Claim No: FL-2016-000008

**NEUTRAL CITATION NUMBER: [2022] EWHC 1431 (Ch)**
**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**FINANCIAL LIST (ChD)**

Heard at:

7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 8 June 2022

**Before**:

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

BETWEEN:

**BILTA (UK) LIMITED (in liquidation) AND OTHERS**

Claimants

- and -

**(1) SVS SECURITIES plc**
~~**(2) KULVIR SINGH VIRK**~~
~~**(3) SIMON FOX**~~
~~**(4) DEUTSCHE BANK AG**~~
**(5) TRADITION FINANCIAL SERVICES LIMITED**

Defendants

**Mr Christopher Parker, QC** and **Andrew Westwood, QC** (instructed by **Enyo Law**) for the Claimants

**Mr David Scorey, QC** and **Mr Laurence Emmett, QC** (instructed by **Greenberg Traurig Law**) for the Fifth Defendant

The First Defendant did not appear and was not represented

Hearing date: 8 June 2022

**Approved Judgment**

**Mr Justice Marcus Smith**

## Introduction

1. This is the hearing of matters consequential on my **Judgment** of 31 March 2022 ([2022] EWHC 723 (Ch)). I adopt the terms and abbreviations used in the Judgment. Various matters arose for my decision in this course of this hearing. They are consolidated in this approved transcript of my various rulings.

## Costs

2. As is recorded in the Judgment at [21] and [22], the issues considered at trial and in the Judgment were substantially narrowed by a **Settlement** concluded between the parties, meaning that only certain issues were live at trial.

3. Of these issues, the **Limitation Defence** succeeded (meaning that certain claims were time-barred), but the section 213 Insolvency Act 1986 claims (the **Section 213 Point**) succeeded. As a result of a combination of the Settlement and the Judgment, there is an obligation in TFS to pay certain sums to the Liquidators. I am not going to say any more about the Settlement or the payment obligation triggered by it and the Judgment, because the Settlement is confidential, and I can determine the issues that are before me without making more specific reference to the Settlement terms.

4. The Settlement rendered many of the issues in dispute unnecessary to resolve and – to be clear – I have no idea how these issues would have been resolved had the Settlement not been concluded. I am going to refer to these issues as the **Liability Issues**, although that label may be a little over-broad given the number of issues raised in the pleadings. To be clear, I use the term to include all matters at issue save those expressly unresolved by the Settlement. The issues left unresolved are set out in [22] of the Judgment. These issues were:

    (1) The Limitation Defence.

    (2) The Section 213 Point.

    (3) The costs of the whole proceedings.

5. Thus, in addition to the **Limitation Defence** and the **Section 213 Point**, which were resolved in my Judgment, the question of costs of the whole proceedings is at large, save for any orders making specific provision as to costs. I am not aware of any such orders, save for an order of the Court of Appeal, to which I will come, but this Judgment is not intended to affect – indeed, cannot affect – any specific orders that have been made as to costs.

6. I consider that a bright line needs to be drawn between:

    (1) The costs pre-settlement.

    (2) The costs post-settlement.

7. The costs position pre-settlement is further complicated by the fact that the trial of these proceedings was adjourned twice over (before the issues were narrowed by the

Settlement). The first application to adjourn was not opposed by the Claimants (although they did not make the application); the second application was opposed by the Claimants, refused by me, but allowed by the Court of Appeal. The costs thrown away by the second adjournment were to be paid by TFS in any event, and the Court of Appeal made an order to that effect. But the amount of those costs remains to be resolved.

8. I am going to consider the pre-settlement costs first. Because of the date of the Settlement – February 2022, with the trial of the unresolved issues taking place in March 2022 – these constitute the vast bulk of the costs incurred, which run to several million pounds on each side.

9. Both parties invited me to make a positive order as to costs. Neither party went to far as to say that the usual rule – that costs follow the event – should be followed. Rather, each party contended that an issues based costs order should followed, and TFS in particular wished me to have regard to the distinct positions of the various different Claimants before me, because some (given the outcome of the trial) would in fact have recovered nothing.

10. Even that is a controversial way of putting things, because actually all recoveries are pooled between the Claimants and – whilst the Settlement leaves open certain unresolved issues, which I have resolved at trial – even the Settlement does not purport to allocate any recovery to any particular Claimant. It is, thus, actually quite difficult to say that any Claimant has completely failed.

11. It is worth asking why the parties did not contend for a "costs follow the event" order. TFS did not even suggest that such an order was a possibility. The Claimants did, but did not seek to base the costs order they contended for on this, as they called it, "simplistic" basis. Paragraph 7 of the Claimants' written submissions suggests that "it is undoubtedly the case that the Claimants were successful, obtaining a recovery" of a portion of the total sum claimed. I am not going to mention that portion – I think it is confidential – but let me say at once it is sufficiently substantial in terms of monetary recovery not to cause the Claimant to be disentitled to costs on grounds of succeeding in a claim but recovering only a *de minimis* amount. The amount recovered is well above *de minimis*.

12. Nevertheless, accepting that fact, the point made in paragraph 7 is wrong, and in my judgment quite obviously so. It is necessary to explain why I do not consider the Claimants to have been successful in a manner triggering the "costs follow the event" rule.

13. In *R (M) v. Mayor and Burgesses of the London Borough of Croydon*, [2012] EWCA Civ 595, Lord Neuberger MR said this:

> "60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.

> 61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that Bahta was decided on this basis.
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> 62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in Scott . However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. Boxall appears to have been such case.
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> 63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win."

**14.** This is not a case (i) situation. It is a case (ii) situation. Assuming, for the sake of argument, the Claimants had succeeded at trial on all the Liability Issues, it is possible to see that a "costs follow the event" order might have been made, although I strongly suspect (given the outcome of the Limitation Defence) that such an order would not likely have been made. But I think it would have been one of the orders that a Judge could properly have made within his or her discretion.

**15.** But that is only because the Liability Issues would have been determined in the Claimants' favour on the merits. The Settlement in this case means that there is – on all of the Liability Issues – no basis on which a "costs follow the event" order could properly be made. The Settlement means that there is – on all of these points – no "event" to inform the incidence of costs.

**16.** This is the sort of case contemplated by Mummery and Chadwick LJJ in *BCT Software Solutions Limited v. C Brewer & Sons Limited*, [2003] EWCA Civ 939. Mummery LJ said:

> "4. The arguments advanced on this appeal have demonstrated the real difficulties inherent in asking a judge to exercise his discretion in respect of the costs of an action, which he has not tried. There are, no doubt, straightforward cases in which it is reasonably clear from the terms of the settlement that there is a winner and a loser in the litigation. In most cases of that description the parties themselves will realistically recognise the result and the costs will be agreed. There will be no need to involve the judge in any decision on costs. If he becomes involved, because the parties cannot agree and ask him to resolve the costs dispute, the decision is not usually a difficult one for him to make.
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> 5. There are, however, more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course, which comes close to conducting a trial of the action that the parties intended to avoid by their compromise. The truth often is that neither side has won or lost. It is also true that a considerable number of cases are settled by the parties in the belief that the terms of settlement represent a victory, or at least a vindication of their position, in the litigation, or in the belief that they have not lost; or, at the very least, in the belief that the other side has not won."

**17.** In a similar vein, Chadwick LJ said:

> "23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party: CPR 44.3(2)(a). But the court may make a different order: CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to "the general rule" − or should make "a different order" (and, if so, what order) it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs."

**18.** As regards the Liability Issues, this is precisely that case. The terms of the Settlement tell me nothing about the or likely outcome of the Liability Issues. Although I was the docketed judge to this matter, and have read the various witness statements exchange by the parties, I am in no position to predict the outcome a trial that would have turned on very important questions of honesty and credit.

**19.** I appreciate that a percentage was mentioned in the Settlement – I am not going to refer to it – but to regard that figure as any kind of assessment of outcome, in this case at least, would be an error. I think there were extremely good reasons why TFS would have accepted even an unrealistically high figure in order to get this deal. That is speculation on my part – but it informs my reading of the Settlement as providing no kind of indicator as to outcome on issues not <u>actually</u> resolved by the Court.

**20.** In short, the payment by TFS to the Claimants arises by way of Settlement, not a finding of liability, and the Settlement provides no element of "vindication" or indication of outcome. I cannot possibly proceed on the basis that TFS would have lost at trial. Nor can I say that simply because the Settlement contained certain provisions, a consequence of making those concessions was that costs should be paid by TFS.

**21.** For those reasons, no "costs follow the event order" can properly be made in this case.

**22.** As I have said, neither party actually invited me to make such an order. Rather, both invited me to make an "issues" based order, although they did so on very different grounds.

**23.** The Claimants invited me to regard the Liability Issues as a single issue, on which they had "won" or been vindicated. For the reasons I have given on the "costs follow the event" point, that is not a tenable argument and is wrong.

**24.** TFS invited me to use a combination of the issues on which there had been success and the Settlement to inform the costs order that should be made in relation to the Liability Issues. In short, victory on the Limitation Defence (where TFS won) and victory on the Section 213 Point (where the Claimants won), in combination with a view to the terms of the Settlement, should be "read across" to inform the outcome of the Liability Issues. That, too, is an approach I reject. It seems to me, accepting that an issues-based costs order is appropriate, the outcome of such an order cannot be informed by other issues, unrelated to that issue. Such an approach undermines the whole point of an issues based costs order, which is to identify who won which issues.

**25.** I am not, therefore, going to make <u>any</u> order in relation to the Liability Issues during the pre-settlement period, subject to one qualification I will come to.

**26.** That conclusion means that I do not have to engage with the question of whether the parties' costs entitlement or liability ought to be disaggregated on a Claimant by Claimant basis. I would have been very reluctant to take such a course, for the reasons given in paragraph 13 of the Claimants' written submissions. In that paragraph, it was suggested that disaggregating the position of the Claimants was unrealistic for four reasons:

**(1)** Factually the evidence of TFS's dishonest participation was collective and based on its dealings with various trading companies which included those connected with the Claimants.

**(2)** The Claimants had agreed to pool all recoveries irrespective of the success of any particular claims.

**(3)** The Claimants were jointly and severally liable for all their solicitors' costs and disbursements.

**(4)** TFS's own costs were not greatly increased by the claims being in respect of Bilta, Weston and Vehement as well as Nathanael and Inline.

**27.** I agree with this. I am not remotely tempted to assess costs on a Claimant by Claimant basis. That would overlook the reality of the issues and the manner in which the case was conducted. In a sense, that precludes a <u>pure</u> "issue-by-issue" approach on costs for another reason. But that is not the reason why I have refused to take TFS's approach. The reason I have done so is because I consider it wrong to allow the issues on which there has been success to inform the issues which cannot be assessed one way or the other in terms of outcome.

**28.** So, the position on costs is as follows. I propose to treat pre-settlement and post-settlement costs distinctly. As regards pre-settlement costs, the proper starting point is

that there should be no order as to costs, and that each party should bear their own. That is because I cannot decide who would have won because there was no determination, and the Settlement does not assist.

**29.** What about the issues that were determined on the merits at trial? In particular the Limitation Defence. Costs were incurred on this throughout the litigation by TFS, and TFS has undoubtedly been successful on the point. TFS therefore contended that there ought to be an issues-based costs order, in relation to pre-settlement costs, to reflect TFS's success on this point.

**30.** Attractively though the point was put, I do not consider that such an order is appropriate in this case. As with the Liability Issues, there should be no order as to costs on the Limitation Defence, nor in relation to any other issue that was resolved during the trial of this action. Why have I reached this conclusion? I have not reached this conclusion because of any uncertainty of outcome: clearly, there is no uncertainty of outcome, because these are points that – *ex hypothesi* – I have determined in my Judgment.

**31.** However, I consider that, in the context of this case, to make an issues-based costs order on some issues (where I can because the outcome is clear), but not on other issues (where I cannot because the voluntary Settlement that both parties entered into prevents such an order, for reasons that I have given), is in principle wrong. My sense is that issues-based costs orders contain at least a weak presumption that the court will be able properly to make such an order in relation to all significant issues in the case, so as to resolve the incidence of the bulk of these costs at large. I do not consider that the parties, in leaving costs at large for me to determine, would or indeed should have anticipated a "partial" issues-based costs order. It is, as I say, implicit in an issues-based approach that the court can reach a proper view on all issues that are before it. The fact is that the parties, by the Settlement, concluded certain issues, but left others open. They also left costs open. I do not consider that they would have expected pre-settlement costs to be determined on an issue-by-issue basis where such an approach was, by definition, not possible in respect of all (significant) issues.

**32.** I cannot, however, leave the fact that there were two adjournments at the instance of TFS out of account. In my judgment, these adjournments would have resulted in the incurring of costs that the Claimants ought to be able to recover, to a limited extent, from TFS. I am going to find that on a broad-brush basis, the Claimants are entitled to recover 7.5% of their assessed pre-settlement costs from TFS because of the two adjournments I have described. I make clear that I make such an order on the basis that it is consistent with the costs order made by the Court of Appeal in respect of the second adjournment. The Court of Appeal ordered that the second adjournment costs be paid by TFS in any event. Those costs were not assessed, and what I am doing is providing a framework for the assessment of those costs consistently, and not inconsistently, with the order of the Court of Appeal.

**33.** As regards post-settlement costs, TFS won on the Limitation Defence, and the Claimants won on the Section 213 Point. The former point took the greatest time and work, both in the hearing at trial and in preparation for trial. On an issues-based approach, each should have their costs against the other on this issue. I have toyed with the idea of a set-off order, for example, that TFS recover 60% of its costs on the Limitation Defence and that there is no order in favour of the Claimants in relation to the Section 213 Point. But I consider that such an order is liable to be so highly uncertain in terms of outcome as to

be indefensible. I consider that the fairer outcome, because it is less uncertain, is to say that each side should have their own costs of the issues on which they won, subject to a detailed assessment. So there will be an order for costs on the Limitation Defence in favour of TFS; and, on the Section 213 Point, a similar order in favour of the Claimants.

## Payment on account

**34.** Both parties invited me to make a payment on account, but they did so on the basis that they would have succeeded on the points that they were contending for in relation to costs. It seems to me quite clear, given the ruling that I have just given, that it would be most unwise to make any kind of order for payment on account.

## Enforcement

**35.** The parties are agreed that there should be a stay on enforcement. I am happy to make an order accordingly.

## Permission to appeal

**36.** I made clear, in my Judgment, that I was provisionally inclined to give permission to appeal in relation to the Section 213 Point. That remains my view, and I give permission to appeal on that point.

**37.** The Claimants seek permission to appeal in respect of both the Limitation Defence and what I shall term the **Section 1032 Point**, which I will describe in a moment. I am satisfied no permission to appeal should be given in relation to the Limitation Defence. I do not consider that there is a reasonably arguable point to trouble the Court of Appeal. My Judgment turns on the facts. I am the judge who heard the evidence, and it seems to me that the chances of the Court of Appeal varying the conclusions and therefore the order that I made on this point are remote.

**38.** The Section 1032 Point is something that I considered in the Judgment at [66]*ff*. The question concerned was the nature and effect of a deeming provision. If I go to the relevant parts of my Judgment, at [69(5)], I consider the law regarding section 1032 of the Companies Act 2006, which creates a fiction, namely, a notional person in control of the two companies in question, Nathanael and Inline. What I concluded in subparagraph (5) was this:

> "The present case I consider to be very straightforward. It would be anomalous in the extreme, and entirely contrary to the schema of the Limitation Act, for the time a restored company spends in enforced non-existence not to count towards the calculation of time for the purposes of limitation, when there is a deeming provision that states in terms that the company is – in such circumstances – deemed to exist. That would be entirely prejudicial to the interests of third parties, and would incentivise the manipulation of the timing of applications to restore a company to the register."

**39.** As Mr Scorey, QC (counsel for TFS) suggested in argument, it is quite clear from subparagraph (5) that I was not very troubled by the deeming provision and that is true. I found the answer to this legal point entirely straightforward, and it seems to me that if the matter should be considered further, that is something which the Court of Appeal should decide and not me. It seems to me that the question actually is a very straightforward one on which the chances of my being overturned are remote.

**40.** So, for all those reasons, I give permission on the Section 213 Point, but I refuse permission on all other matters.

## Permission to appeal my ruling on costs (paragraphs 1 to 33 above)

**41.** Mr Parker, QC (counsel for the Claimants) seeks permission to appeal the costs ruling that I have just handed down. This is a ruling on costs, and as Mr Scorey, QC rightly says, the Court of Appeal is loath to interfere in the discretion of a trial judge on any question of costs.

**42.** That said, this is not a straightforward case because the Settlement is not an entirely straightforward settlement, precisely because it leaves a number of issues at large. It is also right to say that I have found this a not straightforward question to resolve. Ultimately, I consider that the answer is clear – for the reasons I have given – but it does seem to me that this is something which the Court of Appeal ought to look at, particularly when there is already the Section 213 Point going on appeal.

**43.** So I am going to give permission to appeal, but I want to make clear that, to the extent that it is needed, TFS should be permitted to raise on appeal my rejection of issues-based costs order in relation to the Limitation Defence. That, it seems to me, is something which is wrapped up in the way I approached the costs order generally, and it seems to me that that is something which TFS ought to be able to raise when the appeal comes to be heard.

**44.** I am not sure permission to appeal <u>is</u> needed, but I think it should be on the record that it is given if it is needed.

## Costs of the consequentials hearing

**45.** I have before me an application for the costs of the hearing today (including the costs involved in preparing for this hearing). My initial inclination, but for the point made by Mr Scorey, QC just now, was that there should be no order as to costs, which would be consistent with the view that I have taken of the Settlement and costs. The reason we have been here and the reason I have spent the time today has been to work out what the implications of the "non-settlement" Settlement issues are.

**46.** But it does seem to me that there is some force in the "indemnity costs" argument being dropped by the Claimants at the last minute. The fact is that – for various reasons that have been articulated in extensive correspondence and in the witness statements before me on this hearing – the Claimants sought their costs from TFS on the indemnity basis. It has not been mentioned today because it was withdrawn last night. That withdrawal was rightly made, but very late. The fact is that the point is, to put it kindly, is not a good one. On the other hand, given the reasons being articulated in support of that application, TFS would have had to take account of the point and deal with it, and so incur costs.

**47.** Given: *(i)* that the point was hopeless (to be less kind); and *(ii)* was withdrawn at the last possible moment, last night, there ought to be some sanction in costs. I am going to order, in a very broad-brush way, that TFS recover from the Claimants 50% of their costs of and arising out of this hearing. Although the point has not troubled anyone today, it has been generative of quite a significant amount of work in the weeks before this hearing. In those circumstances, the appropriate order to be made is that TFS recover from the

Claimants 50% of the assessed costs incurred from the time my Judgment was handed down.