Neutral Citation Number: [2024] EWHC [2353] (Ch)

Case No: BL-2021-MAN-000070

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 19 September 2024

Before :

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) EDEL MARIE MAGEE **(2) SIOBHAN MARY FERGUSON** **(3) CIARA MELANIE PRYCE** **(4) DONNA MARIAN POWELL** **(AS TRUSTEES OF THE FITZPATRICK FAMILY DISCRETIONARY SETTLEMENT)**	**Claimant**
- and -	
(1) JOHN WADE CROCKER **(2) PEDHAM PLACE GOLF CLUB LIMITED**	**Defendants**
-and-	
CAMELOT TRUST CORPORATION LIMITED	**Third Party**
-and-	
MATTHEW JOHN FITZPATRICK	**Fourth Party**

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Giles Maynard-Connor KC and **Amie Boothman** (instructed by **JMW Solicitors LLP**) for the **Claimants** and **Fourth Party**
Mohammed Zaman KC and **Alexander Heylin** (instructed by **Penningtons Manches Cooper LLP**) for the **First Defendant**

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Judgment on Costs

This judgment was handed down remotely at 10.30am on 19 September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

HHJ CAWSON KC:

INTRODUCTION

1. This judgment should be read together with my judgment handed down on 5 July 2024 ([2024] EWHC 1723 (Ch)) ("**the Judgment**") following the trial of this action in April and May 2024, and the transcript of my judgment delivered on the first day of the trial determining in their favour the Claimants' application ("**the Amendment Application**") to amend their Claim Form, Particulars of Claim and Amended Reply and Defence to Counterclaim in order, amongst other things, to allege that there had been a novation ([2024] EWHC 1874 (Ch)) ("**the Amendment Judgment**") .

2. I will adopt in this judgment the definitions used in the Judgment.

3. Pursuant to paragraph 3 of my Order made on the hand down of the Judgment on 5 July 2024, the parties were required to file and exchange their proposed draft order giving effect to the Judgment, together with their respective written submissions on consequential matters which were not agreed, and in support of any application for permission to appeal. I was then to consider the parties' respective orders and written submissions and either determine the disputed consequential matters and any application for permission to appeal on paper or list a hearing to determine the same. In the event, having considered the parties respective submissions and respective cases as to the appropriate form of order, I decided that I should determine the outstanding issues on paper without a hearing, not least with a view to saving the significant costs of a further hearing.

4. In the event, the outstanding issues between the parties for me now to determine relate solely as to costs, and one minor issue concerning the terms of the order to be made. There has been no application for permission to appeal.

5. In addition to the written submissions on costs of Mr Giles Maynard-Connor KC and Ms Amie Boothman on behalf of the Fitzpatrick Trustees and Mr Fitzpatrick, Mr Mohammed Zaman and Mr Alexander Heylin on behalf of Mr Crocker, I have also been provided with a fourth witness statement of Mr Stephen Morris, the Fitzpatrick Trustees' and Mr Fitzpatrick's Solicitor, dated 29th of July 2024 providing details as to the Fitzpatrick Trustees' and Mr Fitzpatrick's incurred and approved budgeted costs ("**Morris 4**").

TERMS OF THE ORDER

6. The minor issue between the parties as to the terms of the order to be made is that the Fitzpatrick Trustees contend that the order should, after setting out a number of declarations in favour of and as sought by the Fitzpatrick Trustees, include a paragraph 4 saying: *"The Claimants' Claim is upheld as aforesaid"*. Mr Crocker maintains that this is unnecessary, and, in effect, that the declarations speak for themselves. I agree that paragraph 4 is a somewhat lame paragraph. I consider that a more appropriate way to describe the fate of the Fitzpatrick Trustees' Claim is to add some additional words to the preface to the declarations, so that it reads: *"IN DETERMINATION OF THE CLAIMANTS' CLAIM IT IS DECLARED THAT:"*.

ISSUES IN RESPECT OF COSTS

7. As far as the costs of the Claim and Part 20 Claim/Counterclaim as between the Fitzpatrick Trustees and Mr Crocker are concerned:

    i) It is the Fitzpatrick Trustees' case that all such costs should be paid by Mr Crocker apart from the costs in respect of the Amendment Application in respect of which there should be no order for costs, and that the costs awarded in favour

of the Fitzpatrick Trustees should be assessed on the standard basis if not agreed. Further, it is submitted that such costs should, pursuant to CPR 44.2(6)(g), be ordered to be paid together with interest thereon at the rate of 2% per annum from when such costs were incurred until the date of the order to be made, and at the judgment rate of 8% per annum thereafter.

ii) It is Mr Crocker's case that:

a) The Fitzpatrick Trustees should pay his costs of the Amendment Application, and of the Claim and Part 20 Claim/Counterclaim up to and including 23 April 2024 (when the Amendment Application was determined), such costs to be assessed, if not agreed, on the standard basis;

b) He should pay the Fitzpatrick Trustees' costs of the Claimant Part 20 Claim/Counterclaim from 24 April 2024, to be assessed, if not agreed, on the standard basis;

c) Interest should be paid on the costs payable pursuant to sub-paragraphs (a) and (b) above at the rate of 2% per annum from when such costs were incurred until the date of the order, and at the judgment rate of 8% per annum thereafter;

d) Set-off should be applied as between the amounts payable respectively by the Fitzpatrick Trustees and Mr Crocker pursuant to sub-paragraphs (a) to (c) above.

8. So far as the costs of the Part 20 Claim brought by Mr Crocker against Mr Fitzpatrick are concerned, it is common ground that Mr Crocker should pay Mr Fitzpatrick's costs

on the basis that Mr Fitzpatrick was the successful party, and that the cost to be paid should be subject to the payment of interest at the rate of 2% per annum from when such costs were incurred until the date of the order, and at the judgment rate of 8% per annum thereafter. However, it is Mr Fitzpatrick's case that, in default of agreement, such costs should be assessed on the indemnity basis, whereas it is Mr Crocker's case that such should be assessed on the standard basis.

9. The parties recognise that it would be appropriate for the Court to order the making of a payment on account of costs pursuant to CPR 44.2(8) (which requires the court to provide for payment of *"a reasonable sum"* by way of a payment on account unless there is *"good reason not to do so"*), and Mr Crocker realistically does not seek to suggest to the contrary.

10. I propose to first consider the position as between the Fitzpatrick Trustees and Mr Crocker, before then going on to consider the position as between Mr Fitzpatrick and Mr Crocker, and finally how much ought to be paid by way of payment on account of costs by the relevant party or parties.

COSTS AS BETWEEN THE FITZPATRICK TRUSTEES AND MR CROCKER

Amendment Application

11. I will deal firstly with the costs of the Amendment Application.

12. Mr Crocker's position is that the Fitzpatrick Trustees ought to pay him his costs of the Amendment Application given that it was made by the Fitzpatrick Trustees in order to make a number of late required corrections to their pleaded case, and in particular to specifically pleaded that there had been a novation in respect of the 2010 SHA. As to the latter, the point is taken by Mr Crocker that paragraph 25(5) of his Defence had itself

taken the point that an assignment of rights could not achieve the substitution of the Fitzpatrick Trustees as a party to the 2010 SHA because there could be no assignment of the burden of the 2010 SHA. Mr Crocker relies on the fact that paragraph 25(5)(b) of his Defence had specifically taken the point that Mrs Powell was aware that a novation was required as evidenced by an email dated 17 June 2021 in which she had specifically observed that: *"... you can't assign the burden of the contract, only the benefit"*. Reliance is then placed by Mr Crocker on the fact that the Fitzpatrick Trustees' Reply did not engage with the point, and that it was only in their Opening Submissions that the point emerged as an issue. Thus, in short, it is said by Mr Crocker that the Fitzpatrick Trustees brought the requirement to make the late Amendment Application upon their own head, that it wasted the best part of a day of the trial, and that Mr Crocker should therefore be entitled to his costs in respect of this exercise.

13. As against this, the point is made by the Fitzpatrick Trustees that once the point had emerged, and it had been clearly identified in the Fitzpatrick Trustees' Opening Submissions that a case based upon novation was to be run, if necessary after having made the appropriate amendments to the pleaded case, then Mr Crocker could and should have consented to the Amendment Application in relation to novation and other tidying up amendments, and that had he done so, the this would have avoided the necessity to waste court time.

14. I see not inconsiderable force in the Fitzpatrick Trustees' point that Mr Crocker could have consented to the Amendment Application, and that had he done so then the time and costs that were wasted by the exercise would not have been wasted. Further, the Fitzpatrick Trustees were, technically at least, the successful party to the Amendment Application and thus, prima facie, entitled to the costs of their successful application,

albeit that the Fitzpatrick Trustees realistically do not seek their costs of the Amendment Application, recognising that some different order is appropriate in the circumstances, through the making of no order for costs.

15. However, the fact is that this was an application to address issues that, realistically, could and should have been addressed earlier, in particular given the critique as to the Fitzpatrick Trustees' case based on assignment in paragraph 25 of Mr Crocker's Defence. It is certainly the case that Mr Crocker could have consented to the Amendment Application, and that would have saved time and expense. However, the Amendment Application was made late in the day, and on short notice in the middle of final trial preparations. This may not have prejudiced Mr Crocker's ability to deal with the Amendment Application, but given the circumstances in which the need to make the Amendment Application had arisen, I consider that Mr Crocker was entitled to require the Fitzpatrick Trustees to satisfy the Court as to their case on amendment, and I do not consider that his opposition to the Amendment Application ought to be castigated as unreasonable in circumstances in which the Fitzpatrick Trustees were seeking something of an indulgence.

16. I note that in paragraph 64 of the Amendment Judgment I stated that the Fitzpatrick Trustees existing pleaded case displayed, at the worst, ambiguity as to the way in which the case was put as how the Fitzpatrick Trustees were said to have stepped into Camelot's shoes as a party to the 2010 SHA. This was on the basis that the Fitzpatrick Trustees had pleaded the factual basis for an allegation of novation based upon Mr Crocker's agreement to the Fitzpatrick Trustees stepping into Camelot's shoes, albeit expressing their case in terms of assignment as critiqued by Mr Crocker, rather than novation. Nevertheless, a case in novation, i.e. as to a tripartite agreement under which

the Fitzpatrick Trustees stepped into Camelot's shoes vis-à-vis Mr Crocker, had not been pleaded, and this required to be corrected.

17. In the circumstances, I consider that the appropriate order is that the Fitzpatrick Trustees should pay Mr Crocker's costs of an occasion by the Amendment Application, to be assessed by way of detailed assessment on the standard basis in default of agreement.

Costs of the Claim and Part 20 Counterclaim

18. The Fitzpatrick Trustees' case is relatively simple. They rely upon the general rule provided for by CPR 44.2(2) that the unsuccessful party will be ordered to pay the costs of the successful party, albeit that the court may make a different order. They submit that Mr Crocker is to be regarded as the unsuccessful party, and on that basis, he ought to be ordered to pay their costs to be assessed by way of detailed assessment on the standard basis, in default of agreement. Whilst the court is required by CPR 44.2(4) and (5) to have regard to the matters therein referred to, including the conduct of the parties, in considering whether the court should depart from the general rule, the Fitzpatrick Trustees submit that, in the present case, there is no good reason to depart from the general rule.

19. As to the application of CPR 44.2(4) and (5), and as to the types of order as to costs that the Court might make as set out in CPR 44.2(6), the Fitzpatrick Trustees drew my attention to the decision of Norris J in *Redstone Mortgages v B Legal* [2015] 2 Costs LR 425 at [4]-[5]. In this passage, Norris J spoke in terms of judges being required to be content to do *"broad justice if required"*, and he made the point that *"almost invariably overall success involves losing on some issues"*, recognising that the fact that the successful party might have lost on some issues will not, in itself, necessarily justify the Court departing from the general rule.

20. There is no real issue between the parties as to the appropriate principles to apply as far as the application of CPR 44.2 is concerned. However, it is Mr Crocker's case that it is necessary to draw a distinction between the costs incurred up to the Fitzpatrick Trustees being permitted to amend on the first day of the trial (23 April 2024), and those incurred thereafter. In essence, it is Mr Crocker's case that costs require to be dealt with in this way because the Fitzpatrick Trustees did not succeed in their claim for injunctive relief, and in so far as their claim for declaratory relief is concerned, it is said that until amendment was permitted to rely upon there having been a novation, the Fitzpatrick Trustees' case relied upon a case of assignment that was bound to fail for the reasons that Mr Crocker had explained in paragraph 25 of his Defence, and thus alerted the Fitzpatrick Trustees to some 3 years ago.

21. The point is further made that not only was the Fitzpatrick Trustees case based on assignment ultimately unsuccessful, their case regarding them having stepped into Camelot's shoes as a party to the 2010 SHA was also unsuccessful in so far as it sought to rely upon a claim in promissory estoppel – see paragraph 309 of the Judgment. It only succeeded on the basis of the late pleaded case of novation. It is thus said that Mr Crocker came to trial believing, on the basis of the Fitzpatrick Parties' and his respective pleaded cases, that he would win as against the Fitzpatrick Parties, and that had this issue been addressed earlier by the Fitzpatrick Parties, rather than them doubling down on their case based on assignment and promissory estoppel, then the proceedings would have taken a different turn and the focus would have been on the Part 20 Claim as between Mr Crocker and Mr Fitzpatrick. As it was not, it is said on behalf of Mr Crocker that he incurred time and costs in resisting claims based upon assignment and promissory estoppel that were unsuccessful at trial.

22. Mr Crocker places particular reliance on the decision of Court of Appeal in *Beoco Ltd v Alfa Laval Co. Ltd* [1995] QB 137, where, at p.154A-B, Stuart-Smith LJ said this:

> "As a general rule, where a plaintiff makes the late amendment as here, which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the costs of the action down to the date of the amendment."

23. It is submitted on behalf of Mr Crocker that this general rule ought to be applied in the circumstances of the present case so as to require the Court to make the order in respect of costs that he seeks, distinguishing between those costs incurred before and those costs incurred after the amendment permitted on the first day of the trial.

24. I am not persuaded that the present case is an appropriate case to apply the *"general rule"* derived from in *Beoco Ltd v Alfa Laval Co. Ltd* at p.154A-B that Mr Crocker seeks to rely upon, essentially for the reasons advanced on behalf of the Fitzpatrick Trustees. There are, as I see it, a number of clear distinctions between the present case and the sort of situation envisaged by the *"general rule"* identified by Stuart-Smith LJ.

25. Firstly, as pointed out on behalf of the Fitzpatrick Trustees, the present case essentially concerned two broad questions that I identified in paragraph 176 of the Judgment, namely (1) whether the 2014 Transfer was open to challenge, and (2) whether the 2010 SHA had become binding as between Mr Crocker and the Fitzpatrick Trustees (as trustees of the FFDS). The amendment to plead reliance upon a novation only concerned the second of these broad questions.

26. The First of these broad questions, namely whether the 2014 Transfer was open to challenge involved a consideration as to whether the relevant share transfer was open to

challenge on the basis that any consent provided to it by Mr Crocker was vitiated as having been procured by deceit on the part of Mr Fitzpatrick, and secondly whether the effect of the 2010 Articles was to render the transfer invalid and ineffective. The Fitzpatrick Trustees succeeded in respect of this question without any need to rely upon a case in novation, and thus established that they were entitled to declaratory relief as to the effect of the 2014 Transfer and their status shareholders.

27. Secondly, as far as the second question as to the Fitzpatrick Trustees stepping into Camelot's shoes is concerned, this did ultimately depend for success upon a case that there had been a novation. However, the facts are, as I see it, somewhat analogous to those in the case of *Begum v Birmingham City Council* [2015] EWCA Civ 386, [2015] C.P. Rep 32 relied upon by the Fitzpatrick Trustees. In that case the claimant established at trial that the defendant had acted in breach of statutory duty under the Housing Act 1985. However, the claimant's case had originally been pleaded solely in negligence and misrepresentation, and she had made a comparatively late application to amend to plead breach of statutory duty, and only succeeded in respect of this latter claim. The judge at first instance, applying in *Beoco Ltd v Alfa Laval Co. Ltd*, ordered her to pay the costs of the proceedings up to the date of amendment, albeit awarding her her costs thereafter. The Court of Appeal held that this was the wrong approach in circumstances in which different labels regarding cause of action applied to the same underlying facts. On the facts of that case, it was significant that the defendant would have prepared and adduced substantially the same evidence, even if only breach of statutory duty had been pleaded from the start, and so the case that the defendant had to meet was essentially the same before and after the relevant amendment.

28. On this basis, it was held that in *Beoco Ltd v Alfa Laval Co Ltd* fell to be distinguished - see, in particular, per Jackson LJ at [31]. The Court of Appeal held that the general rule that the claimant was entitled to her costs should apply in respect of all her costs, and that her lack of success in relation to her claims in negligence and misrepresentation should be reflected in a reduction of the costs which she was entitled to 85% thereof. A significant factor was that, unlike in *Beoco Ltd v Alfa Laval Co Ltd*, the defendant had not been deprived of the opportunity of making a payment into court because the defendant would have contested the claim in any event. I note that the fact that if the amendment had been made earlier, the action would still have been vigourously resisted was identified by Stuart Smith LJ in *Beoco Ltd v Alfa Laval Co Ltd* at p.154B-C as being a factor that might lead to a departure from his general rule identified at p.154A-B.

29. As I see it, and as reflected in paragraphs 63 and 64 of the Amendment Judgment, the case in novation in the present case was simply a different way of expressing the case as pleaded based upon there having been an assignment which Mr Crocker had gone along with.

30. A key, if not the key factual question that I was required to decide at trial was as to the scope and extent of the discussions that took place between Mr Fitzpatrick and Mr Crocker prior to the 2014 Transfer, and in particular as to whether, in consequence thereof, the 2014 Transfer proceeded on the basis that Mr Crocker was agreeable to the same, and to the Fitzpatrick Trustees stepping into the shoes of Camelot so far as the 2010 SHA was concerned. There was a fundamental dispute on the evidence as to this, and ultimately, I found in favour of the Fitzpatrick Trustees, preferring the evidence of Mr Fitzpatrick to that of Mr Crocker on the issue for the reasons that I explained in the

Judgment. It was this finding, whilst not sufficient to support a case based on assignment or promissory estoppel, which led me to find that there had been a novation.

31. Further, it is to be noted that even after I had allowed the Fitzpatrick Trustees to amend to rely upon a case of novation, their case that they had stepped into the shoes of Camelot as far as the 2010 SHA continued to be vigourously resisted and defended by Mr Crocker.

32. On this basis, I am satisfied that even if a case in novation had been included in the Fitzpatrick Trustees' claim as initially formulated, or introduced by way of amendment at a very much earlier stage, the claim would still have been vigourously resisted. In the circumstances, I do not consider that it can realistically be suggested that Mr Crocker was deprived of the opportunity of making a Part 36 offer or of otherwise seeking to compromise the proceedings, or any aspect thereof, because the case in novation was only formally introduced at a late stage during the course of the trial.

33. I consider that I should follow the approach the Court of Appeal in *Begum v Birmingham City Council* (supra), and award the Fitzpatrick Trustees their costs of the Claim and Part 20/Counterclaim brought by Mr Crocker against them, subject to the order for costs that I have said that I propose to make in respect of the Amendment Application, and subject to a consideration as to whether some modest discount is required in percentage terms to the costs recovered by the Fitzpatrick Trustees to mark the effect of the late amendment and their lack of success in their claim to have stepped into the shoes of Camelot based upon their case as to there having been an assignment or a promissory estoppel.

34. On balance, I am persuaded that I should make a modest reduction of 10% to reflect the fact that Mr Crocker and those acting for him are likely to have spent some not

inconsiderable time at least in having to address this aspect of the Fitzpatrick Trustees' case concerning the parties to the 2010 SHA as formulated in terms of assignment or promissory estoppel that he would not otherwise have had to address despite the common factual basis to these and the novation case.

35. Given that the Fitzpatrick Trustees success in relation to the validity of the 2014 Transfer, and given that it is by no means clear that particularly significant cost were incurred in dealing with the assignment and promissory estoppel case in respect of stepping into Camelot's shoes that would not otherwise have been incurred, I might otherwise have paid greater heed to Norris J's observation in *Redstone Mortgages v B Legal* (supra) that *"almost invariably overall success involves losing on some issues"*, and thus not provided for any reduction. However, I regard it as a significant factor that not inconsiderable time was spent at trial, and that costs will otherwise have been incurred, in dealing with what I consider to be the unsatisfactory evidence of Mr Fitzpatrick relied upon by the Fitzpatrick Trustees as to whether there had been a genuine commercial purpose behind Mr Murray's involvement with Nisma Settlement – see paragraphs 222 and 263 of the Judgment. These considerations, taken together with the factors identified in the previous two paragraphs, do, I consider, make some modest discount appropriate.

36. I shall therefore order that Mr Crocker pays the Fitzpatrick Trustees 90%, rather than the full 100% of their costs of the Claim and the Part 20 Claim/Counterclaim, to be assessed by way of detailed assessment on the standard basis in default of agreement.

37. Further, I shall order that interest is paid by Mr Crocker on such costs at the rate of 2% per annum from when such costs were incurred until the order giving effect to the

Judgment and to this judgment, and at the judgment rate of 8% per annum thereafter until payment.

COSTS AS BETWEEN MR FITZPATRICK AND MR CROCKER

38. I turn then to the costs of the Part 20 Claim brought by Mr Fitzpatrick against Mr Crocker.

39. As I have said, it is not in dispute that Mr Crocker should pay Mr Fitzpatrick's costs of the Part 20 Claim, to be assessed by way of detailed assessment if not agreed. The issue is as to whether such assessment should be on a standard basis or an indemnity basis.

40. It is well established that in order for the court to award indemnity costs there must be something outside the ordinary and reasonable conduct of the proceedings, sufficient to take the case '*out of the norm*' – see the White Book 2024 at 44.3.8 to 44.3.10 and *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879 at [19] and [39]*, Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 at [16]-[26], and *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] 5 Costs LR 709 at [9]-[18].

41. However, it is to be noted that:

    i) *"... there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order'* – see *Excelsior* (supra) at [32]; and

    ii) As clarified in *Esure Services* (supra) at [25], the word *"norm"* is not intended to reflect whether what occurred was something that happened often, so that it might be seen as *"normal"*.

42. Mr Maynard-Connor KC and Ms Boothman on behalf of Mr Fitzpatrick place particular reliance upon the observation of Richards J in *Clutterbuck v HSBC Plc & Ors* [2016] 1 Costs LR 13 at [16] that where an unsuccessful claimant has pursued allegations of dishonesty which have failed *"then in the ordinary course of events the claimants will be ordered to pay costs on an indemnity basis"*. However, they recognise that *Clutterbuck* and similar decisions have recently been reviewed by the Court of Appeal in *Thakkar v Mican* [2024] EWCA Civ 552 - see per Coulson LJ at [18]-[30]. In this latter case, the Court of Appeal expressly rejected the argument that an unsuccessful dishonesty claim gave rise to any form of presumption that costs ought to be awarded on an indemnity basis, or reversed the burden of proof that would ordinarily be on the party seeking indemnity costs. However, Coulson LJ did, at [28], recognise that the pursuit of an unsuccessful dishonesty claim does: '*very often lead to the making of an indemnity costs order*'.

43. In support of his claim to indemnity costs, Mr Fitpatrick relies upon the following factors as taking the case out of the norm and justifying the award of indemnity costs, in that it is said that:

i) Mr Crocker deliberately pursued his failed Part 20 Claim against Mr Fitzpatrick, when he did not need to do so in order to defend the Claimants' Claim or to assert his counter position as pleaded in his Counterclaim;

ii) As a corollary, Mr Fitzpatrick did not need to be joined as a party to these proceedings;

iii) Front and centre to the Part 20 Claim against Mt Fitzpatrick were a number of serious allegations of deceit, dishonesty and other alleged fraudulent conduct stretching back 30 years made by Mr Crocker against Mr Fitzpatrick;

iv) Apart from the substantial monetary relief claimed, such allegations would have caused massive reputational damage to Mr Fitzpatrick if established; and

v) Those serious allegations, now rejected, were pursued most aggressively by Mr Crocker, both before and during the Trial.

44. The Fitzpatrick Trustees make out a cogent case for an award of costs on an indemnity basis by reference to these considerations. However, on balance, in the exercise of my discretion, I declined to make such an award, and I propose to award Mr Fitzpatrick his costs on the standard basis, to be assessed in default of agreement.

45. I recognise that the allegations of deceit that were made by Mr Crocker against Mr Fitzpatrick were serious allegations of dishonesty. However, this was not a case where I concluded that Mr Crocker was necessarily lying in making the serious allegations that he was, and I consider it more likely that he had confused and/or persuaded himself with the passage of time, perhaps in the light of the intervention of members of his family such as Mr Boyes, as to a false version of events concerning the key discussions with Mr Fitzpatrick leading to the making of the 2014 Transfer, and other historical events, including as to Mr Murray's role as settlor of the Nisma Settlement, and what he might been told by Mr Fitzpatrick with regard to the Nisma Settlement – see paragraphs 246 and 247 of the Judgement.

46. Secondly, as Mr Zaman KC and Mr Heylin point out, Mr Fitzpatrick, himself, has hardly come out of the present proceedings whiter than white concerning the role and commercial purpose of the Nisma Settlement, and his evidence in respect thereof, as referred to in paragraph 35 above. Such may well have undermined his evidence as to his discussions with Mr Crocker leading to the 2014 Transfer had not his evidence been supported by other cogent evidence.

47. It is certainly true that Mr Crocker did not need to pursue his Part 20 Claim against Mr Fitzpatrick, and thereby bring Mr Fitzpatrick into the proceedings as a party, in order to defend the claim brought against him by the Fitzpatrick Trustees. However, the deceit allegation that formed the basis of the Part 20 Claim also formed a key part of his defence to the Fitzpatrick Trustees' Claim, and this is not a situation where Mr Crocker was, by his Part 20 Claim, making allegations concerning Mr Fitzpatrick that had not already been raised and ventilated in the context of the Claim and Part 20 Claim as between the Fitzpatrick Trustees and Mr Crocker.

48. In short, therefore, I do not consider that the circumstances justify an award of costs on an indemnity basis in favour of Mr Fitzpatrick against Mr Crocker.

49. I shall therefore order that Mr Crocker pays Mr Fitzpatrick's costs of the Part 20 Claim brought by Mr Crocker against Mr Fitzpatrick, such costs to be assessed by way of detailed assessment on the standard basis in default of agreement. Further, I will order that interest be paid on such costs at a rate of 2% per annum from when the relevant costs were incurred to the date of the order that I propose to make, and at the judgement rate of 8% per annum thereafter.

PAYMENT ON ACCOUNT OF COSTS

50. As I have already identified, having awarded the Fitzpatrick Trustees and Mr Fitzpatrick their costs, I am required, pursuant to CPR 44.2(8), to order the payment of a reasonable sum on account of costs unless there is good reason not to do so. Realistically, it is not sought to be suggested on behalf of Mr Crocker that there is no good reason to order the making by him of a payment on account of costs.

51. As noted in the White Book 2024 at 44.2.12, the determination of a *"reasonable sum"* necessarily involves the Court in arriving at some estimation of the costs that the receiving party is likely to be awarded by the cost judge in the detailed assessment proceedings or as a result of a compromise of those proceedings. There is no rule that the amount ordered to be paid on account should be the *"irreducible minimum"* of what may be awarded on detailed assessment. However, the authorities demonstrate that where the Court has made a cost management order, as in the present case, the receiving party's budget, insofar as it has been agreed between the parties or approved by the Court, is a sensible starting position for determining the *"reasonable sum"* to be paid on account under CPR 44.2(8) because, on detailed assessment, the Court ought not to depart from an agreed or approved budget unless satisfied that there is good reason to do so - see CPR 3.18(b). In *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2015] 3 Costs LR 43, Birse J ordered a sum amounting to 90% of the claimant's approved budget. More recently, Mellor J applied the same approach in *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2024] Costs LR.

52. It is common ground between the parties that I should apply a percentage of 90% to costs that have been agreed or approved pursuant to a party's costs budget. So far as costs that had already been incurred at the time that costs were budgeted, in paragraph 12 of Morris 4, it is suggested that the appropriate percentage is 50% in respect of the Fitzpatrick Trustees' costs to be assessed on the standard basis, and 70% in respect of Mr Fitzpatrick's costs, on the basis that they are to be assessed on an indemnity basis. Given that I found that Mr Fitzpatrick's costs ought also to be assessed on a standard basis, I proceed on the basis that, in those circumstances, Mr Fitzpatrick would contend for a payment on account by reference to 50% of his costs that had already been incurred when costs were budgeted. This ought not to be controversial bearing in mind that in

paragraph 44 of their submissions, Mr Zaman KC and Mr Heylin suggested a percentage of 70% be applied to costs already incurred at the time of the cost budgeting exercise.

53. I shall proceed on the basis of the figures referred to in Morris 4 and the attachments thereto, which appear to be consistent with the figures set out in paragraph 43 of Mr Zaman's and Mr Heylin's submissions. I note that the costs were budgeted excluding any figure for VAT. However, as the evidence is to the effect that the Fitzpatrick Trustees and Mr Fitzpatrick are unable to reclaim VAT, they will be entitled to add a figure for VAT to the costs that they seek as against Mr Crocker.

54. As far as the Fitzpatrick Trustees are concerned, their total incurred costs were £625,177.68 as against their approved budgeted costs of £639,158.03 plus VAT. Of this figure of £625,177.68, £195,449.96 represented incurred costs, and £429,727.72 represented approved budgeted costs. If one applies a percentage of 50% to the former figure, and a percentage of 90% to the latter figure, one gets figures of 97,724.98 and 386,754.95, totalling £484,479.93.

55. However, adjustments to the sum that might otherwise have been provided for by way of payment on account of costs are required in order to take into account the fact that I did not award the Fitzpatrick Trustees the whole of their costs, but only 90% thereof. Further, I consider that some further adjustment is required to reflect the fact that the Fitzpatrick Trustees did not recover the costs of the Amendment Application, and indeed are liable to meet Mr Crocker's costs of that application.

56. I must therefore the figure of £484,479.93 to 90% thereof, namely £436,031.94. By way of further somewhat rough and ready reduction to take into account the costs of the Amendment Application, I will reduce this latter amount by a further £36,031.94,

rounding the sum to be paid by way of payment on account by Mr Crocker to the Fitzpatrick Trustees down to £400,000.

57. As far as Mr Fitzpatrick is concerned, his total incurred costs were £450,828 as against budgeted costs of 551,268.02. Of this figure of £450,828, 50,041.64 represented incurred costs, and £400,786.36 represented approved budgeted costs. Applying the respective percentages of 50% and 90% to these figures, one gets to figures of £25,020.82 and £360,702.37, totalling £385,723.14.

58. I shall thus order Mr Crocker to make a payment on account of costs of £400,000 to the Fitzpatrick Trustees, and £385,723.14 to Mr Fitzpatrick. I will order that the sums be paid within 28 days, being the period specified in the each of the versions of the draft Order provided by all the parties.

CONCLUSION AND SUMMARY

59. I shall therefore make the following orders in respect of costs:

i) the Fitzpatrick Trustees shall pay to Mr Crocker the costs of an occasion by the Amendment Application to be assessed by way of detailed assessment on the standard basis in default of agreement. Interest shall be paid on such costs at a rate of 2% per annum from when the same were incurred to the date of the order to be made, and at the judgement rate of 8% per annum thereafter.

ii) Subject to sub-paragraph (i) above, Mr Crocker shall pay the Fitzpatrick Trustees 90% of their costs of the Claim and the Part 20 Counterclaim brought against them, such costs to be assessed by way of detailed assessment on the standard basis in default of agreement. Interest shall be paid on such costs at a

rate of 2% per annum from when the same were incurred to the date of the order to be made, and at the judgement rate of 8% per annum thereafter.

iii) Mr Crocker shall pay to the Fitzpatrick Trustees a payment on account of the costs referred to in sub-paragraph (ii) in the sum of £400,000 on or before 17 October 2024.

iv) Mr Crocker shall pay Mr Fitzpatrick his costs of the Part 20 Claim brought by Mr Crocker against Mr Fitzpatrick, such costs to be assessed by way of detailed assessment on the standard basis in default of agreement. Interest shall be paid on such costs at a rate of 2% per annum from when the same were incurred to the date of the order to be made, and at the judgement rate of 8% per annum thereafter.

v) Mr Crocker shall pay Mr Fitzpatrick a payment on account of the costs referred to in subparagraph(iv) above in the sum of £385,723.14 on or before 17 October 2024.