

Neutral Citation Number [2021] EWHC 3515 (Comm)

IN THE HIGH COURT OF JUSTICE

Case No. CC-2019-MAN-000043

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (QBD)

CAPPED COSTS LIST

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

Date: 22 December 2021

Before :

HIS HONOUR JUDGE PEARCE SITTING AS A JUDGE OF THE HIGH COURT

Between :

MR ALLAN HODGSON

Claimant

- and -

CREATION CONSUMER FINANCE LIMITED

Defendant

MARK HARPER QC (instructed by SMITH JONES) for the Claimant

TOBY RILEY SMITH QC AND LIA MOSES (instructed by EVERSHEDES SUTHERLAND INTERNATIONAL plc) for the Defendant

Hearing 25th and 26th May 2021.

JUDGMENT

His Honour Judge Pearce :

This judgment was handed down in private at 10am on 22 December 2021. I direct that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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BACKGROUND

1. In this claim, the Claimant sought relief under sections 75 and/or 56 of the Consumer Credit Act 1974 for the alleged misrepresentation of a supplier in selling solar panels to the Claimant. The alleged representation related to the performance of the panels. The Defendant funded the purchase by a debtor-creditor-supplier agreement within the meaning of section 12 of the 1974 Act and hence had a statutory liability for losses caused by any misrepresentation by the supplier.
2. By judgment handed down on 29 July 2021, I gave judgment for the Claimant in the sum of £3,160.50 inclusive of interest. For the reasons identified by the Defendant in its letter of 1 October 2021, I agree that interest was wrongly calculated in that it included both past and future loss and that the corrected figure is £2,850.12.
3. Since the claim proceeded under the Capped Costs List Pilot Scheme of PD51W, the Claimant's costs are:
 - 3.1 To be dealt with by way of summary assessment at the end of the case;
 - 3.2 Subject to the caps contained in the table within PD51W;
 - 3.3 Subject to an overall cap of £80,000 plus VAT, court fees, costs relating to enforcement and wasted costs.
4. The parties agreed that I should deal with this issue without a hearing, having received from them:
 - 4.1 A statement of the Claimant's costs;
 - 4.2 The Defendant's submission in respect of those costs;
 - 4.3 The Claimant's reply to those submissions.I also have available the trial bundle and the court file.
5. A table at the end of this judgment sets out the amounts contended for by each party, the cap contained within PD51W and the sum as assessed for each phase. In my assessment of the sum, I have not distinguished between time spent by solicitors in working on documents and time spent in assessments. Whilst that breakdown is useful in the costs statement, it must be borne in mind that this is a summary assessment.
6. In addition to the capped costs, certain other amounts are allowable under paragraph 3.8 of PD51W. These include Court Fees. In this case, three fees are claimed: an issue fee of £1,000 in the Particulars of Claim phase; a court fee of £100 in the witness statement phase; and a court listing fee of £1,090 in the trial phase. The first and third of these are not disputed by the

Defendant. The second is not dealt with in the Defendant's submissions. In any event, they are figures that are allowable in excess of the cap and I have added them in to the figures in the "Cap" column in the Table.

7. The cap does not encompass VAT (see paragraph 3.9 of PD51W). I have included it in so far as it is chargeable.

OVERVIEW

8. The first matter to bear in mind is that this assessment of costs is a summary assessment. Accordingly, the Guide to the Summary Assessment of Costs is the appropriate starting point.
9. The test for the recoverability of damages under the Capped Costs List Pilot scheme remains that contained in CPR44.3. The general presumption of CPR44.2(2)(a) applies and therefore the costs are to be assessed on the standard basis. Accordingly, the court will only allow costs which are reasonably incurred, reasonable in amount and proportionate to the matters in issue, any doubt as to which is to be resolved in favour of the paying party, here the Defendant. It should be noted that the figures referred to in the Table to the cap are exactly that – a cap that applies to the costs for that phase. They are not a target or an indication of what is reasonable.
10. In determining the issue of proportionality, the court must have regard to whether the costs incurred bear a reasonable relationship to:
 - 10.1 The sums in issue in the proceedings;
 - 10.2 The value of any non-monetary relief in issue in the proceedings;
 - 10.3 The complexity of the litigation;
 - 10.4 Any additional work generated by the conduct of the paying party;
 - 10.5 Any wider factors involved in the proceedings, such as reputation or public importance;
 - 10.6 Any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.

The court will also have regard to the circumstances listed in CPR44.4.

11. This claim was issued in the Circuit Commercial Court because the litigation involves novel points which are commercial in nature. The Defendant applied to strike the claim out on the ground that it ought to have been started on the County Court. In a witness statement in opposition to that application, the Claimant's solicitor, Mr Paul Smith, stated that his firm at that time was representing more than 400 people with similar potential claims and that it was intended to treat this claim as a test claim "*wherein the High Court could provide guidance as to the matters raised in the Defence, the methodology to establish a misrepresentation and*

fundamentally ADR which has taken on a greater importance as a result of the pandemic.” As Mr Berragan, then counsel for the Claimant, said in his skeleton argument for that hearing, if ADR was unsuccessful, *“it is envisaged that the Court will determine the claim and in so doing, provide guidance in respect of the appropriate procedure, the correct approach to the issues of misrepresentation and to the assessment of damages.”* The application to strike out was unsuccessful and hence the claim continued in the High Court, albeit within the ambit of the Capped Costs List Pilot Scheme.

12. I am aware that many people have alleged that representations were made to them similar to the Claimant in this case. However, it is not apparent to me how far the judgment in this case has resolved issues as to the liability. The nature of any representations is likely to be fact specific. Since I tried only one case, it was not possible to perceive any pattern of what sales staff may have said to householders and I would hesitate to conclude that my decision has a broader significance for litigation generally in this respect.
13. However, issues as to the measure of performance of the solar panels and the calculation of future losses certainly involve broader issues of principle. It is necessary to consider the probable future benefit to the householder from the operation of the solar panels in order to assess the loss (if any) that the householder suffers through having incurred the expense of the panels. As is noted in my judgment, in assessing the court is concerned with a number of future contingencies. There was no authority on the nature or assessment of such contingencies in this context and to this extent, the court was asked to provide guidance that was likely to assist in other cases.
14. A particular feature of this type of litigation is that claims are of relatively low value, such that costs would quickly become disproportionate. By way of example, the sums claimed in the Schedule in this case totalled just over £16,000. A further £1,000 was claimed by way of damages for distress and inconvenience. In the event, as I have indicated, the amount recovered was less than £3,000. A judgment that gave clear guidance on the assessment of quantum would in such circumstances be likely to assist in the resolution of other disputes at proportionate costs.
15. It follows from the low value of this case but its importance of this case to other potential cases, that the costs that are reasonable and proportionate are likely to bear little relationship to the value of the case. For example, given the potential impact on the judgment in the resolution of other cases, both parties instructed silks in this case. This was reasonable.
16. The hourly rates used to calculate time costs for the Claimant’s solicitors are disputed. The rates claimed, the Defendant’s counter submission and the Guideline Hourly Rates pursuant to National Band 2 (Burnley) (effective from 1 October 2021) are:

	Claimant’s figure	Defendant’s figure	Guideline Hourly Rate
Litigation Executive	£185	£140	£126
Assistant Solicitor	£240	£180	£177/£218/£255
Partner	£240	-	£255

17. In support of its figures, the Claimant notes the novel nature of the litigation and refers to the grade and experience of its fee earners as follows:

Paul Smith - Grade A - Partner - qualified 1984

Lesley Wilkinson – Grade A – Assistant Solicitor – qualified 1990

Gareth Milburn – Grade C – Litigation Executive, with in excess of 6 years practical litigation experience.

The Claimant makes the point that the court does not have the benefit of a comparison from the Defendant as to what it says the reasonable hourly rates are.

18. The Defendant’s submissions refer to rates apparently drawn from the 2010 figures for what was then Band One in the Guidelines. In fact Burnley fell in the old Band Three. In any event, the figures are out of date, but even the updated figures, referred to above, are significantly lower than that which is claimed.

19. The Defendant allows slightly higher figures than the Guidelines. The suggested guideline hourly rate for Ms Wilkinson supposes that she either is a solicitor with less than 4 years’ experience or that she is some other kind of fee earner. This appears incorrect.

20. The instant litigation is somewhat more complex than the typical type of case that National Band Two would relate to. This appears to be implicitly accepted by the Defendant in proposing figures that slightly exceed the Guideline Hourly Rates. In my judgment, the rates claimed by the Claimant are not out of line for this kind of work.

THE PHASES

A. Pre-Action

21. The maximum allowable for this phase is £10,000. The Claimant claims £8,274. The Defendant allows no more than £4,000.

22. The fee earner time claimed is on the high side for what I would expect in the pre-action phase of a case of this nature. I would have expected fee earner costs of around £4,000.

23. As for counsel's fees, the Defendant makes the fair point that counsel's fee note is headed "Claims against Barclays, Shawbrook and Creation Finance." Given that this case was the lead case, it is reasonable to apportion a substantial amount of counsel's pre-action fees to this case, but in my judgment they must be discounted for the overlap with other claims. On balance, I consider £2,000 for the use of leading counsel to be reasonable and proportionate.

24. Thus I allow £6,000 (excluding VAT) for the pre-action phase.

B. Particulars of Claim

25. The Claimant seeks £2,405.50 by way of solicitors' time costs, £1,250 for counsel to draft the Particulars of Claim and court fees of £1,000. The Defendant allows no more than £2,000, presumably excluding the court fee.

26. In the Particulars of Claim phase, there will of necessity be significant input from both solicitor and counsel where the case is being identified as a lead case. As with the pre-action phase, Counsel's fee note is headed "Claims against Barclays, Shawbrook and Creation Finance." However, there is no material to suggest that Particulars of Claim were drafted in other cases than this one. As the Claimant's submissions say, the fee appears modest for the preparation of Particulars of Claim by leading counsel in a case of this nature.

27. In my judgment, neither solicitors' fees nor counsel's fees fall outside that which is reasonable and proportionate and I allow the sums as claimed.

C. Defence (and Counterclaim)

28. Whilst this phase would include a Counterclaim as well as the Defence, no Counterclaim has in fact been brought.

29. The Claimant seeks solicitors costs of £3,172.59 and leading counsel's fee for a consultation, of £3,500. The Defendant contends that both figures are excessive.

30. I agree with the Claimant's submissions that both partner review and the input of counsel was justified at this stage. However, the figures claimed are distinctly high as totals. I would allow £2,000 in respect of each, a total for the phase of £4,000.

D. Reply (and Defence to Counterclaim)

31. This phase is intended to include a Defence to Counterclaim as well as any Reply. A Reply was served but there was of course no Counterclaim to which a Defence was necessary.

32. The Claimant contends for £864 by way of attendances and documents and £350, by way of counsel's fees, a total of £1,214. The Defendant would allow a total of £600.

33. In my judgment, the figures claimed by the Claimant fall within the reasonable and proportionate range for work of this kind. I allow those figures.

E. Case Management Conference

34. The Claimant claims £1,920 by way of solicitors' time and £3,000 for counsel, a total of £4,920. The Defendant contends that a total of £4,000 is reasonable for this phase.

35. It will be noted that the figure for which the Defendant contends is not greatly below that sought by the Claimant. However, the Defendant asserts that the Claimant's time costs are unreasonable and that counsel's fee for the Case and Costs Management Conference is excessive, in particular in light of the separate claim of a fee for the Defendant's application to amend the defence was made at the same hearing.

36. I do not consider that the Claimant's time costs are excessive. However, the total claimed for counsel's attendance on 10 September 2020 of £4,500 is high. The amendment to the defence comprised part of this hearing and was charged with counsel's fees of £1,500. A total of £3,500 for counsel is reasonable and I would therefore allow £2,000 by way of counsel's fees, giving a total for this phase of £3,920.

F. Disclosure

37. In the disclosure phase, the Claimant claims time costs for attendance and documents of £2,664 with no counsel's fees. The Defendant contends that the figures are unreasonable.

38. This was not the most document-heavy of cases but the Claimant's figure is well within the reasonable range. I allow the sum claimed.

G. Witness statements

39. The Claimant contends for attendances and documents in the total sum of £2,633. In addition, he claims the fee for the application by consent to extend time for service of witness statements leading to the order dated 16 December 2020.

40. The Defendant would allow a total of £1,200 for witness statements. The specific point is made that, in giving judgement, I was critical of the statement of Mrs Hodgson. There is force in this point. The statement refers to matters that she could not truly recall, and she was in effect simply parroting her husband's evidence. Wherever the blame for this lies, the cost of the statement should not fall at the expense of the Defendant since the statement did not further the claim.

41. A reasonable figure for this phase is eight hours work at £240 per hour, that is £1,920. In addition, the Claimant should recover the fee for the application, which led to an order for costs in the case. Thus I allow in total £2,020.

H. Experts' Reports

42. The Claimant claims costs incurred in relation to expert evidence in the sum of £528 for solicitors' time and £1,200 for advice from counsel. As the Defendant points out, no permission was given for expert evidence and the Defendant therefore does not allow anything in this regard. Strictly as an alternative, it contends that the amount claimed are excessive.

43. In his reply submissions, the Claimant clarifies that the advice of counsel was sought with a view to obtaining the import of an expert to check the calculation and with a view to providing an agreed methodology to the court for the calculation of damages.

44. Whilst it is possible to see that expert evidence might have been relevant to the quantification of this claim, for reasons that dealt with in my judgment on the substantive issues, I am not satisfied that the court was ever likely to grant permission for the kind of expert evidence that appears to be contemplated for this phase. The evidence anticipated would amount to explaining how the tariff scheme worked and/or checking the calculation of which amounted an opinion. Accordingly, I do not allow any figure for this phase.

I. Trial and judgment

45. The figure claimed by the Claimant for this phase, £42,808 (inclusive of the trial fee of £1090), well exceeds the cap of £21,090 (inclusive of the court fee). The defendant, sensibly to my mind, does not take issue with the Claimant recovering the full amount of the cap (although somewhat puzzlingly goes on to make comments about certain specific items). I allow £21,090.

J. Settlement/negotiations/mediation

46. The Claimant claims £3,109 time costs for this phase and £450 for counsel's fees. These costs also by the Claimant to include the efforts made by him to refer the dispute to some form of Alternative Dispute Resolution, probably by way of a process of independent evaluation. The Claimant says that the Defendant was resistant to this and that its costs were incurred in attempting to persuade the Defendant to agree in contemplating an application to the court to stay the proceedings for this purpose.

47. The Defendant responds that the only recoverable cost is that of making a single Part 36 offer, for which £3,559 is excessive. The Defendant would allow £180.

48. The court should be cautious to declare costs to be reasonable where they are incurred in what appears to be a genuine attempt to engage in some form of Alternative Dispute Resolution. That

said, if the other side is resistant and, in particular, if not the case is made to stay the proceedings in order to enable another form of dispute resolution to be explored, costs must of necessity be limited.

49. Bearing in mind the burden lies upon the Claimant to justify reasonableness of the costs claimed, it seems to me that the claim should be limited to a total of £2,000. I make no apportionment between solicitors and counsel, that being a matter for the receiving party.

K. Making or responding to an application – Strike Out Application

50. This claim relates to an application by the Defendant to strike out the claim that was heard by His Honour Judge Halliwell on 27 July 2020 by telephone. The costs order was for the Claimant's costs to be costs in the case.
51. The Claimant claims counsel's fees of £3,500 and solicitors' costs of £2,112. The Defendant points out that the cap making such an application in the Capped Costs Pilot is £3,000 and contends that this would be a reasonable figure. Having regard to the cap, it is not necessary for me to explore this phase further. I allow the maximum of £3,000.

L. Making or responding to an application – Amendment to Defence

52. The Defendant applied to amend its defence. That application was heard at the Case Management Conference on 10 September 2020 and permission was granted, with the Defendant being ordered to pay the costs of an occasion by the amendment.
53. The Claimant claims £648 by way of solicitors costs and counsel brief fee of £1,500. The Defendant would allow £1,250 in total.
54. As noted above, this brief fee is in addition to the fee claimed for the Case Management conference. In calculating the figure allows that phase, I assumed a total brief fee of £3,500, broken down as to £2,000 relating to general case management £1,500 relating to this issue. I note the Defendant's arguments, but on the basis of a total of £3,500 for counsel, the figure of £1,500 is both reasonable and proportionate for this aspect of the work.
55. As to the solicitors' time costs, it is reasonable to allow two hours at £240 per hour, a total of £480. Accordingly, I allow in total £1,980.

M. Work done post-issue which is not otherwise covered by any of the stages above

56. Finally, the Claimant claims time costs of £2,233 and counsel's fees of £450 for dealing with Part 18 requests and a reply. The Defendant contends that such figures are unreasonable.
57. Both parties may request further information under Part 18, although only the Claimants was answered. The Defendant makes the point that the claimant should not recover costs for not having answered the Defendant's Part 18 request. I agree with this. Insofar as the draft response

form the basis of the Reply, as contended in the Claimant's submissions, the reasonable and proportionate cost of that document is covered in the Reply phase dealt with above. Accordingly, no fee for counsel should be allowed and solicitors' time costs should be correspondingly reduced.

58. In respect of the Claimant's own request and the reply thereto, it seems to me that a total of 5 hours at £240 per hour is justified, that is a total of £1,200.

CONCLUSION

59. For the reasons set out above, I am satisfied that the reasonable and proportionate phase costs within the caps contained in the Capped Costs pilot are £53,743.50. Given the nature of the issues identified above, I do not consider this figure to be disproportionate, notwithstanding the low value of the claim. The overall cap of £80,000 does not apply and therefore this is the recoverable sum.
60. As to the calculation of VAT, I have included VAT on solicitors' time costs and counsel's fees but not on court fees. On my calculation, the total is therefore £64,054.20. I therefore summarily assess the costs in this figure.

SCHEDULE

Phase	Breakdown	C figure	D figures	Cap	Court's assessment
Pre action Work	Attendances	£1,377.00			£4,000.00
	Documents	£3,897.00			Included in above
	Counsel	£3,000.00			£2,000.00
	Other disbursements	£0.00			£0.00
	Sub total	£8,274.00	£4,000.00	£10,000.00	£6,000.00
Particulars of Claim	Attendances	£573.00			Included in above
	Documents	£1,832.50			£2,405.50
	Counsel	£1,250.00			£1,250.00
	Other Disbursements	£1,000.00	£1,000.00		£1,000.00
	Sub total	£4,655.50	£3,000.00	£8,000.00	£4,655.50
Defence (and Counterclaim)	Attendances	£628.50			£2,000.00
	Documents	£2,544.00			Included in above
	Counsel	£3,500.00			£2,000.00
	Other Disbursements	£0.00			
	Sub total	£6,672.50	£2,000.00	£7,000.00	£4,000.00
Reply (and Defence to Counterclaim)	Attendances	£312.00			£864.00
	Documents	£552.00			Included in above
	Counsel	£350.00			£350.00
	Other Disbursements	£0.00			£0.00
	Sub total	£1,214.00	£600.00	£6,000.00	£1,214.00
Case Management Conference	Attendances	£264.00			£264.00
	Documents	£1,656.00			£1,656.00
	Counsel	£3,000.00			£2,000.00
	Other Disbursements	£0.00			£0.00
	Sub total	£4,920.00	£4,000.00	£6,000.00	£3,920.00
Disclosure	Attendances	£576.00			£576.00

Phase	Breakdown	C figure	D figures	Cap	Court's assessment
	Documents	£2,088.00			£2,088.00
	Counsel	£0.00			£0.00
	Other Disbursements	£0.00			£0.00
	Sub total	£2,664.00	£1,500.00	£6,000.00	£2,664.00
Witness statements	Attendances	£960.00			£1,920.00
	Documents	£1,673.00			Included in above
	Counsel	£0.00			£0.00
	Other Disbursements	£100.00			£100.00
	Sub total	£2,733.00	£1,200.00	£8,100.00	£2,020.00
Experts' reports	Attendances	£288.00			£0.00
	Documents	£240.00			£0.00
	Counsel	£1,200.00			£0.00
	Other Disbursements	£0.00			£0.00
	Sub total	£1,728.00	£0.00	£10,000.00	£0.00
Trial and judgment	Attendances	£3,696.00			£20,000.00
	Documents	£6,672.00			Included in above
	Counsel	£31,350.00			Included in above
	Other Disbursements	£1,090.00	£1,090.00		£1,090.00
	Sub total	£42,808.00	£21,090.00	£21,090.00	£21,090.00
Settlement/ negotiations/ mediation	Attendances	£373.00			£2,000.00
	Documents	£2,736.00			Included in above
	Counsel	£450.00			Included in above
	Other Disbursements	£0.00			£0.00
	Sub total	£3,559.00	£180.00	£10,000.00	£2,000.00
Making or responding to an application (strike out)	Attendances	£576.00			£3,000.00
	Documents	£1,536.00			Included in above
	Counsel	£3,500.00			Included in above

Phase	Breakdown	C figure	D figures	Cap	Court's assessment
	Other Disbursements	£0.00			£0.00
	Sub total	£5,612.00	£3,000.00	£3,000.00	£3,000.00
Making or responding to an application (amending defence)	Attendances	£0.00			£0.00
	Documents	£648.00			£480.00
	Counsel	£1,500.00			£1,500.00
	Other Disbursements	£0.00			£0.00
	Sub total	£2,148.00	£1,250.00	£3,000.00	£1,980.00
Work done post issue not otherwise covered (Part 18 request and reply)	Attendances	£334.50			£1,200.00
	Documents	£1,898.50			Included in above
	Counsel	£450.00			£0.00
	Other Disbursements	£0.00			£0.00
	Sub total	£2,683.00	£500.00	£5,000.00	£1,200.00
TOTAL		£89,671.00	£42,320.00	£80,000.00	£53,743.50
VAT free elements		£2,190.00	£2,190.00		£2,190.00
VAT on remainder		£17,496.20	£8,026.00		£10,310.70
GRAND TOTAL		£107,167.20	£50,346.00		£64,054.20