

Neutral citation number: [2021] EWHC 2730 (Ch)

Case No: BL-2019-001003

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday 16 September 2021

BEFORE:

HIS HONOUR JUDGE HODGE QC
(Sitting as a Judge of the High Court)

BETWEEN:

AHUJA INVESTMENTS LIMITED

Claimant

- and -

(1) VICTORYGAME LIMITED
(2) SURJIT SINGH PANDHER

Defendants

MR DAVID HOLLAND QC and MR EDWARD ROWNTREE (instructed by **Cardium Law**) appeared on behalf of the Claimant

MR IAN CLARKE QC, MR NICHOLAS TROMPETER QC with him (instructed by **SBP Law**) appeared on behalf of the Defendants

APPROVED JUDGMENT ON COSTS

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(Official Shorthand Writers to the Court)

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JUDGE HODGE QC:

1. This extemporary judgment is a sequel to, and should be read in conjunction with, first, the reserved judgment I handed down upon the substantive trial of this claim and counterclaim on Thursday 26 August 2021 and, secondly, the extemporary judgment I delivered earlier today on the subject of interest.
2. As a result of those two judgments, I will be dismissing the claim and awarding judgment to the first defendant on the counterclaim in the sums of:

(1) £824,000, being the principal sum of £800,000 and the interest due under the loan agreement on 21 December 2018, together with

(2) contractual interest thereon under the loan agreement to the date of this hearing in a sum of £1,351,257.13, amounting in total to a judgment sum of some £2,175,257.

The issue I now have to resolve is the costs of the claim and counterclaim.

3. I have received written submissions from Mr Holland and Mr Rowntree for the claimant and from Mr Clarke and Mr Trompeter for the defendant. On the issue of costs, I was addressed orally by Mr Clarke, who appears today without the benefit of Mr Trompeter's presence, for a little over an hour before the short adjournment. I was then addressed by Mr Holland again for a little over an hour either side of the luncheon adjournment; and then I heard briefly from Mr Clarke in reply.
4. Essentially, there are three aspects that fall for consideration:
 - (1) The application of the normal principles governing an award of costs in civil litigation in accordance with CPR 44.2.
 - (2) The effect of an acknowledged Part 36 offer to settle, which brings into play the costs consequences set out in CPR 36.17(4).

(3) The extent to which, if at all, those principles should be affected by the contractual provisions of clause 6.1 of the loan agreement in so far as the costs position of the first defendant, but not the second defendant (who was not a party to the loan agreement), is concerned.

5. The position up until the effective date for the purposes of the Part 36 offer, which is 17 February 2021, falls to be determined in accordance with CPR 44.2. The court has an overriding discretion as to costs but the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, although the court may make a different order. In the present case, it is clear that the successful parties are the defendants. Then:

"(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances of the case, including:

- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful ..."

Although, since there is a Part 36 offer here this exception does not apply, the court will also have regard to (c), any admissible offers to settle.

6. By CPR 44.2(5):

"The conduct of the parties includes—

- (a) conduct before, as well as during, the proceedings ...
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

7. For the purposes of the present case, that consideration about exaggeration applies to the first defendant which claimed in the order of £31 million by way of interest as part of its

counterclaim and has succeeded in recovering some £1.3 million by way of interest and thus has failed in its counterclaim to the extent of some £28.8 million.

8. Mr Clarke reminded me of the observations of Jackson LJ (with whom Moore-Bick and Ward LJ agreed) in *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790; [2011] 6 Costs LR 961 at paragraph 62, emphasising:

"... a growing and unwelcome tendency by first instance courts ... to depart from the starting point set out in CPR 44.3(2)(a) ..."

9. Mr Clarke also referred me to observations of Pitchford LJ (speaking with the agreement of Patten LJ) in *Hutchinson v Neale* [2012] EWCA Civ 345; [2012] 5 Costs LO 588 at paragraphs 27 and 28. There, it was emphasised that:

"There is no general rule that a finding of dishonesty conduct by the successful party will replace the usual starting point. What is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties."

10. The Court of Appeal endorsed the approach of Briggs J in the earlier case of *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1696 (Ch); [2010] 5 Costs LR 657. I was taken by Mr Clarke to paragraph 19. Mr Holland cited more extensively from paragraphs 6 to 9, paragraph 19, paragraph 33 and paragraphs 40 and 60. The court has a range of sanctions available in relation to an otherwise successful party who has put forward a dishonest case. At paragraph 19 (ii), Briggs J stressed that:

"The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs."

11. Mr Holland also cited more extensively to me from the case of *Hutchinson v Neale*. He took me to passages at paragraphs 20, 25, 28 and 31. There, again, it was stressed at paragraph 28 that:

"There is no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point [that costs should follow the event]. What is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties. [T]he full range of [costs] measures is available to ensure that the dishonest but successful party does not gain, and the honest but unsuccessful party does not lose, in consequence of the wrongdoing established."

12. At paragraph 31, Pitchford LJ emphasised that the starting point should be that an order for costs in the successful party's favour should be subject to adjustments to ensure that the successful party does not "recover any costs which may have been incurred in advancing a dishonest case".
13. The defendants submit that they are the successful parties in the litigation so the starting point is that the claimant should pay their costs, and that the claimant had the means of protecting its costs position by making an appropriate Part 36 or *Calderbank* offer but it chose not to do so. That is said to count against it. The defendants recognise and acknowledge that the court made various findings of dishonesty against them in the judgment. They accept that this may be a factor relevant to be taken into account as conduct of the parties within the meaning of CPR 44.2(4)(a); but that provision mandates a consideration of the conduct of **all** of the parties, and not just of the defendants.
14. Crucially, the court rejected significant aspects of Mr Singh's own evidence on behalf of the claimant which were essential to its claim. The court found that Mr Singh had lied on key allegations that, at the meeting on 9 February 2016, he had been handed a copy of the rental schedule, or a document similar to it, and that he was informed at the 9 February meeting that the leases were all for terms of 15 years. The court found that the first time that the lease term representation was ever communicated to Mr Singh was when he had received the rental schedule on 29 February 2016, when he was in India. Yet, although he might have looked at the rental schedule at that stage, the court was

entirely satisfied that the lease term representation contributed in no way to Mr Singh's decision to proceed with the property. Further, Mr Singh had been totally unconcerned about the lease terms when the rental schedule had been emailed to him shortly before exchange of contracts.

15. It is said by Mr Clarke that the significance of this is twofold. First, Mr Singh (and, by extension, the claimant) brought a dishonest claim. The court rejected key aspects of Mr Singh's false narrative as to what he had received and what he had considered and relied upon before entering into the transaction. His claim was nothing more than a contrivance designed to provide a means to renegotiate the price otherwise agreed for the transaction and to avoid paying the sums due on redemption of the short-term loan agreement.
16. Moreover, Mr Clarke emphasises that Mr Singh would have known that the claim was false prior to the start of this litigation for the simple reason that he knew full well the truth of the events that he had misdescribed and that he had not relied upon the lease term representation when entering into the contract. Such dishonesty is said by Mr Clarke to be qualitatively and causatively different in nature to the dishonesty on the part of the defendants. It is the **sine qua non** without which the claim would not have been brought. The claimant pursued allegations which went beyond the reasonable compass of that which was justifiable. If and to the extent that the defendants caused an unwarranted increase in the costs of the action, the claimant has only itself to blame for having brought the action in the first place. Were it not for the judicial criticisms of the defendants, one would have expected the claimant to have been required to pay the costs of the action on the indemnity basis.
17. Secondly, it is said that it would be contrary to common sense and justice to make a costs order which results in any, or any significant, financial adjustment which rewards Ahuja, the claimant, a dishonest litigant. In all of the cases on which Ahuja relies, there is said to have been only one dishonest party, namely the successful party. Thus, in those cases, the court had no trouble in making a financial adjustment in favour of the innocent party. The present case is different since the claimant has conducted itself in a clearly reprehensible manner, self-evidently for potentially very substantial personal financial gain.

18. The only case in which criticisms were made of the unsuccessful, as well as the successful, party was the case, on appeal from HHJ Purle QC, of *Walsh v Singh* [2011] EWCA Civ 80. In that case, it was the defendant who was the successful party and who appealed an order of the trial judge that there should be no order as to costs. In that case, there had been a refusal by the trial judge to accept the evidence of the claimant or her witnesses; but the trial judge had also criticised the defendant's conduct in the proceedings, finding his evidence to be much less satisfactory than that of the claimant. The judge had held that he was quite satisfied that Mr Singh had knowingly not told the truth. Whilst the claimant had brought her claim in good faith and had failed, the defendant had chosen to embellish his evidence with untruths and hurtful cross-examination which had been unnecessary and he had raised the temperature of an already emotional case much higher than it need have been: see paragraphs 4 and 11 of the judgment of Arden LJ.
19. I therefore accept Mr Clarke's submission that, in most of the cases relied upon by the claimant, there was only one dishonest party whose conduct fell to be considered when the court came to exercise its discretion as to costs.
20. Mr Clarke acknowledges that, in order to reflect the facts that the defendants should not be entitled to recover the whole of their costs referable to the pursuit of the false elements of their case, and that the claimant necessarily thereby incurred some costs in proving matters about which the defendants had pursued a false case, the defendants should be subject to some limited adjustment to the general rule that costs follow the event. His primary submission is that the appropriate adjustment is simply to deprive the defendants of the benefit of an indemnity basis of assessment to which, he says, they would otherwise have been entitled in relation to their costs prior to the effective date.
21. His alternative submission is that, if that is insufficient, then the defendants should be deprived of a further proportion of their costs, but no more than 20%. This is said to reflect the approximate amount of time spent on proving the existence of the dishonesty of the defendants' otherwise admitted representation, their fraudulent fax, and the limited scope of the evidence in relation to the false statutory declaration, bearing in mind that the majority of the litigation was also spent dealing with questions of reliance, inducement, causation and loss, on all of which the claimant was the unsuccessful party.

22. As from the effective date, it is said that all of the consequences specified in CPR 36.17(4) should apply because that rule mandates that the court must, unless it considers it unjust to do so, order that the defendants are entitled to their costs on the indemnity basis from the effective date. He submits that it has not been demonstrated that it would be unjust to decline to visit all of the consequences of CPR 36.17(4) on the unsuccessful claimant. He emphasises observations of Briggs J in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) at paragraph 13, holding that:

"The burden on a [party] who has failed to beat [a] Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

23. Mr Clarke also prays in aid the provisions of clause 6.1 of the loan agreement. By that, the borrowers undertook with the lenders to:

‘... pay to the Lenders on demand and on a full and unlimited indemnity basis all costs, charges, expenses and liabilities paid and incurred by the Borrowers [clearly an error of transcription for the Lenders] (whether directly or indirectly) in relation to this agreement and the obligations owed under and associated with this agreement and any associated or collateral security (including all commission, legal and other professional costs and fees and disbursements and VAT on them) together with interest from the date when the Lenders become liable for them until payment by the Borrowers at the Interest Rate, such interest to be payable in the same manner as interest on the Advance.’

24. Mr Clarke took me to the leading judgment of Arden LJ in the case of *Chaplain Ltd v Kumari* [2015] EWCA Civ 798. At paragraph 34, Arden LJ cited observations from an earlier Court of Appeal decision which had held that, "Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right" even though any order for the payment of costs of proceedings by one party to another must always be within the discretion of the court. However, I note that, at paragraph 35 of her judgment, Arden LJ cited a further passage from that earlier Court of Appeal authority where it was recognised that:

"A good reason for depriving a successful litigant to part of the costs to which the contractual term would entitle him would be that that

part of the costs came within the definition of wasted costs in section 51(7) [of the Senior Courts Act 1981], that is to say they were costs incurred by him as a result of improper, unreasonable or negligent conduct on his part or that of his legal or other representatives."

25. In the particular circumstances of the present case, and in the light of the arguments advanced in resisting the usual order for costs, it seems to me that the contractual provision for costs adds little to the exercise of discretion which the court has to undertake generally under CPR 44.2, at least in advance of the effective date for the purposes of the Part 36 offer.
26. At the outset of his written submissions, Mr Holland had made two concessions. The first was that the claimant has always acknowledged that it would have to give credit for the sums due under the loan agreement. The second is that the claimant recognises that the defendants have successfully defended the claim and that they have succeeded in recovering a fraction of what they had claimed on the counterclaim. However, he points to the fact that they had counterclaimed for some £31 million in terms of interest and have recovered only some £1.3 million by way of interest, thereby failing in relation to some £29 million of their claim to interest. This is a case where there were separate and parallel elements of dishonesty. There was sustained criticism in the judgment of the lack of honesty and integrity on the part of both the second defendant and his wife. This is therefore said to be a clear case in which the court should make a different order than the usual order that costs follow the event.
27. Further and in any event, there are said to be many issues within the trial on which the defendants lost and the claimant won, and any costs order should reflect that fact. The court held that the second defendant and his wife, Mrs Pandher, had made a fraudulent misrepresentation in the course of their dealings leading up to the contract, and that they had then constructed an increasingly elaborate web of lies in order to avoid liability for their deceit, which conduct included the fabrication of a document. They persisted in that deceit up to and including the trial, and also in the evidence they both gave on oath to the court.
28. By contrast, Mr Holland emphasises, first, that there was nothing dishonest about the breach of contract claim. That claim failed because the court found on the expert

evidence that no loss had resulted from the breach of contract. Secondly, he emphasises that the defendants' entire factual case was dishonest. It was the claimant's case on reliance that was not established. Third, Mr Holland emphasise that very significant court time and costs were taken up by the dishonest defence advanced by the defendants and that the claimant should recover its costs of that from the defendants.

29. Mr Holland asked rhetorically: "What caused the costs to be incurred?"; and his response is: "The conduct of the defendants." He submits that, on every crucial factual detail, the defendants' case was false. He sets out the defendants' lies at paragraph 22 of his written skeleton. Sub-paragraph 22(1) asserts that Mr Pandher lied about what had occurred at the meeting on 9 February. If one reads paragraphs 78 to 81 of my reserved judgment, Mr Holland says that one will see that the lies of Mr Singh about that meeting were just as great as Mr Pandher's lies.
30. I acknowledge the force of the other points made at paragraph 22 of Mr Holland's skeleton. He emphasises that these were not small or incidental lies; the entirety of the defendants' factual case is said to have been dishonest. They won not because of the veracity of themselves, or of their witnesses, or the justice of their case but rather because Mr Singh was held to have lied about his reliance on the lease term representation and, in relation to the breach of contract claim, the court preferred the expert evidence of the defendants' expert, Ms Morris, to that of the claimant's expert, Mr Wolfenden.
31. Mr Holland stresses that, had the defendants not told these lies, the case would have been much shorter. He took me through paragraph 17 of the reamended defence and counterclaim, which had addressed the issue of reliance and inducement, and pointed out, correctly, that none of the pleaded defences under that head had been established as correct by the defendants.
32. Mr Holland relies upon the judgment of Briggs J in the *Bank of Tokyo* case as supporting the proposition that, where defendants who have been entirely successful in defending claims of fraudulent misrepresentation have knowingly advanced false claims during the trial, they should be disallowed the whole of their costs referable to the pursuit of their false case, and there should be deducted, in effect, by way of set-off from their costs, an amount referable to the claimant's costs incurred in proving the matters about the false

case. The defendants should further be deprived of the benefit of an indemnity, rather than a standard, basis of assessment because of the manifest injustice of awarding indemnity costs to a party who has conducted himself more reprehensibly than his opponent.

33. Mr Holland submits:

(1) that this is a case in which the defendants' conduct is so grave that their entire case can properly be described as amounting to an abuse of process;

(2) if it is not, then it is certainly one in which the court should adopt a punitive approach;

(3) that the court should adopt an issue-based approach to causation;
and

(4) that there were substantial parts of the claim and counterclaim on which the claimant was the successful party.

34. At paragraph 33 of his written post-judgment submissions, Mr Holland suggested an analysis of those parts of the proceedings on which the claimant and the defendants respectively had either succeeded or failed. Mr Clarke disputed that this was an accurate reflection of the breakdown of the time spent at trial on the various issues. I would accept Mr Clarke's criticism of this breakdown. In particular, it seems to me that the 15% attributed to the issue of liability for breach of contract is very much an overstatement, whereas the 15% of the time spent on the quantum of the contractual claim is very much an understatement. A day and a half of the seven days of evidence was taken up with expert evidence, in relation to which the defendants were the successful parties. Therefore, I would not accept the breakdown at paragraph 33 of Mr Holland's first set of written submissions.

35. In his supplemental submissions, Mr Holland persisted in his submissions that:

(1) the defendants' dishonest conduct, both before and after the issue of the proceedings, is such as to amount to an abuse of process such that the starting point that costs should follow the event should not apply;

(2) in the light of the defendants' dishonest conduct, the court should both, at least notionally, award the claimant the costs of proving the defendants' dishonesty, and also impose an additional costs penalty;

(3) in any event, it is said to be clear that disproving the defendants' dishonest claims took up a substantial amount of court time and that this should be reflected in the costs order; and

(4) in short, the defendants' dishonesty so infected the action that justice requires that they should receive no costs at all in successfully defending the claim.

36. Mr Holland argues for no order as to costs. He invites the court to note that:

(1) although the claim in fraudulent misrepresentation failed on reliance, nevertheless a fraudulent misrepresentation was held to have been made, and that a very substantial amount of time and costs both at and before the trial was taken up in exposing the defendants' dishonest attempts to evade a finding of dishonesty in this regard; and

(2) the claim in breach of contract succeeded on liability despite the various defences raised, including that of equitable rectification, which in turn involved the dishonest assertion that the parties had never intended the contract to contain the lease term representation at all.

37. Mr Holland accepts:

(1) that the Part 36 offer dated 27 January 2021 is a valid claimant's offer within CPR 36.17;

(2) that the defendants have beaten that offer in that the judgment on the counterclaim is more advantageous to the defendants than the proposals in the Part 36 offer; and

(3) that the regime in CPR 36.17 therefore applies after the effective date, although that in CPR 44.2 continues to apply prior to that date.

38. So far as the period after the effective date is concerned, the claimant relies on CPR 36.17 (4) and (5) and submits that it would be unjust in all the circumstances to impose any of the sanctions contained in that provision. He refers me to the general principles set out by Briggs J in the *Smith v Trafford Housing Trust* case, as accepted and applied by the Court of Appeal in their later decision in *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365; [2016] 1 WLR 3899.

39. I was taken to paragraph 13 in Briggs J's judgment and to paragraphs 37 to 38 of the judgment of Sir Stanley Burnton in the *Webb* case. There, it was emphasised that:

"In deciding what costs order to make under [CPR] 36.14, the court does not first exercise its discretion under Part 44. Its only discretion is that conferred by Part 36 itself."

In other words, CPR 36.17 is a self-contained code. It does not preclude the making of an issues-based or proportionate costs order; but a successful claimant should be deprived of all or part of their costs only if the court considers that it would be unjust for the successful party to be awarded all or that part of their costs. The decision falls to be made having regard to all the circumstances of the case; and, in exercising its discretion, the court is required to take into account the fact that the unsuccessful party could have avoided the costs of the trial if he had accepted the counter-party's Part 36 offer as it could and should have done. The court expressly adopted the summary of the principles by Briggs J at paragraph 13 of the *Smith v Trafford Housing Trust* case to which I previously referred.

40. Mr Holland submits that, despite the fact that the claim has not succeeded, and that the counterclaim has succeeded in part, it would be just for the defendants to have to bear their own costs, so there should be no order for costs up to the effective date, and existing costs orders, in so far as they remain unpaid in the claimant's favour (amounting to some £93,500) should remain in place. Although the test is a high one, Mr Holland submits that it would be unjust in all the circumstances to impose the prescribed sanctions on the claimant under CPR 36.17.
41. Mr Clarke submits that there is no proper basis for disallowing the defendants' costs to reflect their dishonesty without also reflecting the claimant's own dishonesty. He submits that to cancel each other out, as Mr Holland invites the court to do, would not reflect the proper outcome of the case and the defendants' overall success. He submits that the defendants' dishonesty should not lead to the disallowance of their entitlement to costs in the light of their successful Part 36 offer. Mr Holland acknowledges that he has a high hurdle to overcome and, according to Mr Clarke, he does not get anywhere near to crossing it.
42. Mr Clarke emphasises that the claimant did absolutely nothing constructive to seek to settle this case. A Part 36 offer was made by the defendants some six months before the trial date. That offer indicated the defendants' willingness to settle the claim and counterclaim on condition that the claimant paid the defendants the £800,000, representing the principal sum owed under the loan agreement. Instead of accepting that offer, the claimant put forward the offer it had previously made on 7 January 2021. That offer had been to accept £2.5 million from the defendants, and it took account of the counterclaim that the first defendant had against the claimant, amounting to £824,000. In other words, instead of accepting the defendants' offer, the claimant reiterated, in a letter of 28 June 2021, that the defendants would not succeed at trial and that the claimant would do better at trial than the Part 36 offer which had been made on 7 January 2021. It reiterated that its own Part 36 offer remained open for acceptance, and subject to the cost consequences arising from CPR 36.13.
43. Had the defendants' Part 36 offer been accepted six months before the trial, the parties would have avoided the massive costs incurred in the lead-up to, and during the course

of, the trial itself. There would have been no interim applications, including a voyage to the Court of Appeal, where the claimant succeeded and was awarded its costs.

44. Mr Clarke submits that there is absolutely no injustice in giving effect to the Part 36 consequences and the court should adopt the consequences prescribed by CPR 36.17, as an incentive to settlement rather than as a penalty for unreasonable conduct. At the base of his submissions, Mr Clarke advanced the proposition that the claimant's dishonest claim had been the father of the dishonest defence on the part of the defendants.
45. Those were the submissions. In my judgment, it is necessary, when applying the principles to which I have made reference, to step back and look at this litigation holistically. This was a claim for some £8 million, with a counterclaim which, by the time judgment came to be handed down, was in the order of some £31 million. The claim was dismissed; and the court is in the process of entering judgment on the counterclaim for some £2.175 million.
46. The core allegation on the claim was that the claimant had been induced to enter into the purchase by fraudulent misrepresentations on the part of the defendants. The court found that the misrepresentations had been made, and that they were fraudulent, but that there had been no inducement or reliance. The court found that the claimant had been totally unconcerned about the terms of the occupational leases of the ground floor of Number 65 The Broadway, Southall.
47. In the course of advancing his claim on behalf of the claimant, Mr Singh was found to have concocted false evidence about what had taken place at a meeting on 9 February. As against that, the court found that Mr Pandher and his wife, on behalf of the defendants, had colluded to fabricate false evidence as to the events of 12 February 2016. In particular, they had manufactured a false fax said to have been sent to their solicitors; and that they had done so deliberately, in order to bolster their false defence.
48. In the course of my judgment, I was highly critical of the three principal witnesses, Mr Singh for the claimant and Mr and Mrs Pandher for the defendants. I found that none of them had been reliable or credible witnesses. I found that none of them had come to court to tell the truth or to assist the court to establish the true facts. I was also highly

critical of the failure of both the claimant and the defendants to call their respective solicitors as witnesses, and of their respective failures in that regard to assist the court in achieving the overriding objective. I found that, in addition to the falsehoods already identified, Mr Pandher had lied about what he had agreed with the tenants under the occupational tenancies of the ground floor of Number 65 about agreeing to waive the automatic 10% rental increases under their leases; but I found that there had been no material representation in that regard.

49. I found the first defendant to have been in breach of contract; and I dismissed a claim for rectification of that contract advanced by the first defendant. However, I found that no resulting loss had occurred because of that breach of contract because I preferred the expert evidence of the defendants as to the true value of the commercial investment property in preference to the expert evidence advanced by the claimant.
50. On the counterclaim, I rejected the claim for rectification of the sale contract. I held that the loan agreement had never been validly rescinded by the claimant, but that the provision for default interest was unenforceable as a penalty.
51. It is necessary to stand back and assess the underlying nature and motivation of this litigation. I am satisfied that the claim was brought in order to avoid repayment of the £800,000 loan, and the outstanding month's interest instalment. Although the claim arose out of a fraudulent misrepresentation on the part of the defendants, at all times the claimant knew that the representation had had no effect whatsoever on his decision to purchase the property. The basis of the claim was fundamentally false.
52. The claim was met, in return, in part with lies. But I have no doubt that those lies were spawned by the prosecution by the claimant of a false claim, expressly in order to evade his liabilities under the loan agreement.
53. I emphasise that this is not a case where a claim was brought to expose a fraud on the part of the defendants. The claim advanced was a dishonest one, which spawned a dishonest defence, but the claim was not brought to vindicate the claimant's good name or to preserve its treasured reputation. This was a case entirely about money. What

caused the costs to be incurred in the first place was the institution of this claim in order to avoid the claimant's liabilities under the loan agreement.

54. Both counsel were agreed that this is not a case for any issues-based costs order. Both were agreed that, if there were to be any adjustment in the costs position at all, it should be by way of a proportionate, or percentage-based, costs order in accordance with CPR 44.2(6)(a) and CPR 44.2(7).
55. The successful parties are the defendants. It would be wholly wrong to ignore that success by making no order as to costs, as suggested by Mr Holland. That would be to penalise unduly one of two dishonest parties and to ignore the fact that one of those two dishonest parties has succeeded on a claim that was fundamentally rooted in the prosecution of a dishonest claim by the unsuccessful party.
56. If I look at the position solely under CPR 44.2, and ignore the Part 36 offer, then I would have ordered the claimant to pay a proportion of the defendants' costs. In fixing that proportion, I have to ensure that I not only disallow the defendants' costs of advancing a dishonest defence, but also that I compensate the claimant for its costs of establishing that dishonesty. I must also bear in mind the need to impose a costs sanction proportionate to the gravity of the defendants' misconduct but also proportionate to the dishonesty of the unsuccessful party which has led to this litigation.
57. I do not consider that it would be sufficient simply to disallow an indemnity basis of assessment of the costs in the defendants' favour and simply to order an assessment of the costs on the standard basis. That would not sufficiently reflect the consequences of the dishonest defence advanced by the defendants. In my view, there should be an order for costs in the defendants' favour, subject to adjustments to ensure that they recover no more costs than would have been incurred in advancing an entirely honest case, and adjusted to ensure that the claimant does not find itself bearing the costs of resisting those parts of the defence that were dishonest.
58. In arriving at that result, I have borne in mind the fact that, on issues of fact, the evidence was more or less equally divided in terms of time between the claimant and the defendants, with the claimant taking up more court time but, within the claimant's

evidence, there being included the evidence of the sample occupational tenants which I ended up accepting. I also have to bear in mind the day and a half or so of expert valuation evidence, and the time taken in addressing that evidence in closing submissions, on which the defendants succeeded. I also have to bear in mind that the first half day of the trial was taken up with two preliminary matters on which the defendants were ultimately successful. I must also bear in mind that there would appear to be outstanding costs orders in favour of the claimant which I should not interfere with but which would not have arisen had the Part 36 offer been accepted prior to those matters arising.

59. Doing the best I can, I have concluded that, ignoring the Part 36 offer, the appropriate order for costs would have been to require the claimant to pay 75% of the defendants' costs. I do not consider that the position is affected by the contractual provision as to costs. So far as the second defendant is concerned, there is no contractual entitlement to costs in any event.
60. I do not accept Mr Holland's submission that the costs provision is only capable of covering costs already expended or incurred by the date of the loan agreement. In my judgment, that is not the effect of the words of clause 6.1. I do not accept that all of the costs fall within the scope of clause 6.1. In particular, I do not consider that the costs of the unsuccessful claims to rectify the sale contract are capable of falling within the scope of the contractual provision.
61. But none of that matters because the contractual provision, in the circumstance of the present case, does not affect the position under CPR 44.2. That is for the reasons I have already given, that the dishonest defence advanced by the defendants is a matter which entitles the court to disregard the contractual provisions in the exercise of its discretion as to costs. Even if I were to have regard to the contractual provisions of clause 6.1 of the loan agreement, I still arrive at the conclusion, in the exercise of my discretion as to costs, that it is appropriate that the costs should be assessed on the standard basis, and that they should be limited to 75% of the defendants' costs.

62. I have borne in mind that, according to the costs budgets, the defendants' costs are in the order of £1.063 million whilst the claimant's costs are in the order of £1.3 million. I have taken that into account in arriving at the 25% discount.
63. That is the position that would have applied without the Part 36 offer. In the light of the Part 36 offer, it seems to me that the consequences specified in CPR 36.17(4) should apply in relation to the period after the effective date. For the reasons I have already given, I am wholly unpersuaded that it would be unjust, in all the circumstances of the case, to disapply those consequences. Indeed, I consider that it would be unjust not to apply those costs consequences.
64. The claimant could have protected its position by making its own *Calderbank* or Part 36 offer. It could, and should, have accepted the Part 36 offer that was made by the defendants. Instead, it persisted in what has proved to be a wholly unreasonable view as to its prospects of success, and as to its likely level of recovery. In those circumstances, and notwithstanding the dishonesty of the defendants (which was spawned, as I say, by the dishonesty of the claim itself) it would be unjust for me not to apply the consequences prescribed by CPR 36.17(4).
65. The outcome is that I will award the defendants their costs of 75% of the claim and counterclaim, to be assessed on the standard basis up to the effective date, and thereafter I will provide for the costs to be on the indemnity basis as to that 75%, with interest at 10.1% per annum. There will be the additional amount payable of £75,000. I will now hear submissions on the amount of the payment on account of costs and the date for payment.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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