Marsh v MoJ costs judgment

Monday 31 July 2017, 2pm, court 73

Thirlwall LJ: This is obviously just a read out. What I would like to confirm is the date of service of the Amended Defence. I think it was July sometime.

Miss Vanessa Cashman (for the Claimant): we think it was 23 July 2016

Thirlwall LJ: The Defence was dated a few days earlier but perhaps it doesn't matter very much. We'll take 23 July 2016.

Costs

The Claimant has succeeded in his claim and judgment has been given in the sum of just over £286,000. He failed on his application to strike out the Defence as an abuse of process of the court.

I received very lengthy written submissions from Mr Roy on this issue and lengthy submissions from Mr Holloway in reply. I read them both with care and elucidated certain aspects of the Defendant's submissions in a hearing last Friday.

The parties agreed that there were four questions which needed to be determined. Firstly, whether or not the Claimant should recover his costs of the action in full having won the case or whether as the Defendant submits he should recover only a proportion; Mr Holloway suggests 70%.

Second, whether the Claimant is right in arguing that costs should be paid on the indemnity basis, whether as a result of the Defendant's conduct or as a result of provisions of part 36, or both.

Third, whether any further awards should be made in accordance with part 36, and fourth, whether there should be a payment in respect of costs on account and if so, at what amount.

Before dealing with these four headings in detail, it is important to look at the course of the litigation and at the way in which it has been conducted. I understand that it has consumed 34 days of court time, which is more than double the length of the trial, about which I expressed views in the judgment. I do not intend to set those out again here. My views haven't changed.

I turn to the chronology prepared by the Claimant for this hearing and I take account of the various observations made by the Defendant. It is not necessary for me to resolve the disputes about certain incidents or events during the course of litigation, in particular about the various directions - they are simply part of the background.

The Claimant's letter of claim was sent on 16 March 2012. At that stage, the Claimant was still employed and was still subject to suspension and disciplinary procedures.

The Defendant responded to the letter of claim on 27 July 2012. There is a dispute about whether and to what extent the Defendant complied with the Pre Action Protocol but I do not propose to take any time over that; in the context of this claim it is not of sufficient importance.

In any event, on 1 November 2012 the Claimant sent a further letter of claim which set out the case in detail. There was no response, notwithstanding the Claimant agreeing to an extension of time, first to 27 November 2012 and then to 5 February 2013.

In the meantime on 11 January 2013 the Claimant wrote to the Defendant asking for an extension of the limitation period which otherwise would expire on 18 March 2013. On 1 March 2013 the Defendant replied and refused this request, with no reasons.

Protective proceedings were issued on 18 March 2013 and served on 7 June 2013.
The Defence was served on 5 August 2013. During the course of 2013 and 2014 there were a number of directions hearings. It is not necessary to investigate or analyse them in any detail for the purposes of this decision.

By a letter of 20 March 2014 the Claimant made a part 36 offer in the sum of £223,500. On 26 March 2014 the Defendant first contacted the police to request documents by way of disclosure. This was some two years after the first intimation of the claim and one year after the Particulars of Claim had been served. I should have said that during the course of 2013 and 2014 there were a number of extensions of time to comply with various directions, for the Defendant.

On 14 April 2014 the period for the acceptance of the Claimant's first part 36 offer expired and on 17 April 2014 the Defendant applied for an indefinite extension of time for non-party disclosure. I shall return to the question of disclosure later in this judgment. There were further hearings during 2014 in respect of directions.

On 19 November 2014, the case came before the High Court for orders in respect of police disclosure and other relevant matters. On 5 December 2014 the Chief Constable made an application to withhold disclosure. The application was adjourned because it had not been properly presented and the Chief Constable was ordered to pay the costs thrown away.

In due course the matter came before the High Court again on 30 April 2015 for a number of issues to be considered in relation to disclosure, inspection and other matters. It was adjourned part heard until 6 May 2015. There were two hearings in November 2015 in relation to PII and ultimately there was an open judgment on 21 December 2015 giving directions for disclosure, inspection and related necessary directions including the identification of a trial window, which was adjourned to 3 October 2016 to 11 November 2016, and the trial being given a time estimate of 3 weeks.

In the meantime, on 7 May 2015 the Claimant wrote to the Defendant offering mediation. I invite the shorthand writer to include please in the judgment the letter of 7 May 2015. It says:

We write to offer to engage in mediation.

This is a complex case in respect of which both parties have strongly held views. It therefore seems to us that the objective input of an impartial mediator coming to the matter afresh is likely to be particularly valuable.

Whatever the extent of the disclosure eventually ordered, both sides are about to incur significant additional costs on this exercise and on proofing witnesses. Furthermore the subsequent costs on both sides will be enormous if the matter proceeds to trial.

This therefore seems to us a paradigm case for mediation.

Both parties are of course under an active duty to consider ADR.

We reserve the right to refer this letter to the Court in respect of costs. We refer you in this regard to ***Laporte v Commissioner of Police of the Metropolis*** *[2015] EWHC 371 (QB) and the authorities cited thererin.*

The Defendant wrote to the Claimant on 9 June 2015 in response to that letter. The letter noted that this was "the first occasion on which mediation has been proposed." It pointed out that the Defendant was fully aware of the guidelines in respect of costs as set out in *Laporte v Commissioner of Police of the Metropolis [2015] EWHC 371 (QB).*

The letter acknowledged that the level of costs in the claim was high and that further substantial costs were likely to be incurred. Already at 9 June 2015 the Defendant said that the case to date had cost in the region of £340,000. I pause there. This was, as the Defendant acknowledged, and of which the Claimant was aware, a sum that reflected the endeavours that had been devoted to the case by that stage. The letter continues that "we anticipate that the Claimant's costs will not be anything like as high given that the defendant has been required to engage in far greater investigatory work, a substantial period of time after the event."

The complaint is made as to the breadth of the allegations and the imprecise manner in which the claim has been framed "together with the claimant's lack of cooperation with the sensible scheme proposed for the disclosure exercise".

The Defendant then set out the reasons why it believed that it had a very strong defence to the claim and in particular, said "careful consideration is being given to amending the defence to plead positive averments in respect of conduct alleged against the claimant which is evident from the police disclosure. We confirm we have obtained witness evidence for exchange at the appropriate time from witnesses who will say that the claimant did slap Ms Garces-Rosero as alleged by her. These witnesses are willing to attend trial."

The letter goes on to say that given that the Claimant had not yet had the opportunity of seeing the weight of the police disclosure "against him" or the witness evidence in defence of the claim, mediation would not seem appropriate at this stage although the Defendant is open to discuss how the issues may be narrowed. The letter goes on to say that there is an inevitable risk of the costs of mediation being disproportionately high in the context of this case. Finally, the writer sets out five matters beginning with a sentence "whilst neither party is in a position to know what the final evidence will be:

1. The police disclosure very substantially undermines the claimant's position in material respects;

2. The medical evidence very substantially undermines the claimant's position;

3. The defendant would be prepared to consider mediation directed to how the claimant might now extricate himself form this action, or, perhaps, how the issues may be narrowed, however the latter may be premature pending exchange of statements and amendments to the statements of case;

4. There is particular concern in this case that serious allegations were made against the claimant and the police have disclosed evidence which is indicative of both his involvement as alleged and his knowledge of the conduct of others; that such an action has been pursued has wider implications and it would be of grave concern if public authorities were to be subject to litigation of this nature arising out of investigations into allegations of abuse and steps taken to protect third parties when there has been a series of identified failures by certain public

authorities to carry out such investigations to the detriment of vulnerable individuals;

5. The latter fact does not form an auspicious backdrop against which to pursue a claim based in part upon the allegation that the complainant ought not to have been believed."

Paragraph 4 sows the seed for a submission which was developed before me in the costs hearing. It concludes, "in view of the above, we invite the Claimant to discontinue his claim." I understand that the Defendant adopted that same approach on a number of occasions, [including/and during] the trial.

I return to the chronology.

On 18 March 2016, the Defendant applied to amend its defence. On 28 April 2016 an application was made to adjourn the case and this too came before a High Court judge and orders were made in respect of amended Particulars of Claim which were to be served by 12 May 2016 and an amended Defence by 26 May 2016. Time for exchange of witness statements was extended to 30 June 2016.

The adjourned application to amend came before HHJ Reddihough sitting as a judge of the High Court on 20 and 21 June 2016. He made a number of orders including the following: firstly, that amended Particulars of Claim should be served by 27 June 2016 and the amended Defence by 23 July 2016. Then he set out a timetable for witness statements and exchange of expert medical reports.

At paragraph 9 of the order it says that "At all stages hereafter the parties must consider settling this litigation by any means of alternative dispute resolution (including mediation). Any party not engaging in such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal. Such witness statement must not be shown to the trial judge until the question of costs arises."

There were further applications for further directions, further directions were made and on 14 October 2016 the Claimant made a part 36 in sum of £180,000. The Claimant also invited the Defendant, if the offer were not to be accepted and no counteroffer was to be forthcoming, to reconsider its position and to engage in ADR/mediation.

During the currency of the part 36 offer and of the request to engage in mediation, the parties attended for the PTR before me. I gave a number of directions, to some of which I have referred already in the course of the judgment and I don't repeat them here.

At that hearing the Claimant made a number of complaints about the state of preparedness of the Defendant and its approach generally to compliance with court directions in respect of service of witness statements.

The Claimant also raised questions about, in particular, the evidence of Mr Hurley. I do not need to refer further to that but it is right that it was brought to the Court's attention at that stage. I shall revert to that later in the judgment when dealing with the abuse of process application, which was issued on 4 November 2016 just before the trial. Notice of that application was given on 28 October 2016.

On 8 November 2016 the period for acceptance of the Claimant's second part 36 offer expired. So did the time limit for the period of compliance with paragraph 9 of the order of 21 June 2016. The Defendant had not engaged in ADR nor had it replied to the recent invitation to which I have just referred. It did not provide a statement explaining its reasons and indeed has never done so. A chasing letter was sent by the Claimant's solicitors to the Defendant for a response to the request for ADR; no reply was ever received.

The trial began on 15 November 2016 and the draft judgment was circulated on 13 June 2017. On 29 June 2017 I heard further argument on quantum and further argument on costs on Friday 21 July 2017.

Disclosure

Both parties have drawn my attention to the enormous disclosure exercise, an exercise which the Claimant resisted on a number of occasions. It is right to acknowledge that the parties found it very difficult to work well with each other on this issue and a number of applications and counter-applications were made. It is not helpful and not necessary to labour through the various arguments and disagreements on the way in which disclosure was carried out at the time.

It is inescapable that the exercise in disclosure from the police was enormous. It produced many thousands of documents, most of which were not used in the litigation, still less at trial. Detailed schedules to the Defence were produced which in the main did not take the case very far. Mr Holloway reminded me that it is not for me to second-guess the decisions of the judges who were asked to deal with this matter at the interlocutory stages. I need no persuasion on that. Interlocutory matters are dealt with on the basis of information available to the judge and the submissions that are made to the judge. I readily acknowledge that the trial judge has the advantage of seeing just where the disclosure led and where it ended up and from that privileged perspective it was plain to me that it was an expensive waste of time.

When I asked Mr Holloway to explain why such broad disclosure had been sought his starting point was and remained that it was necessary to meet the wide-ranging allegations that the Claimant had made in respect of the Defendant's failure to provide to the police all exculpatory material before the search (I paraphrase and summarise).

I pause there.

The documents which it was said by the Claimant should have been provided to the police were the Defendant's own documents. Despite a number of questions from me, Mr Holloway was not able to explain why it was necessary to seek disclosure from the police for documents which belonged to the Defendant. Either the Defendant had provided them to the police or not. By way of example the use of force forms which figured somewhat largely in the trial were generated by the Defendant's employees and they were ultimately provided to the police. It was never suggested to me that the

disclosure exercise was necessary because the Defendant had simply handed over all its documents without keeping a record of the documents or even of their contents.

But even if that were the case, the documents were ultimately the Defandant's documents. There was no need for an application for disclosure to retrieve them once the criminal trials were over. It was a matter of asking the police to return them.

It was the Claimant's case that the Defendant had been under a duty to provide exculpatory material to the police. The existence and scope of that duty was a matter of law. The starting point on the evidence was what the Defendant had provided to the police. I still do not understand why the disclosure exercise was not begun on that basis.

The very wide ranging disclosure which was in fact obtained was not directed to that issue.

What was obtained were documents including section 9 Criminal Justice Act statements from people who had something to say about the Claimant at some stage. This was then used as the basis for the comprehensive attack on the Claimant which I deal with in the judgment. As to the documents which should have been provided to the police it would have been perfectly acceptable to ask the police what the effects of the exculpatory material would have been, or was, on their approach to the Claimant (depending on whether or not the Defendant had in fact provided the material) but that did not require further disclosure. It emphatically did not require disclosure on the scale that occurred.

It was evident that the Defendant struggled to deal with disclosure given the resources which were available to it. As I said elsewhere in the judgment, that led to the problems with court-imposed directions and other errors.

On any view it is evident that the disclosure exercise had a very profound effect on the length of the trial and its expense.

ADR

It is well known that personal injury claims by an employee against his or her employer are often amenable to mediation or some other form of alternative dispute resolution. This is because an independent person can approach the case dispassionately and without the history [and sometimes/or] the emotion that can colour one's judgment in relation to claims by an employee against an employer.

On the face of it, this was a claim that in respect of which ADR and in particular mediation was appropriate.

In his written submissions, Mr Holloway points out that the Claimant fails to recognise the full context in which the Defendant was facing and addressing the litigation. He said orally and again in written argument that this litigation was out of the ordinary. What takes it out of the ordinary, as I understand it, is the fact that the MOJ is a public body which found itself at the centre of a police investigation in a prison at a time when many other public bodies are under investigation, in respect of allegations of abuse brought by those to whom the state owes or may owe a duty.

For example, there are claims of historic sexual abuse against a raft of different institutions and a number of enquiries into them and other failings of various institutions. Mr Holloway referred in particular to the "Goddard/Jay enquiry" (his nomenclature). This has led to widespread concern. This is true but I fail to see how widespread public concern about the abuse of people in care or other settings can properly be said to affect the conduct of the Defendant in personal injury litigation brought against it by a member of staff. It doesn't take this ligation out of the ordinary. Claims against government departments are not uncommon. It does not entitle a defendant to conduct itself without regard for the need to conduct litigation proportionately or to disregard an order for mediation. If the Defendant did not wish to engage in mediation for public policy reasons it must be prepared to take the costs consequences of that approach.

In a nutshell, it was the Defendant's submission that there should be no adverse consequences for this refusal to engage in mediation, or indeed any settlement discussions, nor should any adverse consequences arise out of the part 36 payments.

I shall return to those matters in due course.

The amended pleadings

The Amended Defence was served in July 2016. It contained the allegations which I have described in the judgment and they are set out in paragraph 11(i) and (ii) of the Defence and following.

The pleading at 11(i) was drafted in the knowledge that the complainant did not want to pursue the complaint. Mr Holloway observed during trial that the fact that the complainant did not wish to pursue the complaint did not mean it was not true. That is correct but it doesn't mean that it was true.

I have set out my view of the complainant in my judgment. It is plain that she did not withdraw the complaint because of any pressure from the Claimant or anyone else. She decided not to pursue it. It followed in my view that given the quality of the available evidence that the Defendant was not in a position realistically to rely on her for a finding against the Claimant of very serious misconduct nor could the other information be relied on for the reasons I have given. The complainant did want to pursue the slapping allegation. That allegation was tested in the disciplinary process and the Governing Governor exonerated the Claimant.

The case was not proved on the balance of probabilities.

There was there a very clear message as of June 2012 that the complainant would not make a good witness on this issue. In the event she was not called.

From time to time in the trial, and during submissions on costs, Mr Holloway floated the submission that the decision by the Governing Governor in 2012 at the disciplinary hearing was taken without all the relevant material. What that overlooks is that the

Defendant had throughout the letter written by KQ and all the materials that were subsequently used by the Defendant to justify the Claimant's suspension and continuation of the suspension. There seems to be an unspoken assertion that if what was known after disclosure had been known at the time of the disciplinary hearing, the decision would have been different. This is absurd. The Governing Governor heard the witness herself. She heard other witnesses and she heard the Claimant.

It was a matter for the Defendant to what extent it relied on other information at the disciplinary hearing but it does not assist me now on the question of costs for it to be said somehow that something was left out. The Defendant had all the material on which it relied in support of its case on suspension and presumably that which the governors must have relied on in the continuation of the suspension.

I have looked at all relevant documents and I came to the same conclusion as Ms Spencer on the slapping allegation and the same conclusion as Ms Pearce on the other allegation. It was apparent to me notwithstanding that the Defendant said it was not seeking to go behind my judgment these matters were nonetheless relied on in relation to costs.

The effect of this pleading apart from extending the length of the trial was to subject the Claimant to a prolonged process at the end of which he knew the allegations would have to be dealt with at a public hearing. It was, of course, open to the Claimant, if he wanted, to drop his claim and that was certainly something he was encouraged to do by the Defendant. I have not found it easy to understand why this 11(i) allegation was held over the head of the Claimant all the way to final submissions.

I regret that the Defendant's conduct in the ways I have described is at best dispiriting.

I turn then to first of issues that I was asked to deal with and to which I referred earlier in this judgment.

1. Whether the Claimant should recover his costs of the action in full or only a proportion.

The usual rule is that costs follow the event. Mr Holloway argues for a 30% reduction because the Claimant did not succeed in establishing a number of allegations. He set down everything in writing on which he says the Claimant failed. In my judgment most of the issues raised by the Claimant were at least arguable save for the allegation that it was the Defendant's negligence that the search occurred in the manner in which it did. I indicated as early as the PTR that this was unlikely to succeed and so it proved once I had heard the evidence and considered the submissions on the law.

That having been said I have also found, and will not repeat, that the allegation at 11(i) was also hopeless and should not have been brought.

I then look at the result of the pleading at paragraph 11 more generally. In most respects the Defendant has failed in its positive claim. It also ultimately failed in respect of the claim for negligence. As the authorities will require, I have stepped back and looked at this case in the round. I have had the opportunity of rereading the judgment and I consider that on any fair reading of the judgment the Claimant was successful. Accordingly I am satisfied that the Claimant should have the whole of the costs of the trial without any reduction.

2. Should the Claimant recover costs on the indemnity basis whether as a result of the provisions of part 36 or the Defendant's conduct?

I have already set out the conduct of the litigation generally and the dates of the part 36 offers.

I invite the shorthand writer please to incorporate into the judgment now the provisions of part 36.17(1)(b) and (3).

I shall deal first with the first part 36 offer. Mr Holloway began his submissions by reference to the nature of this litigation and the fact it is out of the ordinary. I reject that argument. It is of no avail on the part 36 issue.

The question that I have to decide is whether or not the various consequences of paragraph 1(b) should follow and whether it is unjust that they should. Really at the heart of Mr Holloway's submission is this: but for the change in the discount rate in March of this year, the Claimant would not have exceeded the offer of £223,500 made on 20 March 2014. He relies on the decision in particular of Leggatt J in *Novus Aviation Ltd vs Alubaf Arab International Bank* [2016] EWHC 1937 (Comm).

In that case, the judge concluded that it would be unjust for the consequences of part 36 to flow when the reason that the sum had been exceeded was because of a dramatic fall in sterling just after the EU referendum on 23 June 2016. That had the effect of significantly reducing the dollar value of the part 36 offer. The judge went on to say that if judgment had been entered at any time the claimant would not have beaten his offer. In those circumstances it would be unjust to order indemnity costs.

In his reply to that submission, Mr Roy says that is not the case here. £286,572.87 was at all times worth more than £180,000 and £223,500. That is true but the reality is that had the matter reached trial earlier or indeed had it reached judgment at any stage before March 2017, the damages would have been less than the amount of the part 36 offer.

Mr Roy submits that in reality the position is no different from that which occurs when medical evidence changes in a way that cannot be foreseen and in particular, computation of life expectancy as a result of scientific research. These are vicissitudes of litigation and they don't make it unjust for part 36 consequences to flow.

However, it seems to me that a change to the discount rate is different in kind. True it is, as Mr Roy points out, that since 2012 it has been known that the Lord Chancellor has been reviewing the discount rate but considering the whole context of this case it would not be just for the usual consequences to flow from the offer in 2014.

However, that is not the end of the matter. The later offer in October 2016 was clearly a genuine attempt to avoid the trial. I should add that I am quite satisfied that the original part 36 offer was a genuine attempt to settle the case and certainly was a minimum to open negotiations in which the Defendant was apparently not interested. The offer in

October 2016 again certainly had the same character. It was I think not even referred to by the Defendant but it was certainly rebuffed.

Between the two dates was the amendment of the defence in July 2016. I do not wish to labour the point but in my judgment this was a significant misjudgment by the Defendant, for the reasons which are known to them and may involve some notion of public policy, but as of that date it seems to me that the conduct of the defence was such that from that date indemnity costs are payable.

Whatever the position in respect of the part 36 offer in 2014, there is frankly no answer to the part 36 offer made in 2016. On any view, there is no injustice for the consequences of the part 36 offer to flow. The Claimant has done better than the second offer by a very significant margin irrespective of the change in the discount rate. There is no arguable injustice in my view.

Accordingly, I shall order that the Defendant should pay to the Claimant additional sums pursuant to CPR 36 as follows:

a. Additional interest from 8 November 2016 (date of expiry of the second offer) at 8.5% on general damages and on past losses at 10%.

b. I also make the order that the additional award be made in the sum of 10% of the damages as proscribed by part 36 i.e. £28,657.29.

And that the Defendant do by 28 August 2017 pay the Claimant the total of the totals of the sums at 2(i) and 2(ii).

Paragraph 4 of the order: the Defendant do pay the Claimant's costs to be subject to Detailed Assessment on the standard basis up to 23 July 2016, thereafter on the indemnity basis.

Pursuant to part 36, the Defendant is to pay interest on those costs at 10.5% from 8 November 2016.

I turn then to the question of the costs of the abuse of process argument.

Adopting the same approach as I took in relation to the main judgment, I have reviewed my decision in relation to the abuse of process argument. I remind myself that I did not think it unreasonable that the application was made given the state of the evidence in the period just before trial and the dismissive approach taken by the Defendant to the Claimant's legitimate concerns which were expressed in clear terms at the PTR. I have now reminded myself that I had said at the PTR that I expected a response to what had been said by Mr Hurley to the Claimant's solicitors. It was not until I directed it that the substantive response was given. It came sooner than it would otherwise have been required by the rules but I wanted clarity before the trial started.

The Defendant complains that the Defendant's preparation for trial was disrupted by this application. I fear that was the inevitable result of the way in which the litigation had been conducted up to that point.

The heart went out of the application once Mr Hurley had given his evidence, was cross-examined and re-examined. To pursue it to the very end, which was understandable in one way, was somewhat wasteful of time and resources, both legal and judicial albeit that it was at the very end of the trial.

Standing back, as I did earlier in this judgment, it is quite clear that in the end the Defendant was successful and the Defendant may have its costs of defending the abuse of process argument on the standard basis to be assessed if not agreed.

Finally then, I turn to the question of a payment on account of costs.

The starting point is CPR 44.2(8).

The issues are for me:

1. Is there a good reason not to order the MOJ to pay a reasonable sum on account of costs;
2. If no, what is a reasonable sum?

I ordered that the Defendant will pay the Claimant's costs subject to a detailed assessment and there will, I have no doubt, be significant argument about the final sum which is payable. That is not a good reason not to order a reasonable sum on account. Mr Holloway did not raise any argument in principle against it. His submissions were directed to the overall level of costs which he says are far too high (that in the end will be a matter for the judge in the end who determines the costs) but he also says that the sum should be calculated on the base costs without uplift or insurance premium.

So far as the uplift is concerned, I don't accept that argument. There is no evidence of any technical issue or defect in the CFA and the overwhelming likelihood is that the Claimant will get 100% on the uplift. The case could scarcely have been harder fought.

A further submission is made that the Claimant's team was much larger than that of the Defendant. The question of the adequacy of resources on either side is a matter for the costs judge. In particular, he will be considering the size of the Claimant's team relative to the size of exercise and the trial. I say nothing more about it.

I look at the costs bills on both sides. As is often the case, the costs are enormous when compared with the sum recovered. I note Mr Holloway's submission towards the end of his oral submissions last week that although the costs estimate upon which the Claimant relies (namely the Defendant's without prejudice estimate with the Listing Questionnaire) were £734,615 (which Mr Roy submits stripped of uplift and so on is in fact more than the Claimant's own costs), Mr Holloway said that in the event it was likely that the costs were likely to be £550,000. That is surprising given the sum already incurred by mid 2015 and the fact that costs to date on the document were £530,286 but I accept that there may have been some problem or errors in the billing process, perhaps something to do with timing and I say nothing more about that. It would not be fair in any event to do a direct comparison between the costs incurred on each side.

However, doing the best that I can on a somewhat rough and ready basis I would accept that I cannot see there is any likelihood that the ultimate costs bill will be less than £900,000. So accordingly I must take a reasonable proportion of that which I take to be

£600,000 and I order that the Defendant pay this to the Claimant on account of costs by the date in the order i.e. 28 August 2017.

Have I forgotten anything?

Miss Cashman: Just to check a date – the date from which costs on the indemnity basis are assessed is 23 July 2016 as per the judgment but the date of the application for amended defence was actually March 2016…

Thirlwall LJ: Yes, I think on balance it is fair to use the date it was served i.e. 23 July 2016. If there is nothing else, thank you and this is the last time we will cross paths on this case.