Case 38
Wales (t/a Selective Investment Services)

v

CBRE Managed Services Ltd and Another

[2020] Costs LR 603

Neutral Citation Number: [2020] EWHC 1050 (Comm)
High Court of Justice, Business and Property Courts in Manchester Circuit Commercial Court (Queen's Bench Division)
30 April 2020

Before:
HHJ Halliwell, sitting as a judge of the High Court

Keywords:
conduct, mediation

Headnote

In proceedings for breach of contract in which the claimant was "plainly the unsuccessful party", the court considered the extent to which there should be a departure from the general rule under CPR 44.2(2) that the loser should pay the winner's costs. The claimant had made an offer to engage in mediation prior to issue of proceedings, and again a month before trial. In circumstances where the court accepted that mediation would have had a reasonable prospect of success, the first defendant's refusal to engage in mediation was unreasonable, and its entitlement to costs fell to be reduced in consequence. The claimant would be ordered to pay 50%

of the first defendant's costs until the date that the first defendant made an offer for the claim to be withdrawn on terms that each party bear its own costs, which was not engaged with by the claimant. However unpromising the offer might have appeared, it was incumbent on the claimant to explore all available options, and he would be ordered to pay the first defendant's costs without reduction following that offer until the point the claimant again offered to mediate a month before trial, from which date the claimant would pay 80% of the first defendant's costs. The second defendant had agreed to engage in mediation, and the claimant would pay its costs, save that such liability would be reduced to 80% for the period prior to amendment of the defendant's case; the second defendant had acted unreasonably in the ways in which it had initially advanced its case, costs had been wasted and the costs of the litigation as a whole had thereby been increased as a result.

Cases Cited

Beoco Ltd v *Alfa Laval Co Ltd* [1995] QB 137
Dunnett v *Railtrack plc (Practice Note)* [2002] 1 WLR 2434
Halsey v *Milton Keynes General NHS Trust*; *Steel* v *Joy and Halliday* [2004] 3 Costs LR 393; [2004] EWCA Civ 576; [2004] 1 WLR 3002
PGF II SA v *OMFS Company 1 Ltd* [2013] 6 Costs LR 973; [2013] EWCA Civ 1288

Judgment

1. **HHJ Halliwell:** On 8 January 2020, I handed down judgment following the trial of these proceedings and I made an order dismissing Mr Wales's claims against CBRE and Aviva. This is my judgment on costs following a hearing on 11 March 2020. In it, I shall use the same nomenclature as my earlier judgment, the paragraph numbers of which I shall refer to in square brackets.

(1) Procedural Background

2. The dispute originates from CBRE's decision to move its employees to a new pensions platform and, in so doing, to dispense with Mr Wales's services [5]. In my earlier judgment, I concluded that CBRE first resolved to transfer the Group Pension Scheme to a new platform on 16 November 2012 [44] and that, by 14 January 2013, CBRE had advised Mr Wales of the resolution [49, 50]. Of course, the Group Pension Scheme was not transferred on the date of the resolution itself nor, indeed, on the date Mr Wales was first advised of the resolution. It was not transferred until April 2013 pending which Mr Wales continued to provide services.

3. Mr Wales initially instructed, as his solicitors, Linder Myers LLP. Their initial letter of claim dated 27 July 2015 was addressed only to Friends Life Services Ltd, now part of Aviva. In response to Linder Myers' pre-action correspondence, Aviva advised Linder Myers that, as early as the summer of 2012, CBRE advised Friends Life that Mr Wales's services would no longer be required and that, in September 2012, he was no longer CBRE's adviser.

4. At least in part, this appears to have prompted Mr Wales's new solicitors, Clarke Willmott LLP, to serve a letter of claim dated 29 June 2016 on CBRE alleging that "in or around September 2012 you purported to terminate the contract but failed to notify our client of that termination in writing as you were required to do" and that "as a result of your failure to notify our client he continued to carry out the services outlined in the contract including administering and managing the pension scheme until April 2013".

5. CBRE engaged Stevens & Bolton LLP, as solicitors, on their behalf. Unfortunately, they chose not to provide a detailed response to Clarke Willmott's letter of claim. In their letter of response dated 4 August 2016, they did not deny the allegation that CBRE had purported to terminate the contract in or around September 2012 nor did they deny that CBRE had failed to notify Mr Wales that it had been terminated. However, they alleged that "any failure on the part of our client to provide notice in writing of its termination of the relationship with your client (and none is admitted), whilst it may have invalidated a purported termination, did not amount to a breach of contract". This is unfortunate. CBRE did not purport to terminate the contract in September 2012 nor, indeed, did it take steps to terminate the contract prior to the transition to a new platform. However, the

letter of response dated 4 August 2016 can only have encouraged Mr Wales in his erroneous impression that CBRE had purported somehow to terminate his contract in September 2012.

6. In the letters of claim, Linder Myers and Clarke Willmott indicated a willingness to refer the dispute to mediation.

6.1. By their letter dated 27 July 2015 to Friends Life, Linder Myers stated as follows: "in accordance with the pre-action protocol, our client is willing to consider any proposal to settle this dispute by means of Alternative Dispute Resolution, including mediation. Please set out in your response what form of ADR you consider would be appropriate to try and settle this dispute without the need to issue proceedings".

6.2. By their letter dated 29 June 2016 to CBRE, Clarke Willmott stated as follows.

> "(4.1) If liability is disputed and in accordance with our duty under the Pre Action Protocol to try to settle the issues without proceedings and to consider a form of Alternative Dispute Resolution (ADR) to assist with settlement, our client will consider any request for negotiation or some other form of ADR (including, for the avoidance of doubt, mediation) to enable the parties to settle this dispute without commencing proceedings.
>
> (4.2) If you wish to make any proposals in relation to ADR, these should be included within your Letter of Response where liability is denied. If you do not consider ADR to be [a] reasonable step at this stage, you should set out your reasons in detail."

7. By letter dated 21 December 2015, Aviva indicated that it was "prepared to enter into an alternative dispute resolution process and if necessary a mediation". In contrast, Stevens & Bolton did not engage with the issue in the initial correspondence. However when, by letter dated 2 November 2016, Clarke Willmott "formally propose[d] that the parties hold a 3 party mediation to attempt to resolve this dispute", Stevens & Bolton stated, in a letter dated 11 November 2016, that "we are instructed that our client will not participate in the proposed mediation".

8. Once advised CBRE was unwilling to participate in mediation,

Aviva itself demonstrated an unwillingness to mediate contending that a mediation "would be premature" and that it had "concerns about the utility of a mediation in the event of CBRE refusing to attend".

9. By letter dated 11 August 2017, Aviva advised Clarke Willmott that it had:

> "some sympathy with you[r] client's position. However any liability for failure to validly terminate the contract between your client and CBRE can only rest with CBRE and any claim for 'services' provided by your client to CBRE after September 2012 can, again, only rest with CBRE. In the light of that, we continue to question the utility of a mediation given CBRE's refusal to attend."

10. Nevertheless when, in June 2018, Aviva was warned Mr Wales was about to issue proceedings, it sought to confirm, in a letter dated 20 June 2018, that "conditional on [CBRE] participating", it was "willing to participate in mediation and invite[d] details of proposed nominee (agreeable to [CBRE]) and venue".

11. In the absence of a change in CBRE's stance, Mr Wales issued proceedings in July 2018. His claims against both parties were based on the proposition that they had agreed Mr Wales would be remunerated for his services and they were thus liable to him for commission that Aviva had clawed back. In their initial defences, CBRE and Aviva both admitted that they had entered into a contract with Mr Wales. However, they each maintained they were under no contractual liability to pay or repay his commission.

12. In advance of the initial case management conference, Clarke Willmott delivered draft directions to Stevens & Bolton with provision for a stay to enable the parties to settle the dispute by alternative dispute resolution and an order providing that "at all stages the parties must consider settling this litigation by any means of alternative dispute resolution (including mediation); any party not engaging in any such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise". At the request of Stevens & Bolton the provision for a stay was deleted on the basis that the "proposed timetable allows sufficient time for the parties to engage in ADR and settlement discussions once issues surrounding clarification of the parties' pleadings have been resolved".

13. On 8 November 2018, the court made an order in substantially

the terms sought, incorporating the provision for the parties to consider settlement by ADR at all stages of the litigation. At this stage, directions were made for the parties to file and serve responses to Part 18 Requests and Mr Wales was given permission to file and serve a Reply, if advised, by 4 pm on 18 January 2019. The case was listed for trial with an estimated length of three days commencing on 1 July 2019. Mindful of the requirement that she must file a witness statement explaining any failure to engage in ADR, CBRE's solicitor, Ms Sleave filed a statement dated 28 November 2018 to confirm CBRE considered it was "premature" to "consider arranging a mediation" pending the conclusion of pleadings.

14. The responses to Part 18 Requests were filed and served during December 2018 but it appears Mr Wales did not exercise his right to file and serve a Reply at this stage. In the sense envisaged by Ms Sleave, time for pleadings could thus be deemed to have concluded on 18 January 2019. Although Ms Sleave had apparently anticipated this would be the appropriate time to arrange a mediation, she appears not to have canvassed any form of ADR or mediation with the parties at this stage. However, by letter dated 14 February 2019 headed "without prejudice save as to costs", she offered to settle on the basis that Mr Wales withdrew his claim and each party would bear its own costs. Although the offer was expressed to "remain open for acceptance for 14 days", it was also made "subject to contract and an agreed form of Tomlin order". It follows that it was not open for acceptance as a binding contractual offer. Nevertheless, Mr Wales and his solicitors did not make any inquiries about the offer. They did not purport to accept it and they did not make a counter offer.

15. By this stage, however, Aviva had advised Mr Wales it intended to amend its defence to deny that it had ever entered into a contract with him. However, it didn't formally apply for permission to amend until 12 April 2019 or thereabouts. The application came before HHJ Eyre QC on 3 May 2019. Following a contested hearing, HHJ Eyre gave Aviva permission to amend subject to directions providing inter alia for the witness statements to be exchanged on 21 May 2019. The amendments were fundamental to Aviva's case and they changed the landscape of the pleaded issues. Mr Wales initially contemplated joining Sesame, as third defendant, on the basis that Sesame was the contracting party. On re-consideration, Mr Wales applied for permission to amend the particulars of claim to rely inter alia on a

collateral contract with Aviva. He also took the opportunity to rely, by way of amendment, on contractual duties of honesty and good faith. At a hearing before me on 7 June 2019, I gave Mr Wales permission to amend the particulars of claim on this basis and I extended the time for the delivery of witness statements to 21 June 2019.

16. Meanwhile, by email dated 29 May 2019, Clarke Willmott had proposed a mediation in the week commencing June 17. On behalf of Aviva, Clyde & Co indicated that they were willing to mediate and had good availability on June 17 and 19; they might also be able to re-arrange other meetings on June 18 but would prefer not do so if this could be avoided. However, they reiterated that they did not consider the mediation was likely to be productive if CBRE was not also in attendance. Unfortunately, Stevens & Bolton LLP chose not to respond at this stage. However, Ms Sleeve subsequently filed a witness statement confirming that CBRE had chosen not to mediate on the grounds that there was insufficient time to prepare for and attend a mediation in the week commencing June 17, the directions on June 7 had imposed a tight time scale and preparing for a mediation would have adversely affected CBRE's ability to comply with these directions. Moreover, she stated that:

> "it was unlikely that a mediation [on] the dates proposed would have resulted in a settlement given the number of factual issues remaining in dispute between the parties as the parties would not have had the opportunity to exchange witness evidence prior to the mediation."

17. It appears that witness statements were exchanged by 21 June 2019 in accordance with my directions on June 7. This included a witness statement amounting to some 17 pages from Mr Wales and three relatively short witness statements from Aviva. CBRE relied on a single witness statement from Mr Duncan James Green. This was no more than six pages in length and was based largely on inferences from some of the contemporaneous documentation.

18. However, no further steps were taken to refer the matter to mediation. The matter proceeded to trial on the dates originally listed for hearing, i.e. 1–3 July 2019. However, it was not possible to complete the trial within the time scale initially provided and the parties returned for closing submissions on 27 August 2019.

19. In my judgment dated 8 January 2020, I dismissed Mr Wales's claims against both parties. I concluded that, whilst CBRE was under

an implied contractual duty to deal honestly with Mr Wales, it was not in breach of such a duty nor was it liable to him on any other basis. I concluded that Mr Wales and Aviva did not enjoy a contractual relationship, Aviva was not estopped from denying that Mr Wales was entitled to the commission which had been clawed back from him by Sesame and Mr Wales was not entitled to a restitutionary remedy.

(2) The Legal Principles

20. CPR 44.2(2) provides that:

> "if the court decides to make an order about costs –
>
> (a) the general principle is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order."

21. By CPR 44.2(4):

> "in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

22. By virtue of CPR 44.2(5):

> "the conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction-Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
>
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

23. In the present case, Mr Wales is plainly the unsuccessful party on his claims against each defendant. He should thus be ordered to pay their costs unless there is good reason to the contrary.

(3) CBRE

24. Mr Wales maintains that he should not be ordered to pay CBRE's costs or, at least, that CBRE as a successful party should be deprived of a substantial proportion of its costs. Relying on *Halsey* v *Milton Keynes General NHS Trust* [2004] 1 WLR 3002 and the judgment of Briggs LJ in *PGF II SA* v *OMFS Company 1 Ltd* [2013] EWCA Civ 1288, at [34], he submits that an unreasonable refusal to agree to ADR warrants a departure from the general rule in CPR 44.2(2) and "silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable". He accepts that the burden is on him, as the unsuccessful party, to show that CBRE has unreasonably *refused* or, in the light of *PGF II*, *declined* to participate in ADR and, by reason of such conduct, there should be a departure from the general rule. However, he submits that, in the present case, there is ample evidence to support such a conclusion.

25. I am satisfied that Mr Wales has successfully established that this is the case.

26. Firstly, CBRE has repeatedly declined and, indeed, refused to participate in mediation. Upwards of eight months before proceedings were commenced, it refused to participate in the three party mediation proposed by Clarke Willmott. Once proceedings were issued, it was not prepared to refer the dispute to mediation until "conclusion of pleadings". In February 2019, it did make an offer to compromise the proceedings through its solicitors, Stevens & Bolton, albeit on a subject to contract basis only. At that stage, it was incumbent on Mr Wales to respond and he is culpable for a failure to make inquiries about the offer or otherwise engage with CBRE's solicitors during this period. However, once Clarke Willmott proposed mediation in the week commencing 17 June 2019, CBRE again declined to participate in or do anything to advance a mediation prior to trial the following month.

27. Secondly, in my judgment CBRE's conduct in refusing or at least declining to refer the dispute to mediation prior to the issue of proceedings and, again, in the week commencing 17 June 2019, was unreasonable.

27.1. CBRE's refusal to engage in mediation prior to the issue of proceedings compounded its failure to provide a detailed response to Clarke Willmott's letter of claim in breach of the requirements of the *Practice Direction for Pre-Action Conduct and Protocols*. More particularly, at this stage it meant that the parties were denied the opportunity to fully canvass and engage with the underlying issues, including the issues arising from Aviva's erroneous allegation – unchallenged by CBRE – that CBRE had purported to terminate Mr Wales's appointment in September 2012, a fact implicitly concealed from Mr Wales himself. Had CBRE been willing to engage in mediation, there would in all likelihood have been a tripartite mediation in which all the material issues were properly considered and addressed. There is a real prospect that Aviva's erroneous allegation would have been corrected at that stage. There is also a possibility that other issues and obscurities could have been eliminated. CBRE's stance precluded a tripartite mediation and CBRE can be taken to have been aware it would at least imperil bilateral negotiations or discussions between Mr Wales and Aviva.

27.2. In my judgment, Ms Sleave did not provide, in her witness statement dated 17 June 2019, a satisfactory explanation for CBRE's failure to participate in a mediation in the week commencing that day particularly when considered in the overall procedural context. Whilst she stated there was insufficient time for the parties to prepare for and attend a mediation in the week commencing 17 June 2019, there is nothing to suggest that the solicitors instructed by Mr Wales or Aviva considered that they had insufficient time to do so, indeed they evinced a willingness to proceed with such a mediation. Ms Sleave referred to the "tight time scale" imposed by my directions on June 7. However, Mr Wales and Aviva were subject to the same time scale. It is true that the directions provided for witness statements to be exchanged by 4 pm on 21 June 2019. However, CBRE chose to exchange one witness statement only amounting to no more than six pages. Save for the bald assertions to the contrary in Ms Sleave's witness statement, there is no good reason to believe the preparation of CBRE's amended statement of case and Mr Green's modest witness statement could somehow have left insufficient time for [a] representative of CBRE to attend a

mediation in the week commencing on June 17 or that, more generally, such a mediation might have "adversely affected CBRE's ability to comply with" the other directions. Ms Sleave also stated that it was unlikely that a mediation would have resulted in a settlement on the proposed dates "given the number of factual issues … as the parties would not have had the opportunity to exchange the witness evidence prior to the mediation". She appears to have prejudged the dates on which the parties would have been able to exchange witness statements, whether in draft or otherwise, but on the un-tested hypothesis that she might have been correct, there is no reason to believe that this would have precluded a successful mediation. Many mediations are successfully concluded without witness statements and there is no reason to believe there are features of the current dispute which would dictate a different outcome. If Ms Sleave believed that there could be no successful mediation prior to exchange of witness statements, this amounted to an unexplained shift from her previous position that the parties need only wait until after close of pleadings. In my judgment, CBRE's failure to participate in a mediation in the week commencing 17 June 2019 can be characterised as a refusal and the refusal was unreasonable.

27.3. In its approach to the benefits of mediation, CBRE appears to have lost sight of the wider observations of the Court of Appeal in *Halsey*, including the following observations at [15]:

> "We recognise that mediation has a number of advantages over the court process. It is usually less expensive than litigation which goes all the way to judgment, although it should not be overlooked that most cases are settled by negotiation in the ordinary way. Mediation provides litigants with a wider range of solutions than those that are available in litigation: for example, a apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing obligation to do so. As Brooke LJ pointed out in *Dunnett* v *Railtrack plc (Practice Note)* [2002] 1 WLR 2434, 2436–2437, para 14:
>
> 'Skilled mediators are now able to achieve results

> satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone way having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solution which are beyond the powers of the court to provide.'"

It provided for them each to [*sic*].

28. In the *Halsey* case, the Court of Appeal endorsed submissions of the Law Society that:

> "factors which may be relevant to the question of whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success."

In the present case, these factors do not point consistently in the same direction. However, on balance, I am satisfied that they are consistent with Mr Wales's case that CBRE has unreasonably refused or declined ADR.

28.1. There was and is nothing in the nature of the present dispute to render it unsuitable for mediation. It is not suggested that it raises issues of binding precedent in relation to CBRE's affairs which required judicial determination. In any event, it is inherently unlikely that this featured as a consideration in CBRE's analysis of the issues. Conversely, in view of the nature and longevity of the historic relationship between CBRE and Mr Wales, a mediation would have provided them with an opportunity to address wider considerations that were not justiciable by the courts.

28.2. When considering factor (b), the merits of a case, the Court of Appeal in *Halsey* warned of the risk of claims against "large organisations, especially public bodies … vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy". Mr Wales's claim before me failed. Once submitted to detailed forensic examination and considered in the context of the evidence as a whole, I was satisfied that the conceptual basis for Mr Wales's claim was unsound. However, I am also satisfied Mr Wales nursed a genuine sense of grievance against both defendants based, in part, on the erroneous allegation that, having terminated his contract in September 2012, CBRE sought to conceal what it had done from Mr Wales himself. He did not bring the claim as a tactical ploy to buy off the cost of a mediation and, to the extent that CBRE encouraged his sense of grievance by failing to engage properly with the pre-action correspondence, it brought the litigation on itself.

28.3. On analysis, the Court of Appeal in *Halsey* considered that factor (c) ("the extent to which other settlement methods have been attempted") was "in truth no more than an aspect of factor (f)" ("whether the ADR had a reasonable prospect of success"). In the present case, it is notable that CBRE took steps to initiate a potential compromise through its subject to contract offer by letter dated 14 February 2019. Mr Wales did not take steps to investigate or pursue the offer. However, it cannot be inferred that mediation, whether tripartite or otherwise, had no reasonable prospect of success.

28.4. As to factor (d), at no stage were the costs of mediation disproportionately high in relation to the sums at stake in the litigation as a whole.

28.5. CBRE declined or refused to refer the dispute to mediation prior to the commencement of proceedings and shortly before trial. However, it was never suggested that, once fixed, the trial date should be delayed so as to accommodate mediation. CBRE maintains that, by 17 June 2019, a mediation would have prejudiced it in its trial preparation. However, in the absence of substantial evidence – as distinct from bald assertion – I am not satisfied that this is the case.

28.6. Factor (f) requires me to consider whether a mediation would have had a reasonable prospect of success. In *Halsey*, the Court

> of Appeal confirmed, at [28] that, the burden of proof is on the unsuccessful party. However, they also stated that "this is not an unduly onerous burden to discharge: he does not have to prove that a mediation would in fact have succeeded. It is significantly easier to the unsuccessful party to prove that there was a reasonable prospect that a mediation would have succeeded than for the successful party to prove the contrary". In the present case, a reasonable case could be advanced that the parties would have had better prospects of successfully compromising the case had the mediation taken place at an early stage prior to the commencement of proceedings than in June 2019. The landscape of the case changed when Aviva was given permission to amend its case to deny the existence of a contractual relationship with Mr Wales. Moreover, by that stage, the parties had incurred a substantial amount of costs and become entrenched in their positions. However, given the nature and longevity of the historic relationship between the parties and the nature of the issues in the litigation, I am satisfied that at each stage a mediation would have had a reasonable prospect of success.

29. CBRE's unreasonable refusal to participate in mediation can be traced back at least as far as Stevens & Bolton's letter dated 11 November 2016 in which they confirmed CBRE had instructed them it would not do so. Between 11 November 2016 and 14 February 2019, they did not offer to refer the dispute to mediation nor, indeed, did they take any other specific steps with a view to compromising the dispute notwithstanding the willingness shown by Mr Wales and, indeed at times, Aviva to refer the matter to ADR. Had they done so, there is a reasonable prospect that the proceedings could have been compromised. If not, at the very least it is likely some of the obscurities and difficulties which have bedevilled the proceedings could have been avoided. In the absence of a satisfactory explanation for CBRE's conduct, I am satisfied it should thus be deprived of a substantial proportion of its costs in the period ending with Stevens & Bolton's letter dated 14 February 2019 in which it offered to compromise the proceedings on a subject to contract basis. In November 2018, Ms Sleave's stance was that it was premature to mediate prior to the conclusion of pleadings. With the benefit of hindsight, this would have

been more convincing had she sought to initiate a mediation once the time for pleadings closed in January 2019. I shall disallow 50% of CBRE's costs during this period to reflect the nature and significance of their failure to engage in mediation.

30. When CBRE offered to compromise the proceedings on a "drop hands" basis, they did so on a "subject to contract" basis. However unpromising their offer might have appeared to Mr Wales, CBRE thereby opened negotiations and it was incumbent on Mr Wales, through his solicitors, to explore the available options with him. Had the parties ultimately contracted to settle the dispute on essentially the terms being offered, Mr Wales would obviously have achieved a compromise on terms more favourable to him than the ultimate outcome of these proceedings. I am thus satisfied that, from 14 February 2019 until 17 June 2019, Mr Wales should be ordered to pay the whole of CBRE's costs as the successful party within the meaning of CPR 44.2(2).

31. However, in the week commencing on 17 June 2019, CBRE again refused to engage in mediation following the proposals in Clarke Willmott's email dated 29 May 2019. Had it not been for its refusal to do so, I am satisfied that, in all likelihood, Mr Wales, Aviva and CBRE would have entered into a tripartite mediation. By that stage, the landscape had changed following the amendments to Aviva's case so as to deny a contractual relationship. However, in the hands of a skilful mediator, there is a reasonable prospect that common ground could have been found on at least some of the issues and, indeed, that a wider basis could have been found for compromising the litigation as a whole.

32. By this stage, CBRE had, of course, offer[ed] to compromise the proceedings through its solicitors' letter dated 14 February 2019. Moreover, Aviva's defence to the claim was stronger and better defined. I shall thus disallow 20% of CBRE's costs from 17 June 2019.

(4) Aviva

33. Although it has successfully defended the claim, Mr Wales submits that Aviva should be required to pay his costs of the proceedings until HHJ Eyre's order dated 3 May 2019 under which it was given permission to amend its defence to deny its putative contractual relationship with Mr Wales. In doing so, he relies on the following

proposition from the judgment of Stuart-Smith LJ in *Beoco Ltd* v *Alfa Laval Co Ltd* [1995] QB 137:

> "As a general rule, where a plaintiff makes a late amendment, as here, which substantially alters the case the defendant has to meet and without which the action will fail, the defendant is entitled to the costs of the action down to the date of the amendment."

34. On behalf of Aviva, Mr Clegg submits that this principle is inapplicable, by analogy, to amendments to a defence. Consistently with this submission, I was not referred to any authority in which the principle has been successfully applied so as to warrant an order providing for a defendant to pay the claimant's costs. In the absence of such authority, I am not satisfied that it is applicable as a free-standing principle outside the statutory framework in CPR 44.2. However, if the principle is applicable, it is not satisfied in the present case because, whilst the amendments to Aviva's defence were of a fundamental nature in denying the existence of a contractual relationship between Mr Wales and Aviva, Aviva's original defence would have succeeded without the amendment. On the hypothesis that they were contacting parties, I was satisfied Aviva had a good defence to the claim as originally pleaded and amended. Mr Wales was contractually entitled to the payment of commission from the pension contributions of CBRE's employees. However, Aviva was contractually entitled to claw back commission that was paid in anticipation of the receipt of pension contributions which ceased once the Group Pension Scheme was moved to the new platform.

35. Again, the general rule is that the unsuccessful party – in this case, Mr Wales – will be ordered to pay the successful party's costs. However, by CPR 44.2(4), I must have regard to all the circumstances, including the conduct of the parties, in deciding what order to make. For this purpose, the conduct of the parties is defined, in CPR 44.2(5), so as to include (a) conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest an allegation or issue; and (c) the manner in which a party has pursued or defended its case.

36. Applying these considerations, I am satisfied there is good reason to deprive Aviva of part of its costs. At the outset, Aviva positively asserted in the pre-action correspondence with Linder Myers, for Mr Wales, that there was a direct contractual relationship

between Mr Wales and Aviva. It also asserted or at least gave Mr Wales the impression that CBRE had elected to terminate his services in the summer of 2012. Once proceedings were issued, Aviva did not specifically put its contractual relationship with Mr Wales in issue and it admitted the allegation that, in or around September 2012, CBRE advised Aviva that the contract between Mr Wales and CBRE had been terminated. Aviva's stance on these matters was incorrect. Once Aviva obtained permission to amend its defence, its case was advanced differently, particularly in relation to the first of these issues. It contended, in terms, that Mr Wales's contractual relationship was with Sesame, not Aviva. It continued to admit the erroneous allegation, encouraged by its own pre-action correspondence, about CBRE's decision to terminate his services but did so on a modified basis.

37. In my judgment, Aviva acted unreasonably in advancing its case in these ways. Firstly, it was in a better position than Mr Wales to clarify the nature of the tripartite contractual relationship between Mr Wales, Sesame and Aviva and it ought to have done so at the outset. Its credit control manager, Mr Michael Gregson, demonstrated, when giving evidence, that he had a full understanding of the general nature of the contractual arrangements between Aviva, its authorised intermediaries and their appointed representatives, such as Mr Wales. It can be surmised that this was the case at all times material to these proceedings. Aviva's stance at the outset must have been based on a failure to make the most rudimentary of inquiries about these matters. Secondly, it allowed the impression to be created that CBRE terminated Mr Wales's contract during the summer of 2012 or, at the latest, the following September. This is less significant than the first consideration not least because its employees did not have direct knowledge of these matters and its stance was essentially based on inferences it had drawn from information provided by CBRE. However, Aviva ought to have properly investigated this aspect of the case before proceedings were issued and advised Mr Wales of the case it intended to present.

38. Unfortunately, the stance initially taken by Aviva in the pre-action correspondence and, subsequently, its statement of case, appears to have helped shape Mr Wales's initial approach to the pre-action correspondence and the early stages of the litigation. It also obscured the issues. Once Aviva's stance changed and it was given permission to amend, Mr Wales revisited the issues and made

substantial changes to his statement of case. This ultimately led to extensive changes to the statements of case of each defendant. There can be no doubt that, in consequence, each of the parties incurred significant costs that were ultimately wasted.

39. Mr Berragan also submitted that Aviva is culpable and should thus be deprived of at least some of his costs for its conduct in failing to participate in a mediation with Mr Wales. However, in my judgment, there is no room for this submission. Aviva repeatedly indicated a willingness to engage in the mediation process. However, it reasonably took the view that, in the absence of CBRE, the prospects of achieving a satisfactory compromise or substantially reducing the relevant issues would be substantially diminished. Ultimately it was not prepared to enter into a bilateral mediation with Mr Wales in the absence of CBRE. However, in this respect, it did not act unreasonably at any stage of the dispute.

40. I shall disallow a proportion of Aviva's costs on the basis only that costs have been wasted as a result of the way in which Aviva advanced its case until it obtained permission to amend on 3 May 2019. This indubitably shaped the early course of the litigation and ultimately increased the costs of the litigation as a whole. For this reason, I shall disallow 20% of Aviva's costs in the period up to and including 3 May 2019. For the avoidance of doubt, this relates only to the liability for costs which has not already been determined by preceding court orders, such as the order of HHJ Eyre itself dated 3 May 2019.

(5) Basis of Assessment

41. To the extent that Mr Wales is liable to pay the costs of CBRE and Aviva, I shall make an order providing for such costs to be subject to detailed assessment. However, there is a dispute as to the basis of assessment.

42. Before me, CBRE submitted that Mr Wales should be ordered to pay its costs on the indemnity basis on the grounds that his conduct took the case "out of the norm". In his submissions on CBRE's behalf, Mr Pavlovich relied, in particular, on three particular aspects of Mr Wales's conduct, namely failures in the presentation of his pleaded case, his allegations of dishonesty and bad faith, and his failure to accept CBRE's drop-hands offer.

43. In my judgment, whilst Mr Wales's conduct is open to criticism,

it does not warrant an order for the payment of CBRE's costs on the indemnity basis.

44. Mr Pavlovich submitted that Mr Wales's particulars of claim was incoherent whether in the form originally pleaded or following amendment on 10 June 2019. In my judgment, this is to over-state CBRE's case. The case originally advanced against CBRE was based on implied contractual terms to indemnify Mr Wales, to provide information to Aviva and not to do anything to prevent his claiming or receiving commission. This was based on the proposition that there was also a contractual relationship between Mr Wales and Aviva. Once Aviva obtained permission to amend its case to challenge this proposition, Mr Wales sought permission to amend its case against CBRE to rely on an implied contractual duty of honesty and good faith. The conceptual and evidential basis for Mr Wales's case against CBRE was thin and, before me, his case failed. However, it was advanced with reference to recognisable legal principles and it was by no means incoherent.

45. Mr Pavlovich maintained that Mr Wales's conduct in advancing unsuccessful allegations of dishonesty and bad faith could also be characterised as conduct "out of the norm" warranting indemnity costs. No such allegation should be made lightly and a party who makes such an allegation can generally be expected to have good reason for doing so. In the present case, Mr Wales failed to establish a case based on dishonesty or bad faith. However, in the pre-action correspondence, CBRE chose not to deny the allegation that it purported to terminate his contract in or around September 2012 and, in this way, CBRE encouraged Mr Wales to believe CBRE had not been open with him. No doubt he was mindful of this when, having taken further advice from counsel about the legal basis for his claim, he authorised counsel to amend his particulars of claim to advance a case based on dishonesty or a failure to act in good faith. Ultimately, Mr Wales was ill-judged in pursuing these allegations. However, in my judgment, this does not justify an order for indemnity costs.

46. Mr Pavlovich also relies on Mr Wales's failure to accept CBRE's drop-hands offer. The offer, contained in Stevens & Bolton's letter dated 14 February 2019, was only made on a subject to contract basis. However, Mr Wales can certainly be criticised for failing at least to investigate the offer further and explore the terms on which CBRE was willing to compromise. Nevertheless, the overall context was

significant. By this stage, Mr Wales had repeatedly demonstrated a willingness to refer the dispute to mediation and, following the closure of pleadings, Ms Sleave had given him the impression CBRE would itself be willing to refer the matter to mediation. Consistently with this, CBRE had willingly submitted to HHJ Pearce's order dated 14 November 2018 providing, in terms, that the parties would consider settling the litigation by ADR. Mr Wales was thus entitled to infer that a compromise would be fully explored at a mediation. CBRE, not Mr Wales, ultimately declined to refer the matter to mediation. In these circumstances, Mr Wales's failure to pursue or investigate Stevens & Bolton's letter dated 14 February 2019 cannot be characterised as conduct out of the norm so as to justify an indemnity costs order against him.

47. On behalf of Aviva, Mr Clegg also sought an order providing for Mr Wales to pay Aviva's costs on the indemnity basis. However, this was limited to the costs of the hearing before me on 11 March 2020 and it was implicitly based on the proposition that Aviva would be entitled to an order providing for its costs to be paid in full, subject to assessment, and could reasonably expect an interim payment on account of costs in the sum of £80,000. In view of the fact that, following argument on 11 March 2020, I have disallowed 20% of Aviva's costs in respect of the period prior to 3 May 2019, and, as will be seen later, I have determined that he is entitled only to an interim payment in a sum significantly less than £80,000, there is no room for me to award Aviva indemnity costs on the basis sought.

48. The costs of CBRE and Aviva shall be assessed on the standard basis.

(6) Interim Payment on Account of Costs

49. CBRE and Aviva seek an interim payment on account of costs under CPR 44.2(8). Having determined that, subject to detailed assessment, Mr Wales must pay a substantial proportion of their costs, I am required to make such an order unless there is good reason not to do so. On Mr Wales's behalf, submissions were made as to the time for payment rather [than] the principle of whether I should make such an order and I can see no good reason not to make such an order. Mr Wales must thus make an interim payment in respect of the costs of CBRE and Aviva.

50. In quantifying the interim payments, I shall take into

consideration HHJ Pearce's costs management order dated 8 November 2018 together with the procedural history and the available cost schedules. Following the costs management order, costs have been incurred on procedural steps and additional hearings that were not originally envisaged and, on detailed assessment, it is likely that the court will be invited to depart from the budget on certain phases. Conversely, on some items, such as ADR, the parties have plainly not incurred the expense envisaged and on other items, such as the sum of £14,500 for witness statements on behalf of CBRE, the budgeted figure is substantially in excess of the amount that could reasonably have been expended. I am advised that ultimately CBRE expended some £6,809 for work on witness statements itself rather higher than I would have expected.

51. Under the costs management order, it was recorded that, by then, CBRE and Aviva had already incurred £23,228 and £19,472 respectively on pre-action costs, statements of case and the initial case management conference. There was budgeted provision for CBRE to incur £26,225 and Aviva, £14,400, on disclosure and witness statements with £9825 (CBRE) and £8450 (Aviva) on the PTR, and £35,325 (CBRE) and £35,550 (Aviva) on the trial and trial preparation. However, no provision was made for the costs of CBRE's attendance at the hearing before HHJ Eyre dated 3 May 2019 at which Aviva was given permission to amend and it was not envisaged that the PTR would be restored for a second hearing when Mr Wales was originally given permission to join Sesame Ltd as a third defendant. Nor was there provision for the costs of the hearing before me on 11 March 2020, for which CBRE has submitted a costs schedule in the sum of £12,534.50 and Aviva £6,392.

52. I shall quantify the interim payment to CBRE in the sum of £63,000. I have done so by taking into account (1) £11,614 for CBRE's pre-action costs and expense on statements of case and the original CMC (i.e. 50% of £23,228), (2) £15,346 for disclosure and witness statements (i.e. the aggregate amount actually incurred on such work and identified as such by Mr Pavlovich at the hearing on 11 March 2020); (3) £9,825 (i.e. the total amount budgeted for the PTR, noting that Mr Pavlovich provided, in his Skeleton Argument for incurred costs of £4,873.80 in respect of the first PTR hearing only); (4) £28,260 (i.e. 80% of the amount budgeted) in respect of the trial and trial preparation; and (5) £10,027.60 (i.e. 80% of the amount

encompassed in CBRE's costs schedule for the hearing on 11 March 2020). I have then taken 70% of CBRE's un-budgeted costs of £11,614 and £10,027.60 (in aggregate £21,641.60), i.e. £15,149.12, and 90% of the budgeted costs of £53,431, i.e. £48,087.90, aggregating at £63,237.02. I have then rounded down the aggregate amount to £63,000.

53. I shall quantify the interim payment to Aviva in the sum of £72,000. I have done so by taking into account (1) £15,577.60 for Aviva's pre-action costs and expense on statements of case and the original CMC (i.e. 80% of £19,472); (2) £5,820 for Aviva's budgeted expense on disclosure (i.e. 80% of £7,275); (3) £50,825 in respect of the budgeted amounts for witness statements, PTR, trial preparation and trial; and (4) £6,392.00 in respect of Aviva's costs schedule for the hearing on 11 March 2020. I have then taken 70% of Aviva's unbudgeted costs of £15,577.60 and £6,392 (in aggregate £21,969.60), i.e. £15,378.72, and 90% of the budgeted costs of £56,645, aggregating at £72,023.72, which I have rounded down to £72,000.

54. Mr Wales must thus make interim payments on account of costs to CBRE and Aviva in the respective sums of £63,000 and £72,000.

55. Before me, Mr Berragan submitted that, in the exercise of my discretion under CPR 44.2(1), I should provide for payment on or before 10 June 2020. In support of this submission, he disclosed that, whilst Mr Wales has had the benefit of adverse costs insurance, his insurer is insolvent and, in any event, has sought to dispute liability under the policy. He thus requires time to raise funds. He also seeks permission to apply to join the insurer as a party to the proceedings. However, Mr Wales has not adduced evidence in relation to these issues and he has, by now, had a significant amount of time to raise funds. I shall not make specific provision for these matters but I shall provide, in general terms, for him to have permission to apply. Payment must thus be made within 14 days of this judgment.

(7) Disposal

56. Following the dismissal of his claims against CBRE, Mr Wales must pay CBRE's costs of these proceedings save that with respect to the period before 14 February 2019, he is liable for 50% of CBRE's costs only, and with respect to the period on or after 17 June 2019, he is liable for 80% of CBRE's costs only.

57. Following the dismissal of his claims against Aviva, Mr Wales

must pay Aviva's costs of these proceedings save that with respect to the period on or before 3 May 2019, he is liable for 80% of Aviva's costs only.

58. All such costs shall be subject to detailed assessment on the standard basis.

59. Mr Wales must make interim payments on account of such costs to:

59.1. CBRE in the sum of £63,000; and
59.2. Aviva in the sum of £72,000.

Neil Berragan (instructed by Clarke Willmott LLP) appeared for the claimant.

Anthony Pavlovich (instructed by Stevens & Bolton) appeared for the first defendant.

Sebastian Clegg (instructed by Clyde & Co LLP) appeared for the second defendant.