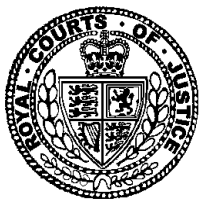

Neutral Citation Number: [2022] EWCA Civ 233

Case No: CA-2021-003302/CA-2021-003249

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT

QUEENS BENCH DIVISION

MR JUSTICE CAVANAGH

QB-2019-003882

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/02/2022

Before :

LORD JUSTICE COULSON

- -

Between :

PGI Group Limited **Applica**

- and -

Magret Thomas & 30 Others **Responde**

- -

- -

Nicholas Bacon QC and **Ognjen Miletic** (instructed by **Hogan Lovells International LLP**) for the **Applicant**

Benjamin Williams QC and Kate Boakes (instructed by **Leigh Day Solicitors**) for the **Respondents**

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Hearing Date : 16 February 2022

- -

Approved Judgment

ON APPLICATION FOR PERMISSION TO APPEAL

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII and the National Archives. The date and time for hand-down is deemed to be 10.30am on 25 February 2022

LORD JUSTICE COULSON :

Background Matters

1.
On 16 February 2022, I heard the oral application for permission to appeal against the orders of Mr Justice Cavanagh ("the judge") dated 29 October 2021 and 8 December 2021. I told the parties that, in view of the trial date in June 2022, I would provide my judgment as soon as possible, and certainly no later than 25 February. Because the judgment indirectly addresses one or two aspects of costs law and practice on which there is no authority, and because appellate judgments on costs are anyway rare, I have – after some hesitation – agreed to provide a neutral citation number. I am extremely grateful to Mr Bacon QC and Mr Williams QC, and their respective teams, for their clear elucidation of their arguments on a number of matters which were unclear from a perusal of the papers.

2.
The respondents are the claimants in these proceedings. They are 31 Malawian women who were employed by a Malawian company, Lujeri, to work in tea or nut plantations in Malawi. They allege that they were raped, sexually assaulted, harassed and discriminated against by male employees of Lujeri. The applicant, and the defendant in these proceedings, is the parent company of Lujeri.

3.
The proceedings comprise a group claim for damages, on the basis that the applicant owed various duties of supervision and control over Lujeri to the respondents. It is accepted that the claims are legitimately brought in the UK, although the relevant law is Malawian. The trial has been listed for 3-4 weeks commencing on the 13 June 2022, with the claims of two lead claimants being considered.

4.
The application for permission to appeal arises out of Cavanagh J's order of 29 October 2021 refusing the applicant's application for a Costs Capping Order ("CCO") in respect of the respondents' future costs in the sum of £150,000, and his subsequent order of 8 December 2021, fixing the respondents' costs budget in the sum of £848,140 (as against the figure of £1.5m odd which the respondents had originally suggested as a cost budget for their future costs). In other words although, as a result of his detailed assessment of the costs budget arguments, the judge concluded that the respondents' reasonable and proportionate costs from the date of the application to the end of the trial were £848,140, the applicant seeks to cap those costs at a figure of £150,000 (or less than one fifth of the judge's own costs budget figure). The £150,000 has been calculated by the applicant by reference to what are said to be the likely costs of pursuing Lujeri and the applicant in Malawi.

5.
There was also other relevant evidence about the costs already incurred by the parties. At the time of the application, the respondents' incurred costs were £1.6 million odd, a figure which the judge was aware of at the time of the CCO (see [3] of his judgment), and subsequently criticised during the costs budgeting exercise. Taken together with the £848,140 budgeted for future costs, that would give a total of £2.5 million odd for the respondents' costs. The applicant's incurred costs were £750,000, and its future costs were budgeted by the judge at £1,750,000. That, coincidentally, would make the applicant's total costs also about £2.5 million.

The CCO Regime

6.

CCOs are very rare. CPR PD 3F at 1.1 makes plain that they will only be made “in exceptional circumstances”. The costs budgeting regime, introduced after costs capping as part of the Jackson reforms, is widely regarded as a more scientific way of achieving the same goal. However it is not right to say that the CCO regime is moribund. It was retained in the CPR, following the introduction of costs budgeting, at the express request of certain regular litigants, including Pension and Trust Funds, who said in their response to the CPRC that they liked the certainty that CCOs can bring, saying that they proved a useful tool in cases with a finite amount of money. The available evidence appears to demonstrate that, despite that, CCOs are rarely sought or made (and that is certainly my experience) but the available statistics are not entirely reliable. Consistent with this, the response to the CPRC concerning Pension and Trust Funds explained that the majority of cases were agreed without the need for a cost capping order, but with the knowledge that the court had the power to make one.

7.
The relevant part of the CPR in respect of CCOs is r.3.19. The critical rules for present purposes provide:

“5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –

(a) it is in the interests of justice to do so;

(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and

(c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –

(i) case management directions or orders made under this Part; and

(ii) detailed assessment of costs.

(6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –

(a) whether there is a substantial imbalance between the financial position of the parties;

(b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;

(c) the stage which the proceedings have reached; and

(d) the costs which have been incurred to date and the future costs. ”

Accordingly, in order to obtain a CCO, sub-rule (5) requires the applicant to demonstrate that a CCO is a) in the interests of justice; and b) that there is a substantial risk that, without such an order, costs would be disproportionately incurred; and c) that the risk of costs being disproportionately incurred cannot be adequately controlled by costs budgeting.

8.
There are very few authorities on r.3.19. The White Book suggests that Tidal Energy Limited v Bank of Scotland PLC [2014] EWCA Civ 847 is authority for the proposition that cost capping orders may only arise where there was evidence that the costs judge could not adequately distinguish between costs reasonably incurred and costs unreasonably incurred in a complex case. However, that was simply an example taken by Arden LJ (sitting alone) to explain how r.3.19(5)(c) might work. Tidal was actually a

case in which it was argued that costs could not be controlled by the detailed assessment of costs at the end of the case, so that the costs of leading counsel should be prohibited before they were ever incurred. Arden LJ rejected that proposition. In Black v Arriva North East Limited [2014] EWCA Civ 1115 the underlying issue concerned the funding of the litigation, and the application for a CCO was dismissed. Both cases pre-dated costs budgeting.

The Proportionality Rules

9.
Provisions concerned with proportionality and, in particular, proportionate costs, are scattered throughout the CPR. I have identified the following: CPR 1.1(2) (which includes the need to ensure that the parties are on an equal footing); CPR 3.19(6) (which includes the requirement to consider whether or not there is a substantial imbalance between the financial position of the parties); CPR 44.3(2)(a) (which provides that "costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred"); CPR 44.3(5) (which includes the requirement to consider the value of any non-monetary relief claimed and wider factors such as reputation); and CPR 44.4(3) (which includes the requirement to consider the importance of the matter to the parties). I shall refer to these various parts of the CPR compendiously as "the proportionality rules". I do not set them all out here.

10.
On behalf of the applicant, Mr Bacon QC places particular reliance on r.44.3(2)(a), also introduced as part of the Jackson reforms, which emphasised the importance of proportionality in the assessment of costs. The rule means that, even if an element of costs is both reasonable and necessary, it may still be reduced or even disallowed altogether on assessment if it is found to be disproportionate in amount.

The Judge's Judgment

11.
The judge sat with Costs Judge Brown at the first hearing, as well as in relation to the subsequent costs budgeting exercise. It was accepted by the parties that it was sensible for the judge to deal with the detail of the costs budgeting exercise only after he had concluded that a CCO decision was inappropriate. I understand the logic of that. But some of the matters raised now by way of criticism of the CCO only really came to light during the later costs budgeting exercise, by which time the CCO decision had already been made. Moreover, some of the debate during the PTA hearing raised, in my mind at least, the extent to which it would now be appropriate to consider making a CCO under r.3.19 without undertaking a detailed analysis of the figures for both costs incurred and to be incurred.

12.
The reasons for the judge's refusal to make a CCO in this case were set out in some detail in his judgment at [2021] EWHC 2776 (QB). It is unnecessary to set out large parts of that judgment here, given that this is an application for permission to appeal only. However, I note the following findings which I consider particularly relevant to the application for PTA:

12.1 The applicant estimates that the maximum damages that the 31 individual claimants will recover is likely to be around £10,000 each, or perhaps less, which was described by the judge as "modest by English standards" [13]. However, whilst those sums might be modest, the judge subsequently pointed out that they "are very significant for poor Malawian plantation workers, and they may indeed by life-changing" [79].

12.2 The claims are about much more than money: the claimants want to show that they were telling the truth; they want to restore their reputations; and they want to bring these and similar abuses to an end. The judge called these non-financial objectives “vindication” [13]. The judge plainly thought that the vindication aspect of these claims was very important. At [79] he said:

“ …I am satisfied that the Claimants' legitimate desire for personal vindication, and for the acceptance by the Court that they were abused in the way that they allege and that the Defendant is liable for this treatment, coupled with a legitimate desire to use the court proceedings as a way of shining a light on these practices and promoting reforms in the future, mean that future costs that are substantially in excess of the damages at issue will not be disproportionately incurred. The importance of the matter to the parties is a relevant consideration, in relation to proportionality (see CPR 44.4(3)(c)).”

12.3 It is accepted that the claims are arguable. There is no ground for striking out the claims [20]-[22].

12.4 If a CCO were made in the sum of £150,000, as the applicant seeks, then that would be likely to force the claimants to discontinue these proceedings [26]. In this way, the making of the CCO would stifle the claim.

12.5 In theory at least, the claimants could bring their claims against Lujeri, and the applicant, in Malawi [29].

13.
The judge considered all of the various competing arguments in his careful judgment. He found that none of the three pre-conditions required for a CCO (paragraph 7 above) had been made out. Although he focused at [67]-[88] on the second of the three pre-conditions (namely whether there was a substantial risk that, without a CCO in the sum of £150,000, costs would be disproportionately incurred), the judge also rejected the application on the first pre-condition (the interests of justice) at [89]-[94], and on the third pre-condition, saying at [95] that there was no risk that costs would be disproportionately incurred, because they could be controlled by costs budgeting.

14.
There are three substantive grounds of appeal. They are:

14.1 Ground 1: The judge applied the wrong proportionality test;

14.2 Ground 2: The judge failed properly to take account of the costs already incurred in his analysis;

14.3 Ground 3: The judge was wrong to hold that the costs of prosecuting the claims in Malawi was irrelevant to proportionality.

15.
For five general reasons, set out below, I consider that the application for permission to appeal cannot succeed. I then turn to address each of the three grounds of appeal, and explain why, in my view, none of them has a realistic prospect of success.

The General Reasons for Refusing PTA

16.
The first general reason why I consider that the application for permission to appeal has no real prospect of success arises out of the nature of the judge’s decision. He refused the CCO and instead calculated cost budgets for both sides. In exercising his discretion, he took into account all the facts

and matters raised by the parties, including but not limited to the matters set out in paragraph 12 above. The question of proportionality, which is the entire focus of this application for permission to appeal, was just one element of the judge's overall evaluation.

17.
In relation to judgments about costs issues, this court allows the first instance judge a properly wide ambit of discretion. In F & C Alternative Investments Ltd v Barthelemy (No 3) [2012] EWCA Civ 843; [2013] 1 WLR 548 at [42], Davis LJ said that "decisions on costs are pre-eminently matters of discretion and evaluation". He emphasised that this court will only interfere if the decision is wrong in principle, or if something was taken into account which should not have been, or was not taken into account which should have been, or is "plainly unsustainable". That test was repeated in Patience v Tanner and Another [2016] EWCA Civ 158; [2016] 2 Costs LR 31, CA at [31]-[33]. On the facts of this case, there is nothing that would lead me to conclude that the proposed appeal even arguably met such a high threshold, or that this court should interfere with the judge's careful exercise of his case and costs management powers.

18.
Secondly, pursuant to CPR 3.19(5), there are three pre-conditions which each need to be made out before a CCO will be made (paragraph 7 above). The judge concluded that none of those three pre-conditions had been met here. The three grounds of appeal raised by the applicant, and analysed below, go to the second pre-condition, namely whether or not there was a substantial risk that, without a CCO (for £150,000), costs would be disproportionately incurred. The grounds do not on their face go either to the first pre-condition (namely that a CCO is not in the interests of justice) or the third (namely that the risk of costs being disproportionately incurred could be adequately controlled by cost budgeting).

19.
That seems to me to be fatal to the application, because the judge dealt with both of those other two pre-conditions, and rejected the applicant's case on each. In those circumstances, even if I was persuaded that the judge had erred in his consideration of the second pre-condition, that would not be sufficient for the applicant's purposes, because it would leave untouched the judge's conclusions that a CCO was not in the interests of justice and that any risk of costs being disproportionately incurred could be dealt with by costs budgeting (which is what he went on to do).

20.
That is not just idle box-ticking. It is impossible to over-state the interests of justice in the present case, given the nature, scope and extent of the respondents' allegations and what the judge said about them at [79]. If a CCO in the sum of £150,000 would have the effect of stifling these valid claims, then that might be regarded as a very powerful factor against making such a CCO. Moreover, as to the third pre-condition, costs budgeting has always been regarded as a scientific way of keeping future costs to proportionate levels, whilst Mr Bacon accepted that a CCO was – or certainly could be - "a blunt instrument".

21.
Thirdly, the grounds attack, in different ways, the judge's conclusion on proportionality. In my judgment, the proportionality rules identified in paragraph 9 above were properly considered by the judge, in particular at [72]-[88]. It is not said by the applicant that he omitted to cite or apply any of the relevant rules. His deliberations led him to conclude that, in this case and on these facts, there was not a substantial risk that, without a CCO in the sum of £150,000, costs would be

disproportionately incurred. I can discern no arguable error of principle in his application of the proportionality rules.

22.
Fourthly, I consider that the judge's conclusion, that it would not be proportionate to make the requested CCO, was not only well within the ambit of his discretion, but was also a conclusion which the vast majority of judges would also have reached. In short, that is because:

22.1 £150,000 was accepted by everyone as being nowhere near the minimum reasonable and necessary costs that the respondents would incur in pursuing their claims in the High Court from the date of the application to the end of the trial. It is less than a fifth of the sum which the judge calculated as the appropriate costs budget.

22.2 On its own evidence, the applicant will incur future costs of £1,750,000 to defend itself against these allegations up to trial. In other words, the applicant will spend more than 10 times the amount at which it wants the respondents' costs to be capped. Even allowing for the difference in the costs incurred by the parties to date, and the fact that the size of the applicant's own costs can never be the decisive factor in either CCOs or costs budgeting, such a stark difference might be said to perpetuate the substantial imbalance in the parties' financial positions, and give rise to a potentially grave inequality of arms going forward.

22.3 As the judge found, these are claims which are about much more than money. The vindication elements of the claim (including restoring reputations) are expressly identified in the proportionality rules as relevant factors. They cannot be over-emphasised in cases of this sort. Any attempt to calculate proportionality by way of some sort of cost/benefit analysis which concentrates on the level of damages only – an attitude which I consider informs the applicant's approach, despite Mr Bacon's pleas to the contrary – is not in accordance with the proportionality rules.

22.4 A CCO in the sum of £150,000 would inevitably bring an end to the claim. The making of such a CCO would therefore amount to the striking out of a valid claim by the back door. That would, in my judgment, be contrary to the overriding objective set out in r.1.1. The court would need exceptional reasons for taking such a course.

22.5 No authority was cited in which any court has ever made either a CCO or fixed a costs budget in a figure (£150,000) which was so much lower than the figure for future costs which the judge considered reasonable and necessary (£848,150).

23.
Fifthly, bringing those points together, I consider that the applicant has failed to demonstrate that it is arguable that there are exceptional circumstances here which justify the making of a CCO in such a low amount (PD 3F, para 1.1). Indeed, I would suggest that the circumstances summarised in the preceding paragraphs make plain that, to the extent that they could be regarded as unusual or even exceptional, they militate strongly in favour of refusing the CCO sought by the applicant. I would respectfully suggest that, if there is a case which, on its facts, would make a good vehicle for testing the limits of the proportionality provision in r.44.3(2)(a) by way of a CCO, this is most assuredly not it.

The Three Substantive Grounds of Appeal

24.
I turn to deal with the three individual grounds of appeal.

Ground 1

25.
This asserts that the judge was wrong to say that, as a matter of principle, the court could never make a CCO for less than the minimum sum required to litigate the claims through to completion in the High Court. On analysis, I consider that there is a good deal wrong with that submission.

26.
First, I do not consider that that was what the judge decided. At [73]-[74] the judge outlines that point of principle by reference to the respondents' submissions, and then says in terms at [74] that he does not have to decide it because, even assuming that the applicant was right, and that "there may in theory be cases in which the minimum sum required for a claimant to fight the case would be disproportionate, because the costs are out of proportion to the potential benefits to the claimant of the litigation", for the reasons that he goes on to explain, "this is not such a case". He repeated at [105] that he did not need to decide that point of principle. So I do not accept that the judge reached the conclusion in principle about which the applicant now complains.

27.
In the ordinary case, of course, it would be unusual if the future costs, to be capped by way of a CCO, were fixed at far less than the reasonable minimum amount necessary to pursue a valid claim through to trial. Translating that to the facts of this case, if £850,000 is the right figure for future costs identified by the judge, a reduction of that sum by more than four fifths to arrive at a CCO of £150,000 would be an extraordinary result.

28.
However, just as the judge did, I accept that there may be cases in which the reasonable and necessary costs required to enable the claimant to fight the case through to trial were disproportionate, and would therefore justify a CCO in a lesser amount. Indeed, that is more than just a theoretical possibility (which is how the judge wrongly described it): that principle is enshrined in r. 44.3(2)(a), which provides for such a result in terms (even though it is concerned primarily with assessment after the event, not limiting the incurring of such costs in the first place by way of a CCO). So in principle, a costs budget or a CCO could be set at a sum that was less than the reasonable and necessary costs to be incurred, because that sum might still be disproportionate. What matters is that the judge concluded that, on the facts, this was not such a case. For the reasons that I have already given, I agree.

29.
I accept Mr Bacon's submission that one or two passages in the judgment, in particular at [72], suggest that the judge may have thought that there was a principle that any sum less than "the lowest amount which [a party] could reasonably been expected to spend in order to have its case conducted and presented efficiently, having regard to all the relevant circumstances," could not be proportionate. I consider that to be loose language which was immediately contradicted by [73]-[74] and had no effect on the result (for the reasons I have explained). But I should make it clear that, if that was what the judge thought, he was incorrect.

30.
The judge's formulation cited in the preceding paragraph was taken from [13] of the judgment of Leggatt J (as he then was) in Kazakhstan Kagazy PLC and Others v Baglan Zhunus and others [2015] EWHC 404 (Comm). But Kagazy was concerned with an interim payment on account of costs and addresses what is recoverable on assessment. It was not expressly concerned with proportionality.

Accordingly, to the extent that subsequent judgments have treated it as if were (such as the reference at [50] in May v Wavell Group Limited (HHJ Dight, Central London County Court, 22 December 201, unrep)) they should be treated with caution. Indeed, it is not clear whether the new proportionality rules even applied to Kagazy at all, given the date on which those proceedings commenced.

31.
Mr Williams QC, on behalf of the respondent, accepted that the judge may not have articulated the principle in the way in which it was put to him in submission. But since the judge did not decide that there was any such principle, and instead rejected the claim for a CCO on the facts, it cannot matter. In Mr Williams' evocative phrase, with which I agree, Ground 1 of the appeal really amounted to no more than a complaint that the judge did not reject the point of principle even more forcefully than he did.

32.
Finally, even assuming that the applicant was right, and that the judge wrongly applied a principle that a CCO could not be made which was less than the minimum legal spend (as per Leggatt J), that does not mean that, in this case, a CCO of £150,000 was therefore justified. That figure is in many ways meaningless; it could never be the amount of the respondents' future costs in the UK because it was calculated by reference to the costs of proceedings in Malawi. The point that Mr Williams made to the judge was that, pursuant to r.44.3(4), on assessment in the UK, the costs would be assessed on either the standard or the indemnity basis. They would not and could not be assessed by reference to the costs in Malawi.

33.
Moreover, I am in no doubt that one of the reasons that the judge baulked at the CCO was because of the very low figure that was being suggested. During the oral application for PTA, Mr Bacon indicated that, if the judge had wanted to make a CCO in a different figure, it was open to him to do so. In my view, that is unrealistic. These sorts of costs decisions are complicated enough as it is. They require express consideration of a lengthy list of factors. In such circumstances the judge is not obliged to cast around and seek to find another figure, which neither party is contending for, and suggest that figure instead: see, by analogy, John Doyle Construction Ltd v Erith Contractors Ltd [2021] EWCA Civ 1452 at [32]. This is an adversarial process, not a horse fair or an open-ended test of a judge's ingenuity.

34.
Moreover, the logic of the applicant's position must mean that any other figure for the CCO could not have been objectively justified anyway. The £150,000 was expressly linked to the costs of the claim in Malawi. If the judge thought that was not a relevant comparator, that was the end of that aspect of the case. I deal with whether it was a relative comparator or not under Ground 3 below.

35.
Accordingly, even if the applicant was right that the judge erred in principle, it does not mean that the second pre-condition set out in r.3.19 was made out. I am confident that it was not. Ground 1 has no real prospect of success for all the reasons that I have given.

Ground 2

36.
This complains that the judge ignored the fact that the £150,000 related only to future costs, and that the claimants had already incurred costs of £1.6m. The applicant points to the fact that CPR r.3.19(6)

(d) requires the court to take into account “the costs which have been incurred to date and the future costs” when exercising its discretion to make a CCO.

37.
I consider that this criticism of the judge is unfair. The judge expressly noted in his judgment that the incurred costs were £1.6m. But at the hearing of the application for a CCO, there was no analysis of that figure and no material on which the judge could properly conclude that only a part of that figure would be recovered on assessment. As Mr Bacon fairly accepted, the judge focused on the £150,000 in respect of future costs because that was the amount of the CCO sought by the applicant. If the applicant wanted the judge to reach specific conclusions about the costs which had already been incurred, because that was going to be relevant to (and support) the CCO application, the applicant needed to make detailed submissions on the amount of those incurred costs, and what was unreasonable and disproportionate and why. It was not for the judge to do that exercise alone and unguided, and it cannot therefore be a ground of appeal that the judge failed to make detailed findings about the costs incurred.

38.
Of course, the problem in principle with costs incurred to date is that, whilst a court is required to take them into account when making a CCO, there is nothing that the court can really do about them at the time of the application. They have been incurred so, in general terms, they cannot be retrospectively reduced, save on assessment at the end of the case. It is the same for cost budgeting: the court has to take into account the amount of the incurred costs, but the practical difficulties that this can pose for the budgeting exercise are stark.

39.
In CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited and others [2015] EWHC 481 (TCC); (2015) 2 Costs LR 363, to which Mr Bacon referred in argument, I considered that the costs said to have been incurred by the claimants were extraordinarily high. So I fixed an overall cost budget of £4.28m, which was made up of the figures which I considered to be recoverable on assessment in respect of the incurred costs, and the approved budget figure in respect of the estimated future costs. That total figure was about the same as the costs which the claimants said that they had already incurred. In that way, something like a CCO was applied, albeit by way of a costs budget.

40.
But that was, in its own way, an extreme case. Moreover, the figure was arrived at following an all-day hearing at which very detailed arguments on the costs incurred were presented. That only supports my view that, if the applicant wants the amount of incurred costs to be properly and fairly taken into account in the making of a CCO, then the same process would have to be adopted. That did not happen here.

41.
This debate, about the possible need for a detailed analysis of the incurred costs before a CCO could be made, also led on to a discussion at the PTA hearing about the proper approach to CCOs generally. I quite accept Mr Bacon’s submission that, originally at any rate, a CCO was something of a blunt instrument, designed to impose a summary cap on expenditure. But the subsequent changes to the CPR, and in particular the introduction of the new proportionality test, may make it harder to justify any CCO which does not involve a detailed consideration of both past and future costs. Depending on

the facts of the case, if a CCO is to be proportionate, then it may well call for a much more detailed analysis of the appropriate figure than the framers of the original rule perhaps had in mind.

42.
At all events, it does not seem to me that Ground 2 is a fair or appropriate criticism of the judge and I consider that, for the reasons that I have given, it has no real prospect of success.

Ground 3

43.
This is headed “Relevance of available alternative forum”. The criticism is that the judge was wrong to hold that the costs of prosecuting the claims in Malawi were irrelevant to the court’s consideration of proportionality. In my view there are two different elements in play here.

44.
As to the fact that there was an available alternative forum, the judge carefully took that into account: see for example [81]-[83]. But, as the judge pointed out, there was no suggestion that the claim in the UK was not properly brought, so the fact that there was an alternative forum was not of any particular significance. Moreover, to introduce that issue under the guise of proportionality ran the risk that it became a forum non conveniens argument by the back door.

45.
The costs of pursuing the claim in Malawi must be irrelevant to the making of a CCO in the UK. If a claim is validly brought in the UK, then that brings with it the reasonable/proportionate costs of pursuing those proceedings in the UK. As noted above, those costs could only be assessed on either the standard or the indemnity basis. It is wrong in principle to say that, although the claims were validly brought in the UK, the costs should be pegged to the costs that would be incurred if the claims had been brought in a different country. There is no authority for such a proposition. It would be completely artificial.

46.
I should say that I not accept the assumption that it is appropriate to draw this close comparison between the actual UK proceedings and the notional Malawi proceedings in any event. That is because it has never been suggested that, in Malawi, the respondents would be protected by Qualified One-Way Costs Shifting (“QOCS”) in the way that they are in the UK. QOCS provides a major incentive to claimants in the UK which, on this basis, is not available in Malawi. That difference alone makes any close comparison inapt.

47.
Mr Bacon QC suggested that limiting the costs to the costs that would be incurred in Malawi was an appropriate course, because it would be similar to penalising a party in costs for, say, refusing to mediate and pursuing the matter to trial instead. But the analogy is inappropriate. In that example, the party who refused to mediate has done something which the rules expressly discourage, and so may deserve being penalised in costs. Here the respondents are entitled to pursue these proceedings in the UK, and have not therefore done anything “wrong” or not in accordance with the CPR. There is thus no reason to penalise them in costs. On the specific issue of mediation, the respondents have agreed to mediate and the costs of mediation have been built in to the costs budget approved by the judge.

48.

For these reasons, I consider that Ground 3 has no real prospect of success. Grounds 4 and 5 are entirely parasitic on Grounds 1-3, each of which I have rejected.

Summary

49.
In all the circumstances, therefore, I consider that this appeal has no real prospect of success. I therefore refuse permission to appeal. This judgment was sent to the parties in draft on 22 February 2022 and handed down on 25 February 2022.