# England and Wales High Court (Senior Courts Costs Office) Decisions





**Neutral Citation Number: [2008] EWHC 90100 (Costs)**
Claim No: 5KT02682

**IN THE SUPREME COURT COSTS OFFICE**
**FROM THE BRIGHTON COUNTY COURT**

Clifford's Inn, Fetter Lane
London, EC4A 1DQ
12 February 2008

B e f o r e :

**MASTER CAMPBELL, COSTS JUDGE**

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**Between:**

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| **MR GUY M J BATEMAN** | **Claimant** |
| **- and -** | |
| **PAUL JOYCE** | **Defendant** |

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**Mr Roger Mallalieu (instructed by Weightmans) for the Claimant**
**Mr Simon J Brown (instructed by Edwards Duthie) for the Defendant**
**Hearing date: 29 January 2008**

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**HTML VERSION OF JUDGMENT**

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**Master Campbell:**

1. This judgment addresses the interpretation of a consent order ("the Order") agreed between the parties on 21 February 2007 and sealed by the Court on 9 March 2007 which compromised the Claimant's claim against the Defendant and the Defendant's counterclaim against the Claimant.

2. The material parts of the Order say this:

"BY CONSENT and upon the non attendance of both parties IT IS HEREBY ORDERED as follows:

1. That all further proceedings in this action be stayed on the terms set out below, except for the purpose of carrying the terms into effect with liberty to apply for that purpose.

2. The trial date listed for 1 and 2 March 2007 be vacated.

3. The Defendant do pay the Claimant his costs of the claim on the standard basis, such costs to be subject to a detailed assessment in default of agreement.

4. The Claimant to pay the Defendant his costs of the counterclaim on the standard basis, such costs to be the subject of a detailed assessment in default of agreement.

5. Upon payment of the sum stated in the schedule of costs, both parties be discharged from any further liability in respect of the claims made herein."

3. The issue for decision is whether the costs payable by the Claimant to the Defendant under paragraph 4 are limited by the *Medway Oil* principle (see *Medway Oil and Storage Company Limited v Continental Contractors Limited* [1989] A.C.88, the effect of which would be to restrict the costs for which the Claimant is responsible to any extra costs generated by the counterclaim and to exclude any costs relating to the claim.

4. At the hearing the Defendant was represented by Mr Simon J Brown who relied on a witness statement made by Ms Riffat Yaqub, a solicitor at Edwards F Duthie, dated 19 October 2007, in support of her contention that the *Medway Oil* principle did not apply and that her client was entitled to all his costs of the counterclaim, including, in particular, costs concerned with liability. Mr Mallalieu appeared for the Claimant, on whose behalf Mr Emerson Wallwork, a partner of Weightmans, had made a witness statement in reply on 25 January 2008. Neither Counsel required the deponents to be cross-examined on their witness statements but both lodged skeleton arguments. At the conclusion of argument I reserved judgment.

**THE BACKGROUND**

5. This is uncontroversial. On 7 February 2004 the parties were involved in a road traffic accident. The Claimant sustained relatively minor injuries but the Defendant was badly hurt and required surgery to include amputation of his left arm above the elbow. On 20 June 2005 the Claimant commenced proceedings for damages for personal injuries alleging that the Defendant had been negligent. In August 2005 the Defendant served a defence denying liability together with a counterclaim for damages for personal injury and loss. On 14 February 2007, a "round table" meeting took place involving Counsel and the parties' solicitors at which it was agreed that the Defendant would pay damages to the Claimant of £3,000 and that the Defendant would receive damages from the Claimant of £350,000. That agreement was reflected in a schedule to the Order which says this:

"1. The Claimant agrees to accept the gross sum of £3,000 in full and final settlement of his claim herein.

2. The Defendant agrees to accept the gross sum of £350,000 in full and final settlement of his claim herein.

3. The Claimant withholds from the Defendant and shall pay to the Compensation Recovery Unit in accordance with Section 8 of Schedule 2 to the Social Security (Recovery of Benefits Act 1997) the sum of £10,011.25.

4. The Claimant do pay the Defendant the sum of £39,988.75 (£350,000 less CRU) within 21 days of the date of this order.

5. The Defendant do pay the Claimant the sum of £3,000 within 21 days of the date of this Order."

6. The round table meeting did not resolve the issue of costs. On 19 February 2007 Ms Yaqub wrote to Mr Wallwork in these terms:

> "Dear Sirs
>
> ... We refer to the settlement conference on 14 February 2007. Subject to receiving a signed form of authority from our client, we have prepared a draft consent Order for your approval. We would be grateful if you would kindly endorse the Order and return it to us. On receipt of a signed form of authority from our client, we shall arrange to lodge the consent Order with the Court and notify the Court of the settlement reached between the parties.
>
> In the meantime we would be grateful if you would kindly confirm that you would be happy to consider our costs and disbursements on the writer preparing a schedule of costs and disbursements in the format enclosed, rather than arranging for a costs draftsman to prepare a formal bill of costs.
>
> Yours faithfully ..."

7. The draft Order enclosed with the letter was expressed in the following terms:

> "BY CONSENT UPON THE NON ATTENDANCE OF BOTH PARTIES IT IS HEREBY ORDERED AS FOLLOWS:
>
> 1. That all further proceedings in this action be stayed on the terms set out below except for the purpose of carrying the terms into effect with liberty to restore for that purpose.
>
> 2. The trial date listed for 1 and 2 March 2007 be vacated.
>
> 3. The Claimant do pay the Defendant his costs of the action including the costs of this Order on the standard basis, such costs to be subject to a detailed assessment in default of agreement.
>
> 4. Upon payment of the sums stated in the schedule and costs, both parties be discharged from any further liability in respect of the claims made herein."

8. The schedule was in the same terms as the Order which was sealed on 9 March 2007 (see paragraph 5 above) save that in paragraphs 3 and 4, the figures for CRU and the final balance were left blank.

9. On 20 February 2007 Mr Wallwork replied as follows:

> "Dear Sirs
>
> ... We thank you for your letter of 19 February 2007 and confirm that we have now requested a cheque representing the agreed settlement figure including the previous interim payment in accordance with our discussions.
>
> We enclose a slightly amended consent Order and look forward to hearing from you with confirmation that this has now been lodged and the witnesses de-warned. We confirm that we propose forwarding the issue of costs to the Costs Unit in our Liverpool office to deal with.
>
> As requested we enclose a copy of the up to date Certificate of Recoverable Benefits in this matter.
>
> Yours faithfully ..."

10. The amendments to the draft consent order were the addition of a new paragraph 3 and an alteration to the original paragraph 3, (which became paragraph 4), as follows:

"3. The Defendant do pay the Claimant his costs of the claim on the standard basis such costs to be subject to a detailed assessment in default of agreement.

4. The Claimant do pay the Defendant his costs of the counterclaim on the standard basis, such costs to be subject to a detailed assessment in default of agreement."

11. On 21 February 2007 Ms Yaqub replied to Mr Wallwork's letter of the previous day in the following terms:

"Dear Sirs

... Thank you for your letter of 20 February 2007 enclosing the consent Order and CRU certificate. We have had an opportunity to consider the CRU certificate and amended the consent Order further under the heading "schedule" paragraph 3 and paragraph 4. We have noted that the CRU benefits are in the sum of £9,771.45. This figure is taken from the CRU certificate for the period 30 January 2007 to 26 February 2007.

At paragraph 4 of the Order under the heading Schedule we have inserted the figure £34,228.55. This sum represents the amount to be paid to the Defendant less the CRU which we understand you will repay to the Department for Work and Pensions.

We should be grateful if you would kindly sign the amended Order and return this to us by fax as soon as possible.

We note that you have requested our client's settlement cheque and we look forward to receiving this as soon as possible.

...

You have suggested that the issue of costs will be dealt with by the Costs Unit in your Liverpool office. Please confirm whether Costs Unit includes a costs agency which forms "an umbrella" to Weightmans, such as Costs Advocates, QM Solicitors, Jaggards, etc.

We await your reply.

Yours faithfully"

12. Also on 21 February 2007, Ms Yaqub wrote to Mr Wallwork in these terms:

"Dear Sirs,

Thank you for your letter dated 16 February 2007the contents of which we note.

We have discussed this matter on the telephone on 19 February 2007....

In relation to your client's costs, kindly confirm that they will be limited to the predictive costs limit.

Yours faithfully"

13. The amended draft order enclosed with the letter of 21 February 2007 was signed by Weightmans on behalf of the Claimant, sent to the Court on 1 March and and sealed on 9 March 2007. Subsequently, the Claimant's costs of the claim were agreed and paid in the sum of approximately £40,000 and on 29 May 2007, the Defendant commenced proceedings for detailed assessment for the costs he was claiming under Clause 4 of the Order.

14. On 19 June 2007, Weightmans served Points of Dispute. Point one said this:

"... The only authority for costs and therefore the Claimant's liability for payment of costs in favour of the Defendant relates solely to the Defendant's costs of the counterclaim.

The Costs Judge is referred to *Medway Oil* ... which states that the principles to be applied on the assessment of costs where judgment is given for the Claimant on the claim with costs and for the Defendant on the counterclaim with costs is as follows:

"(i) where a claim and counterclaim are both dismissed with costs, upon the assessment of the costs, the true rule is that the claim should be treated as if it stood alone, and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it;

(ii) costs not incurred by reason of the counterclaim cannot be costs of the counterclaim;

(iii) in the absence of any special direction by the court there should be no apportionment;

(iv) the same principles apply where both the claim and counterclaim succeed."

The bill of costs is therefore defective in that it appears to seek to recover the Defendant's costs of the entire action whereas, on the basis of the consent Order, agreed between the parties and approved by the Court, the Defendant is only entitled to recover his costs of the counterclaim.

Any issue as to liability is therefore costs in the claim and is not recoverable by the Defendant as costs of the counterclaim.

It is therefore considered that the bill of costs is defective as it includes a claim for costs in relation to liability issues."

15. On 28 June 2007 the Defendant served Points of Reply and in the absence of agreement, the detailed assessment of the Defendant's bill, which claimed £152,587.82 plus VAT of £24,699.13 was listed before me for hearing on 29 January 2008.

**THE SUBMISSIONS FOR THE CLAIMANT**

16. Mr Mallalieu drew attention to the fact that the proposed amendments to the first draft order were not simply "the crossing of a T and dotting of an I". On the contrary, they were substantial amendments which had altered the draft order from one in which the Defendant had no responsibility for the Claimant's costs, to an order under which the Defendant would not only incur full liability for the Claimant's costs, but also himself receive from the Claimant only the extra costs attributable to the counterclaim. Far from objecting to the amendments, the Defendant's reaction had been to sign the revised order and agree to and pay the Claimant £40,000 for his costs of the successful claim.

17. When the amended draft was received by Ms Yaqub, it had been in her hands whether to ask additional questions about the proposed alterations or to seek other changes but she had chosen not to do so. Instead, the amendments had been agreed without further enquiry and in Mr Mallalieu's submission, in accepting the alterations, the Defendant had consented to an order in which the words used had an established meaning. By that he meant that the principle in *Medway Oil* applied. Mr Mallalieu then took me carefully through the speech of Viscount Haldane and to the cases he had referred to in the judgment in order to explain what this principle was and why it applied in this case.

18. In *Medway*, both the claim and counterclaim had been dismissed with costs. The head-note at page 88 summaries what Viscount Haldane said at page 95:

"... The true rule is that the claim should be treated as if it stood alone and the counterclaim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counterclaim can be costs of the counterclaim. In the absence of *special directions* [emphasis added] by the Court there should be no apportionment. The same principle applies where both the claim and the counterclaim have succeeded. *Saner v Bilton* [1879] 11 Ch D 416; *Crean v M'Millan* [1922] 2 I.R.105; and *Wilson v Waters* [1926] 1 KB 511 approved and followed. *Christie v*

*Platt* (1921) 2 K.B. explained and distinguished. Decision of the Court of Appeal (1928) 1 KB 238 reversed."

19. Viscount Haldane also set out on page 95 the view of the Court of Appeal which had not found favour :

> "... The other view is that the proper principle of taxation under a judgment such as the judgment in this case is that when one party has got the costs of a claim and another of a counterclaim, the Taxing Master ought to allow each party all such costs as he properly incurred in maintenance or resistance, as the case may be. When therefore the matters in controversy are common to both claim and counterclaim, the costs, so far as common to both claim and counterclaim, should be apportioned."

20. However, Viscount Haldane for the reasons he had given on page 95, had gone on to say, at 104, that:

> "I am therefore of the opinion that we must reverse the judgment of the Court of Appeal and restore that of MacKinnon J."

21. Mr Mallalieu also relied on *Cinema Press Ltd v Picture and Pleasures Ltd* [1945] KB 356 which applied the rule in *Medway Oil* and to *Dyson Technology Ltd v Strutt* [2007] EWHC 1756 (Ch), a modern authority in which Patten J had followed the pre Civil Procedure Rules principles laid down in *Medway Oil* and *Cinema Press*.

22. In the present case, the words used in the Order had a clear and established meaning, namely that where the Defendant was to pay the Claimant his costs of the claim and the Claimant was to pay the Defendant his costs of the counterclaim, the principle in *Medway Oil* applied. Accordingly, all that the Defendant could recover were the extra costs by which the counterclaim had increased the overall costs and any items claimed that were outside these parameters fell to be separated out of the bill and disallowed on the detailed assessment.

23. In addition, Mr Mallalieu fairly referred to Viscount Haldane's speech at 104, when he had said this:

> "The successive decisions, down to *Christie v Platt* (1), established a principle which in individual cases may seem a hard one. But it is a clear one and in most cases can operate justly ..."

24. In this regard, Mr Mallalieu placed emphasis upon the fact that before she had agreed the Order, Ms Yaqub could have queried the amendments and negotiated "special directions" so as to disapply *Medway Oil*, for example, by adding the words "including the costs of liability" after "counterclaim" in Clause 4. This would have addressed Viscount Haldane's concern that the principle could be seen as a "hard one" in a case such as this. However, she had not done so, but instead had agreed to an order incorporating Mr Wallwork's changes, only on the detailed assessment to change her mind with a view to avoiding the Order's clear, defined and established meaning so that her client could recover the costs of his claim, in addition to the extra costs of the counterclaim. In Mr Mallalieu's submission, the terms of the Order were plain and the Defendant should not be permitted to recover on detailed assessment, those costs to which he had given up his entitlement when he had accepted the amendments to the draft order.

**THE SUBMISSIONS FOR THE DEFENDANT**

25. Mr Brown submitted that the terms of the Order reflected the common intention of the parties, namely that each side should receive the costs that he had incurred in respect of his claim. Where, as here, the parties had come to terms as to costs, they were not bound by authority or precedent in determining their respective liabilities for costs (see his skeleton at paragraph (1)).

26. In Mr Brown's submission, there was a common intention between the parties, namely that each would receive the costs of proving liability. That was reflected in the exchange of drafts enclosed with the letters of 19 and 20 February 2007, the first of which provided for the Defendant to receive the costs of his claim and the second (an amendment accepted by Ms Yaqub) that the Claimant should receive the

costs of his claim. Nowhere in the correspondence had Mr Wallwork told Ms Yaqub that the amendments he had made would have a substantial effect on the costs her client would recover. The reverse was true; his letter of 20 February 2007 had returned the draftorder "*slightly* (emphasis added) amended". Accordingly, the final order reflected the common intention of the parties, namely that Mr Wallwork's client should be paid his costs of the claim and Ms Yaqub's client should have the costs of his claim, albeit that it was expressed in the order as "the counterclaim" rather than "the claim" or "action" as had been the case in the original draft.

27. Mr Brown further submitted that any reasonable individual looking at the Order would interpret it as meaning that each of the Claimant and Defendant were to receive the costs of their claims. He relied on *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 in which Lord Hoffman had explained the principles by which contractual documents are nowadays construed. On page 912 at H, Lord Hoffman had said this:

> "The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background previous negotiations of the parties and the declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which the document (or any other utterance) would convey to a reasonable man is not the same as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require Judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:
>
>> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense." "

28. Mr Brown applied these principles to the case in point. He submitted that the use of the word "counter" in Clause 4 of the Order could be construed as being ambiguous and which, if removed, would eliminate the *Medway Oil* limitation contended for by Mr Mallalieu. In any event, if the word was to be given its natural and ordinary meaning, a reasonable person would have understood the Order as giving his client the costs of his claim, without limitation.

29. Principle (5) also applied. Mr Brown submitted that it flouted business common sense to contend that the Defendant had, in the same breath, accepted that he should pay the Claimant's costs of the claim and at the same time foregone all his own costs, save those arising on the counterclaim. In short, Mr Brown submitted that the Court was not required to accept an interpretation which the parties could not have intended in particular where, (as Lord Hoffman had expressed the position in *ICS*), "something must have gone wrong with the language". In this event, such an outcome would not reflect the obvious intention of the parties and accordingly the Court should not enforce the obviously unfair interpretation contended for by Mr Mallalieu (see his skeleton at (3)).

30. Mr Brown did not accept, in any case, that *Medway Oil* applied. It was his submission that the facts here were far removed from those in *Medway* and the cases referred to by Viscount Haldane. In the first place, the orders for costs in those matters had been made after the Judges had heard argument. In the present case there had been no judicial decision; the parties had agreed, in an out of Court settlement, that they would bear each other's costs in relation to each claim. Having concluded such an agreement, *Medway Oil* had no application since its effect would be to undo what the parties had done by agreement.

31. Mr Brown also submitted that the situation here was different to that which had pertained in *Saner v Bilton*. In the present case, it was simply an historical accident as to whether Mr Bateman or Mr Joyce came to be the Claimant; had Mr Bateman not issued proceedings, Mr Joyce would have done so. These facts were very different to those in *Saner v Bilton* where Fry J had held that once the plaintiff had let out "the waters of litigation", it was "impossible to say how far the counterclaim ever would have been agitated if he [the plaintiff] had not begun that litigation" (see 419). Fry J had added that "the court can give special directions which may vary the rule" but in the present case there had been no opportunity for special directions as the dispute had been resolved by consent and not following an application to the Court. Accordingly, the correct interpretation of the Order was that each party should bear the costs of the other's claim. It would be offensive to the overriding objective in CPR 1 if the Court was to impose a rule of law or principle which was, in effect, a trap for the parties. In the present case, it was not only Ms Yaqub who would thereby have fallen foul of such a trap, but also Mr Wallwork who had represented his amendments as being "slight" when the changes to Clauses 3 and 4 were anything but.

**DECISION**

32. The point for decision is whether the Order is subject to the principle in *Medway Oil*, as Mr Mallalieu contends, in which case the Claimant will only pay the Defendant's costs referable to the counterclaim, or whether, as Mr Brown argues, *Medway Oil* has no application in which event the Defendant's costs are not subject to the limitation which the principle in that case would otherwise impose.

33. At first sight the Order gives the appearance of being on all fours with *Medway Oil* so that "where both the claim and counterclaim succeed or are dismissed, there is no apportionment" (see judgment of Goddard CJ in *Cinema Press* at page 361). Accordingly "what the decision in Medway does not do is to authorise the Taxing Master in a case like the present, to apportion the costs of work, all of which is relevant to both claims" (see judgment of Patten J in *Dyson* at paragraph 50). It follows that if Mr Mallalieu is correct, the bill cannot be apportioned to permit the Defendant to recover those costs he might have incurred in relation to the claim; at the detailed assessment, any such work must be separated out of the bill, leaving only the costs he incurred on the counterclaim as being potentially recoverable from the Claimant.

34. Mr Brown's submission is not to question *Medway Oil* as a proposition of law but is, instead, to advance his case on the footing that the principle has no application here, where he says it was the common intention of the parties that each should bear the other's costs of his claim, such costs to be

apportioned on detailed assessment as necessary. Expressed differently, the kernel of his argument is that Ms Yaqub and Mr Wallwork resolved the issue of costs on the basis that their respective clients would bear the costs of each other's claims and it was only when the points of dispute raised *Medway Oil* that it was asserted for the first time that there was a limitation on the costs that the Defendant could recover. In these circumstances, Mr Brown submits I should not interpret the Order by reference to the principle in *Medway Oil* but should, on the contrary, give effect to the common intention contained in the bargain that he says the parties had made.

35. As I have said, there was no cross examination of either Ms Yaqub or Mr Wallwork on their witness statements. Nonetheless I have read each with care and observed that there is there is a measure of common ground, in they are in agreement that there was no discussion about the costs of the Defendant at the round table meeting on 14 February 2007 (see Yaqub at paragraph 2 and Wallwork at paragraph 5). For her part, Ms Yaqub asserts that there was no mention of costs at all, whereas Mr Wallwork deposes that the Claimant's costs were discussed and that the Defendant's offer made provision for the Claimant to receive his costs of the claim (see paragraph 5 and exhibit EJW1). Nothing turns on that point because Ms Yaqub accepted on 21 February 2007 that her client had agreed to pay the Claimant's costs of the claim. From that, I infer that she is simply mistaken in her recollection about whether the Claimant's costs had been discussed at the meeting.

36. Was there, as Mr Brown submits, a similar agreement in relation to the Defendant's costs? Mr Wallwork deposed at paragraph 6 of his witness statement that the amended order embodying paragraphs 3 and 4, represented "the standard provision for costs in a matter such as this and [was] entirely consistent with *the terms of the agreement reached*" (emphasis added). In my view, Mr Wallwork may be correct that such an order would be standard, as happened in *Medway Oil* and the cases cited therein, when made by a Judge having heard argument, but that was not the situation here. It is common ground that no discussion took place about the Defendant's costs at the round table meeting on 14 February 2007 (see paragraph 35 above). It follows that "*the terms of the agreement reached*" referred to by Mr Wallwork in paragraph 6 in relation the Defendant's costs, must have been concluded subsequent to the meeting but *before* the draft orders were exchanged, since these merely expressed in writing what had already been agreed.

37. It is clear from the correspondence that there had been a telephone conversation on 19 February 2007 between Ms Yaqub and Mr Wallwork (see Ms Yaqub other letter of 21 February 2007). On that day, Ms Yaqub had also dispatched the first draft order to Mr Wallwork in which paragraph 3 had provided for the Claimant to pay the Defendant his costs of the action. In my judgment, it is more likely than not that Clause 3 as then drafted reflected what had been discussed and agreed in the conversation that had taken place that day, namely that the parties should each be paid by the other, the costs of their respective claims. Had that not been the case, Mr Wallwork's response on 20 February 2007 would have been to the effect that "we have yet to discuss your client's costs; we have not agreed to pay them; it is only in relation to my client's costs that we have reached agreement". Instead, when he returned the draft, it provided for the Defendant's costs, albeit on Mr Mallalieu's case, only in respect of the counterclaim.

38. In the event, either by mistake or oversight, Ms Yaqub's first draft omitted to provide for the Claimant's costs, an error which Mr Wallwork spotted straightaway. When he returned the draft consent order "slightly amended" on 20 February 2007, Mr Wallwork made two alterations. The first was to change clause 3 to reflect what had been agreed at the round table meeting on 14 February 2007 in relation to the Claimant's costs, an alteration accepted without question by Ms Yaqub. The second was to substitute "counterclaim" in "old" paragraph (3), for "action" in "new paragraph 4 (plus omitting "including the costs of this Order" but nothing turns on that) to reflect the terms of the agreement reached in relation to the Defendant's costs. Those changes he described as being "slight" as if they were merely of form rather than substance.

39. During the course of argument Mr Mallalieu described the letter as "unfortunate" but in my view it is more than that. Mr Brown submitted that if Mr Wallwork had known that what he was proposing would be a substantial change, he was at fault in encouraging Ms Yaqub to believe that the alternations were slight, when the truth (namely that the *Medway Oil* principle applied) was otherwise. I do not think there is anything in the suggestion (if it goes as far as that) that there was some form of sharp

practice or hoodwinking. In my judgment, it is more likely than not that the word "counterclaim" was substituted for "action" in ignorance of the ramifications that such an alteration might have. In other words, all that Mr Wallwork had intended to do in changing the wording was to put into effect the agreement Ms Yaqub and he had reached earlier in relation to the Defendant's costs. Had he been aware that the change might have had far reaching consequences, it is to be expected that, as an officer of the Court, Mr Wallwork would have said so, in which case he would not have described the amendments as "slight". After all, his letter of 20 February would need only have needed to say something on the lines "with regard to the amendment in Clause 4, we would draw your attention to the principle in *Medway Oil*, etc" to make the point.

40. I have reached these conclusions after considerable thought, given that, as I have said, neither Ms Yaqub or Mr Wallwork were cross-examined on their witness statements. Aside their evidence, further factors have weighed with me however. Costs is a highly specialised area of law and in my judgment, it is reasonable to suppose that at the time he negotiated the Order, Mr Wallwork would not have had an in depth knowledge of the intricacies of *Medway Oil.* That case is, of course, famous, but whether it had survived the implementation of the CPR was not a matter which was tested until Patten J decided *Dyson* and is certainly not something that Mr Wallwork could have been certain about in February 2007, given Lord Woolf's comments in *Biguzzi v Rank Leisure* (2000) 1 Costs LR 67 on page 77 that:

> "The whole purpose of making the CPR a self contained code was to send the message that generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies."

41. *Cinema Press* would not have assisted him either, in this respect, since this was also a pre CPR case and the law report in question only came to light during the course of the appeal to Patten J in July 2007 (it was not cited before Master O'Hare at first instance, nor is it mentioned in the White Book). For these reasons, I am not persuaded that Mr Wallwork amended the first draft order on 20 February 2007 with *Medway Oil* in mind.

42. My conclusion that the law of costs is unlikely to be the first string to Mr Wallwork's bow is also to be inferred from his witness statement. In paragraph 2, Mr Wallwork states that he had been the partner with the conduct of the file but that his colleague, Brian Collins, was entrusted with the task of dealing with costs. Indeed, it is plain that even before the Order was sealed, Mr Wallwork had told Ms Yaqub that the issue of costs would be dealt with by Weightmans' Costs Unit in the Liverpool Office and in my judgment, the reality of the situation is that it was a member of the costs unit, rather than Mr Wallwork, who was alert to the *Medway Oil* point. In other words, I am satisfied that the contractual agreement reached by Mr Wallwork and Ms Yaqub in relation to costs was that, as Mr Brown has contended, each party would bear the costs of the other's claim. That was their common intention which the Order was intended to reflect and it was only when the scrutiny of the Costs Unit was brought to bear that the *Medway* point was identified and taken. It follows that I prefer Mr Brown's submissions. I agree with him that when Mr Wallwork and Ms Yaqub signed the Order on behalf of their clients, neither solicitor had any awareness that in the depths of the Costs law reports, there lurked an authority such as *Medway Oil* which might have as potentially a dramatic effect on the interpretation of the Order as Mr Mallalieu has contended for.

43. It follows that I accept Mr Brown's submissions that when the words in paragraph 4 of the Order are given their natural and ordinary meaning, it is clear that the intention of the parties was that each should bear the costs of the other's claim. I further agree that it would flout "business common sense", (to adopt Lord Wilberforce's words), were any other conclusion to be reached; after all, having drafted an order which provided for her client to have his costs of the action, it would make no business sense for Ms Yaqub twenty four hours later, without demur, to agree to a revised order under which her client gave up his entitlement to those costs, save in relation to his counterclaim. Accordingly, I reject Mr Mallalieu's submission that the Defendant's costs are limited by the principle in *Medway Oil*.

44. Lest the matter goes further it is appropriate to say that I agree with Mr Mallalieu so far as the "who goes first" argument is concerned. In my view, if, contrary to my finding, *Medway Oil* does apply, the Defendant's costs will be limited irrespective of whether the counterclaim was "stand alone" and would have been pursued even if the claim had not. As to "special directions" I also agree with Mr

Mallalieu. Whilst it is true that there was no opportunity for the Court to give special directions in this case, it was open to Ms Yaqub during her negotiations with Mr Wallwork to put the point beyond doubt; all that was needed were words such as "for the avoidance of doubt the principle in *Medway Oil* is excluded" in the Order.

**NEXT STEPS**

45. For the reasons I have given, the Defendant's costs are not limited by the principle in *Medway Oil* and accordingly, subject to reasonableness, the Claimant must pay the costs of liability issues. If the Claimant wishes to apply for permission to appeal, then any application to me should be made when the judgment is handed down, which is likely to be at the commencement of the detailed assessment.

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