Online Case 16
Group Seven Ltd and Another

v

Nasir and Others;
Equity Trading Systems Ltd

v

Notable Services LLP and Others

[2016] 2 Costs LO 303

Neutral Citation Number: [2016] EWHC 620 (Ch)
High Court of Justice, Chancery Division
21 March 2016

Before:
Morgan J

Headnote

In proceedings in which two actions had been case managed with a view to their being tried together with a trial estimate of 40 days, it was appropriate to make a costs management order under CPR 3.15 where the costs budgets had not been agreed and the litigation could not be conducted justly and at proportionate cost. The first claimant's costs budget sought £3,576,249 and the second claimant's £1,476,926 in respect of claims for €7.02m and €9.02m respectively making a maximum combined budget for the claimants of £5,053,176. Such a figure was a disproportionate sum in relation to the size of the claim. A maximum combined costs budget of £3.5m was a more reliable guide. For the first defendant, a Swiss bank which had brought Part 20 claims, the budget sought was £3,724,954. Such a figure

was unreasonably high. Accordingly, the parties would be required to review their budgets within 14 days so that the court could conduct a final review of them on the papers.

As regards specific items in the costs budgets, this was not a case where it was necessary to instruct solicitors in the City of London since it did not involve complicated matters and in particular anything sophisticated in the way of financial services or banking. It was doubtful whether it had been necessary for the Swiss bank to have instructed a City firm, but as a foreign bank, it was more understandable that it had done so. For these reasons, Central London rates (with an uplift) would be allowed save for the Swiss bank in respect of which rates for a City firm would be permitted by reference to the 2010 guideline rates but not any more than those rates. So far as counsels' fees were concerned, since there was one firm of solicitors acting for the claimants, only a single team of counsel was required and a single budget could be prepared for the claimants' future costs. The claimants would be permitted one leading counsel and one junior, and the Swiss bank one leader and one junior. So far as incurred costs were concerned, on material before it, the court could not confidently and accurately identify a reasonable and proportionate figure for the incurred costs and the approach in *CIP Properties (AIPT)* v *Galliford Try Infrastructure Ltd* [2015] 2 Costs LR 363 and *GSK Project Management Ltd* v *QPR Holdings Ltd* [2015] 4 Costs LR 729 would not be followed.

Cases Cited

Bilta (UK) Ltd v *Nazir (No. 2)* [2015] 2 WLR 1168
CIP Properties (AIPT) Ltd v *Galliford Try Infrastructure Ltd* [2015] 2 Costs LR 363; [2015] EWHC 481 (TCC)
GSK Project Management Ltd v *QPR Holdings Ltd* [2015] 4 Costs LR 729
Yeo v *Times Newspapers Ltd* [2015] 2 Costs LO 243; [2015] 1 WLR 3031

Judgment

MORGAN J:

Introduction

1. Pursuant to earlier directions, the two actions which are referred to in the heading to this judgment are being case managed together with a view to their being tried together at a trial in February 2017, with a time estimate of 40 days.

2. This judgment deals with the matters considered at a costs management conference in the two actions which took place on 2 March 2016. In advance of that conference, the following costs budgets were prepared:

(1) Group Seven Ltd and Rheingold Management Inc (which will be referred to together as "Group Seven") prepared a budget for the action in which they are the claimants;
(2) Equity Trading Systems Ltd ("ETS") prepared a budget for the action in which it is the claimant;
(3) Mr Nasir is a defendant in the action brought by Group Seven and he prepared a budget;
(4) three defendants (Notable Services LLP, who act as solicitors, and Mr Landman and Mr Meduri, who are members of the LLP) referred to as "the Notable Defendants", are sued in both actions and have prepared two budgets, one for each action;
(5) LLB Verwaltung (Switzerland) AG (to which I will refer as "the Swiss Bank") is a defendant in both actions and prepared a budget which it then split equally between the two actions;
(6) Mr Louanjli is a defendant in both actions and prepared a budget which he then split equally between the two actions.

The Case in Summary

3. Group Seven makes a claim against Mr Nasir and Mr Yi; ETS does not claim against these defendants. Group Seven alleges that Mr Nasir and Mr Yi were parties to a fraud practised on it in 2011. At that time, Group Seven parted with €100 million in favour of some of the alleged fraudsters. However, the dissipation of some €88 million euros was later prevented, leaving Group Seven with a net loss of €12 million euros. It has since made recoveries resulting and, I was told, has given credit for certain matters, resulting in a net loss of €9.2 million euros.

Group Seven has brought earlier proceedings against others who were involved in the alleged fraud and those proceedings resulted in a judgment in favour of Group Seven: see [2014] EWHC 2046 (Ch), upheld on appeal at [2015] EWCA Civ 631. I understand that Group Seven has not made any recoveries pursuant to that judgment. Others involved in the alleged fraud have been, or are, the subject of criminal proceedings.

4. Group Seven also makes a claim against the Notable Defendants. Group Seven alleges that its monies were received by some or all of the Notable Defendants so that they are liable for dishonest assistance in a breach of trust (by the company now known as ETS) and also for unconscionable receipt of trust monies belonging to Group Seven. ETS brings the same claims against the Notable Defendants but also claims in negligence against Notable Services LLP for breach of an admitted duty of care owed to ETS. The Notable Defendants plead a defence of *ex turpi causa* on the ground that ETS was used to defraud Group Seven.

5. Group Seven and ETS also claim against Mr Louanjli on the ground that he made false statements to facilitate the alleged fraud. Group Seven and ETS then claim against the Swiss Bank, the employer of Mr Louanjli, on the grounds that it is liable for the wrongdoing of its employee.

6. The connection between Group Seven and ETS is as follows. ETS was formerly known as Larn Ltd ("Larn"). In the course of the alleged fraud, Larn (via Notable Services LLP) received €100 million of Group Seven's money. Group Seven later sued Larn and entered into a Tomlin order under which Larn was to pay a sum of money to Group Seven. Larn did not comply with the Tomlin order and Group Seven obtained judgment against it. In due course, Larn was wound up and Group Seven is its principal creditor. As already explained, Larn (now known as ETS) makes essentially the same claims as does Group Seven against all defendants apart from Mr Nasir and Mr Yi. In addition, ETS has a claim in negligence against Notable Services LLP. In the two sets of proceedings, Group Seven and ETS have instructed the same solicitors, Mishcon de Reya LLP, although up until the present time, different individual solicitors have acted for these parties. This was principally due to an insistence by the Notable Defendants that documents which were provided by them to the liquidator of ETS, pursuant to s 235 of the Insolvency Act 1986, should not be made available to Group

Seven. By way of disclosure in the present proceedings, these documents can now be made available to Group Seven and the principal need for separate solicitors for Group Seven and ETS has been removed. On 6 October 2015, Mischon de Reya wrote to Caytons Law, solicitors for the Notable Defendants, stating that if the two actions were tried together (as they now will be) the costs of dealing with both actions would not be significantly greater than dealing with the Group Seven action alone. On 27 November 2015, Mishcon de Reya wrote to Pinsent Masons stating that the claims by Group Seven and by ETS were clearly aligned and that ETS was seeking to recover monies so that they could be passed back to Group Seven.

7. These various claims are being actively defended by Mr Nasir, the Notable Defendants, the Swiss Bank and Mr Louanjli. There are other claims against other defendants which are not being defended by those defendants.

8. The Swiss Bank has brought Part 20 Claims against Mr Nasir, the Notable Defendants and Mr Louanjli and I was told that further Part 20 Claims between defendants were contemplated.

9. The principal sum claimed by Group Seven is about €9.2 million which, at a rate of exchange of 1.30 euros to the pound, is approximately £7.08 million. The principal sum claimed by ETS is about €11.98 million which, at the same rate of exchange, is about £9.22 million.

The Budgeted Costs

10. The totals in the costs budgets are:

(1) Group Seven – £3,576,249.77;
(2) ETS – £1,476,925.95;
(3) Mr Nasir – £1,251,955.43;
(4) The Notable Defendants – £1,779,566.85 + £116,630.87 = £1,896,197.72;
(5) The Swiss Bank – (together) £3,724,954.56;
(6) Mr Louanjli – (together) £1,399,438.

11. The total of the sums in the costs budgets is £13,325,721.

The Relevant Provisions in the CPR

12. The relevant provisions in the CPR dealing with costs management

and costs budgeting are rules 3.12 to 3.18 and Practice Direction 3E. The most material provisions for present purposes are as follows:

"3.15. – **Costs management orders**

(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

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

(a) record the extent to which the budgets are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

3.17. – **Court to have regard to budgets and to take account of costs**

(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.

(2) Paragraph (1) applies whether or not the court has made a costs management order.

3.18. – **Assessing costs on the standard basis where a costs management order has been made**

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

(Attention is drawn to rule 44.3(2)(a) and rule 44.3(5), which concern proportionality of costs.)"

13. The most relevant part of Practice Direction 3E is as follows:

"**C. Costs management orders**

7.1 Where costs budgets are filed and exchanged, the court will generally make a costs management order under rule 3.15. If the court makes a costs management order under rule 3.15, the following paragraphs shall apply.

7.2 Save in exceptional circumstances –

(a) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved or agreed budget; and

(b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved or agreed budget.

7.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

7.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

7.5 The court may set a timetable or give other directions for future reviews of budgets.

7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party.

The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

7.7 After its budget has been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with re-cast figures, annexed to the order approving it or recording its agreement.

7.8 …

7.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets."

14. It is also relevant to refer to CPR rules 44.3 and 44.4.

"44.3 – **Basis of assessment**

(1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis;

but the court will not on either basis allow costs which have been unreasonably incurred or are unreasonable in amount. …

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where –

(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or

(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,

the costs will be assessed on the standard basis.

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

44.4. – **Factors to be taken into account in deciding the amount of costs**

(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular, the court will give effect to any orders which have already been made.

(3) The court will also have regard to –

(a) the conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget."

Discussion

15. All the active parties have prepared costs budgets. No part of those budgets has been agreed. Under rule 3.15, I am obliged to make a costs management order unless I am satisfied that this litigation can be conducted justly and at proportionate cost in accordance with the overriding objective, without such an order being made. I am not so satisfied, so it follows that I must make a costs management order. The principal consequences of such an order are stated in rules 3.17 and 3.18.

16. Under rule 3.15, I am required to approve the parties' budgets or parts thereof and for that purpose I may revise those budgets or parts. As explained in Practice Direction 3E, the court's approval should relate only to the total figures for each phase of the proceedings. I am not required to undertake a detailed assessment although I may have regard to the constituent elements of each phase. I am required to consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

17. The budget approval exercise is confined to future costs and I am not required to approve (with or without revisions) costs incurred before the date of the budget. However, I may comment on costs which have been incurred and may take those costs into account when the considering the reasonableness and proportionality of all subsequent costs.

18. I have considered what other judges have done in other cases of costs management, in particular, in *Yeo* v *Times Newspapers Ltd (No. 2) Practice Note* [2015] 1 WLR 3031 ("*Yeo*"), *CIP Properties (AIPT) Ltd* v *Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC)

("*CIP*") and *GSK Project Management Ltd* v *QPR Holdings Ltd* [2015] 4 Costs LR 729 ("*GSK*").

19. On the way to my overall conclusions, I need to consider a number of particular matters which were raised in the course of argument. These are:

(1) the proportionality of the sums in the budgets;
(2) whether there should be a single budget for Group Seven and ETS;
(3) the solicitors' hourly rates
(4) counsel's fees;
(5) contingencies;
(6) various other matters;
(7) what should be done in relation to incurred costs?

Proportionality

20. I must consider whether the budgeted costs are reasonable and proportionate. Proportionality is a central concept in the CPR: see, for example, the references to it in the definition of the Overriding Objective in rule 1.1. When it comes to the assessment of costs, proportionality can result in the non-recovery of costs even where they are otherwise reasonable costs and even where they are necessary costs: see rule 44.3(2).

21. The CPR contain some guidance as to how a court should go about assessing the proportionality of costs. The guidance is given in rules 44.3(5) and 44.4(3). I will therefore comment on the application of that guidance in this case.

22. Rule 44.3(5)(a) refers to the relationship of the amount of the costs to the sums in issue. I have already referred to the amount of the budgeted costs and to the size of the sums in issue. The rules do not prescribe any particular mathematical relationship between the costs and the sums in issue. It would obviously be inappropriate to do so.

23. Similarly, the decided cases do not give much direct help when considering this relationship. In *CIP*, Coulson J referred to the sums in issue as £18 million although he thought that a more reliable figure for the sums in issue was £8 million. He stated that the claimants' budgeted costs of around £9 million were plainly disproportionate and that the defendant's figure of £4.4 million was at the higher end of proportionality. In *GSK*, Stuart-Smith J considered a claim for £806,000 where the claimant's costs budget was about £825,000. He

thought that the case would need to be wholly exceptional to justify a costs budget of that amount and the case before him was not wholly exceptional. He further stated that good reason would have to be shown to justify more than about half of £825,000. He added that the costs budget figure was so disproportionate that it showed that something had clearly gone wrong.

24. In so far as these cases provide any assistance in the present case, they might suggest that a maximum combined costs budget for Group Seven and ETS should be of the order of £3.5 million, which is about half of the claim made by Group Seven. I appreciate that the ETS claim is a little higher than the Group Seven claim but, in substance, the ETS claim is being pursued to allow it to recover monies which are ultimately due to Group Seven so I regard the amount of the Group Seven as a more reliable guide to what is involved. The aggregate of the budgeted costs for Group Seven and ETS is £5,053,176. That seems to me to a disproportionate sum in relation to a claim for £7.08 million. As against that, counsel for Group Seven pointed out that the budgeted figure includes just over £700,000 for contingencies but even if one removed the entirety of the contingency figure, the result still appears to me to be disproportionate to the sums claimed.

25. Rule 44.3(5)(c) refers to the relationship of the costs to the complexity of the litigation. Counsel for Group Seven and counsel for ETS wanted me to regard this case as particularly complex. I do not see it that way. The dispute is principally one of fact. It was suggested that the fraud was a sophisticated fraud. That does not seem to be the case. Further, Group Seven has already had a 30 day trial in their earlier proceedings and must by now have a very thorough understanding of the factual case it wishes to present. It is not starting from scratch in seeking to uncover wrongdoing. Counsel for ETS stressed that the defence of *ex turpi causa* would take the court into a difficult area which, he suggested, had not been resolved by the decision of the Supreme Court in *Bilta (UK) Ltd* v *Nazir (No. 2)* [2015] 2 WLR 1168. I was not addressed in detail on the possible application of this defence and so I ought not to comment in any detail on that matter. Counsel for ETS then suggested that this would be an appropriate case for a leapfrog appeal to the Supreme Court on the *ex turpi causa* defence. If he were right about that, that would tend to emphasise that the most important job of the trial judge would be to provide detailed findings of fact to enable an appellate court to

determine any matters of principle that might arise. There again, the case would be essentially a factual dispute which is not particularly complex. I am not expected at this stage to manage the costs of any future appeal.

26. Rule 44.3(5)(d) refers to the relationship of the costs to any additional work generated by the paying party. That rule applies where an order for costs has been made and one knows who the paying party is. At the costs budget stage, there is not yet an order that anyone pay the budgeted costs but I consider that the question of proportionality should be judged on the hypothetical basis that the party who has prepared the budget turns out to be the receiving party. Counsel for Group Seven submitted that it is to be expected that each defendant in this case will take every conceivable point and will raise every conceivable objection to Group Seven's claim. He also draws attention to the procedural difficulties and the delay which has already been encountered up to the present time, attributable to a lack of cooperation on the part of some of the defendants. I can see the force of this submission. However, I am not asked to approve the costs which Group Seven has already incurred and, as to future costs, I would be prepared to allow Group Seven and ETS sums for contingencies to reflect the possibility that there will be future procedural difficulties which might be attributable to a lack of cooperation from some of the defendants. I will refer to the question of contingencies again later in this judgment.

27. Rule 44.3(5)(e) refers to the relationship of the costs to wider factors such as reputation or public importance. I do not think that any party can say that the case is one of public importance. Counsel for Group Seven suggested that the claim affected its reputation. I am not persuaded of that. As regards the solicitors, Notable Services LLP, and its members, Mr Landman and Mr Meduri, I accept that their reputations could be damaged, alternatively vindicated, by the outcome. The same could be said about Mr Louanjli. As to the Swiss Bank, it has ceased trading and is been sued on the basis that it is vicariously liable for the wrongdoing of Mr Louanjli, who is now a former employee. I am prepared to accept that the parent of the Swiss Bank would not wish to have an adverse finding against the Swiss Bank. However, I would not be minded to give much weight to the suggested reputational damage to the parent company when

considering the question of the proportionality of the costs of the Swiss Bank.

28. Rule 44.4(3) refers to a number of considerations when assessing the reasonableness and proportionality of costs. Some of those matters are already referred to in rule 44.3(5) and I have already discussed them. Rule 44.4(3) refers to the question of the skill, effort, specialised knowledge and responsibility involved. I will bear in mind those matters when assessing reasonableness and proportionality. Most of these matters will be reflected in the amount of time expected to be spent by various fee earners and by the level of the relevant fee earner. I comment that this is a case where the lawyers will have to give thorough consideration to the detailed facts but I do not regard the case as one which concerns sophisticated or complex transactions or even difficult areas of law.

29. There was some discussion as to whether the fact that Group Seven and ETS are alleging dishonesty and fraud should affect the question of proportionality. I consider that that fact is already reflected in the matters which have been discussed and is not a free standing consideration. In some cases of fraud or alleged fraud, at the end of the case, a court may be influenced by its finding of fraud, or of the absence of the alleged fraud, to award costs on an indemnity basis. If that were ordered, then the recoverable costs would not be restricted to proportionate costs. However, at the costs budgeting stage, the court is required to consider the question of the proportionality of the costs, even in a case involving an allegation of fraud.

30. When considering the question of proportionality, I necessarily have to look at the incurred costs as well as the future costs; this is clear from para 7.4 of Practice Direction 3E.

31. I have already expressed the view that the combined costs of Group Seven and ETS are disproportionate.

32. I also think that the costs of the Swiss Bank look very high. The Swiss Bank appears to have spent an extraordinary amount on the process of voluntary disclosure. I will consider that matter further when I comment on the costs already incurred by it. I will also consider in due course the solicitors' hourly rates and the question of the fees for counsel for the Swiss Bank. As will be seen, I conclude that the budgeted costs for the Swiss Bank are unreasonably high and this has contributed to those costs being disproportionate. I bear in mind that although the Swiss Bank has made Part 20 claims against the

other active defendants, it will be Group Seven and ETS which will carry the principal burden of establishing liability on the part of those other defendants and the need for the Swiss Bank separately to establish wrongdoing by those other defendants will be limited. Apart from those matters, the issues with which the Swiss Bank is directly involved are more limited.

33. As regards the other defendants, it is less easy to express the view that their costs are disproportionate.

34. There was some discussion as to whether I should consider whether the aggregate of all the costs, some £13.3 million, was disproportionate. I do not think that is the right question. I recognise that there are circumstances in which one side might end up bearing some £13.3 million of costs. For example, if Group Seven and ETS lose against every defendant and are ordered to pay all of the defendants' costs and bear their own costs, then they will be some £13.3 million out of pocket, on these budgeted figures. It is less likely, but not impossible, depending on contribution and indemnity orders between defendants, for one defendant to end up £13.3 million out of pocket on costs. However, what is principally required in assessing a costs budget is to consider the proportionality of the amount of the budget so that the court feels that it would be appropriate to award the budgeted sum to the receiving party and require it to be paid by the paying party.

A Single Budget for Group Seven and ETS?

35. I have already described the relationship between the claims made by Group Seven and by ETS. Some of the defendants submitted that I should simply refuse to approve two separate budgets for these two claimants and that I should require them together to submit a new single budget.

36. As to the costs already incurred by Group Seven and ETS, they have both set out those costs on their Precedent Hs. In so far as I wish to comment on those matters, I can do so without requiring the provision of a new single Precedent H which simply adds together the figures for incurred costs. As to future costs, I need to consider whether I can approve those costs, whether I take them together or separately.

37. For the future, now that the problem of disclosure of the s 235 documents has been resolved, the interests of Group Seven and ETS

are aligned, as they accept. For the future, they will use one firm of solicitors and the allocation of work within that firm should not depend on whether there are two clients with two claims (which claims are aligned) or a single client. The position of counsel is more troublesome. Group Seven intends to instruct leading and junior counsel who were both involved in the previous proceedings. ETS intends to instruct a different leading counsel. The real differences between the Group Seven Claim and the ETS claim are that Group Seven claims against Mr Nasir and Mr Yi, whereas ETS does not, and ETS adds a claim in negligence against Notable Services LLP to the claims of Group Seven and ETS against the Notable Defendants for various acts of wrongdoing. The first of these differences is not said to justify ETS being separately represented. I do not see that the second difference justifies separate representation. The common claim against the Notable Defendants involves allegations of serious wrongdoing and is going to require the court to examine the factual position as to their involvement. The fact that Notable Services LLP owed a duty of care to ETS, but not to Group Seven, ought not to complicate very much, if at all, the examination of the factual position. In so far as the court will have to adjudicate on the defence of *ex turpi causa* raised in response to the negligence claim, I doubt if that defence will add much to the factual examination required and may not add much complication on the law, particularly if counsel for ETS is right that the case will have to be considered by an appellate court on the basis of the findings of fact at trial.

38. Group Seven and ETS have sought to divide up the work involved by leaving counsel for ETS to conduct the case, not just the case in negligence, against the Notable Defendants. On reflection, I do not consider that is justified as a reasonable and proportionate approach. The entire case of Group Seven and ETS against all defendants is capable of being handled by one QC and one senior junior. Of course, the amount of preparation will reflect the fact that that QC and junior are responsible for dealing with the entire case against all the defendants.

39. This conclusion does not itself determine whether Group Seven and ETS should prepare a single budget. However, as the budget (or budgets) will relate to the work of one firm of solicitors and a single team of counsel (a QC and a junior) I would expect that the budget for Group Seven and ETS for the future could take the form of a single

budget. However, if those preparing the budget (or budgets) thought there would be greater certainty produced by preparing separate budgets, I would not regard that as wrong in principle.

Solicitors' Hourly Rates

40. The costs budgets use various hourly rates for the solicitors retained by the various parties.

41. I was referred to the guideline hourly rates to be used on a summary assessment of costs, as printed in the White Book at 48GP.53. The 2010 rates for solicitors in the City of London for Grades A, B, C and D, respectively, are £409, £296, £226 and £138. The solicitors for the Notable Defendants (Caytons Law) and for the Swiss Bank (Pinsent Masons) are in the City of London. The corresponding rates for Central London are £317, £242, £196 and £126. The solicitors for Group Seven and ETS (Mishcon de Reya) and for Mr Nasir (Portners) are in Central London. The corresponding rates for Outer London are £267, £229, £165 and £121. The solicitors for Mr Louanjli (FPG) are in Outer London.

42. Various submissions were made about the use of these guideline rates for costs budgeting in this case. It was said that the guidelines were for summary assessment and not for an action that resulted in a long trial. It was said that the guideline rates dated from 2010 and were out of date. It was said that the guidelines were only for the purpose of guidance and were not binding on a court. It was said that the rates for a Grade A fee earner could and should be increased to reflect the substance and complexity of the case. It was said by Group Seven and ETS that they should be allowed the rates for the City of London and, indeed, much more than those rates.

43. The rates put forward in the various budgets were:

(1) Group Seven: A, C and D: £425, £285–£250 and £180;
(2) ETS: A, C and D: £550–£575, £275 and £125–£265;
(3) Mr Nasir: A, C and D: £350–£375, £250–£275 and £150–£175;
(4) Notable Defendants: A, C and D: £200–£255, £175–185 and £105–£125;
(5) Swiss Bank: A, C and D: £450–£575, £300–£365 and £100–£200;
(6) Mr Louanjli: A, B, C and D: £330, £229, £165 and £121.

44. In assessing the various submissions made on this part of the case, I consider that this case is not one where it is necessary for a party to

instruct solicitors in the City of London. The case does not involve complicated matters and in particular does not involve anything sophisticated in the way of financial services or banking, even though one of the defendants is a bank. I do not think that it is necessary for Group Seven and ETS to instruct a City firm and, indeed, they have not done so. I doubt if it was necessary for the Swiss Bank to have instructed a City firm but, as a foreign bank, it is more understandable that it has done so. I have decided that I should increase the Central London rates for those parties who have instructed Central London solicitors and I should allow the Swiss Bank the rates for a City firm by reference to the 2010 Guideline rates but not any more than those rates.

45. I will approve budgets which contain the following maximum hourly rates:

(1) Group Seven and ETS: A, C and D: £365, £210 and £132;
(2) Mr Nasir: A, C and D: £365, £210 and £132;
(3) Notable Defendants: A, C and D: £255, £185 and £125;
(4) Swiss Bank: A, B, C and D: £409, £296, £226 and £138;
(5) Mr Louanjli: A, B, C and D: £330 (Grade A uplifted to reflect importance of case to client notwithstanding use of solicitors in Outer London), £229, £165 and £121.

Counsel's Fees

46. The various budgets show disbursements for counsel for trial preparation and for the trial itself. It is not always easy to work out what brief fee is being charged and the amount of the refresher. However, I can approve the figures in the budgets of the following three parties for the disbursements for counsel for trial preparation and for the trial itself: Mr Nasir, the Notable Defendants and Mr Louanjli.

47. The fees for counsel for trial preparation and for the trial in Group Seven's budget are £793,100 (QC) and £468,650 (junior). I was told that these fees included brief fees of £567,500 (QC) and £335,400 (junior).

48. The fee for counsel for trial preparation and for the trial in ETS's budget is £345,000 (QC without a junior). I was told that this fee included a brief fee of £250,000.

49. The fees for counsel for trial preparation and for the trial in the Swiss Bank's budget are £487,000 (QC) and £319,000 (junior).

50. The fees for counsel for trial preparation and for the trial in the budgets for Group Seven, ETS and the Swiss Bank seem to me to be excessive. I have therefore tried to build up for myself the ingredients of what would be reasonable fees for trial preparation and for the trial for these parties. I have reached the following conclusions:

(1) the brief fees for counsel for Group Seven and ETS should include 30 days of preparation; this period will suffice because of the familiarity of those counsel with the basic facts and documents in the case by reason of their lengthy involvement in the previous proceedings; I consider this period will be appropriate even though the claims and the defendants in the present proceedings are different from those in the previous proceedings;
(2) the brief fees for counsel for the Swiss Bank should include 20 days of preparation; this period will suffice by reason of the reduced extent of the matters with which the Swiss Bank is directly involved; although the Swiss Bank has made Part 20 claims against the other active defendants, it will be Group Seven and ETS which will carry the principal burden of establishing liability on the part of those other defendants and the need for the Swiss Bank separately to establish wrongdoing by those other defendants will be limited;
(3) all of the brief fees should provide for the usual elements which make up a brief fee, including the effect of booking out a large amount of time in counsel's diary;
(4) in general, counsel should be allowed 36 days of refreshers to reflect the current trial estimate of 40 days, less three days for judicial pre-reading and excluding the first day of the trial, which is included in the brief fee; the exception to this should be leading counsel for the Swiss Bank; I do not consider that it is necessary for leading counsel for the Swiss Bank to be present throughout the trial in addition to junior counsel attending throughout the trial; refreshers for 25 days will be ample for such days as leading counsel needs to attend as well as the time taken to read the transcript on days when he is absent from the trial;
(5) there should be different rates for Group Seven and ETS, as

compared with the Swiss Bank, to reflect the differences in the extent of the issues with which those parties are directly involved.

51. I consider that reasonable fees for counsel for trial preparation and for the trial should be calculated as follows:

(1) Group Seven and ETS (together) leading counsel: brief fee of £200,000 plus refreshers of £5,500 per day for 36 days, making a total of £398,000;
(2) Group Seven and ETS (together) junior counsel: brief fee of £100,000 plus refreshers of £2,750 per day for 36 days, making a total of £199,000;
(3) Swiss Bank leading counsel: brief fee of £125,000 plus refreshers of £5,000 per day for 25 days, making a total of £250,000;
(4) Swiss Bank junior counsel: brief fee of £65,000 plus refreshers of £2,500 per day for 36 days, making a total of £155,000.

52. Counsel for Group Seven, ETS and the Swiss Bank submitted that their budgeted figures for counsel for trial preparation and for the trial were reasonable as they reflected market forces. They suggested that their clerks had been able, or would be able, to negotiate fees at the level of the budgeted fees and that the clients were prepared to agree them. It was said that it was not unreasonable to pay the market rate negotiated in this way. Some of the other parties submitted the reverse and the Notable Defendants drew attention to the fees for counsel which they had negotiated which were significantly below the fees budgeted for by Group Seven, ETS and the Swiss Bank.

53. I have already held that it is not reasonable and proportionate for Group Seven and ETS between them to retain two leading counsel and a junior counsel. Further, I am not persuaded that the budgeted fees for Group Seven, ETS or the Swiss Bank are reasonable; they are so far above what I would arrive at for reasonable fees considering the ingredients which should be used to build up those fees.

54. But even if the fees contended for by Group Seven for one leading counsel and one junior counsel and the fees contended for by the Swiss Bank for its counsel were reasonable on the grounds that they represented market rates, it seems to me that the sums being claimed are a major reason why these parties' budgeted costs give rise to sums which are disproportionate, having regard to the matters discussed earlier. As already explained, even if I were persuaded that

the fees claimed for counsel were reasonable, they should not be included in the budget at that level when they contribute to the overall result that the budgeted sums for Group Seven, ETS and the Swiss Bank are disproportionately high.

55. For the Pre-Trial Review, I will approve a fee for each counsel which is a refresher plus 50%.

56. In so far as the budgets use hourly rates for counsel, I will approve maximum sums of £500 and £275 for leading and junior counsel respectively as reasonable and proportionate fees.

Contingencies

57. Some of the costs budgets include figures for contingencies.

(1) Group Seven: £426,661.50;
(2) ETS: £273,414.76;
(3) Mr Nasir: £76,600;
(4) The Notable Defendants: (for both actions) £117,419.90; and
(5) Mr Louanjli: (for both actions) £44,595.

58. The provision for contingencies did not receive much attention at the hearing. I was referred to the discussion as to contingencies in *Yeo* but there was no attempt to apply the detailed reasoning in that case to the figures for contingencies in this case. It may be that if the above comments as to rates were applied to the contingencies for Mr Nasir, the Notable Defendants and Mr Louanjli, the figures could be agreed. I am less clear about the position in relation to Group Seven and ETS. Together, their figures for contingencies amount to £700,076.26. In the course of a discussion as to whether the total costs for Group Seven and ETS were disproportionate, counsel for Group Seven seemed to suggest that the figures for contingencies should be removed in order to produce a lower figure which, he suggested, would be easier to defend in respect of proportionality. Further, I could not see in the Group Seven budget a breakdown of the figure of £426,661.50 which Group Seven appeared to accept was the contingency figure it was contending for.

59. I think that the parties should look at the contingency figures again in the light of these comments. As I have indicated, it may be the figures for Mr Nasir, the Notable Defendants and Mr Louanjli could be agreed and a further review would enable Group Seven and ETS to decide exactly what they do want to claim in relation to contingencies.

I add that I think it likely that Group Seven and ETS will incur costs on various procedural matters which are not already covered elsewhere in their budgets.

Other Matters

60. The parties' solicitors have exchanged detailed correspondence commenting on a large number of matters arising in the various costs budgets. At the hearing some of these matters were raised and considered. The arguments put forward were difficult to assess as they largely consisted of assertion and counter-assertion. I remind myself that I am required by para 7.3 of Practice Direction 3E to consider whether the budgeted costs fall within the range of reasonable and proportionate costs and, conversely, I am not required to attempt to conduct a detailed assessment in advance. As I have now dealt with the major points of contention, I consider that it is not necessary to go further into the detailed arguments about individual items even if I felt that I had the material which would allow me to determine in advance a likely reasonable and proportionate fee. I consider that if the parties revise their budgets as to future expenditure in accordance with this judgment, I will then be able to make a final assessment as to whether the revised budgets fall within the range of reasonable and proportionate costs.

Incurred Costs

61. I have commented earlier on various matters which the costs judge might consider relevant when carrying out a detailed assessment of the incurred costs. Those comments dealt with the hourly rates for solicitors and counsel and my comments on proportionality. There was considerable argument about the costs incurred by the Swiss Bank in relation to disclosure. I found it difficult to assess the submissions on this point. As before, they largely consisted of assertion and counter assertion. I confess that I am very sceptical indeed about the case being put forward by the Swiss Bank. The Bank has involved a number of levels and types of lawyer and seems to have gone about the exercise in a very time consuming and possibly not very productive way. However, I recognise that my scepticism might not be well founded and it will ultimately be for the costs judge to arrive at a reasonable and proportionate cost for this work if it should come about that the Swiss Bank is the receiving party in relation to its costs for this work.

In those circumstances, I do not wish to make any further comments on the costs which have been incurred by it on disclosure.

62. I note the approach taken in *CIP* and in *GSK* in relation to incurred costs, which the judges in those cases considered to be disproportionate, and the orders made to reflect that view. In those cases, the judges felt able to identify a figure for incurred costs which they considered would be reasonable and proportionate and then to direct that if a costs judge at a future date allowed a higher figure in relation to the incurred costs, then the difference between the figure identified as reasonable and proportionate at the budget stage and the costs judge's later assessment should be deducted from some other budget figure for future costs.

63. I do not consider it is appropriate in this case to make similar orders to the orders made in those cases. On the material before me, I do not feel that I could confidently and accurately identify a reasonable and proportionate figure for incurred costs nor do I feel able to say that if a costs judge later allowed a higher figure that it would necessarily be appropriate to deduct the difference between the budgeted figure and the costs judge's higher figure from some other figure for future costs which I am otherwise prepared to approve as reasonable and proportionate.

The Next Steps

64. The parties should review their budgets in so far as they provide for future costs and reflect in those budgets the comments in this judgment, in particular as to solicitors' hourly rates, counsel's fees and contingencies. They should then submit their revised budgets (within 14 days) so that I can conduct a final review of them. That further review will allow me to consider whether the resulting costs can be considered to fall within the range of reasonable and proportionate costs as required by para 7.3 of Practice Direction 3E, particularly in the light of my earlier comments on proportionality. I point out that CPR rule 3.16 states that where practicable, costs management conferences should be conducted by telephone or in writing.

Jeffrey Chapman QC and *Simon Atrill* (instructed by Mishcon de Reya LLP) appeared for Group Seven Ltd and Rheingold Management Inc.

Matthew Collings QC (instructed by Mishcon de Reya LLP) appeared for Equity Trading Systems Ltd.

Sebastian Clegg (instructed by Portner Law Ltd) appeared for Mr Nasir.

Francis Bacon (instructed by Caytons Law) appeared for Notable Services LLP, Mr Landman and Mr Meduri.

Peter De Verneuil Smith (instructed by Pinsent Masons LLP) appeared for the Swiss Bank.

Olivia Chaffin-Laird (instructed by FPG solicitors) appeared for Mr Louanjli.