Neutral Citation Number: [2024] EWHC 2724 (KB)

Case No: KA-2023-000196

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

On appeal from the County Court at Central London
HHJ Johns KC dated 22 September 2023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2024

Before :
Mr Justice Dexter Dias

- -

Between :

M & S Restorations Limited

Appellant

- and –

[1] BANCO SANTANDER TOTTA S.A.
[2] JANOS NORBERT KOVACS
[3] ALINA ROSETTA NICO
[4] GHEORGHE NASTASE

Respondents

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- -

Grant Armstrong (instructed by **Harris da Silva**) for the **Appellant**
Christoper Snell (instructed by **Knights PLC**) for the **First Respondent**

Hearing dates: 18 October 2024

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JUDGMENT

The Honourable Mr Justice Dexter Dias

Approved Judgment

This judgment was handed down remotely at 10.00am on 28 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Dexter Dias :

§I. INTRODUCTION

1. This is the judgment of the court in a costs appeal.

2. The appellant is M & S Construction Limited ("the Company"), represented by Mr Armstrong of counsel. The first respondent, and the sole respondent participating in the appeal, is Banco Santander Totta S.A. ("Santander" or "the Bank", to be generally called "the respondent"). The respondent is represented by Mr Snell of counsel. Judgment has previously been entered in default against the second to fourth defendants/respondents, who did not participate in the trial or appeal. The court is indebted to both counsel for their high-quality submissions.

3. By an appeal notice dated 12 October 2023, the appellant appeals a costs order of HHJ Johns KC ("the Judge"), made at the Central London County Court on 22 September 2023. The Judge had a two-day trial listed before him about a disputed banking debit made from the Company's account with Santander. The Judge made the appealed costs order on the second day following entering judgment for the claimant company.

4. Permission to appeal the order was granted by Sir Stephen Stewart KC, sitting as a Deputy Judge of the High Court, on 18 June 2024. The order was an award to the appellant of 50 per cent of its costs, the Company having been correctly identified by the Judge as the successful party in the claim. However, the appellant is not satisfied with that award. It submits it should have been granted all of its costs, to be subjected to detailed assessment. Thus, it submits that the figure of 50 per cent is "wrong", to apply the governing test under rule under Civil Procedure Rules 1998 ("CPR") Part 52.21(3). Against this, the respondent submits that this is a review and not a rehearing. On proper review analysis, the Judge's order is unimpeachable as it rests comfortably within the wide discretion granted to first instance judges on questions of costs. It should remain intact. As the respondent puts it in its skeleton argument at para 35, "the attacks on the Judge's exercise of his discretion are misplaced."

§II. BRIEF FACTS

5. The essential facts can be stated shortly.

6. In the late 1990s, a stonemason from Portugal called Domingos Mateus Cristovao set up a company with Carlos Silva in London. Eventually, they created another company M & S Restorations Limited. This is the appellant, a small company with three members of staff, holding itself out to provide stonemasonry services to the domestic and commercial sector in and around London. It remains in operation today. For its business banking requirements, it opted to bank with Santander. By the time of the fraud in 2016, Santander had had relationships with the two original principals for something like 30 years in various guises. It certainly knew Mr Silva as a customer well.

7. On 11 January 2016, Santander received an email from the account of the Company's director Mr Silva. It was a payment instruction in the sum of £35,425 to be paid to someone called Janos Kovacs. The respondent subsequently requested an invoice from the Company, which the fraudster provided later that day. On 12 January, the Bank debited the Company's account in that sum.

8. However, the request did not come from anyone authorised by the Company. It was from third party fraudsters who had targeted the Company. The Judge made a finding of fact about that. As he stated at para 3 of the judgment:

> "The evidence was, and I find, that this was indeed the work of third party fraudsters, not the doing of any agent of the Company."

9. Therefore, this was not a situation where the bank's customer was deceived into authorising a payment (*Philipp v Barclays Bank PLC* [2023] UKSC 25 ("*Phillip*")), nor where valid payment instructions were issued by an agent or customer with apparent authority (*Barclays Bank PLC v Quincecare Limited* [1992] 4 All ER 363). Here the money went to the second respondent Janos Kovacs, and there is no evidence that he had any association with the Company or any authority deriving from it. Janos Kovacs very swiftly redistributed the funds to the third and fourth respondents Alina Nico and Gheorghe Nastase, again unconnected to the Company. Additionally, within a few days Janos Kovacs spent the balance at the well-known Bicester Village outlet centre with its designer brand stores. Thus, the money has long been dissipated and the Company was out of pocket in a significant sum for a relatively small going concern.

10. On 18 January 2016, when the Company became aware of the fraudulent transaction, it contacted both Santander and the police. Mr Silva's email to Santander stated that the Company email had been "hacked" and that the payment request was fraudulent and not made by it. One of the members of staff, Ms Joanne Robbins, immediately contacted the Company's "point of contact" (liaison manager) at the Bank, Ricardo Navalho, to the same effect. On 19 January, Santander's compliance team contacted Barclays "reportscam" team. This is because Janos Kovacs had an account with Barclays. Santander requested a return of the funds to its client (company), confirming that the Company had reported the matter to Action Fraud, and provided

the reference number. The significance of this is that from the very first communication with the first respondent, the appellant had indicated that this was a third party fraud and the respondent/defendant sought the return of the funds on the Company's behalf on that basis. However, things changed.

11. By 7 March 2016, in its "final response", Santander told the Company that it did not accept responsibility for the loss and there had been a breach of security for which the Company ultimately was responsible. In other words, that it was some kind of "inside job", as counsel succinctly styled it on appeal. It has been this change of approach that led to an irresolvable conflict between the prime parties and legal proceedings. For example, on 9 July 2018 when the solicitors then acting for the respondent bank replied to the appellant's letter dated 20 June 2018, they stated that the fraud "was practised by someone within your client itself".

12. The Company's solicitors sent a Letter of Claim on 17 September 2020 and attached draft particulars of claim. These particulars were the subject of criticism from the defendant bank in its defence, alleging that they were "prolix and non-compliant", being around 30 pages long. This criticism about their overcomplication and unfocused nature continued at trial. Indeed, the filed particulars of claim were adversely commented upon by the Judge in his judgment, stating that the basis of claim the appellant succeeded on was "submerged" beneath a range of further pleading (judgment para 13, set out in full below). I will examine this observation and its basis shortly.

13. To continue with the chronology, the appellant made a CPR Part 36 offer to settle in the sum of £37,400 inclusive of interest on 17 September 2020. It was withdrawn after 33 months on 19 June 2023. The Judge entered judgment for the appellant at trial in the full sum claimed of £35,425 plus interest, and thus the appellant successfully beat its Part 36 offer, albeit the offer was unilaterally withdrawn before trial, following the long expiration of the relevant period during which the permission of the court is required for withdrawal.

14. It is to the trial I turn. It took place before the Judge on 21 and 22 September 2023. The Bank fully contested the trial at the outset. However, probing by the Judge led to counsel for the defendant bank accepting that it could not challenge that this was a third party fraud. It must be remembered that at least since March 2016, that is seven and a half years previously, the Bank had been claiming that this was an internal fraud "within" the Company. Mr Snell's in-court concession was the first recognition by the Bank since March 2016 that it could not challenge the claim of third party fraud. I will also revisit the significance of this point. Nevertheless, the Bank continued to seek to defend the claim. Counsel submitted that if there was "impersonation" as he put it, that relieved the Bank of legal responsibility. The Judge, quite understandably, required legal support for this proposition and counsel succeeded in securing an adjournment until day two of the trial. When the court reconvened the next morning, counsel accepted that he could find no legal support for the argument. The legal defence could not be sustained at that point and judgment was entered for the Company. The judge then turned to the question of costs. About this, there was intense argument, which persisted before me.

15. The key decisions of the Judge were that while the appellant was plainly the successful party in costs terms - a proposition no one disputes - the "normal rule" that

it should receive its costs should be departed from and the Company should only be awarded 50 per cent of its costs. It repays setting out the relevant passage from the judgment over which much forensic argument has centred:

> "13. Here, the Company is the winner. But the circumstances do require some departure from the general rule. It will be plain from my decision on the claim that this was always, or always should have been, a simple case. It was not presented that way by the Company in the pre-claim letter or in the proceedings once issued. Instead, it was made unnecessarily complex. At least some of the ways of putting the claim had no proper basis on the facts as pleaded; a breach of the *Quincecare* duty and a breach of a tortious duty of care are examples. Mr Armstrong highlighted paragraphs 30 and 34 to 36 of the Particulars of Claim where he says the simple basis of the claim can be found. I have had regard to those in my decision not to require amendment, for which I gave brief reasons. But the simple analysis is submerged under a weight of other pleading, a weight which has plainly led to much of the costs of this litigation.
>
> 14. I consider that the right order is to give the Company a proportion of its costs and that the right proportion is 50 per cent. A more limited proportion than that would fail, in my judgment, to give sufficient weight to the general rule and to the offer made by the Company. Although the offer was later withdrawn, it remains a factor in the exercise of discretion under CPR Part 44 as is clear from the notes in the White Book at 36.10.3. It was beaten. To give the Company the whole of its costs on that basis would not be right given the conduct I have referred to and that the Bank's failure to accept the offer is the more understandable given the context of that conduct. But it would be wrong to give less than 50 per cent of the Company's costs. Further, a more limited proportion would wrongly ignore that the Bank must bear a little of the blame for the fighting of unnecessarily complex proceedings. The Bank ought to have recognised that, however the case was pleaded and at least once the witness evidence was in, that this was a case of third party fraud and the consequence of that was that it could not properly debit the Company's account."

16. The appellant now argues that the 50 per cent figure is "wrong" for Part 52 purposes and should be reviewed and overturned by this court. The respondent submits that the Judge's decision falls comfortably within the "generous" ambit of discretion afforded to judges at first instance (*Esan v Notting Hill Housing Trust* [2018] EWCA Civ 1462 ("*Esan*")), and especially trial judges, and should not be interfered with. The respondent relies on Cook on Costs at para 22.37:

> "If the CPR 44.2 template is followed (and a review of cases from the last year suggest that judges now clearly articulate the rule 44.2 stage approach … identifying first the successful party and then considering whether there is any reason to depart from the general rule that this party should recover its costs), any appeal can be based only on the argument that the court exercised its discretion in a way that exceeded the generous ambit within which reasonable disagreement is possible."

§III. RELEVANT CIVIL PROCEDURE RULES

17. The governing procedural rules about appeal and the discretion as to costs are uncontroversial and can also be stated shortly. The conduct of appeals is regulated by CPR Part 52. Rule 52 insofar as it is material provides:

> "Hearing of appeals
>
> **52.21**
>
> (1) Every appeal will be limited to a review of the decision of the lower court unless—
>
> (a) a practice direction makes different provision for a particular category of appeal; or
>
> (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.
>
> …
>
> (3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

18. The court's discretion as to costs is regulated by CPR Part 44. The material provisions are in these terms:

> "Court's discretion as to costs
> **44.2**
> (1) The court has discretion as to –
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid.
> (2) If the court decides to make an order about costs –
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, 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; and
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
> (5) The conduct of the parties includes –

> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
> (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;
>
> Factors to be taken into account in deciding the amount of costs
> **44.4**
> (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,
> …
> (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."

19. Naturally, every decision must be made in accordance with the overriding objective at CPR Part 1, so well-known it is trite to restate it, save to emphasise that the court must deal with the case justly and at proportionate cost (Part 1.1), and in accordance with the factors at Part 1.2.

§IV. DISCUSSION

20. Most essentially, I must determine whether the Judge's impugned decision falls within either limb of the governing test under CPR 52.21(3). I have received no submissions about the "serious procedural or other irregularity" (3)(b) basis (Limb 2). Having reviewed the case independently, I find none. Therefore, the only remaining ground for allowing the appeal is whether the decision of the lower court is "wrong" under (3)(a) – Limb 1.

21. Such discretion must be exercised reasonably and judicially. Wrong does not simply mean that this court would have reached a different decision to the trial judge. It means that the correct decision is so materially different that it is beyond the generous (which I interpret as wide) range of discretion that is afforded to a judge at first instance. It is no part of my function to tinker, quibble or modestly adjust. None of those things take the correct decision beyond the broad band of discretion. While *Esan* generous must mean generous, it does not mean extravagant or excessive. It means what it says: a broad but not limitless range. This approach flows from the

serious recognition of two critical features: first, that these are discretionary decisions about which there may be a reasonable range of rational conclusions; second, that the judge at first instance, and in particular a trial judge, often has a privileged perspective and superior insight into what went on before her or him. For an appeal to be allowed, there must be a clear indication that something is wrong in the sense that the right decision is beyond that range of reasonable decisions. That is my approach. In so concluding, I read the judgment as a whole and do not micro-analyse the text in an artificially pedantic way. Instead, I ask what was the decision and what were the main reasons for it.

22. I am quite clear that the Judge adopted the correct approach. He identified the "winner" (the Company) and then asked himself whether he should make a "different order" for Part 44.2. He concluded that he should. Once more, he was perfectly correct. The remaining issue is whether his settled upon proportion of 50 per cent was "wrong" in Part 52.21 terms.

23. To my mind, the position is clear: 50 per cent is the wrong proportion. I go further and judge that the correct proportion of costs that should be awarded to the appellant is 75 per cent. I explain why shortly. But first I explain the significance of that conclusion. I judge that the difference between a 50 per cent award and one of 75 per cent is so significant and material that it justifies allowing the appeal. This is because the appellant should be awarded 50 per cent *more* costs that the Judge determined. That is a substantial difference and the 75 rather than 50 per cent figure is beyond the range of protected discretionary decision-making. This is a serious and significant upward adjustment. It means that the appeal must be allowed as the original decision, with great respect to the Judge, was "wrong" in that specified and required sense under Part 52. I now explain why I reached that conclusion.

24. The appellant's submission that it should receive 100 per cent of its costs is obviously unsustainable. The particulars of claim were unnecessarily prolix and diffuse. When one examines the section in the particulars devoted to the defendant bank, one finds subdivisions of:

    (1) Breach of the Payment Services Regulations 2009;

    (2) Contractual breach;

    (3) Breach of contractual duty of care

    (4) Breach of tortious duty of care

    (5) *Quincecare* duty

    (6) Duty not to facilitate fraud

25. I entirely agree with the Judge that the actual and true claim that succeeded was, as he accurately put it, "submerged" within all this other pleading. When one views the "prayer" at the end of the particulars, the claimant company seeks against Santander damages:

> "by reason of breach of the Regulations, breach of duty and/or negligence of the First Defendant and/or its servants and/or its agents."

26. The appellant needed to simply state that this was a third party fraud and the Bank did not have the right or authority to debit the Company's account. This was in truth a simple case. None of the employees of this small company perpetrated this fraud, but third party fraudsters did. Accordingly, the Bank should repay the amount it debited from the Company's account as a result of the fraud as the Bank was acting outside its mandate. Mr Armstrong is correct that authorities make clear that it is often legitimate to advance what he calls "alternative claims" (*F&C Investments (Holdings) Limited v Barthelemy* [2011] EWHC 2807 (Ch), per Sales J (as he then was), see paras 16-21; *Sycamore Bidco Limited v Breslin* [2013] EWHC 583 (Ch), per Mann J at para 12). The distinction here is that the alternative bases grounded in, inter alia, agency had no proper factual basis on the appellant's own evidence. The evidence filed by the appellant was clear and unmistakable: it was an external fraud, an "outside job". Agency did not come into it. The initial exchange between the Judge and Mr Armstrong makes the position clear:

> "JUDGE JOHNS: But overall, you are saying that this is the work of third party fraudsters, nothing to do with the company and therefore, "The bank did not have the authority to debit our account." And on that case, all the stuff of whether they were put on in inquiry and so on is irrelevant, is it not?
>
> MR ARMSTRONG: It falls away.
>
> JUDGE JOHNS: Because that is really to do with a situation where an agent with at least apparent authority has defrauded the customer, the company in this case.
>
> MR ARMSTRONG: This issue emerges principally because the claimant is absolutely adamant it is nothing to do with the claimant. They have searched their emails. They have never seen these emails whilst it was happening or subsequently. They fall outside their knowledge. The problem comes because the first defendant has said, "It must be something to do with you," and that seems to be the line that they have taken all the way through. It may be sensible **(Overspeaking)** as to whether or not the first defendant is asserting now, having seen all of the evidence, that it is something to do with the claimant …"

27. This exchange continued with the Judge attempting to clarify, quite properly, how it was, given the clear factual and evidential basis of the appellant's case, the other "stuff", as the Judge put it, was relevant. Mr Armstrong pointed to two "parts of the analysis": first, third party fraud; second, agency or equivalent. The exchanged on this proceeded:

> "MR ARMSTRONG: But we point to -- that is the first part of the analysis. The second part is, if we are wrong in relation to that, there were, what I have described within my skeleton, as being the amber flashing lights in relation to a number of features of --
>
> JUDGE JOHNS: Understood. But that would be an appropriate approach if it was a case of you having been defrauded by an agent of the company.
>
> MR ARMSTRONG: Indeed.

JUDGE JOHNS: But you are not saying we are within that territory"

28. It is clear why the Judge pressed Mr Armstrong about the alternative claims. He was right to do so. Therefore, I agree that there was a material overcomplication of the case by the appellant. For example, the appellant applied to file expert evidence on breach of tortious duty. This was to my mind an unnecessary over-elaboration of straightforward third party fraud claim. Mr Snell goes further and submits in the respondent's skeleton at para 25(b.):

> "It is also implicit in the Judge's reasoning that he did not consider that the Appellant had succeeded on all of its case as pleaded (CPR 44.2(4)(b))."

29. It is vital in giving effect to the overriding objective that the court deals with the case "fairly" (Part 1.2(2)(d)). That must mean that each party has a proper opportunity to present its arguments to the court and for the court to make a decision with reasons. While the Judge certainly made observations about these other claims, it had been unnecessary to pursue them and for the Judge to rule upon them. Therefore, there was not a fair opportunity for these alternative matters to be properly canvassed before the trial court. That is why in his carefully framed submissions Mr Snell was astute to say that the lack of success of the balance of claims was "implicit" in the Judge's decision. There were in truth no "adverse findings", as Mr Armstrong submitted, made by the Judge following full and fair argument on the question of other claims. It became unnecessary. That said, I can agree with both Mr Snell and the Judge that the case has been made overly complicated by the appellant. Mr Snell accurately put it later in his skeleton argument at para 29:

> "That was the Judge's real criticism of the Appellant: the failure to plead a simple case in a short and straightforward manner."

30. This liminal situation of undetermined claims is one of the material complicating features of the case. Accordingly, some reduction from a full costs award is necessary due to the overcomplication, while having regard to the lack of full argument and ruling upon the alternative claims. The question is the proper extent of reduction. This cannot be viewed in isolation. The correct figure must also weigh the conduct of the respondent Bank.

31. As Mr Silva the proprietor of the Company evidences in his statement dated 18 April 2023, on 15 January 2020, his solicitors obtained a Banker's Trust disclosure order against Barclays. That is an order designed to require financial institutions to disclose otherwise confidential client information that may assist in tracing and recovering funds misappropriated through fraud. Here the Bankers Trust order revealed that the person to whom the money was sent, Janos Kovacs, was a Hungarian national. Janos Kovacs then transferred the monies onwards upon receipt to the third and fourth respondents as well as spending money in "expensive designer shops" at Bicester Village. Mr Silva's evidence was supported by another employee Joanne Robbins. Ms Robbins was previously a Special Constable in the Essex Police. She had worked for the Company for nearly a decade by the time of the fraud. She spotted the fraud immediately on 18 January 2016 when she saw the transfer document detailing Janos Kovacs and was, as she put it, "gob smacked". She contacted the Company's liaison manager at Santander instantly and the police were called with a crime reference number obtained. Her statement is also dated 18 April 2023. As the Judge said, once

this evidence was "in", the respondent ought to have recognised that this was a case of third party fraud "and it could not properly debit the Company's account" (judgment, para 14). Yet the Bank continued to fight the case both on the facts and the law.

32. On the facts, at the outset of the first trial day, the Judge asked Mr Snell questions about the factual basis of the defence. This exchange took place:

> "JUDGE JOHNS: So two points then, now I understand your stance. One is, are you challenging as a matter of fact that it was a third party fraudster and not an agent of the company?
>
> MR SNELL: We have no ability to do that. We simply do not know.
>
> JUDGE JOHNS: Well they give clear evidence that it is not an agent of the company, it is a third party.
>
> MR SNELL: Of course. We do not know who authorised --
>
> JUDGE JOHNS: So you do not challenge that factual conclusion.
>
> MR SNELL: Well we cannot. Putting it frankly, we cannot. We do not have any basis on which we can challenge that."

33. The point arises irresistibly: on what basis following the witness evidence filed on behalf of the Company could the Bank credibly dispute that this was a third party fraud? This factual dispute, first advanced by the Bank in March 2016, and persisting for over seven years, and the entire legal proceedings until the first morning of the trial after it began, evaporated on entirely appropriate, proactive and, I am bound to say, inevitable judicial enquiry. What I get little sense of is any explanation from the respondent for why the assertion had been maintained so long, and especially after the filing of the appellant's witness evidence. No meaningful explanation was given to the Judge. None was given to this court. There is no explanation for the change of position by the respondent or why this important concession was being made so late in the forensic day.

34. A connected point relates to the Part 36 offer, the rules around such offers constituting a self-contained code within the CPR. The Company's Part 36 offer was compliant with the code and remained open to the respondent for 33 months. As Mr Armstrong puts it, "almost the whole of legal proceedings". The Judge did mention this as a relevant factor in his judgment (at para 14), and he is correct that despite withdrawal, it remains a relevant factor for decisions on costs (Part 44 and White Book 36.10.3). However, I judge that greater weight should have been given to this factor. This is because the availability of the offer must be seen in the context of the flaws in the factual defence, particularly after the filing of the evidence that made the third party fraud clear. Instead, the Judge stated that the Bank's "failure to accept the offer is the more understandable given the context of that [the appellant's pleading] conduct". Once it was plain that there was no factual basis to contest the claim, the Bank ought to have urgently reconsidered the Part 36 offer. At para 17, the Judge stated that it was "hard to be too critical" of the failure to accept the offer "given the way the case was pleaded". I cannot, with respect, agree. Once the evidence was in, the factual

contestation of the claim became nigh on untenable, as Mr Snell recognised on the first morning of the trial. Nothing evidentially changed in that interim period.

35. Taking these two points together, I cannot agree that the respondent bank is merely "a little to blame". It had been told this was a third party fraud from the first day Ms Robbins opened the post on 18 January 2016 and saw the fraudulent transaction documentation. The Company never withdrew its assertion that this was a third party fraud. The Judge correctly observed at para 3:

> "… the transaction was said to be fraudulent as soon as it was discovered on 18 January 2016 when Mr Silva contacted the Bank and the police."
>
> And:
>
> "There are no real candidates for a fraud by an agent. This is a small office of three people, two of whom gave evidence."

36. The complicating feature is the proliferation of "alternative claims" in the particulars. But as the Judge accurately observed: despite them, the factual basis of the third party fraud claim was discernible within the particulars. The appellant makes two points about this. First, that there has been no adverse determination of the alternative claims as they were never tried, the third party fraud claim succeeding. Second, that the Judge did not order that pleadings should be amended. I must say something about each of these points.

37. On the first, the difficulty the appellant has is that the evidence it has filed is directed at the third party fraud. There is no evidence filed about agency. Indeed, the appellant's case is that there is no agent, only the fraudster Janos Kovacs and his associates.

38. On amendment, I am not persuaded that the lack of order for amendment can be equated with a fulsome endorsement of the particulars of claim. What in fact happened was that an experienced first instance judge took an admirably pragmatic view and quite properly determined that it would not be proportionate in the evolving circumstances to incur further legal costs. Thus the submission in the appellant's skeleton argument that the particulars were "properly pleaded" (Ground 6(i)) fails to engage with the obvious concern the Judge had with the pleadings, and rightly so.

39. All these factors need to be balanced and weighed carefully. With respect, I find that insufficient weight has been given to the clear failures by the respondent bank. First, to persist with a hopeless factual case once the evidence was in and while the Part 36 offer was open. Second, even once the factual case was plainly untenable at trial, to seek to advance a legal defence that has no support in authority whatsoever. The Judge dealt with this at para 5:

> "Mr Snell did argue, nevertheless, that the payment instruction here was valid. But that involved saying that if a person impersonates a customer and is successful in obtaining a bank's money, the bank can properly debit that customer's account. I found that a surprising proposition and gave Mr Snell an opportunity by way of a half-day adjournment to find some authority for it. None

was found. And the proposition seems to me contrary to what is said in *Philipp* about cases where there is no authority, at paragraph 30."

40. If it amounted to a genuine defence in law, it should have been explored, substantiated and laid before the appellant and the court well in advance of trial. It was not. I agree with the Judge that the abandoned argument runs contrary to the recent clarification of the law by the Supreme Court in *Philipp*. I judge that it was a forlorn last-ditech attempt to continue to contest the claim. As Lord Leggatt, giving the judgment of the unanimous court in *Phillip*, said at para 30:

> "Unless otherwise agreed, the bank's duty to comply with its mandate is strict. **Where the bank acts outside the mandate by making a payment which the customer has not authorised, it cannot debit the customer's account.** Conversely, where the bank receives an instruction to make a payment given in accordance with the mandate, the ordinary duty of the bank is simply to carry out the instruction and to do so promptly. In *Bodenham v Hoskins* (1852) 21 LJ Ch 864, 869, Kindersley V-C said that:
>
> > "… the banker looks only to the customer, in respect of the account opened in that customer's name, and whatever cheques that customer chooses to draw, the banker is to honour. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the monies are that are paid into that account, and he is not to inquire for what purpose monies are drawn out of that account: that is the plain general rule, as between banker and customer."
>
> The same point was made in *Lipkin Gorman v Karpnale Ltd* [1989] 1 WLR 1340, 1356, where May LJ said that there is nothing in the contract between a bank and its customer which could require a banker to consider the commercial wisdom or otherwise of the particular transaction."
>
> (emphasis provided)

41. The evidence in this case was that the fraud was perpetrated by third party fraudsters. Accordingly, as Lord Leggatt puts it, as the customer has not authorised the transaction, the Bank "cannot debit the customer's account". Seen in the clear light of the Supreme Court's recent judgment, and combined with the factual failure, I cannot agree that this means that the respondent is only "a little to blame", as the Judge stated. While I agree that the Bank's litigation conduct is not sufficiently deviant from the norm to merit assessment on an indemnity basis, I do think that its conduct must be given significantly greater weight in evaluating the proportion of costs that the appellant is entitled to be awarded.

42. It is an important feature of appeals that due weight and deference is granted to first instance judges and particularly trial judges. But here the classical advantages that status bestows is limited. I have been able to read everything that the Judge read. I have had the benefit of full transcripts of the trial. Although three witnesses gave evidence, the sole witness called on behalf of the Bank, a customer relations manager Mr Condeço, had nothing to do with the 2016 events and was, as the Judge rightly stated at para 3:

> "unable to give any useful evidence on the question of whether this was the work of third party fraudsters".

43. Yet for years, this had been the factual claim of the respondent bank. In truth, as the parties agree, nothing in the end turned on the trial evidence. It was the concession on third party fraud that was critical, along with the respondent's total inability to provide any legal support for its "impersonation" defence. Therefore, this court has been placed in a position very nearly equivalent to the trial judge in respect of making an evaluation on costs. Consequently, the court is in a good position to meaningfully review the decision.

44. I must say something about proportionality. It is a topic both parties submitted on. It is accepted by both counsel that the Judge is entitled to take proportionality into account in assessing the appropriate payment on account. However, the appellant submits that the Judge fell into error by factoring proportionality into the assessment of the allowable proportion of claimed costs. The basis of this submission is what the Judge said at para 10:

> "Mr Armstrong, for the Company, submits the Bank should pay the whole of the Company's costs, indeed on the indemnity basis. He relies on the Company's success and that the Company has beaten an offer made by the Company on 17 September 2020, that being in the total sum including interest of £37,400 which reflected interest at less than 1.25 per cent per annum. That offer was later withdrawn in June 2023. The basis of assessment may be of importance. I am told that around £125,000 including VAT has been spent by the Company on this modest claim worth around £35,000 plus interest. There would seem to have been a lack of proportionality here."

45. I do not take this to mean that the Judge reduced the allowable proportion by reason of proportionality. Later at para 18, the Judge said:

> "I consider a reasonable sum for the payment on account, had my order been for the whole of the Company's costs, would be £40,000. That is a little lower than the value of the claim, at least with interest, and it is hard to see a detailed assessment arriving at a figure lower than that. I cannot though be confident that the Company will get much more on an assessment, given the need for an assessment to have regard to the proportionality of costs including to the value of the claim."

46. I do not read into this, as the claimant does, an exercise in "reverse engineering" the allowable percentage taking proportionality into account. Instead, the Judge is evaluating the reasonable sum for payment on account. On this issue, I concur with the respondent that the Judge was exercising the second of two distinct discretions, the first on allowable proportion, the second on payment on account. I find that the Judge did not err on proportionality. As he said in terms, the amount spent by the parties is "only a starting-point" as to reasonable sum for payment on account (para 18).

§V. DISPOSAL

47. Turning back to the question of allowable appeal, I adopt the approach of the Court of Appeal in *Esan*, where at para 19, Newey LJ (with whom Leggatt LJ (as he then was) agreed) said:

> "The Court of Appeal [i.e. an appellate court] is of course slow to entertain appeals relating merely to costs. While it will do so in an appropriate case, it recognises that the judge had a discretion and, where no error of law is shown, the appeal court should interfere only where the judge's exercise of discretion has exceeded the generous ambit within which reasonable disagreement is possible."

48. The difficulty facing the Judge here was that the conduct of both parties procedurally has been suboptimal – to use his term, to "blame". The real question is how properly to weigh these deficiencies in terms of their costs impact. I agree that the Company was the successful party and that the normal rule of costs recovery should be departed from, and the court should make a different order for Part 44 purposes. Having evaluated all the rival matters carefully, I judge that a 50 per cent costs award proportion is wrong in Part 52 terms. The correct figure should be 75 per cent. That is a very significant and substantial difference, and of a scale to take the appropriate award beyond the band of protected discretionary decisions. That is because the appellant is entitled to a costs proportion half as much again as the Judge awarded. Naturally, the final figure will be subject to detailed assessment. But in that exercise, the figure of 75 per cent is the correct proportion, and gives effect to the overriding objective to deal with the case justly (CPR Part 1.1 and 1.2).

49. Further, the payment on account must be correspondingly and proportionately uplifted. I direct that counsel agree the precise figure and draft an order to reflect the terms of this judgment.

50. I emphasise that this decision is not by way of criticism of an experienced trial judge, who was admirably proactive in trying to identify and narrow issues. It is a simply a material difference of evaluation of a magnitude that triggers Limb 1 of the CPR Part 52.21 appeal test.

51. Appeal allowed.

Appendix A

Procedural history

Date	Event
11-12 January 2016	Fraudulent transaction
17 September 2020	Letter of claim attaching draft particulars of claim
17 September 2020	Part 36 offer made
10 January 2022	Claim issued and particulars of claim
14 March 2022	Defence
29 April 2022	Reply
19 June 2023	Part 36 offer withdrawn
21-22 September 2023	Trial
12 October 2023	Appeal notice
2 May 2024	Appellant's revised skeleton argument
18 June 2024	Permission to appeal granted
15 October 2024	Respondent's skeleton argument
18 October 2024	Appeal hearing
21 October 2024	Draft judgment circulated to parties

Appendix B

Prime materials

Item	**Pages**
Appeal bundle	658
Authorities bundle (8 authorities) + one additional authority (*Esan,* 7pp.)	129
Appellant's skeleton	20
Respondent's skeleton	10