Neutral Citation Number: [2024] EWHC 585 (KB)

Case No: KA-2023-000157

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2024

Before :

THE HONOURABLE MR JUSTICE MARTIN SPENCER

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Between :

Rainer Hughes Solicitors	**Appellant**
- and –	
(1) Liverpool Victoria Insurance Company Limited	**Defendant/ First Respondent**
(2) Emine Karadag	**Claimant/ Second Respondent**
(3) Dzheylyan Velkova Ilieva	**Second Part 20 Defendant/ Third Respondent**

Mr Dale Timson (instructed by **Rainer Hughes Solicitors**) for the **Appellant**
Mr Charles Curtis (instructed by **Keoghs**) for the **First Respondent**
Mr Chaitanya Kediyal (instructed by **BY Law**) for the **Second and Third Respondents**

Hearing date: Monday, 4th March 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

THE HONOURABLE MR JUSTICE MARTIN SPENCER

The Honourable Mr Justice Martin Spencer :

Introduction

1. Pursuant to permission granted by Sir Stephen Stewart, the Claimants' former solicitors, Rainer Hughes ("the solicitors"), appeal against the Order of His Honour Judge Monty KC dated 1st August 2023 whereby he ordered them to pay to the First Respondent (the Defendant in the original action) the sum of £3,000 by way of wasted costs together with the costs of the wasted costs application.

2. The relevant parties are as follows:

   i) The Appellant, Rainer Hughes Solicitors who were the previous solicitors of Mrs Karadag, the Claimant in the original proceedings;

   ii) Liverpool Victoria Insurance Company Limited, the Defendant in the original proceedings and the First Respondent to this Appeal, referred to as "the First Respondent";

   iii) Mrs Emine Karadag, the Claimant in the original proceedings and the Second Respondent to this Appeal, referred to as "the Second Respondent" or Mrs Karadag;

   iv) Ms Dzheylyan Ilieva the Second Part 20 Defendant in the original proceedings and the Third Respondent to this Appeal, referred to as "the Third Respondent" or Ms Ilieva.

Background Facts

3. On 3 July 2018, the Second Respondent, Mrs Karadag, was allegedly involved in a road traffic accident when she was driving a Range Rover Sport motor vehicle in which the Third Respondent, her daughter-in-law was a passenger. The other vehicle was being driven by a Mr Paul Soare and the First Respondent was Mr Soare's insurers.

The Proceedings

4. The Second Respondent instructed Bond Turner Solicitors to act on her behalf and proceedings were issued out of the County Court Money Claims Centre on 20 May 2019 seeking to recover damages for personal injury, hire charges of £49,144.08 and miscellaneous expenses. A personal injury claim by the Third Respondent was settled by the First Respondent without the need to issue court proceedings. The Second Respondent had attended a medical appointment with Dr Geoffrey Hill on 2 October 2018 alleging neck and back discomfort with limitation of movement as a result of a whiplash injury and pain to the right foot. She also had travel anxiety. The medical report refers to the Second Respondent being accompanied by "her daughter/interpreter". On 20 November 2019, the Second Respondent signed a witness statement in Turkish, with an English translation as attested to by Mr Zafer Ceri, a qualified interpreter fluent in English and Turkish, dated 4 December 2019. This statement was made on the basis that liability was not in dispute and gave evidence in relation to the Second Respondent's claim for damages.

5. A trial was fixed for 16 April 2020 but this was vacated because of the Covid-19 pandemic. On 1 April 2020 the First Respondent applied to the court for permission to resile from the admission of liability and to plead fraud and to bring a counterclaim in the tort of deceit against the Second and Third Respondents.

6. In September 2020, the Second Respondent changed her solicitors and instructed Rainer Hughes who came on the record by a Notice of Acting on 30 September 2020.

7. On 12 October 2020, the First Respondent's application to resile from their admission of liability and plead fraud was allowed by the court. A defence and Part 20 claim was served by the First Respondent and Part 20 defences were served on behalf of the Second and Third Respondents on 17 December 2020. The Part 20 defence for the Second Respondent was drafted by counsel in English and a Statement of Truth was signed by the Second Respondent in English.

8. The file handler at Rainer Hughes for the Second and Third Respondents was Mr Jason Borg. He left Rainer Hughes in November 2021 but before doing so he prepared a witness statement on behalf of the Second Respondent which was in English. The witness statement included the following:

    i) At paragraph 10, referring to the immediate aftermath of the alleged accident, she said:

    > "I kept my communication with the driver of the grey Ford to an absolute minimum as I am not very good at communicating in English under extreme stress and I therefore had to rely on my daughter-in-law to handle the situation and communicate with the third-party driver";

    ii) At paragraph 23, referring to her dealings with an organisation called Direct Accident Management Ltd ("DAMS") who were to arrange a courtesy replacement car for her, she said:

    > "I was further contacted by telephone by an agent of DAMS who told me that a vehicle would come to my address and all I had to do was to make sure I would be at home. There was no precise time slot and unfortunately, the agent arrived with the vehicle at a time when my daughter-in-law was not around to go through all of the paperwork for me before I could sign. The process seemed pleasant and I did sign the documentation, not realising that what I was actually signing was an expensive hire agreement."

    iii) At paragraph 28 Mrs Karadag said:

    > "I would like to give further clarification to the point of impetuosity. I have never heard of this word and did not know its meaning at the time. I have been advised on the meaning of this word and I therefore confirm that I do not want to make a case of impetuosity."

9. It seems clear that this was intended to be a reference to impecuniosity but the misspelling was not picked up by Mr Borg before the statement was sent to the Second Respondent, nor was it corrected before the statement was signed. It is not clear whether it was the meaning of "impetuosity" or "impecuniosity" which Mrs Karadag did not know.

10. The statement was signed by the Second Respondent on 3 November 2021 and contains a Statement of Truth. There is no Turkish version. The statement was made after Mr Borg had sent an email to the Third Respondent stating:

> "This is my last week at Rainer Hughes and I will be moving on. This is why I really want to get your mother-in-law's statement as well as yours done before I finish up at the end of this week. .. Please let me know if you and your mother-in-law will both be available to talk through the content of your statements with me."

11. In a statement dated 23 January 2023, Mr Sanjay Panesar, Rainer Hughes' Senior Partner, says that the statement was filed and served in English with [the Second Respondent's] signature without further reference to any translation required. Mr Borg did then say that the statement would subsequently be translated into Turkish, but this was "as further assistance" (whatever that may mean).

12. Ms Natalie Wallace took over the file from Mr Borg and she in turn handed over the file to Mr David Inskip, a trainee solicitor, in October 2022 when she went on maternity leave. The trial was scheduled to take place on 12 December 2022. On 27 October 2022, the Second Respondent's pre-trial check list was filed which indicated that the Second Respondent required a translator (presumably an interpreter) at trial. The pre-trial review took place before HHJ Lethem on 28 October 2022 and he directed that Rainer Hughes take instructions and clarify in writing that the Claimants' witness statements were compliant with CPR 32 and that the Statements of Truth complied with CPR 22. The Order stated:

> "AND UPON it being noted that the Claimant's pre-trial checklist dated 27.10.22 sets out that she will require an interpreter at trial but that not all of her pleadings and witness statements have been translated into Turkish
>
> It is Ordered that
>
> 1 The Defendants' solicitors shall take instructions, and then clarify in writing (to be relied upon at trial) that the Claimant's witness statements comply with CPR 32 and whether the various Statements of Truth that she has verified comply with CPR 22. They should also indicate the level of the Claimant's grasp of English. Such written clarification shall be provided by 4pm 11.11.22."

13. Mr Panesar states in his witness statement:

> "16 It has always been the position that Mrs Karadag's English is proficient and that the interpreter at the trial was to

> assist with the stresses of the trial as Mrs Karadag is elderly and has medical issues. David Inskip conveyed HHJ Letham's Order to Mrs Ilieva as she had been the first point of contact for the Claimant. Ms Ilieva confirmed in numerous telephone calls that Mrs Karadag fully understood the contents of her witness evidence, and it was again confirmed that the interpreter was necessary for the reasons above.
>
> 17 Mr Inskip confirmed to the court on 10 November that 'Mrs Karadag's level of English is proficient, and she is able to understand and assist in the drafting of the court pleadings. However for the purposes of a trial cross-examination it is the appropriate course of action to ensure no delay.'"

14. The trial of the matter came before HHJ Monty KC on 12 December 2022. I take up the history from paragraph 13 of Judge Monty's Judgment in the court below:

> "13. The trial was in my list for two days, starting on 12 December 2022. The first issue I had to deal with was whether Mrs Karadag should have relief from sanctions in relation to the non-payment of the trial fee (an application for relief had been made on 22 November 2022). I also had to deal with the fact that Mrs Karadag's counsel told me at the start of the hearing that Mrs Karadag was unable to read properly her witness statement or the pleadings, which were in English, as she was only proficient in Turkish. Mrs Karadag had attended court with a Turkish interpreter. It proved impossible for the statement and the pleadings to be translated in Turkish that day, and in the event I refused the application for relief from sanctions and I struck out the claim (there had been no proper explanation given for the failure to pay the trial fee, and because of the language issue the trial could not go ahead in any event). I also struck out the Defence to the Counterclaim.
>
> 14. At the Defendant's request, because of the issues around the translation of the statement and pleadings, I made an order that Rainer Hughes should show cause why they should not be jointly liable for some or all of the costs which I directed should be paid by Mrs Karadag and Ms Ilieva, and gave directions for the service of evidence by Rainer Hughes. Later, by an order made without a hearing on 3 March 2023, I gave permission to the Defendant to put in evidence in response thereto.
>
> 15. A hearing was then listed for 25 July 2023.
>
> 16. I note in passing that it would have been helpful if a transcript of my *ex tempore* judgment from 12 December 2022 had been obtained or at least a note provided."

15. The Order made by Judge Monty KC on 13 December 2022 was as follows:

> "1. The Claimant's application for relief from sanctions dated 22.11.22 is dismissed and the Claimant's claim shall stand as struck out.
>
> 2. Pursuant to CPR 25.8 the Claimant do repay the interim payment of £17,542.42 that was paid by the Defendant to Bond Turner Solicitors on 13.08.18 by 4pm 23.01.23.
>
> 3. The Claimant/First Parts 20 Defendant's defence to the Part 20 claim shall stand as struck out.
>
> 4. There be Judgment for the Defendant/Part 20 Claimant on the Part 20 claim against the Claimant/First Part 20 Defendant in the agreed sum of £25,000.
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> 5. The Claimant/First Part 20 Defendant do pay the Defendants' costs of the claim and the Part 20 claim, to be the subject of a detailed assessment if not agreed.
>
> 6. For the avoidance of doubt, the costs referred to in paragraph 5 above shall be enforceable pursuant to CPR 44.15(c) on the basis that the Claimant and/or her solicitor's conduct is deemed likely to obstruct the just disposal of the proceedings.
>
> 7. Rainer Hughes Solicitors do show cause why they should not be jointly and severally liable for some or all of the costs referred to in paragraph 5 above pursuant to CPR 46.8.
>
> 8. Rainer Hughes to provide any witness statements and/or other evidence relied upon in opposition to being liable for such costs in whole or in part by 4pm 23.01.23.
>
> 9. Upon receipt of such witness statements and/or evidence the matter shall be referred to HHJ Monty KC for further directions.
>
> 10. The Defendant/Part 20 Claimant's claim against the Second Parts 20 Defendant shall be stayed with nil order as to costs."

16. I make some comments about the terms of this Order at paragraph 50 below. Pursuant to Judge Monty's Order, the senior partner of Rainer Hughes, Mr Sanjay Panesar, filed a statement on 23 January 2023. At paragraph 3, he states:

> "I make this Witness Statement from facts and matters within my own knowledge. Where I refer to facts and matters outside my own knowledge, I identify the source of those facts and matters. I confirm that such facts and matters are true to the best of my knowledge and belief. I confirm that those matters that are within my own knowledge are true to the best of my knowledge and belief."

17. Mr Panesar exhibited to the statement a paginated bundle of documents which he claimed contained "all documents and correspondence from instruction to date". Mr Panesar stated:

> "6. Mrs Karadag had an in-person meeting with representatives of the firm in September 2018 [this was a misprint for 2020]. The file handler for this matter was Jason Borg, a solicitor with Rainer Hughes who left the firm in November 2021.
>
> 7. At this meeting it was clear that Mrs Karadag had a good grasp of English and she subsequently signed a Letter of Authority for Rainer Hughes to take conduct of her case from her previous solicitors.
>
> 8. Mrs Karadag has been assisted throughout the proceedings by her daughter-in-law Dzheylyan Ilieva. Ms Ilieva is also the Second Part 20 Defendant to the proceedings. It is not denied that Ms Ilieva assisted Mrs Karadag but there was no indication at any point since instruction that Mrs Karadag was unable to understand the proceedings.
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> 9. Jason Borg sent the first witness statement of Emine Karadag to Ms Ilieva on 3 November 2021. This statement was entirely in English and Mr Borg requested that Ms Ilieva and Mrs Karadag read the statement carefully and sign and return if satisfied that witness statement was completely accurate.
>
> 10. The statement was filed and served in English with the Claimant's signature without further reference to any translation required.
>
> 11. Mr Borg did then say that the statement would subsequently be translated into Turkish, but this was as further assistance. Rainer Hughes have many clients for whom English was not their first language, and tried to assist as much as possible in this respect. Rainer Hughes have adhered to the Civil Procedure Rules throughout this matter and have ensured that Mrs Karadag understood all of the evidence in her case.
>
> 12. Notwithstanding Mr Borg's comments there has been no request from the Claimant or Ms Ilieva for the translated copies of either the witness statement or indeed any of the pleadings or other material in this matter. Had there been then this firm would have acted upon such a request and the need for translations of all pleadings and statements, as there was no such request or concern raised by Mrs Karadag or Ms Ilieva (and Rainer Hughes had no reason to believe that this was needed) the matter proceeded.
>
> …

> 16. It has always been the position that Mrs Karadag's English is proficient and that the interpreter at the trial was to assist with the stresses of the trial as Mrs Karadag is elderly and has medical issues. David Inskip conveyed HHJ Letham's Order to Ms Ilieva as she had been the first point of contact of the Claimant. Ms Ilieva confirmed in numerous telephone calls that Mrs Karadag fully understood the contents of her witness evidence, and it was again confirmed that the interpreter was necessary for the reasons above.
>
> 17. Mr Inskip confirmed to the court on 10 November that 'Mrs Karadag's level of English is proficient and she is able to understand and assist in the drafting of the court pleadings. However for the purposes of a trial cross-examination it is the appropriate course of action to ensure no delay'"

18. The matter came back before Judge Monty on 2 March 2023 on the papers for directions. He gave permission to the First Respondent to file and serve evidence in response to the witness statement of Mr Panesar and permission to Rainer Hughes to file and serve any further evidence in reply. The hearing was to be listed before him on the first open date after 10 March 2023.

19. On 16 March 2023, in accordance with Judge Monty's directions, Ms Sacha May of Keoghs Solicitors for the First Respondent filed a witness statement in reply to the statement of Mr Panesar. In that statement, Ms May joined issue with Mr Panesar in relation to a number of assertions which Mr Panesar had made, referring to documents which had passed between the parties but which were not included in the exhibit to Mr Panesar's witness statement. For example, Ms May points out that, following the submission of the Part 20 Defendants' reply to defences on 14 December 2020, she "raised issue to Jason Borg in correspondence dated 21 December 2020 that the reply to defence of Mrs Karadag was in English despite assertion that Mrs Karadag is Turkish and her statement requires translation. Mr Borg responds stating that:

> "indeed, this might have been intimated previously, but due to time constraints, we were unable to source our client's statement in Turkish in the first instance. We are aiming to obtain such and will have better opportunity to do this if a stay is agreed".

20. Ms May concludes that Rainer Hughes were aware of the need to translate the Reply to the Defence but no such translation or application for relief was made. From the contemporaneous correspondence, Ms May submits that:

> "It is therefore clear at an early stage that Rainer Hughes were aware that Mrs Karadag required translation assistance, that such translation was not required as a form of an assistance and such translation should have been filed with the witness statement and in accordance with the court's deadline. As Mr Panesar has advised that they were aware that the statement required translation and is therefore contradictory to Mr Panesar's further submissions that Rainer Hughes have ensured compliance with the Civil Procedure Rules. It is important to note that the witness

> statement of the Claimant was served on 5 November 2021 approximately 11 months post the email from Mr Borg on 21 November 2020, 12 months prior to the pre-trial review hearing and 13 months prior to the trial. Rainer Hughes therefore had ample time to ensure that the relevant steps, translations and applications were undertaken/commenced prior to the hearing".

21. Further points are made in Ms May's statement which are taken up by Judge Monty in his Judgment.

22. On 31 March 2023, Mr Panesar filed a further statement but this is very short and takes the matter no further.

23. The Wasted Costs hearing came before Judge Monty on 25 July 2023. He allowed the application for a Wasted Costs Order and ordered that Rainer Hughes do pay wasted costs arising from the failures relating to the Claimant's first language being Turkish which he summarily assessed in the sum of £3,000. He further ordered that Rainer Hughes should pay the costs of the First Respondent relating to the wasted costs application which he summarily assessed on the indemnity basis in the sum of £9,500. He also ordered Rainer Hughes to pay the costs of the Second and Third Respondents on the wasted costs application summarily assessed in the sum of £4,000. Finally he refused permission to appeal.

The Judgment of HHJ Monty KC

24. Having briefly set out the chronology, Judge Monty then set out in uncontroversial terms the principles involved in a wasted costs application, citing section 51(6) and (7) of the Senior Courts Act 1981, CPR 46.8 and the relevant provisions of Practice Direction 46. He further set out the principles emerging from authorities such as *Ridehalgh -v- Horsefield* [1994] Ch205 CA and *Lady Archer -v- Williams* [2003] EWHC 3048.

25. In relation to the rules governing statements of truth and the language in which witness statements must be drafted, the learned Judge set out the relevant provisions of PD 22, CPR Part 32 and PD 32 together with guidance provided in the Kings Bench Guide 2022 and the Chancery Guide. He further cited the decision of Freedman J in *Afzal -v- UK Insurance Ltd* [2023] EWHC 1730 where it was decided that for a witness statement or statement of truth to be in a witness' own language there is no requirement that they be in the witness' first language or mother tongue because witnesses who are bi-lingual or otherwise sufficiently fluent in English to give evidence in English (which includes answering questions in cross-examination) may have more than one language as their 'own' language and therefore be able to give evidence in English even if it is not their first language or mother tongue. Judge Monty summarised the position as follows:

> "40. The result is, in my Judgment, very clear. If a witness is not sufficiently proficient in English to give evidence at trial in English, their witness statement must be in their language of choice, with a certified translation into their own language, and they will require an interpreter when they give their oral

> evidence at trial. This is clear from the CPR, the PD and the extract from the High Court Guides I have mentioned."

26. Judge Monty then considered the evidence. Although he had before him a statement from the Second Respondent, Mrs Karadag, he took no account of that statement in reaching his conclusions.

27. Judge Monty rejected a submission by Mr Dale Timson on behalf of Rainer Hughes that the wasted costs application should be dismissed because, given Mr Panesar's statement that at no point had Mrs Karadag told them that she could not understand her witness statement and that they understood her to be proficient in English, it was not possible within the scope of the hearing to determine the issue of fact as to whether she was or was not proficient in English and without such a determination there was nothing to gainsay what Mr Panesar had said in his statement. Rejecting that submission, Judge Monty stated:

> "46. Mr Panesar's statement is in my view unsatisfactory for a number of reasons. First, he says that the exhibit to this statement "contains all documents and correspondence from instruction to date." It does not. As Mr Curtis demonstrated, Keoghs (solicitors for the Defendant) asked for some further documents which they believed had not been exhibited, and these were provided. Secondly, Mr Panesar does not seem to have been the fee earner on this case. There were a number of fee earners involved: Mr Borg, Ms Wallis, Mr Inskip and Mr Beard. None of these has provided a statement (at least one of them, Mr Borg, is no longer at the firm, but I am not told about the others). It is not clear what involvement if any Mr Panesar had with this case. Despite this, Mr Panesar gives evidence of what he says happened at various stages, including at meetings where it is not clear whether he was present, and without producing any attendance notes. Mr Timson said that I should infer that Mr Panesar was at the meetings about which he gives evidence, but I see no reason to do that where he does not expressly say he was. Thirdly, since the preparation of Mrs Karadag's statement is at the centre of this dispute, one might have expected some evidence about how that statement was taken, when it was taken and by whom and in what language. Mr Panesar's statement is silent on this and again there is no relevant attendance note or notes exhibited. Fourthly, Mr Panesar says a number of things which in my judgment are at odds with the documents which have been provided, as I shall set out below."

28. Judge Monty took the view that the contemporaneous evidence plainly contradicted what he considered to be the main thrust of Mr Panesar's evidence. He then referred in more detail to that evidence and the documents in question. Having done so, Judge Monty set out his conclusions and the legal consequences at paragraphs 79-82 of his Judgment as follows:

> "79. In any event, it seems to me that the picture which emerges from the documents and correspondence to which I have referred

> – even if I ignore what was said in the more recent email exchanges between Ms Ilieva and Rainer Hughes – is a very clear one.
>
> 80. It was flagged from the outset that Mrs Karadag would need a translator. She attended her doctor with Ms Ilieva as a translator. Her first statement was prepared by Bond Turner in Turkish with a certified translation. There are numerous references to the need for a translator and to Mrs Karadag's poor English. Mr Borg said that the witness statement would need translating to accord with the rules, and a translator was organised for the trial. Any witness who required a translator at trial would in my view be deemed to be insufficiently proficient to give evidence at trial in English, particularly in circumstances where a solicitor took the view that the statement (and the file) would need translating. There was a proliferation of red flags here which should have led Rainer Hughes to realise that without properly translated statements, this was a disaster waiting to happen.
>
> 81. I have no doubt that their failure to have done so was negligent in the sense identified in *Ridehalgh*, and that it was also a breach of the firm's duty to the court: see *Persaud v Persaud* [2003] EWCA Civ 394 at [27] and *Gillian Radford & Co v Charles* [2003] EWHC 3180 (Ch) at [20]. This is because there was a clear breach of CPR 32 and PD 22, and in my view this was also a breach of the overriding objective set out in CPR 1, which imposes an obligation on the court to deal with cases justly and at proportionate cost by (amongst other things) enforcing compliance with rules, practice directions and orders. Rainer Hughes' negligence seems to me to have been a breach of the duty on a legal representative to assist the court in promoting the over-riding objective.
>
> 82. I am also entirely satisfied that these failures led to costs being wasted, which is the second part of the *Ridehalgh* test. That is clear from the order I made on 12 December 2022, and I so find on the basis of the current evidence. Not only were the failures the cause of the claim being struck out, it is plain that additional time was spent by the Defendant in dealing with these issues."

29. Judge Monty then considered his discretion whereby a court should not make a wasted costs order unless it is just in all the circumstances to do so and in this regard he considered a submission by Mr Timson on behalf of Rainer Hughes that, as in *Harrison -v- Harrison* [2009] EWHC 428 (QB) where it was held by MacKay J that the costs of pursuing a wasted costs order were so disproportionately large when compared to the costs at stake, that the court should decline to exercise its discretion to grant the relief sought, so here the costs of the wasted costs application were disproportionate to the wasted costs themselves which were being put by Mr Curtis for the First Respondent as in the region of £6,000. This compared to the First Respondent's claimed costs of

the wasted costs application in the sum of approximately £15,000 and Rainer Hughes' costs in the sum of approximately £20,000. Judge Monty rejected the proportionality argument at paragraph 85 as follows:

> "85. The answer to the proportionality point, in my judgment, is that as Mr Curtis says, the obligation is on the Defendant as applicant to prove the 3-stage *Ridehalgh* test is satisfied, and this was a straightforward case where the costs had been increased by Rainer Hughes not accepting the inevitable, and conceding that they were wrong, and instead having argued – without justification – that there was never anything to suggest that Mrs Karadag was other than proficient in English. I agree with that submission. This was, in my judgment, a very clear case in which Rainer Hughes negligently failed to deal with the language issue, have defended this application without calling evidence from those actually involved at the truly material times such as the drafting of the statement, have failed to produce all relevant documents, and have ignored what is in my view clear from the documents. That is why the costs are greater than they should have been. I have taken the level of costs into account, when comparing them to the wasted costs sought, and I have decided in the exercise of my discretion, at the third stage of the test, that it is just in all the circumstances to order Rainer Hughes to compensate the Defendant"

30. Having thus decided to make the wasted costs order, the next stage was for the learned Judge to consider the quantum of the wasted costs. Having heard submissions, he assessed these at £3,000.

31. Judge Monty dealt with the costs of the wasted costs application and hearing. He determined that the Respondents were the successful party and, pursuant to the principles set out in *Three Rivers District Council -v- Bank of England* [2006] EWHC 816 (COM) that the costs to be paid by Rainer Hughes should be assessed on the indemnity basis. He penalised the First Respondent for the fact that their Statement of Costs had been served late and assessed their costs at £9,500 inclusive of VAT. The Second and Third Respondents, given the conflict with Rainer Hughes arising from the combination of the costs order made on 12 December 2022 and the First Respondents' application for a wasted costs order, were separately represented and Judge Monty assessed their costs, to be paid by Rainer Hughes, at £4,000.

32. Finally, Judge Monty refused permission to appeal.

Discussion

33. The issues on this Appeal cover both procedure and substance. It is alleged that the learned Judge erred procedurally in failing to consider proportionality as a preliminary issue before going on to consider the merits of the application for wasted costs. It is further said that, had the learned Judge done so, he would or should have concluded that this was not a case suitable for the summary jurisdiction represented by an application for wasted costs. Strong reliance is placed on the decision of Mackay J in *Harrison -v- Harrison* [2009] EWHC 428 (QB) who, having referred to the authorities

which established that the jurisdiction will only be exercised in cases which are 'plain and obvious' and that it is a summary remedy which should be capable of being dealt with in "hours rather than days" went on to say:

> "25. Therefore, even where impropriety etc is shown, there exists a discretion in the court as to whether any order should be made and the lack of proportionality of the remedy may, dependant on the facts of the case, disentitle the applicant to relief (see *Chief Constable of North Yorkshire -v- Boardsley* [2000] Lloyd's Rep PN 675). This is so even at what is sometimes referred to as Stage 1 of a wasted costs order application, where the question is whether the Respondent should even be required to show cause at all. The present hearing in this case is ill defined but capable of being either Stage 1 or Stage 2, as I think was acknowledged. I will return to that."

34. Then, having considered the figures involved in that case, Mackay J went on to say:

> "28. In any event if I am wrong about that the numbers in this case and the scale of these proceedings are entirely out of proportion, the one against the other, and the proceedings are therefore disproportionate to any benefit they could possibly bring. The court was given about 800 pages of documents and witness statements, 2 bundles of authorities and skeleton arguments of 110 paragraphs from the Applicant and 76 from the Respondent, with a half-day pre-reading suggestion (which happily through fortunate events I was able to spend on the case). But much more to the point than this, the Applicant's statement of his costs for this application are that they are £57,784. The Respondent's estimate, and bearing in mind that new solicitors and counsel had to be instructed and had to read into the case, is higher and is estimated at £85,000. Even if it were the case, which I do not think it is, that some discernible 4-figure or 5-figure claim can be extracted from the wreckage of these figures, I have no hesitation in declining to exercise my discretion to grant the relief sought."

35. Clearly, in my Judgment, and as I return to in paragraph 50 below, there is merit, whenever an application for a wasted costs order is sought, for the Judge to consider proportionality and whether, on the information available, he or she should exercise their discretion to decline allowing the application to proceed. However, as Mr Curtis submitted, this is very much in the Judge's discretion. No hard and fast rule can be laid down because the circumstances in which a wasted costs application may be made are infinitely varied. There may be cases where the issues of impropriety are so complicated or clearly contestable that a Judge can foresee that the costs will far outweigh the sums at stake that such a hearing is disproportionate. However, there will be other cases where the Judge considers that the case is so clear-cut and obvious that it is very unlikely that the wasted costs application will be contested and will be straightforward. However, there will be cases which fall into a middle ground and where the discretion of the Judge very much comes into play. The ambit of the discretion is wide and will not be lightly interfered with by an Appeal Court. This is

just such a case: on the basis of the facts as they appeared to Judge Monty in December 2022 when he refused relief from sanction, it appeared to be a clear case of a solicitor having failed to comply with the rules and practice direction and have the witness statement and pleadings drafted in the Claimant's "own language" which was Turkish. In my Judgment it cannot properly be suggested that Judge Monty erred in making a "show cause" order at that stage. Thereafter, the learned Judge rightly made provision for a Directions Hearing which took place on paper on 2 March 2023. It seems to me that it was then that an application on the part of Rainer Hughes that the matter should not proceed on grounds of proportionality should have been made if such an application was appropriate at all. However, no such application was made and the matter proceeded to the full hearing in July 2023. By that time the costs had been incurred. Of course, the court retained the right to exercise its discretion not to make a wasted costs order but again, there appears to be no suggestion that an application was made to Judge Monty that he should dismiss the application "*in limine*". It is true that, in his skeleton argument for that hearing, Mr Timson submitted:

> "17. This issue has now been ongoing for some 7 months. There are bundles of over 200 pages said to be relevant to this issue alone, plus no doubt detailed skeleton arguments and voluminous authorities bundles. The costs are already no doubt disproportionate, and the matter is already well outside what is a summary procedure."

36. However, the suggestion that proportionality should have been dealt with first and the application dismissed without consideration of the merits only appears to have arisen first on this appeal.

37. In the circumstances, I reject the suggestion that the learned Judge erred procedurally.

38. I also reject the submission that the learned Judge erred substantively in failing to exercise his discretion to dismiss the application on grounds of proportionality. First, as I have stated, the discretion of the Judge is a wide one. I refer to paragraph 85 of the Judgment (see paragraph 29 above) where the learned Judge dealt with the proportionality point. I can see no basis upon which it could be submitted that Judge Monty misdirected himself. He was entitled to take into account the fact that, on his assessment, the costs were greater than they should have been because of the unreasonable approach taken by Rainer Hughes to the application. Judge Monty stated:

> "I have taken the level of costs into account, when comparing them to the wasted costs sought, and I have decided in the exercise of my discretion, at the third stage of the test, that it is just in all the circumstances to order Rainer Hughes to compensate the Defendant."

39. In my Judgment it cannot properly be argued that the learned Judge was wrong so to decide. A further point is this, though: Mr Timson sought to rely upon the fact that the wasted costs were, in the event, only ordered in the sum of £3,000. However, this was, in part, because he was successful in arguing down the claim for wasted costs as a matter of quantum on the basis of causation arguments, and in particular because he successfully persuaded the learned Judge to disallow the costs claimed in relation to the consideration of the documents on the basis that such consideration would always have

been required. At the earliest stages of these proceedings, it may well reasonably have been thought that the wasted costs were significantly higher than the sum eventually awarded and the retrospectoscope cannot be used to imbue the court at the earlier stages with the knowledge that the award would only be £3,000. Even then, though, it is by no means clear that the wasted costs application would have been deemed disproportionate. Again, it depends upon the approach taken and whether this leads to the costs of dealing with the application being larger than they should have been.

40. Finally, there is, as it seems to me, a public interest in costs which have been wasted as a result of a solicitor's negligence or misconduct in the proceedings being visited on the solicitor in the form of a wasted costs order. Firstly, this encourages lawyers to comply with the rules of the court. Secondly, it immediately relieves the costs burden from the solicitor's client who would otherwise potentially need to take negligence proceedings against the solicitors with all the additional costs that would incur. For these reasons, an Appeal Court will be very slow to find that a Judge misapplied his discretion in allowing a wasted costs order to proceed. In that regard, I fully endorse the dictum of Clarke LJ in *Royal Institute of Chartered Surveyors -v- Wiseman Marshall* [2000] PNLR 649 at page 659B where he said:

> ""…it will only be in a very rare case that this court would interfere with a decision by the judge as to whether or not to make a wasted costs order. It must be rarer still that this court will be willing to interfere with a decision of the judge at the first stage."

41. So far as grounds 1 and 2 of this appeal are concerned, it is convenient to deal with them together. The starting point is that, in my Judgment, Judge Monty was wholly entitled to proceed to an adjudication on the basis of the evidence that was before him, Of course, there may be cases where the issues are contested in such a way that it is apparent to the court that they cannot be resolved without hearing oral evidence and without conducting what is in effect a mini-trial. In such cases, the court would be right to refuse to do so and to dismiss the application for a wasted costs order on that basis. It is agreed between the parties, as stated by Mackay J in *Harrison -v- Harrison*, that the jurisdiction is confined to cases which are "plain and obvious" and where the matter is capable of being dealt with in "hours rather than days". However, in my Judgment, Mr Timson is wrong to suggest that an assertion by the senior partner of a firm of solicitors of the nature contained in Mr Panesar's statement is sufficient to bring the claim into the category of cases which a judge should decline to consider. Judge Monty was entitled to look beneath the surface of Mr Panesar's assertions and consider whether Mr Panesar had set out a sufficient basis for making them: the reason is that, without there being such a sufficient basis, the assertions remain just that: assertions, and nothing more. There are obvious examples. Thus, at paragraph 7 of his statement, referring to Mrs Karadag having an in-person meeting with representatives of the firm in September 2020, Mr Panesar said:

> "At this meeting it was clear that Mrs Karadag had a good grasp of English,".

42. What was the basis for that assertion? Mr Panesar did not suggest that he was at the meeting: if he had been, he would surely have said so. There is no attendance note suggesting he attended the meeting. If he did not, then he could only properly make

that assertion on the basis of what someone else had told him. However, the source of his knowledge is not stated even though, at paragraph 3 of the statement, he states:

> "Where I refer to facts and matters outside my own knowledge, I identify the source of those facts and matters".

43. Mr Timson submitted that Judge Monty should have inferred - and I can infer - that Mr Panesar's claim that, at the meeting, it was clear that Mrs Karadag had a good grasp of English arises from facts and matters within his own knowledge because of what he says, at paragraph 3,

44. I disagree. Where it is so straightforward a matter for Mr Panesar to state, if it is the case, that he personally heard Mrs Karadag speaking and was present at the meeting, he would be expected to say so. The absence of such evidence is in the nature of a deafening silence.

45. In his Judgment, Judge Monty from paragraphs 49-73, subjected the documentary history to a full analysis: this was appropriate to see what support, if any, there was for the position adopted by Mr Panesar and what the evidence showed about Mrs Karadag's fluency in the English language. The Judge concluded that the picture which emerged from the documents and correspondence was a very clear one – namely that it had been found from the outset that Mrs Karadag would need a translator and thereafter there was "a proliferation of red flags here which should have led Rainer Hughes to realise that without properly translated statements, this was a disaster waiting to happen." On that basis, in my Judgment, Judge Monty was fully entitled to conclude that Rainer Hughes had been negligent in the sense identified in *Ridehalgh* and that it was a breach of the firm's duty to the court, applying *Persaud* and *Gillian Radford & Co -v- Charles* [2003] EWHC 3180 (CH). As the Judge said, "this is because there was a clear breach of CPR 32 and PD 22" and also a breach of the overriding objective imposing an obligation on the court to deal with cases justly and at proportionate cost by, among other things, enforcing compliance with rules, practice directions and orders. The identified negligence of the solicitors was a breach of the duty on a legal representative to assist the court in promoting the overriding objective.

46. Grounds 4 and 5 of the Appeal can be dealt with relatively briefly. Firstly, the decision to award costs on an indemnity basis was a matter within Judge Monty's discretion and there were features of this case which justified him in finding that it fell outside the norm such that an indemnity order was appropriate. Thus, he said at paragraph 85:

> "This was, in my judgment, a very clear case in which Rainer Hughes … have defended this application without calling evidence from those actually involved at the truly material times such as the drafting of the statement, have failed to produce all relevant documents, and have ignored what is in my view clear from the documents. That is why the costs are greater than they should have been."

47. Judge Monty took this up at paragraph 100 where he stated:

> "I have no doubt that the negligence of Rainer Hughes together with their stance on this application which I would define as an

> attempt to defend the indefensible, took this out of the norm and that I should assess the costs on an indemnity basis."

48. Mr Timson criticises the reliance by Judge Monty on the negligence of Rainer Hughes on the basis that this is not a matter which should go to indemnity costs but goes to "liability" and should not be visited on the solicitors twice. There is arguably some force in this, but the approach of the solicitors to the application was, in any event, more than sufficient to justify the judge awarding costs on the indemnity basis. In any event, it seems unlikely that this has made a significant difference to the summary assessment of the costs particularly when the learned Judge reduced the costs to £9,500 to reflect the failure on the part of the First Respondent to provide the Statement of Costs in good time and because some of the costs were in relation to conduct rather than translation issues.

49. The submission that the Second and Third Respondents should not have had their costs of attending the hearing was, in my judgment, hopeless. They had been advised by Rainer Hughes themselves to seek alternative representation and Mrs Karadag, in particular, had a clear interest in the outcome of the application because such costs as were awarded against Rainer Hughes as wasted costs would go to reduce her own liability to the First Respondent arising out of the Costs Order made by Judge Monty in December 2022. No challenge is made to the level of costs awarded by Judge Monty.

50. Finally, I return to procedural matters and in particular paragraph 5.9 of Practice Direction 46 which states:

> "**5.9**
>
> On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify—
>
> (a) what the legal representative is alleged to have done or failed to do; and
>
> (b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative."

It was acknowledged by Mr Timson that this paragraph did not have direct application here because there had been no application notice or evidence in support. It seems to me that it would be desirable for the spirit of this practice direction to apply, though, even where there has not been such an application notice. Where a Judge decides to make a "show cause" order, it is desirable that the matters referred to in PD 46, paragraph 5.9 should be addressed as early as possible. A judge making a "show cause" order should consider giving a direction that the applicant (in this case it would have been the First Respondent) serve a notice and witness statement identifying;

> (a) what the legal representative is alleged to have done or failed to do
>
> (b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative.

This will then give the court a basis upon which to make an early assessment of the issue of proportionality because there will then be information on how straightforward or complicated the "negligence" issues are likely to be and how the likely costs of dealing with those issues will compare to the wasted costs that are sought. Even if, at the early stage, it appears that it is not disproportionate to allow the application to proceed, a court should be encouraged to keep the matter under review as the application progresses. Andrews J (as she then was) undertook a similar exercise in *Adegbulugbe v Nursing and Midwifery Council* [2014] EWHC 405 (Admin): she said:

> "4. After hearing argument on the matter after giving judgment dismissing the appeal, I was satisfied that the evidence before me was sufficient to cross the threshold in CPR 48 PD53.6, namely that if it was unanswered, it would be likely to lead to a wasted costs order being made, and that the wasted costs proceedings were justified, notwithstanding that they would lead to further costs being incurred. I gave directions for the service of further evidence and submissions, and that there should be a further hearing at which the Solicitors and Counsel would be afforded the opportunity to put forward reasons why a wasted costs order should not be made against them. I also adjourned over to the further hearing the NMC's application for costs against Ms Adegbulugbe, as the losing party to the appeal." (emphasis added)

Thus, she took an early view on the issue of proportionality although she did not refer in terms to PD46, para 5.9. In fact, I have no doubt that Judge Monty would instinctively have considered these factors before deciding to make the "show cause" order.

51. Subject to the above, I wish to commend the clarity and careful nature of the Judgment given by HHJ Monty KC in this case which was, as it seems to me, a model of its kind and made this court's task so much easier in adjudicating upon this appeal.