Easter Term
UKSC 2018/0177

COSTS JUDGMENT

Micula and others (Respondents/Cross-Appellants) *v* Romania (Appellant/Cross-Respondent)

before

Costs Judge Leonard

Costs Officer Sewell

JUDGMENT GIVEN ON
23 May 2023

Heard on 10 March 2023

Appellant
Jamie Carpenter KC
(Instructed by Thrings LLP and Paragon Costs Solutions)

Respondents
Nicholas Bacon KC
(Instructed by Croft Solicitors (First Respondent) and White & Case LLP (Second to Fifth Respondents))

COSTS JUDGE LEONARD (with whom Costs Officer Sewell agrees):

Introduction

1. There are six parties to this appeal. For the purposes of the assessment of the costs payable under an order made by the Supreme Court on 11 November 2020 ("the Costs Order") there is one "Paying Party" who has been ordered to pay the costs of five "Receiving Parties".

2. The paying party is the State of Romania. The First and Second Receiving Parties, Viorel and Ioan Micula, are brothers born in Romania who became Swedish nationals in 1995 and 1992 respectively, having renounced their Romanian nationality. The Third to Fifth Receiving Parties are Romanian companies incorporated by the First Receiving Party and the Second Receiving Party.

3. Throughout this appeal, and the proceedings below that led to it, the First Receiving Party and the Second to Fifth Receiving Parties were separately represented. The First Receiving Party was represented by solicitors Shearman & Sterling (London) LLP ("S&S") until February 2019 and thereafter by Croft Solicitors ("Crofts"). The Second to Fifth Receiving Parties were at all times represented by solicitors White & Case LLP ("W&C").

4. Each firm of solicitors instructed its own leading and junior Counsel. In the proceedings below, the First Receiving Party instructed two KCs, Patrick Green KC and Professor Sir Alan Dashwood KC, and one junior (Matthieu Gregoire in the High Court and Jonathan Worboys in the Court of Appeal). In the Supreme Court, he instructed Patrick Green KC, Professor Sir Alan Dashwood KC and Mr Worboys. He also obtained advice from Lord Neuberger.

5. The Second to Fifth Receiving Parties were represented throughout by Marie Demetriou KC and Hugo Leith of counsel.

6. This judgment addresses two issues which need to be determined before the assessment of the Receiving Parties' costs of this appeal can proceed. The first concerns the interpretation of the Costs Order, in particular whether the Receiving Parties' claim for costs has been formulated in accordance with the terms of the Costs Order. The second concerns the treatment of costs which were originally charged and/or paid in a currency other than Sterling.

7. We are obliged to Nicholas Bacon KC (for the Receiving Parties) and Jamie Carpenter KC (for Romania) for their cogent and detailed skeleton arguments. Insofar as pertinent to the issues to be addressed in this judgment, matters raised in Romania's Points of Dispute and the Receiving Parties' Replies are covered in each skeleton, and do not need to be addressed separately.

The Rules

8. It is necessary, for the purposes of this judgment, to refer to some of the provisions of the Civil Procedure Rules ("CPR") and of the Rules and Practice Directions of the Supreme Court, in relation to the award and the assessment of costs.

9. CPR 44.2 confers upon the Civil Courts a wide discretion to require a party to pay all or part of another party's costs, as the court deems appropriate to the circumstances of the case. Rule 29 of the Rules of the Supreme Court confers upon the Supreme Court all the powers of the courts below. As to proceedings before the Supreme Court itself, Rule 46 provides that "The Court may make such orders as it considers just…", which is consistent with the more detailed provisions of CPR 44.2.

10. CPR 44.3, at subparagraphs (1) and (2), provides:

> "(1) Where the court is to assess the amount of costs… the court will not… allow costs which have been unreasonably incurred or are unreasonable in amount…
>
> (2) Where the amount of costs is to be assessed on the standard basis, the court will… resolve any doubt which it may have as to whether costs were reasonably… incurred or were reasonable… in amount in favour of the paying party."

11. Rule 51 of the Rules of the Supreme Court 2009 incorporates similar provisions:

> "51.—(1) Costs assessed on the standard basis are allowed only if they are proportionate to the matters in issue and are reasonably incurred and reasonable in amount.
>
> (2) Any doubt as to whether costs assessed on the standard basis are reasonably incurred and are reasonable and

> proportionate in amount will be resolved in favour of the paying party."

12. Supreme Court Practice Direction 13, at paragraph 3.1 and 3.2, provides:

> "3.1… The court will not allow costs which have been unreasonably incurred or which are unreasonable in amount.
>
> 3.2 On the standard basis, the court will only allow costs which are proportionate to the matters in issue and will resolve any doubt as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party.

13. At paragraph 1.3 the Practice Direction also provides:

> "1.3 The assessment of costs is governed by the relevant provisions of the Supreme Court Rules 2009 supplemented by this and the other Practice Directions issued by the President. To the extent that the Supreme Court Rules and Practice Directions do not cover the situation, the Rules and the Practice Directions which supplement Parts 44 to 47 of the Civil Procedure Rules (the "CPR") are applied by analogy at the discretion of the Costs Officers…"

14. The authorities referred to by the parties in their submissions apply the Civil Procedure Rules. For present purposes the underlying principles are the same whether the Rules of the Supreme Court or the Civil Procedure Rules apply, but we do need to make particular reference to Supreme Court Practice Direction 6 at paragraph 6.3.7, which reads:

> "The filing of a case carries the right to be heard by two counsel. The fees of two counsel only for any party are allowed on assessment unless the Court has ordered otherwise."

The background

15. Prior to Romania's accession to the European Union on 1 January 2007, the Receiving Parties had made investments in Romania which had benefited from tax incentives. In order to comply with EU State aid rules, Romania abolished those incentives, as a result of which the Receiving Parties brought an ICSID (International Centre for Settlement of Investment Disputes) arbitration under a bilateral investment treaty between Sweden and Romania.

16. In the arbitration Romania argued, with the support of the European Commission, that it had been forced to revoke the tax incentives and that payment of any compensation pursuant to an award would itself constitute illegal state aid under EU law so as to render the award unenforceable in the EU.

17. On 11 December 2013, the tribunal issued an award against Romania in the sum of around £150m including interest ("the Award"). Romania applied under the procedure set out in the ICSID Convention to annul the Award and to suspend its enforcement pending a decision.

18. On that application the European Commission, maintaining that for Romania to satisfy the Award would amount to illegal State aid, injuncted Romania from doing so pending a final decision by the Commission on the compatibility of the Award with State aid rules.

19. The ICSID initially stayed the Award, but when Romania refused to confirm that it would pay the Award in full and unconditionally if its annulment application were rejected, the stay was revoked in September 2014.

20. On 2 October 2014, the First Receiving Party applied for registration of the Award in this jurisdiction, pursuant to the Arbitration (International Investment Disputes) Act 1966. Registration was granted in the Commercial Court on 17 October 2014. On 28 July 2015, Romania applied to vary or set aside the registration order and in September 2016 the Receiving Parties cross-applied for security for costs in the event that a stay of enforcement was ordered.

21. In the meantime, on 30 March 2015, the European Commission had made a final decision that payment of the Award was incompatible with the internal market ("the Final Decision"). It prohibited Romania from satisfying the Award and demanded that Romania recover any payments which it had already made.

22. On various dates in November 2015, the Receiving Parties issued proceedings seeking annulment of the Final Decision in the General Court of the European Union ("GCEU").

23. On 26 February 2016, the ICSID rejected Romania's application for annulment of the Award.

24. On 20 January 2017, in the Commercial Court, Blair J dismissed Romania's application to set aside the registration of 17 October 2014, but granted its application to stay enforcement of the Award pending a decision by the GCEU. In a second judgment of 15 June 2017, Blair J rejected the Receiving Parties' application for security.

25. The Receiving Parties appealed Blair J's orders for a stay and refusing security. On 27 July 2018, the Court of Appeal dismissed the appeal against the order for a stay, but allowed the appeal against the refusal of security and ordered Romania to provide security in the sum of £150m (though not as a condition of the stay). The Court suspended enforcement of that order pending an appeal to the Supreme Court.

26. Romania duly appealed to the Supreme Court, which granted permission to appeal, continued the Court of Appeal's stay of enforcement pending the hearing of the appeal, and granted permission for the Receiving Parties' cross-appeal against the stay.

27. The European Commission had intervened in the proceedings in the High Court and Court of Appeal and was granted permission to intervene in the Supreme Court appeal.

28. On 18 June 2019, the GCEU annulled the Final Decision, which brought to an end the stay ordered by Blair J and upheld by the Court of Appeal. Without the stay, there was no need for an order for security, so the Supreme Court adjourned the appeal until October 2019 to allow the parties to consider whether it had any remaining jurisdiction to hear the appeals.

29. On 27 August 2019, the Commission appealed against the GCEU's decision to the Court of Justice of the European Union (CJEU). As a result, Romania issued a fresh application in the Commercial Court for a stay of enforcement of the Award pending the CJEU's decision. A stay was granted by Phillips J on 10 September 2019. Phillips J, on the Receiving Parties' application, also ordered Romania to provide security in the

sum of £150m. Phillips J granted permission for a leapfrog appeal to the Supreme Court.

30. The Supreme Court reconvened in October 2019 to hear Romania's appeal against Phillips J's order for security and the Receiving Parties' cross-appeal against his order for a stay.

31. By a judgment dated 19 February 2020, the Supreme Court allowed the Receiving Parties' cross-appeal, holding that a stay should not have been granted. In the absence of a stay there was no reason for the security, so Romania's appeal was not considered.

32. The Supreme Court's order of 19 February 2020 provided for the parties to file written submissions on costs by 12 May 2020.

Romania's written costs submissions to the Supreme Court

33. Under the heading "Two sets of costs" Romania criticised the Receiving Parties' representation by two separate legal teams, arguing that at a very early stage of the proceedings below Romania had made clear its view that it was unreasonable for the Receiving Parties to be separately represented and that the Receiving Parties should be entitled only to the costs of one legal team.

34. No good reason, said Romania, had ever been given for the separate representation. In the Court of Appeal, Leggatt LJ had queried the separate representation and asked whether there was a conflict of interest to justify it, to which Ms Demetriou KC had responded that she did not think that there was a conflict and that she would take instructions (notwithstanding which no explanation for the separate representation had been forthcoming).

35. The Court of Appeal, said Romania, had reduced the Receiving Parties' costs to a single set of costs to reflect that (the precise wording of the Court of Appeal's order was "Romania is to pay the Appellants' costs of the Security Application including the appeal against the Security Order, to be the subject of detailed assessment on the standard basis and limited to one set of costs").

36. Romania submitted accordingly that

> "Any payment of costs to the Claimants should, consistent with the Order of the Court of Appeal below, be limited to a single law firm and one leading counsel and one junior counsel, since it was not proportionate and justified for the Claimants to have two parallel teams of law firms and five counsel. Furthermore, the Claimants should be limited to the lower of the two sets of costs incurred by them…
>
> Romania submits that any costs award in the Claimants' favour should be the lower of the costs (reasonably) incurred by the two sets of legal teams, i.e., a single law firm and (consistently with Practice Direction 6.3.7) no more than two Counsel. If two separate teams working on the same matter incur materially different costs, the lower set of costs are clearly the efficient figure."

The Receiving Parties' costs submissions to the Supreme Court

37. Under the heading "two sets of representatives", the Receiving Parties argued that it would be reasonable for Romania to pay two sets of costs in all the circumstances. The separate representation was justified and non-duplicative, and two sets of costs were appropriate and should be allowed. Romania had been supported by the European Commission, which had had its own interest in the proceedings, and which had been represented by one law firm and Queen's Counsel, so that the Receiving Parties effectively faced two legal teams and two leading counsel.

38. Separate representation, said the Receiving Parties, had been appropriate and justified because there was a real potential that on key points in the litigation, and in broader efforts to enforce the Award, their interests could diverge. The Receiving Parties had acted responsibly to divide issues between them so as to effectively manage costs and avoid duplication. They had co-operated in agreeing upon the content of submissions to be jointly made, as where the First Receiving Party's Written Case before the Supreme Court adopted the Second to Fifth Receiving Parties' submissions. In oral submissions Leading Counsel for the First Receiving Party and for the Second to Fifth Receiving Parties had addressed discrete issues. Different but equally efficient divisions had also been made in the courts below.

39. It followed, the Receiving Parties argued, that an order awarding to them just one set of costs would result in an unjustified windfall for Romania, as the Receiving Parties had cooperated effectively to avoid costs being duplicated and had sought to

refine and present the arguments in a manner that was focused and helpful to the Court. It would also, they submitted, go against the grain of the ICSID Convention for the costs of legitimate enforcement to fall on the enforcing parties. Having two legal teams had not significantly (still less unreasonably) added costs to the litigation, since the work that was necessary to undertake and was undertaken, would have had to be undertaken in any event.

40. In that respect, the Receiving Parties submitted that in the hearing before the Commercial Court on 9 September 2019 to extend the stay, their combined costs were together lower than Romania's.

41. Practice Direction 6.3.7, said the Receiving Parties, provides for the representation by two counsel of "any party" that files a written case. The Receiving Parties comprised five persons, falling into two groups, each of which had filed a written case. Romania did not apply for any direction that the Receiving Parties file only one written case and the Supreme Court made no such order. Had Romania made such an application, it would have been resisted for the reasons already given. In the premises, Romania's arguments based upon Practice Direction 6.3.7 provided no support for its argument that only one set of costs should be ordered.

42. The Receiving Parties made no alternative submissions on how their recoverable costs should be formulated if they were, as Romania proposed, limited to one set.

The costs order

43. On 11 November 2020, the Court made the following costs order ("the Costs Order"), which referred to the Paying Party as "Romania" and the five Receiving Parties as "the Micula Parties":

> "Romania pay the Micula Parties' costs in the Supreme Court and below, to be assessed on the standard basis if not agreed and limited to one set of costs to be shared between the Micula teams in proportion to their actual costs expenditure, equal to one set of costs (being the higher set of costs claimed) but with allowance for two KCs and one junior between them."

44. The Costs Order was not accompanied by a written judgment.

The Receiving Parties' approach to claiming costs

45. The Receiving Parties have commenced detailed assessment in the Senior Courts Costs Office in respect of the High Court and Court of Appeal costs, and have applied for the assessment of their costs in the Supreme Court.

46. At every level, each of the two groups of Receiving Parties has produced its own complete bill of costs. A "Master Bill of Costs" submitted on behalf of all of the Receiving Parties then blends the two bills so as to claim, within categories of activity adopted by the bill format (such as time on documents or attendances on the client or counsel) the higher of the figures incurred by either the First Receiving Party or the Second to Fifth Receiving Parties.

47. Romania takes issue with that approach. The question is whether the Costs Order permits it. The parties differ to some extent on the appropriate formulation of the issues to be determined in this judgment, but we are of the view that Romania's is apt. It is as follows.

48. What is the correct interpretation of paragraph 1 of the Costs Order? In particular:

(a) subject to the separate question of Counsel's fees, does the Order permit the Receiving Parties to claim:

(i) the higher of the figures in the bills of costs of the first Receiving Party on the one hand or the Second to Fifth Receiving Parties on the other in respect of each of the work categories listed in Supreme Court Form 5 (the Receiving Parties' case); or

(ii) the costs of whichever of the First Receiving Party or the Second to Fifth Receiving Parties has claimed a greater total amount in their bill of costs (Romania's case)?

(b) in respect of Counsel's fees, does the Order permit the Receiving Parties to claim:

(i) the highest combination of fees charged by any three Counsel (but including at least one junior), regardless of which party instructed them, in respect of each separate work category (the Receiving Parties' case); or

(ii) the fees which are claimed in whichever of the First Receiving Party's or the Second to Fifth Receiving Parties' bills of costs that is the larger in total, limited to two KCs and one junior (Romania's case)?

Romania's submissions on the correct interpretation of the order of 11 November 2020

49. Mr Carpenter has offered these examples of the consequences of the Receiving Parties' approach to formulating the claim for costs.

50. In the High Court, the First Receiving Party's bill claims £27,258.52 for attendances on Counsel and £988,684 for document time, while the Second to Fifth Receiving Parties' bill claims £33,502 for attendances on Counsel and £339,415 for document time. Accordingly, the Master Bill claims £33,502 for attendances on Counsel (the Second to Fifth Receiving Parties' figure, being the higher) and £988,684 for attendances on documents (the First Receiving Party's figure, being the higher).

51. In the Supreme Court the Receiving Parties have claimed the fees of one KC for each group of Receiving Parties (the more expensive one in the case of The First Receiving Party). For each category of work, the Receiving Parties have claimed the fees of whoever was the most expensive junior. In consequence of this the Receiving Parties claim the brief fee for Mr Worboys (£48,875, as opposed to Mr Leith's

£47,500), but the refreshers for Mr Leith (£4,000, as opposed to £3,500 for Mr Worboys).

52. Where work in a particular category was undertaken by only one KC, the fees of two junior Counsel have been claimed. For example, under the heading "Advice Post-Notice of Appeal", there is a claim for the fees of Ms Demetriou KC, Mr Worboys and "Junior Counsel – Lord Neuberger of Abbotsbury".

53. Mr Carpenter makes the point that the result of this approach is that, at every level, the costs being claimed by the Receiving Parties collectively exceed by a substantial margin the total of either group of Receiving Parties' individual bills and amounts to a very high percentages of the combined total of all the Receiving Parties' bills. He has illustrated this with the following table:

	The First Receiving Party	The Second to Fifth Receiving Parties	Claimed	% of Receiving Parties' combined total
High Court	£1,288,710.78	£790,791	£1,556,313	75%
Court of Appeal	£483,887.73	£283,900	£614,191	80%
Supreme Court	£586,270.47	£409,435.65	£801,605	81%

54. Mr Carpenter submits that this was not what the Court intended by the Costs Order of 11 November 2020. Rather, the Court intended that the Receiving Parties could claim between them one or other set of costs in full (the whole of the First Receiving Party's costs or the whole of the Second to Fifth Receiving Parties' costs), whichever was the greater, and that whichever bill was the greater could include the fees of two leading Counsel. This is in fact the Receiving Parties' alternative contention, should the court reject their current approach.

55. The court's task is, he says, to apply a straightforward construction of the Costs Order in accordance with the leading case on the construction of court orders, *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6. In *Sans Souci Ltd* Lord Sumption held (at paragraph 13 of his judgment) that the court's task is not to consider the literal meaning of the words and then to resolve any resulting ambiguities and only to admit extrinsic evidence if an ambiguity is identified. On the contrary (paragraph 13):

> "… the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve."

56. In this case, the Court gave no judgment which explains the Costs Order, but Mr Carpenter submits that "the issue which its order was supposed to resolve" is clear from the parties' submissions on costs. The Court had to decide three issues. They were whether the Receiving Parties should be entitled to one set of costs or two; if one set of costs, whether it should be the lower or the higher of the two; and whether one set of costs should include the costs of more than two Counsel.

57. Those issues are clearly and simply determined in the Costs Order. The Receiving Parties can recover one set of costs. That one set is "the higher set of costs claimed". There should be "allowance for two KCs and one junior between them".

58. The phrase "set of costs" has an established meaning. It refers to the costs of a particular party. In *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176 the House of Lords held (Lord Lloyd at 1178) that, in a planning appeal where multiple parties might be represented:

> "… the losing party will not normally be required to pay more than one set of costs, unless the recovery of further costs is justified in the circumstances of the particular case…"

From Lord Lloyd's statement of the applicable principles which follows, it is clear that what this means in such cases is that the Secretary of State should be awarded their costs in full and the developer (in most circumstances) will not. It follows that an award of "one set of costs" means an award of "the full costs of one party".

59. Consistently with that established meaning, Romania's costs submissions made clear its understanding that "one set of costs" meant "a single law firm and one leading counsel and one junior counsel" and "a single law firm and… no more than two Counsel". The Receiving Parties confirmed the same understanding of the concept of "one set of costs" when heading the relevant part of their submissions "Two sets of representatives". It is reasonable to infer that the Court interpreted the expression in the same way.

60. The Court's determination that the set allowed should be "the higher set of costs claimed" is consistent with that approach. It envisages that the Receiving Parties will have two sets of costs, and the costs to be assessed and allowed should be the higher of the two entire sets.

61. Again, this is consistent with the parties' submissions and, in particular, Romania's submissions that "the Claimants should be limited to the lower of the two sets of costs incurred by them" and that "If two separate teams working on the same matter incur materially different costs, the lower set of costs are clearly the efficient figure". The Court did not accept Romania's submission that the set allowed should be the lower set, but the Court's decision that it should be the higher set is entirely consistent with Romania's approach to the meaning of the word "set".

62. The Receiving Parties' approach is not consistent with the language of the Costs Order and results in "set of costs" having two different meanings in two different parts of the Order. The Receiving Parties are not claiming "one set of costs": they are mixing and matching different parts of two sets of costs. But even if they could persuade the Court that "one set of costs" can be read as meaning the combined parts of two sets of costs, that meaning cannot be applied to "the higher set of costs claimed". If "one set of costs" is simply shorthand for "any combination of parts of two sets of costs", then "the higher set of costs claimed" cannot mean anything.

63. "Higher" necessarily implies a comparison, but on the Receiving Parties' approach, there is only one "set of costs" being claimed, namely the combined claim. To justify the Receiving Parties' approach, one would have to insert a number of words into the Costs Order, along these lines (the necessary additional wording is shown below in italics):

> "Romania pay the Micula Parties' costs in the Supreme Court and below, to be assessed on the standard basis if not agreed and limited to one set of costs to be shared between the Micula teams in proportion to their actual costs expenditure,

> equal to one set of costs (being the higher *of the costs in each category of work done that is claimed in each* set of costs claimed) but with allowance for two KCs and one junior between them."

64. Mr Carpenter submits that the practical consequences of the Receiving Parties' approach demonstrate that it is unlikely to reflect the Court's intention. The approach of using the traditional categories of bill drawing to determine which parts of each set of costs to claim is arbitrary and there is nothing to support it in the Costs Order.

65. The approach taken by the Receiving Parties has, Mr Carpenter submits, an inherent "upwards ratcheting" effect on the costs claimed. It is highly unlikely that the Court intended that a consequence of its decision would be that the costs claimed would exceed the costs of either individual group of Receiving Parties and amount to as much as 75% to 81% of their combined costs.

66. This "ratcheting" effect is particularly demonstrated by the claiming of the brief fee in the Supreme Court for one junior Counsel and the refreshers of another. The total fees for Mr Worboys in the Supreme Court were £53,375, while the total fees for Mr Leith were £51,500, but the Master Bill claims £53,875, more than the total charged by either of them.

67. The Receiving Parties' approach may also, says Mr Carpenter, lead to the claiming of duplicated costs and other anomalies. One firm of solicitors may have devolved to Counsel a task which the other firm of solicitors undertook themselves. The Receiving Parties' approach could result in both items being claimed. One firm of solicitors might write a letter to their client, the drafting of which is claimed in attendances on documents, but that letter might trigger a telephone call, the cost of which is claimed in attendances on the client. The cost of the call to discuss the letter might be claimed, but not the cost of the letter itself, or vice versa.

68. On this approach, in order to assess the Receiving Parties' Master Bills, it is likely to be necessary to undertake a complete assessment of both of the underlying bills, because the context for a claim made from one set of costs in the Master Bill may only be apparent from looking at work which is not being claimed for in the Master Bill. It is highly unlikely that the Court intended that the process of detailed assessment should involve more than the assessment of a single bill.

Romania's submissions on counsel's fees

69. Mr Carpenter submits that the Court's intention was that, if the higher set of costs was incurred by a group of Receiving Parties which instructed one KC and one junior, then the costs of a KC instructed by the other group of Receiving Parties could also be claimed. However, since the First Receiving Party instructed two KCs and junior Counsel and The First Receiving Party's costs are the higher costs overall, there is no need to take that approach.

70. The Costs Order does not permit the recovery of the fees of the principal KC for both groups of Receiving Parties as this would be inconsistent with the overarching guiding principle of recovery of "the higher set of costs claimed". It would also mean that the First Receiving Party, in recovering the higher of the two sets of costs, would, anomalously, be claiming the costs of attending upon Professor Sir Alan Dashwood, whose fees he is not claiming (so as to allow the Second to Fifth Receiving Parties to claim the fees of Marie Demetriou KC).

71. The Costs Order does not permit the recovery of three Counsel's fees for any category of work, regardless of their seniority or who instructed them, nor the fees of two junior Counsel. The meaning of "one junior" is entirely clear.

72. The natural meaning of the Order is concerned with identification of the "Counsel team". Once that team is identified, the fees of those Counsel can be claimed. There may be a substitution within that team, for example, the replacement of Mr Gregoire by Mr Worboys, but if junior Counsel for the First Receiving Party did not undertake a particular task, the Order does not permit a claim for junior Counsel for the Second to Fifth Receiving Parties' fees for undertaking that task.

The Receiving Parties' submissions on the correct interpretation of the order of 11 November 2020

73. There is no material difference between the parties on the appropriate principles of interpretation. Mr Bacon refers both to *Sans Souci* and to *SDI Retail Services Ltd v Rangers Football Club Ltd* [2021] EWCA Civ 79 in agreeing with Mr Carpenter that the interpretation of an order is an objective exercise, determining what the language used conveys in the context in which the order was made. That context includes any judgment given, but the subjective view of the Judge making the order is irrelevant (*SDI Retail Services Ltd*, Phillips LJ at paragraph 61).

74. The Receiving Parties nonetheless take issue with Romania's interpretation of the Costs Order, which they say amounts to a rewording along the lines of "Romania shall pay the Receiving Parties' costs equal to either a claim for the total costs incurred by the First Receiving Party or the total costs incurred by the Second to Fifth Receiving Parties, whichever is the higher."

75. This interpretation is, submits Mr Bacon, the kind of order that Romania sought and which the Supreme Court declined to order. In its costs submissions Romania sought an order that Romania should be liable for the lower of either the First Receiving Party's or the Second to Fifth Receiving Parties' costs. The Court rejected the submission. It did not limit the Claimants to recovering only the First Receiving Party's or the Second to Fifth Receiving Parties' costs. The order says in terms that "Romania pay the Micula parties' costs in the Supreme Court…". That is a reference to both the First Receiving Party and the Second to Fifth Receiving Parties. Both groups were to be receiving parties, not just one of them.

76. If Romania's contention were correct, it would result in only one group of the parties recovering their costs. That is not what the Costs Order provides on any fair and objective reading. Nor could there be any "sharing" of the costs as envisaged by the Costs Order. One can make sense of the words "… one set of costs to be shared between the Micula teams in proportion to their actual costs expenditure ..." only if the Court anticipated that both sets of Receiving Parties would be able to make a single composite claim for costs consisting of a mixture of their own costs and the costs of the other. If only one team could recover costs, there would be no need for any sharing provision at all.

77. Romania's interpretation cannot work by reference to the indemnity principle. On Romania's case, the First Receiving Party and the Second to Fifth Receiving Parties would be making a joint claim for the First Receiving Party's costs where the Second to Fifth Receiving Parties have no liability for those costs. It is submitted that it is unlikely that the Supreme Court would have promulgated an order under which it expected the Second to Fifth Receiving Parties to breach the indemnity principle in signing off a bill confirming their liability for the First Receiving Party's costs.

78. In contrast, the Receiving Parties' interpretation accommodates the indemnity principle because any item claimed in the composite bill will have been incurred by either the First or the Second to Fifth Receiving Parties. Hence the bill can be certified – where an item of costs is claimed, it does not exceed the amount that the party claiming it has incurred in respect of that item.

79. The Receiving Parties argue that Romania's approach fails to pay any regard to the prospect that work undertaken by the First Receiving Party was not in fact duplicative of the work undertaken by the Second to Fifth Receiving Parties, as explained in their costs submissions to the Supreme Court. Romania's interpretation of the Costs Order would afford no opportunity on the part of the First Receiving Party and the Second to Fifth Receiving Parties to recover costs on work which was reasonably and necessarily incurred but not duplicated by their respective teams.

80. The Receiving Parties submit that the real purpose of the Costs Order was to enable items of costs to be claimed by both sets of legal teams which were not duplicated, and to prevent duplicative costs being claimed. So, where an item of work was only incurred by the First Receiving Party, it is (subject to the usual assessment principles) recoverable. Where an item of work is only incurred by the Second to Fifth Receiving Parties, it is, equally, recoverable. Where both the First Receiving Party and the Second to Fifth Receiving Parties' legal teams undertook the same work, then the higher of the two teams' costs for that work is to be claimed. This applies equally to solicitors' costs and disbursements and counsel's fees.

81. This interpretation of the Costs Order is, submits Mr Bacon, consistent with and meets the objectives and principles of *Ong v Ping* [2015] EWHC 3258 (Ch), an authority expressly relied upon by Romania in a letter dated 3 February 2016 in which Romania took issue with the fact that the Receiving Parties were collectively represented by two separate legal teams.

Ong v Ping

82. For the purposes of this judgment, it is necessary to give some detailed consideration to *Ong v Ping*, and to compare and contrast it to this case.

83. In *Ong v Ping* a mother and her three children succeeded before Morgan J in establishing that a house in which they had lived, but had been forced through possession proceedings to vacate, was in fact the subject of a trust and that previous orders made in the possession proceedings should be set aside.

84. The mother and the children had instructed different firms of solicitors (Isadore Goldman and Stephenson Harwood LLP respectively) to act for them, although the two firms had instructed the same counsel. In the early stages of litigation, there had been at least a theoretical possibility of a conflict of interest between mother and children. However, at the practical level, they had acted as if they had the same interests and

there was no conflict in the way their cases were presented at trial. No issue was raised during the trial by the defendant as to the appropriateness of the claimants having two firms of solicitors.

85. The defendant (with one exception that is not material for present purposes) was ordered to pay all of the costs of the mother and the children, the question of whether they were in principle entitled to recover the costs of two firms of solicitors being reserved for further argument.

86. Having heard argument, Morgan J considered whether the question of separate representation should be left to a Costs Judge, but decided, in particular because the matter had been fully argued before him, that he should determine certain matters.

87. At paragraphs 58 to 60 of his judgment Morgan J put some emphasis upon the judgment of the Court of Appeal in *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc* [2001] RPC 1 and the principles to be derived from that and other authorities to which he had been referred, along with the relevant provisions of the Civil Procedure Rules:

> "58. The defendant also cited *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc*... In that case the proprietor of a patent sued two other pharmaceutical companies for infringement of the patent. Both defendants successfully argued at trial that the patent was invalid and the judge's order revoking the patent was upheld by the Court of Appeal. The judge had ordered the plaintiff to pay the defendants' costs but he imposed a limitation that from a specified date:
>
> > '… the first and second defendants shall recover only one set of costs between them, to be taxed as if only one firm of solicitors were acting for both parties and the parties were represented by one leading and one junior counsel, and how that one set of costs is split between the first and second defendants is a matter for them.'
>
> The judge explained his order as follows:

> ‘It seems to me that the governing principle should be that where there are two or more parties fighting a common enemy, unless there are special circumstances, the court should lean in favour of one set of costs. One can always say that the second party might be better off if they had their own particular legal team. I am not always sure that is true: too many cooks often spoil the broth. Even assuming that a party might be slightly better off, unless there is a real conflict, genuinely justified by separate sets of lawyers, I think the better view is the parties should be under pressure to agree there should be one set of lawyers to face the common enemy. I think the court should be reluctant to grant two sets of costs.’

59. The judge's order for costs was reversed by the Court of Appeal. Aldous LJ (with whom Buxton LJ and Holman J agreed) said:

> ‘70. In my view the governing principle enunciated by the judge is too broadly stated. The governing principle is that the losing party should only be required to pay the costs reasonably incurred by the other party or parties. No doubt parties should be under pressure only to instruct one set of lawyers to face a common enemy, as to do otherwise could result in an unreasonable expenditure of costs for which the losing party should not pay. But it does not follow that successful defendants, even if they adopt a common approach, should be invariably deprived of part of their costs.
>
> 71. In the present case the appellants chose to fight the issues of infringement and validity against two defendants. No complaint was made, nor could it have been made, that both instructed solicitors and counsel to advise them and to serve defences. The complaint upheld by the judge was that sometime in February, before the trial in July 1998, that position changed and it became unreasonable for the defendants to be represented by their own solicitors and counsel. That

being so, it was not reasonable for the appellants to pay both sets of costs. What was it that meant that it was unreasonable for one of the parties to continue to be separately represented? The judge did not answer that question, except to say that he was not saying that the solicitors acted improperly. His conclusion depended upon what he thought was reasonable for the losing party to pay, not upon an assessment as to whether one of the respondents had acted unreasonably. That became evident in the discussion after judgment when [counsel], who appeared for the respondents, raised the difficult questions as to how the respondents were to split the one payment of costs between them in the absence of agreement. That resulted in the judge ordering that how the one set of costs was to be split between them 'was a matter for them'. Did he expect that if agreement was not reached, the actual split would have to be decided by litigation? I am not sure how that would be done as he did not give them liberty to apply to him for that purpose.

72. [Counsel for the appellants] supported the judge's conclusion that from February 1998 the appellants should only be liable to pay one set of costs as that was the amount that it was reasonable for a claimant to pay. I disagree. A losing claimant should ordinarily pay the costs reasonably incurred by the parties that he takes proceedings against. What costs are reasonably incurred by one or more defendants should be ascertained by the costs judge who carries out the assessment. Upon such an assessment duplication and failure to co-operate can be seen and adjustments made accordingly. To decide what costs were reasonably incurred by defendants by considering what costs a losing client should pay, amounts to pre-judging the results of a detailed assessment without considering the facts. The judge's conclusion involved, by implication, a decision that the costs of one or both of the respondents had been unreasonably incurred. That could not have been inferred from the fact that they had separate solicitors and counsel and he had no evidence before him to

enable him to reach that decision. No such conclusion could be reached without looking at the full picture which of course would be done by the costs judge on a detailed assessment.

73. I would discharge the costs order made by the judge upon the basis that he approached the issues between the parties on the wrong basis. Successful parties are ordinarily entitled to their costs reasonably incurred. If there be evidence before the judge that certain costs do not fall within that category, then they should be disallowed. In this case there was no such evidence and therefore the matter had to be left to the costs judge when carrying out the detailed assessment. Of course it is always open to the judge to draw attention in his judgment to matters which he believes require particular investigation during assessment. I would therefore substitute for the judge's orders as to costs an appropriate order for the costs of the respondents to be paid by the appellants.'

60. The relevant rules of the CPR, taken together with these decisions, establish the following propositions, which are relevant to the assessment of costs on the standard basis:

(1) costs will be recoverable only to the extent that they were reasonably incurred;

(2) the court will resolve any doubt as to whether costs were reasonably incurred in favour of the paying party;

(3) where the receiving parties were separately represented, the court will give them the opportunity to explain their case as to why the costs of the separate representation were reasonably incurred;

(4) it may often be appropriate for that opportunity to be given in the course of a detailed assessment by a costs judge

but there is no reason in principle why the matter should not be capable of being considered by the judge who is asked to make an order or orders for costs;

(5) if the court considers that the costs of separate representation exceeded what was reasonably necessary to present the claimants' case and protect their interests, then the court will conclude that the additional costs (in excess of the costs which would have been incurred if the claimants had instructed a single firm of solicitors) were not reasonably incurred and those costs will be disallowed."

88. As to the case before him, Morgan J came to the following conclusions. There was a strong argument that the conduct of the mother and children, in being represented by separate firms of solicitors, was irregular, but any such irregularity had been waived by the defendant. There was however a point at which separate representation was no longer reasonably necessary, as considered at paragraphs 66 to 69 of his judgment:

"66… I conclude that the assessment of costs in this case should reflect the fact that separate representation was not justified as reasonably necessary from immediately after 20 November 2012.

67. The next question is how to give effect to that conclusion. The defendant submits that the claimants should only be allowed to recover the costs of instructing Stephenson Harwood or Isadore Goldman, but not both. I do not think that can be right in view of the likelihood that not all of the work done by those two firms was duplicatory. I will not make a finding as to the extent of the duplication but in view of what I was told as to the division of the work between them, if I were to disallow the entirety of the costs charged by one of the firms, I would prevent the claimants recovering costs which were necessary for them in order to conduct the litigation.

68. I consider that the right order to make should distinguish between the period up to and including 20 November 2012 and the period on and after 21 November 2012. In relation to

> the former period, the costs judge should assess the costs of Jane and the children on the standard basis without further direction from me. In relation to the latter period, the costs judge should determine, on the standard basis, the costs which would have been incurred if the claimants had used one firm of solicitors, rather than two. On the basis of the submissions made to me, it is likely and certainly possible, that the costs recoverable will involve the addition of some of the costs incurred by Stephenson Harwood to some of the costs incurred by Isadore Goldman.
>
> 69. The order I will make will ultimately result in the assessment of the sum payable by the defendant to the claimants. I was not addressed on the separate question of which part of that sum would be paid to Jane and which part to the children. It may be that the claimants will agree that matter as between themselves. If they do not agree, it will have to be decided. It would be better to decide it after the detailed assessment has been done. It would be wrong of me to decide anything on this point in the absence of argument but a possible preliminary approach would be to distinguish between charges for work which was not duplicated and charges for work which was duplicated. In the case of the former, it would seem right that the costs which are allowed for that work by one solicitor should be regarded as receivable by the client of that solicitor. As regards the latter category, it will be necessary to apportion that cost between the claimants."

89. Mr Bacon submits that *Ong v Ping* was similar to this case. Objection was taken to the instruction of two firms of solicitors, but divisions of labour had been organised to avoid duplication. If the court had limited the recoverable costs to the higher of the total costs incurred by either Isadore Goldman or Stephenson Harwood LLP but not both, then if (say) Isadore Goldman had the higher total costs but necessary work had in fact been undertaken by Stephenson Harwood LLP, the receiving parties would not be able to recover the cost of Stephenson Harwood LLP's work, even if Isadore Goldman had not duplicated that work. Such an outcome would have resulted in a windfall for the paying party and would have been unprincipled.

90. The purpose of the Costs Order, argues Mr Bacon, was to achieve the same objective as Morgan J achieved in *Ong v Ping*. It the recovery of one set of costs,

comprising the highest costs incurred by the First Receiving Party or the Second to Fifth receiving parties, by reference to items of work rather than total costs. This permits reasonable non-duplicative work to be recovered by the First Receiving Party or the Second to Fifth Receiving Parties.

Conclusions on the correct interpretation of the Order of 11 November 2020

91. We have concluded that the Receiving Parties' formulation of their costs claim is not justified by the wording of the Costs Order; that the Costs Order is not the same as the costs orders made either in *Bristol-Myers Squibb Co v Baker Norton* or in *Ong v Ping*; that it cannot have the same effect as the orders made in those cases; that the Receiving Parties' formulation of their costs claim is not in any event consistent with *Bristol-Myers Squibb Co v Baker Norton* or *Ong v Ping*; and that the practical and financial consequences of the Receiving Party's approach, as highlighted by Mr Carpenter's examples, supports the conclusion that their interpretation of the Costs Order is not sustainable. We have reached those conclusions for the following reasons.

Conclusions: the wording of the Costs Order

92. We accept Mr Carpenter's interpretation of the phrase "set of costs". It was employed not only in Bolton but in *Bristol-Myers Squibb Co v Baker Norton* and by Morgan J in *Ong v Ping* (in which he referred to both of those authorities) to describe the costs of a single legal team instructed by particular party or group of parties.

93. Mr Bacon submits that there is no reason why the phrase "set of costs" could not refer to a combined set of costs. Hypothetically the phrase might be employed in that way (although we have not been offered an example), but that is not its obvious meaning: "a set of costs" is not the same as "a combined set of costs".

94. One would, accordingly, expect any order that makes provision for multiple receiving parties or groups of receiving parties to receive a "combined set of costs" to say so in clear terms, and the Costs Order does not.

95. We have also concluded that Mr Carpenter must be right in saying that the phrase "the higher set of costs claimed" used in the Costs Order would makes no sense if the purpose of the order were to allow the Receiving Parties to recover one set of combined costs.

96. That difficulty cannot be overcome, as the Receiving Parties have attempted to do, by choosing and blending the higher of each group of Receiving Parties' costs within categories to which the Costs Order makes no reference. If it had been the intention of the Supreme Court, when making the Costs Order, to permit the Receiving Parties to divide two sets of costs into categories and then to claim against Romania the higher figure from each category one would expect the Costs Order to say so, and it does not. This is unsurprising, given that no such exercise was mooted in the parties' costs submissions.

97. The artificiality of the Receiving Parties' approach is underlined by the fact that they have, in claiming the highest figures they can identify within given categories, expanded upon the work categories provided for in Supreme Court Form 5, the required form of bill (Supreme Court Practice Direction 13, paragraph 7.1) for assessments in the Supreme Court. There are obvious difficulties in favouring any interpretation of the Costs Order which requires the reformatting of prescribed forms, over one which does not.

Conclusions: *Ong v Ping*

98. In awarding one set of costs for these proceedings, the Supreme Court has taken a different approach from that adopted in either *Bristol-Myers Squibb Co v Baker Norton* or *Ong v Ping*. In *Bristol-Myers Squibb Co v Baker Norton* the court, in setting aside an order for two parties between them to recover one set of costs, simply substituted an order for each of the two parties to recover their costs in the usual way, and left it to a costs judge to determine the extent to which separate representation had led to costs being unreasonably incurred. In *Ong v Ping* Morgan J identified a date up to which separate representation was reasonable, but from the point that separate representation ceased to be reasonable left it to the costs judge to determine the extent to which costs had been unreasonably incurred as a result.

99. From that point, Morgan J identified the limit of reasonably incurred costs as the costs which would have been incurred if the claimants had used one firm of solicitors rather than two, but he did not limit the costs recovery of two sets of parties to one set of costs. He plainly intended (as did the court in *Bristol-Myers Squibb Co v Baker Norton*) to allow the recovery of two sets of costs, but only to the extent that they had not been unreasonably incurred as a result of separate representation.

100. It would seem to follow that any provision in a costs order to the effect that multiple parties are to recover only one set of costs is inconsistent with the approach taken in *Bristol-Myers Squibb Co v Baker Norton* and *Ong v Ping*, which was to allow

the recovery of two sets of costs subject to the normal principles of reasonableness set out in the rules and Practice Directions to which we have referred.

101. Any provision for two parties, or for two sets of parties, to recover the higher of two sets of costs is equally inconsistent with the *Bristol-Myers Squibb Co v Baker Norton* and *Ong v Ping* approach. That is because any such provision would run directly contrary to the court's evident intention in those cases to allow the process of detailed assessment to determine the overall level of reasonable costs. In fact it would impede the assessing judge's ability to do so in accordance with the relevant rules.

102. In summary, any order for multiple parties to recover one set of costs, or for two sets of parties between them to recover the higher of two sets of costs, is different in substance and must produce a different outcome to that of either *Bristol-Myers Squibb Co v Baker Norton* or *Ong v Ping*.

103. The thrust of Mr Bacon's submissions is largely based upon the proposition that for any court to depart from the *Ong v Ping* approach would be wrong in principle. The difficulty with that as an aid to interpretation is that it is clearly open to the court to make a different order if it considers that to be appropriate in the circumstances of the case. The Receiving Parties' costs submissions did not suggest that it would be unlawful or contrary to established principle to provide for the Receiving Parties to recover one set of costs: only that it would be right, in the circumstances, for them to receive two sets of costs.

104. One example (albeit superseded by the Costs Order) of an order that does not take the *Ong v Ping* approach is the order made by the Court of Appeal in this case, which provided in straightforward terms for the recovery by the Receiving Parties of one set of costs. Evidently the Court of Appeal did not consider the making of such an order (*Bristol-Myers Squibb Co v Baker Norton* notwithstanding) to be wrong in principle, and was not persuaded by any submissions that might have been made by the Receiving Parties as to the efficient division of work, to adopt the *Ong v Ping* approach.

105. Nor, for the reasons we have given, can it be right to conclude that the Supreme Court chose to adopt th*e Ong v Ping* approach. The court may, when considering the parties' cost submissions, have considered whether to do so (*Ong v Ping* having been mentioned briefly in early correspondence appended to Romania's submissions). As Mr Carpenter says, it is impossible to tell. What is clear is that the court did not do so.

106. If it had, the Costs Order would not have limited the recovery of the Receiving Parties' costs in the way it did. It would have provided rather for the limit to be determined on detailed assessment and (if entirely consistent with *Ong v Ping*) incorporated a provision to the effect that on assessment the costs recoverable by the Receiving Parties should not exceed the costs which would have been incurred if they had used one legal team, rather than two.

107. The Costs Order is not, however, worded in that way. It provides rather that the Receiving Parties shall recover one set of costs, so establishing that the Supreme Court was not persuaded that it was reasonable for the First Receiving Party and the Second to Fifth Receiving Parties to be separately represented, notwithstanding their submissions about the efficient division of work.

108. It also provides that the set of costs in question will be the higher (which may be a partial concession to those submissions) and that that higher set of costs will be shared between the First Receiving Party and the Second to Fifth Receiving Parties in proportion to their actual expenditure. This last provision is again inconsistent with *Bristol-Myers Squibb Co v Baker Norton* and *Ong v Ping*, in which the division of recovered costs fell to be determined either on assessment or following assessment.

Conclusions: practicalities

109. The Receiving Parties' formulation of their costs claim creates other problems. The figures set out by Mr Carpenter illustrate that they have produced a total claim for costs which is higher than either of the two sets of costs incurred, respectively, by the First Receiving Party and the Second to Fifth Receiving Parties. This, and the consequent recovery of up to 81% of the Receiving Parties' combined costs, is not consistent with the provisions of the Costs Order for the Receiving Parties to recover only one set of costs.

110. Mr Carpenter also seems to us to be correct in saying that the approach adopted by the Receiving Parties does create anomalies and practical difficulties for assessment which could not have been intended when the Costs Order was made. Mr Bacon argues that some costs orders do, of necessity, lead to complicated detailed assessments, but there are obvious reasons for preferring an interpretation of the Costs Order which does not increase the difficulty, time and expense involved in undertaking the assessment of costs to one which does.

Conclusions: the indemnity principle

111. For all the above reasons we accept, as Mr Carpenter contends, that the Costs Order provides for the Receiving Parties between them to share, in proportion to their actual expenditure, the amount recovered on the assessment of the costs incurred by the First Receiving Party, that being the higher of the two sets of costs with which the court was concerned when the Costs Order was made.

112. We do not accept that this approach offends the indemnity principle. Mr Carpenter suggests that the Costs Order simply provides for the First Receiving Party to recover his costs and to then share the recovery with the Second to Fifth Receiving Parties. That is one viable interpretation which avoids any difficulty with the indemnity principle.

113. Our own view would however be that the Costs Order provides for all of the Receiving Parties to recover their costs, but for the amount recovered to be limited to the assessed amount of the First Receiving Party's costs (with additional refinements in relation to counsel's fees, discussed below). One could demonstrate that this results in no breach of the indemnity principle by assessing both sets of Receiving Parties' costs and setting off the sum payable to the Second to Fifth Receiving Parties against individual items allowed in their bill, but that exercise would be entirely redundant.

114. If our interpretation of the Costs Order would, as Mr Bacon contends, lead to the Second to Fifth Receiving Parties recovering the First Receiving Party's costs, it is difficult to see how the Receiving Parties' preferred approach (in which both groups of Receiving Parties claim some of the other group's costs and some of their own) could avoid similar difficulties. Our conclusion is however that Mr Carpenter is right in saying that the indemnity principle is not engaged at all.

Conclusions on the recovery of counsel's fees under the Costs Order

115. The Costs Order provides for one set of costs (the higher) to be submitted for assessment by the Receiving Parties, but also provides that they may recover the fees of two leading counsel and one junior between them. In doing so, the order creates an exception to Practice Direction 6.3.7 (as provided for in the Practice Direction itself).

116. As we have observed, it is clear from the terms of the Costs Order that the Supreme Court did not consider it reasonable for the First Receiving Party and the Second to Fifth Receiving Parties to be separately represented. It would be consistent

with that, as regards the recovery of counsel's fees, for the Receiving Parties (insofar as achievable) to be in the same position as they would have been in had they instructed a single legal team advised and represented by two KCs.

117. Bearing that in mind, along with the fact that the Costs Order (as Mr Carpenter points out) contains an overarching provision for the recovery of the higher of the two sets of costs incurred by the Receiving Parties, it would seem to follow that the Receiving Parties are entitled to claim the fees of the two leading counsel instructed by the First Receiving Party.

118. If in fact the First Receiving Party had instructed only one leading counsel, then the position would (as Mr Carpenter concedes) be different. The Second to Fifth Receiving Parties would be able to recover the fees of their own leading counsel, even though it falls outside the higher set of costs provided for in the Costs Order, because the order makes express provision for the Receiving Parties between them to recover the fees of two leading counsel.

119. That is not, however, the position. Because the First Receiving Party instructed two leading counsel, and their fees fall within the higher set of costs provided for by the Costs Order, those are the fees that can be recovered.

120. With regard to junior counsel, for the same reasons, we have concluded that the Costs Order provides for the recovery of the junior instructed by the First Receiving Party. With regard to the number of juniors, the position appears to be relatively straightforward. The Costs Order provides for the recovery of the costs of one junior. It need not be the same junior at all times, because (as was in fact the case) there may be a change of junior counsel. It does not however provide for the recovery of more than one junior instructed at the same time. That is the position regardless of whether one or two leading Counsel was also instructed at the relevant time.

121. For those reasons, our conclusion is that the Receiving Parties are, under the terms of the Costs Order, entitled to submit for assessment (within the costs of the First Receiving Party) the fees of Patrick Green KC, Professor Sir Alan Dashwood KC, Matthieu Gregoire and (from the point when Mr Gregoire ceased to act and he took over) Jonathan Worboys. They are not entitled to claim the costs of other counsel.

Currency

122. The second issue we need to address arises from the way in which the Second to Fifth Receiving Parties have drawn up their bill, in particular as to the methodology employed in converting costs paid in other currencies into Sterling. It also has some bearing upon the First Receiving Party's bill, so (notwithstanding the conclusions we have already reached as to the appropriate interpretation of the Costs Order) it stands to be addressed.

123. W&C charged the Second to Fifth Receiving Parties in Euros. The hourly rates claimed in their Supreme Court bill appear, consistently with that, to result from conversion from another currency. The bill however offers no information about the currency in which The Second to Fifth Receiving Parties paid their costs or any process of conversion into Sterling.

124. Romania asked in its Points of Dispute for details of when W&C's invoices were paid and in which currency, relying upon the judgment of the Senior Cost Judge in *Deutsche Bank AG v Sebastian Holdings Inc* [2020] EWHC B16 (Costs) in arguing that the bill should have been drawn so as to show the charges in the original currency, converted to Sterling based on the exchange rate at the time of payment.

125. In their Replies, the Second to Fifth Receiving Parties said that they would provide information about payment in currencies other than Sterling in advance of the assessment and argued, relying upon *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* [2019] EWHC 715 (Ch), that the date on which any currency conversion should take place is the date when a bill is filed with the Court.

126. Under cover of a letter dated 30 August 2022, the Second to Fifth Receiving Parties provided a table confirming that every bill delivered by W&C was in Euros, along with the date of payment of each bill and the currency conversion rate applied, which appears to be in each case the rate applicable when it is said the bill was paid.

127. Romania's concern has been that the information in that table cannot readily be reconciled with the inter partes bill because it identifies seven different exchange rates, whereas the Second to Fifth Receiving Parties' Supreme Court bill shows only a single hourly rate for each fee earner, derived (as Mr Carpenter puts it) from an undisclosed original sum in Euros on an undisclosed date at an undisclosed rate.

128. The reason that a similar issue may arise in relation to the First Receiving Party is that, as at the time of the hearing before us, the First Receiving Party, whilst claiming his Supreme Court costs in Sterling, had not disclosed the currency in which Crofts delivered bills to him. Romania says that in the High Court and Court of Appeal S&S charged the First Receiving Party in US dollars, but the First Receiving Party paid in Euros, so there appears to be a double currency conversion issue. However, the First Receiving Party's bills in those courts are drawn in Sterling without any indication of how or when the US dollar charges have been converted.

129. In submissions, Mr Bacon stated that if Romania insists on each item allowed in the Receiving Parties' bills to be the subject of individual audit back to a particular invoice so as to identify the equivalent conversion rate, then that will be a burdensome task (albeit one which can be undertaken if the court requires it). If Romania insists upon doing so for each and every item, then Romania should pay the attendant (and considerable) cost. There is however no precedent for such an expensive approach.

130. The Receiving Parties, he said, simply seek to ensure that when it comes to their reimbursement for their reasonable legal spend, they do not suffer a loss by reason of exchange rate fluctuations since the date of payment. They say that the bills should first be assessed so that the items of costs which are held to be recoverable are first identified and quantified in Sterling, and that only then can any meaningful steps be taken to ensure that of the sums allowed, the receiving parties recover the equivalent of what they have spent at the time of payment of the invoices. There is nothing to be gained now in seeking to rule on applicable conversion dates or rates on items which still need to be assessed.

131. Mr Carpenter opposed this on the basis that, in principle, the Receiving Parties' costs should be claimed at the conversion rate as at the date that costs were paid (which appears to have fluctuated significantly over the invoicing period).

132. He argued that, given the lack of transparency to date as to exactly how conversion operated (for example, whether payments were agreed in another currency or only converted when bills were raised), to allow conversion back into Sterling at the present time might result in the Receiving Parties' costs being assessed by reference to rates in Sterling which are quite different from those which in fact formed the basis for the retainer.

133. The date of payment of bills has the benefit of objective certainty, whereas any other date will be more or less arbitrary. Taking that approach ensures that Romania, which has no control over the currency in which the Receiving Parties chose to pay

their legal representatives, does not bear the burden of exchange rate fluctuations. It will cap the sums claimed in the Receiving Parties' Sterling bills, and will allow Romania to know from the outset the amount of costs claimed.

134. For those reasons, he said, it is neither justifiable nor appropriate to defer the conversion exercise until the assessment has been completed.

135. In his response Mr Bacon confirmed that the First Receiving Party proposed to provide to Romania a conversion table similar to that already supplied by the Second to Fifth Receiving Parties. He also stated that a weighted average had been used in each bill for the purposes of currency conversion. Mr Carpenter stated that this information had not been provided before.

136. It might well be possible for the parties to narrow the issues now that that information has been made available, but in the meantime we have to address the parties' dispute as to the appropriate date for currency conversion, and whether any further conversion exercise should be undertaken now or later.

Currency: case law

137. In *Deutsche Bank AG v Sebastian Holdings Inc* the Senior Costs Judge concluded (at paragraphs 61-67 of his judgment) that costs incurred in a foreign currency should be claimed in their Sterling equivalent at the date of payment, rather than a later date, such as when the bill was finalised or the date of assessment.

138. In reaching that conclusion, he considered two High Court decisions. In *Actavis UK Ltd v Novartis AG* [2009] EWHC 502 (Ch), Warren J (at paragraph 29 of the judgment) said this:

> "Conventionally, as I understand it, the Costs Judges make only sterling awards and convert foreign currency disbursements or fees into sterling at the rate prevailing at the time of payment where payment has been made before the assessment has been completed, with any outstanding amounts being converted at the rate prevailing when the assessment is carried out…"

139. At paragraph 34 of his judgment Warren J made it clear that his "strong inclination" was towards the view that what he understood to be the practice of costs Judges was correct. He left it the costs judge to make the final decision.

140. In *MacInnes v Gross* [2017] 4 WLR 49, Coulson J held that a receiving party was not entitled to be compensated for losses resulting from currency fluctuations between the dates when the costs were paid by the receiving party and the date when they might be paid by the paying party. He noted (at paragraph 21) that a paying party can work out in advance the additional risk created by the potential liability to pay interest on costs, but any potential liability to pay currency fluctuations is uncertain and wholly outside his control: and that some protection against currency fluctuations would be provided to the receiving party by the "generous" interest rate of 4% over base.

141. At paragraph 66 of his judgment in *Deutsche Bank AG v Sebastian Holdings Inc*, the Senior Costs Judge summarised the conclusions he had reached following consideration of those authorities:

> "It seems to me that the just solution is that the sums paid by the Claimant in United States dollars should be claimed at their sterling equivalent at the time of payment, rather than at any later date. The Claimant is an international bank and was capable of paying the disbursements in any currency it chose and, if it chose to pay out of a dollar account, it was capable of replenishing that account from a sterling account and to claim the sterling equivalent. In the following 7 years doubtless the Claimant could have taken steps to mitigate any exchange rate losses. More significantly the Claimant is entitled to interest at 8 per cent on those sums for most of the period since the judgment and that should provide significant protection."

142. In *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* [2019] EWHC 715 (Ch) John Kimbell KC, sitting as a Deputy Judge of the High Court, awarded and summarily assessed the costs of proceedings in the Business and Property Court. With regard to currency, the principal issue he had to consider was whether the receiving party, which had been invoiced by its solicitors in Euros, could have its costs assessed and ordered in Euros. He concluded that it could.

143. A secondary issue concerned the treatment of Counsel's fees, which had been invoiced in Sterling and converted to Euros as at the date of filing of the summary assessment statement. At paragraphs 52 and 53 of his judgment Mr Kimbell KC said:

> "In respect of counsel's fees the currency of account is sterling but the currency of payment is the euro. In my judgment, the most appropriate currency for these costs too is the euro. The appropriate date of conversion is the date on which the overall costs schedule is filed… It would of course be possible to divide the costs into two awards one in sterling and one in euro. However, counsel's fees represent only fraction of a relatively modest total bill and, in my judgment, it would not be in keeping with the overriding objective to split the costs award into fragments on a summary assessment in those circumstances."

Conclusions on currency

144. In our view, *Deutsche Bank AG v Sebastian Holdings Inc*, and the authorities referred to by the Senior Costs Judge, are much more on point for present purposes than is *Cathay Pacific Airlines Ltd v Lufthansa Technik AG*. That case concerned a summary assessment undertaken, as a summary assessment should be, in a quick and pragmatic fashion. Mr Kimbell KC's conclusion as to the appropriate date for conversion (which does not appear to have been argued before him) reads less as a statement of principle than as a direction for the best way of dealing with a small and (for the purposes of his decision) anomalous part of the receiving party's costs, which were assessed in total at €25,000.

145. This is a detailed assessment in which the total costs claimed in the Supreme Court and below exceed £2 million. The Receiving Parties, as Mr Carpenter says, instructed English solicitors to bring proceedings before the English courts. They might have been expected to have billed their clients in Sterling, and the Receiving Parties' choice to pay in another currency is outside the control of Romania, which should not have to bear the consequences. The Receiving Parties are entitled to statutory interest from 11 November 2020 at a statutory rate which far exceeds any commercial rate and which, as in *MacInnes*, could be regarded as sufficiently compensating them for any losses resulting from currency fluctuations.

146. For those reasons, we have concluded that the appropriate date of conversion for sums paid by the Receiving Parties in a currency other than Sterling is the date of

payment. We believe that Mr Carpenter is also justified in saying that it is not appropriate to defer the conversion exercise until the assessment of the bills has been completed. The Sterling entries in the bills themselves should reflect the appropriate conversion date as at the time that the items in question were paid for by the Receiving Parties.

147. Whether that requires a very detailed and burdensome exercise is another question. It has occurred to us that the process of conversion may largely involve adjusting hourly rates, which might not in itself be particularly difficult. Alternatively it may be that the parties can agree a pragmatic and cost-effective approach based on, for example, a weighted average. We would be open to submissions on the best way of achieving a fair and cost-effective resolution of the currency conversion problem.

Summary of conclusions

148. The Costs Order made by the Supreme Court on 11 November 2020 provides for the Receiving Parties between them to share, in proportion to their actual expenditure, the amount recovered on the assessment of the costs incurred by the First Receiving Party, that being the higher of the two sets of costs with which the court was concerned when the Costs Order was made.

149. The Receiving Parties are, under the terms of the Costs Order, entitled to submit for assessment (within the costs of the First Receiving Party) the fees of Patrick Green KC, Professor Sir Alan Dashwood KC, Matthieu Gregoire and (from the point when Mr Gregory ceased to act and he took over) Jonathan Worboys. They are not entitled to claim the costs of other counsel.

150. Within the Receiving Parties' bills the appropriate date of conversion into Sterling, for sums paid by the Receiving Parties in a currency other than Sterling, is the date of payment. We accept that it is not appropriate to defer the conversion exercise until the assessment of the bills has been completed, but we would hope that the exercise can be approached in a cost-effective and pragmatic fashion.