paragraph 23. He said in that paragraph:

> "Here, however, the amount at stake is, as I have already referred to, between £215 million and £218 million, so the concerns of proportionality are likely to be much less than before. That does not mean that the parties have *carte blanche* to spend as much money as they want but that it is unlikely that costs of the order of £20 or £30 million or so would necessarily be regarded as disproportionate in the same way."

87. In that judgment, Mr Justice Nugee did not make a CMO but instead simply ordered that budgets in the form of Precedent H be exchanged. However, subsequently the court did order a CMO in that case, and I am told by Mr Scott KC that, in fact, costs were approved and/or agreed in the sum of £19 million and £11 million.

88. That takes me to the next point, which is an issue raised by the defendants that, given the total costs incurred by the defendant when compared to the value of the claim itself, proportionality in that respect should be taken as a factor highly relevant to the issue of whether or not a CMO must be made. The defendants refer to authorities where that approach or a similar approach was taken. However, as properly accepted by Mr Scott KC, on behalf of the first defendant, while the principle is applicable generally, there are factors relevant to particular cases that allow courts to distinguish those conclusions on the basis of different factual factors.

89. In my judgment, a simple comparison of costs against value does not provide a complete answer to whether or not costs are proportional. One also has to take into account the other factors and, in any event, whether the costs are proportionate, while a factor to be taken into account, is not a factor that trumps the other factors.

90. Here, it is clear and accepted that the value of the claim suggests that it is not proportionate to cost manage by way of a CMO, and it is said by the defendants that the extra costs of budgeting the first defendant's costs of any revised budget will take up disproportionate court time and the parties' effort and expense. Further, the defendants say there will be no real savings in cost

and/or that the net savings do not justify a CMO given the provision of cost estimates by both defendants.

91. Clearly, proportionality weighs against the making of a cost management order. However:
    a. the defendants have already engaged in the process of providing estimates, and in the case of the second defendant, those estimates appear to have been provided with the assistance of a costs draftsperson and the additional costs are unlikely to be significant.
    b. Clearly, while extra court time will be taken up, there is the balancing fact of controlling costs in the context of proper cost management.
    c. Having looked at the cost estimates of the two defendants, in my judgment, there is a real prospect of costs being saved, and there is utility in applying the cost management regime to this claim.
    d. In respect - and I have dealt with this in part before - of the first defendant, given the level of pragmatic agreement, it is likely that the first defendant will not incur significant costs in respect of the process of cost management once its budget is exchanged with the narrative statement required by Precedent H.

Other factors

92. I deal now with the other factors referred to by the parties.
93. The only other relevant factor referred to by the parties is a question of what is described as ‘oppression or pressure’. Of course, when dealing with a cost management order, I must ensure that I do not confuse terminology or the analysis that is required for the purposes of an application for security for costs. In any event, in this case, there is no evidence put forward by the claimants that without a CMO, their claim will be stifled. So, in respect of this issue, it is not a factor that I take into account when exercising my discretion.

Conclusion on the exercise of the discretion

94. Taking all those factors into account, I have come to the firm judgment that, in this case, it is just, and in the furtherance of the overriding objective, to make a cost management order.

The security for costs application

95. I have to deal with the security for costs application as I have decided that it is appropriate to make a CMO. As in principle the claimants have agreed to provide security for costs, in my judgment, it is appropriate to case manage the security for costs application for it to be determined at the cost management conference when budgets will be determined, that conference to take place either, if the court can facilitate it, at the case management conference listed on 1 November 2023 or subsequently. I come to the conclusion for these reasons:

    a. the approved budgets will provide a strong guide to the quantum for security.
    b. it is more appropriate for the quantification exercise to be undertaken at that stage rather than seeking to deal with quantum on an estimated cost basis that are challenged. The point is made by the defendants that the claimants could have undertaken that exercise at this hearing rather than dealing with it through cost management. However, as I indicated, the process of quantifying costs in a security for costs application is less rigorous and clearly does not involve a regime that encourages the issues to be narrowed and for the differences between the parties to be explained succinctly, as is required if a cost management order is made.
    c. It is appropriate for both defendants' security for costs to be dealt with together.
    d. There is no real protest - and this was a point that was not addressed in any great detail - of the short delay before the amount of security is quantified. I accept that there will be a delay, but as the second claimant accepts that he has a personal liability for costs, and as indicated by Mr Scott KC on behalf of the first defendant, it is asserted, at the very least in correspondence on behalf of the claimants, that the second claimant has the backing of

his firm, Griffins, (which is an unlimited company and I suppose should not truly be called a firm), the risks over that short period are minimal, particularly in light of the acceptance that the claimants must provide security for costs.