JUDGMENT : NICHOLAS WARREN QC (sitting as a deputy judge of the Ch.Div), 21 January 2005

Introduction

[1] This is an appeal from an order on costs only made by Master Moncaster on 3 August 2004, brought with permission of Hart J.

[2] The Appellant ("Longstaff") is the Claimant in the action, the nature of which I will come to in due course. Longstaff discontinued the action against all three Defendants by a notice of discontinuance dated 23 June 2004. The Claimant then sought costs against the Defendants. The Master, in a reserved judgment after lengthy argument, decided to make no order as to costs, leaving all parties to bear their own costs of the action and of the costs application. In the light of the submissions which have been made about the Master's judgment, I propose to recite the facts and correspondence in rather more detail than he did in order to address the attacks which are made on his decision.

Background

[3] The First and Second Respondents ("Ms Evans" and "Mr Lewis") were Defendants in High Court proceedings brought by Longstaff which concerned the affairs of a joint venture company, Redwell Investments Ltd ("Redwell"). Those proceedings were litigated before Ferris J at trial in the Chancery Division in 2002. The learned judge substantially dismissed Longstaff's case and awarded costs against it.

[4] The effect of the judgment of Ferris J was to leave Redwell "deadlocked". Longstaff and Ms Evans and Mr Lewis were then involved in a **mediation** of outstanding matters in dispute. An exhaustive **mediation** process resulted in a settlement which was recorded in a Settlement Agreement dated 18 January 2003 ("the Settlement Agreement"). Sector had held 50% of the shares in Redwell as nominee/trustee for Evans/Lewis family interests; that 50% was, in the events which happened, to be sold to Longstaff under the Settlement Agreement. Ms Evans and Mr Lewis, together with the Third Defendant ("Sector") provided certain warranties in relation to Redwell as part of the Settlement Agreement.

[5] The material warranty for present purposes was this:
"The annual audited accounts of Redwell for the year ended 30 September 2001 were prepared in accordance with the UK GAAP and there has been no material adverse change in the financial condition of Redwell since the date of those accounts."

[6] That warranty, like all the warranties, was subject to a temporal limitation:
"The warranty obligation set out above shall expire 12 months after the date of completion of the sale of the Sector Shares [ie 50% of the shares in Redwell held by Sector] pursuant to Clause 5 . . ."
The completion date under the Settlement Agreement was 17 April 2003; the warranty set out in 5 above expired on 17 April 2004.

[7] Clause 7.8 of the Settlement Agreement provided for **mediation** of any dispute arising out of it. The parties were obliged to attempt to settle by **mediation** "before resorting to any other means of dispute resolution save as may be necessary to seek relief to preserve the *status quo* pending the outcome of the **mediation**". **Mediation** was to be commenced by giving notice to CEDR Solve. If no settlement was reached within 60 days from the date of the notice to CEDR Solve, any party was permitted to institute court proceedings.

[8] The relevant accounts of Redwell showed an amount for debtors under Current Assets. Included in the figure under "Other debtors" was the sum £562,968. Although the accounts do not explain this, that sum included a debt of some £212,319 (see 9d below) owing to Redwell by a company called 1–3 Cuba Street Ltd ("Cuba Street"). Cuba Street was a company in which both Ms Evans and Mr Lewis were interested; at material times, Ms Evans was company secretary and Mr Lewis was a director. Ms Evans is a qualified solicitor although she no longer holds a current practising certificate. For the purposes of the current application, it is not disputed that the Cuba Street debt was a current asset if, but only if, payment was due within 12 months or if a demand for payment could be made to make it due within 12 months. The Cuba Street debt originally comprised a loan of £57,500 together with the outstanding balance, £162,500, of the purchase price of 1–3 Cuba Street. I shall refer to the total outstanding from time to time of the loan and the balance of the purchase price as "the Cuba Street

debt". By May 2004, the balance owing, including interest and after allowing for a set off, was, according to Ms Evans, Mr Lewis and Cuba Street, some £216,908. There is a dispute as to the exact figure owing, Redwell maintaining that the figure is greater because (a) interest should be a larger figure and (b) the set-off should not be allowed. Nothing turns on that for present purposes.

The material facts after the Settlement Agreement

[9] I have been taken in some detail through the evidence filed in support of the present cost application. I do not propose to refer to each and every document but note the following:

- (a) In an email dated as long ago [as] 5 April 2001, Ms Evans had explained that, in connection with the acquisition of 1–3 Cuba Street by Cuba Street, Redwell had loaned £57,500 to Cuba Street. She stated that this loan "would be repaid by Cuba Street when it had funds to do so and in the meantime that amount attracted interest . . .". This appears to have been Ms Evans' position not only in relation to the loan but also to the rest of the outstanding purchase price.
- (b) Some time after completion of the sale of the shares in Redwell to Longstaff, demand was made, on 11 February 2004, on behalf of Redwell by its solicitors McClure Naismith ("MN") in the person of Mr Graham Reid for the loans which had been advanced by Redwell to be repaid in full: that has always been taken by all parties as a demand in relation to the outstanding purchase price as well as the £57,500 loan.
- (c) On 18 February 2004, Mr Reid emailed Ms Evans, referring to an earlier telephone conversation, saying that he awaited evidence that confirmed that the loans were not repayable on demand. She responded later that day saying that Cuba Street "does not accept that proper demand for repayment of any loan from [Redwell] has been made. No loan currently outstanding is currently repayable on its terms". This, presumably, was a reference to the terms set out under a. above. It is common ground that Ms Evans was acting then, and at all times thereafter, on behalf of Cuba Street. It is not asserted by Cuba Street that she had no authority to act on its behalf.
- (d) Confirmation was obtained from Cuba Street's accountants on 3 March 2004 that the Cuba Street debt was £212,319.
- (e) On 4 March, Mr Reid again emailed Ms Evans. He recorded that, in a previous communication, she had not agreed that the loans were repayable and had instead asserted that the loans were repayable only when the property was sold and that the accounts had been wrongly drawn. He rejected that assertion, noting that the accounts showed the Cuba Street debt to be due and repayable. He drew attention to the warranty which I have set out above, again reiterating that Ms Evans, as representative of Cuba Street, was asserting that the loans were not due and that she, Mr Lewis and Sector were therefore in breach of warranty. He suggested a meeting to discuss the issue "as it would seem inappropriate to launch court proceedings where there is a clear breach of warranty – alternatively Cuba Street must repay the debt". He noted the expiry of the warranty on 17 April 2004.
- (f) On 8 March, Mr Simon, one of the owners of Longstaff, put in train a reference to **mediation** over the warranty claim by contacting CEDR Solve. He referred to Ms Evans as "asserting that the debts are not payable on demand".
- (g) On 9 March, Mr Reid again asked Ms Evans for any evidence which she might have to show that the loans were repayable only on the sale of the property. And then, on 12 March, he emailed in relation to **mediation,** pointing out that Ms Evans had indicated that she would deal with the warranty claims only in accordance with the Settlement Agreement (which it is reasonable to infer meant only by **mediation)**. He stated that contact had been made with CEDR Solve and that 22 March was available with a suitable mediator.
- (h) On the same day (12 March), Mr Reid emailed Ms Evans again. Himself concerned by the approaching time limit for the expiry of the warranty (but without expressly identifying that concern) he wrote seeking immediate confirmation, and reply by return, that Ms Evans, Mr Lewis and Sector agree to his proposal that the Settlement Agreement be amended by providing that all rights and obligations (including warranties) could be enforced by proceedings commenced on or before the 40th day following the last day of the **mediation** hearing. Failing such confirmation and agreement, his

client would commence proceedings for breach of warranty. I observe that this somewhat peremptory demand went well beyond what was necessary to preserve Longstaff's position in relation to the possible breach of warranty which had been identified – all that was needed was an agreement that no time limit point would be taken in relation to that particular claim. There was no reason at all why Ms Evans, Mr Lewis and Sector should agree to as wide an extension as Mr Reid proposed.

- (i) Ms Evans replied on the same day (12 March) saying that, if Mr Reid were to redraft the proposal to make it easier for the other parties to understand, she would take instructions commenting that it was too loosely drafted to be of assistance. Mr Reid did not reply until 22 March. He disagreed that the draft was difficult to follow and again said that proceedings would be issued in the absence of agreement. Ms Evans responded later that day saying that is was not reasonable for Longstaff to seek to insist on a unilateral amendment and to insist on a response by return. She said that Mr Lewis certainly did *not* understand the import of the email (ie of the demand which Mr Reid was making) and pointed out that she was not advising Mr Lewis as she no longer held a practising certificate and that she had never advised Sector. She ended by saying: "You should not make any assumption about any amendments to the settlement agreement", a somewhat cryptic comment which Counsel for Longstaff suggests is made with an eye to avoiding any estoppel argument being raised against her.
- (j) I return to the topic of **mediation.** Since complaint is made by Longstaff about Ms Evans' conduct in relation to the proposed **mediation** concerning the warranty, I should set out the course of the correspondence:
- (i) On 12 March – on the very same day as Mr Reid's email referring to **mediation** – Ms Evans replied stating that neither she nor Mr Lewis could attend a **mediation** that week as they were moving house. I see no reason to doubt the truth of that. She also stated that, for the same reason, she would be unavailable the week after 22 March. It does not seem unreasonable to me to decline, on 12 March, a **mediation** during the week of, and the week after, a house move on 24 March, given that it would obviously be necessary to put some work into preparation for it.
- (ii) In his first email dated 22 March, Mr Reid said that he would forward other dates for **mediation.** This followed on from Ms Evans' own (prompt) response on 12 March to Mr Reid's initial email of that date. It is, I find, more than a little surprising that Counsel for Longstaff criticises Ms Evans for failing to suggest alternative dates when (a) it was Longstaff which wanted (and needed) the **mediation** and (b) Mr Reid delayed 10 days in a critical period before himself responding.
- (iii) In a subsequent email of the same date (22 March) Mr Reid suggested 29, 30 or 31 March as alternative dates, to which Ms Evans immediately responded that, as she had previously stated, she would not be available that week. She went on, quite reasonably I think, to say that, as submissions would need to be prepared and exchanged ahead of any **mediation,** it was unlikely that any **mediation** could actually take place within the next month.
- (iv) Counsel for Longstaff criticises that as well, saying that Ms Evans made no such similar comment when refusing the initial date and was, in his submission, simply looking for excuses to avoid the **mediation.** I do not consider that criticism is justified.
- (v) Later on 23 March, Mr Reid said they would strive to find other dates and would welcome any suggestions on dates which Ms Evans might have. He stated that he had instructions to issue proceedings in the absence of an agreement to amendment to the Settlement Agreement.
- (vi) On 24 March, Ms Evans responded saying that there were no dates in the next month or so which she could *not* make, but dates would have to be checked with Mr Lewis, Sector and Redwell's former accountants all of whom would attend the **mediation.** She referred to the proposed amendments again and stated that to issue proceedings before completion of the **mediation** would be a breach of the terms of the Settlement Agreement. That was clearly wrong, since it was expressly provided in the Settlement Agreement that it was permissible to preserve the *status quo* pending the outcome of **mediation;** this *status quo* could properly be preserved by commencing proceedings. But if she had been right, one can easily see that it would have suited her if the **mediation** had not been completed (or even started) by 17 April. I do not, however, on the evidence before me consider that it can

properly be suggested that she deliberately obstructed the **mediation** to that end. Nor do I accept Longstaff's criticisms about Ms Evans' approach to **mediation.**

- (k) On the same day, 23 March, Mr Reid also emailed in relation to the Cuba Street debt. Having heard nothing more about evidence concerning the terms of the loans, he stated that Redwell had instructed the commencement of proceedings. Ms Evans replied the next morning saying that, because of her move, all her papers were in boxes. Importantly, she says that Cuba Street had agreed to sell 1–3 Cuba Street and the matter was in solicitors' hands. She stated that the loan to Redwell would be repaid on completion and that she would obtain more details and revert to Mr Reid.
- (l) Although Mr Lewis had been copied in on many of these emails, very few appear to have been copied to Sector. However, on 23 March, Mr Reid wrote long emails to both Mr Lewis and Sector settling out Longstaff's claim on the warranty, repeating his proposal for amendment of the Settlement Agreement and threatening proceedings if the amendment were not agreed. I repeat the observation made at the end of h. above.
- (m) On 30 March, Mr Sewell (Mr Reid's litigation partner) informed Ms Evans that proceedings on the warranty would be commenced on 16 April. He wrote that he was copying the letter to Mr Lewis and to Sector "as a matter of courtesy". I think it should not have been simply as a matter of courtesy since (see (i) above) Ms Evans had made it clear she was not acting for either of them. I note here that although MN never received a direct response to that request, neither did MN take any steps to apply to the court for a stay once proceedings had been issued; as the Master points out in para 20 of his judgment, this could have been done saying "there is no doubt, I should have thought, that the court (meaning me) would have ordered a stay".
- (n) On the same date, in relation to the Cuba Street debt, Mr Powell, a partner in Pyle Owen, Cuba Street's accountants, emailed Mr Reid confirming that the balance held to the credit of Redwell was £216,192.08. He wrote: "My clients are currently arranging a re-finance of 1–3 Cuba St Ltd which will take approximately four weeks to complete whereupon the above sum will be cleared off." It is to be noted that the four-week period (which was in fact exceeded) expired *after* 17 April, the cut-off date for the warranty.
- (o) Also on the same date, Ms Evans emailed Mr Reid stating the Mr Lewis had confirmed that the sale was in solicitors' hands. Contracts had not yet been exchanged and there was no guarantee of when that might happen. She stated (consistently with Mr Powell's email) that if there was any unexpected delay in the sale, the company would seek to raise funds to repay the Redwell loan. She does not, at this stage, expressly concede that the Cuba Street debt was already due.
- (p) Mr Lewis alone, not on behalf of Ms Evans as well, then consulted solicitors, Davies Arnold Cooper ("DAC"). DAC wrote to MN (fao Mr Sewell) on 8 April confirming their involvement. They appreciated that Longstaff felt bound to issue a protective claim before 17 April and stated that they were aware of the proposal in Mr Reid's email of 12 March (see (h) above). The nature of the proceedings as a "protective claim" was again referred to by Mr Sewell himself in his letter to DAC dated 13 April in which he refers to the proposal in Mr Reid's email of 12 March.
- (q) Two sets of proceedings were then issued: the first being the present warranty proceedings, the second being a claim for the Cuba Street debt against Cuba Street. The warranty proceedings were served by fax and post on Ms Evans and Mr Lewis (but not on Sector, as to which see later in this judgment) on 15 April. It is not surprising that both sets of proceedings were commenced. Either the Cuba Street debt was immediately due, in which case Cuba Street was liable, or it was not due, in which case there was a breach of warranty (although whether anything substantial could be recovered is a different matter). It was Ms Evans who was asserting (on behalf of Cuba Street) that the Cuba Street debt was not due; Mr Lewis knew of that and did not suggest (either himself or through DAC) that the position was otherwise. In those circumstances, Ms Evans and Mr Lewis can hardly complain that Longstaff took steps to protect its position pending **mediation.**
- (r) It appears that the service fax/letter MN dated 15 April crossed with a fax/letter from DAC. DAC's letter was expressed to be in reply to MN's letter dated 13 April. DAC stated that "our client is not in a

position to agree to a stay". The reference to a stay is not clear since there was no mention of a stay in MN's letter dated 13 April. There was, however, reference to the 12 March proposal and I think it must be that which was being referred to.

- (s) On 16 April, MN faxed DAC referring to the proceedings which had, by then, been served, asking to be told, by return of fax, whether "your client [*ie* Mr Lewis alone] is now in a position to agree a stay and if so on what terms". It is clear that this letter was talking about a stay of the proceedings and not about an amendment to the Settlement Agreement. It appears to me that this is the first clear and unequivocal proposal that the warranty issue should be put on hold – prior to the issue of proceedings, the only suggestion had been to make an amendment to the Settlement Agreement which went beyond what was needed to preserve the *status quo* pending **mediation.**
- (t) Longstaff attach great importance to this letter to show that it took reasonable steps to prevent the action proceeding whilst the Cuba Street debt was sorted out. Unfortunately, no similar suggestion appears to have been made to Ms Evans (or indeed to Sector) once proceedings had been commenced. There is no response to that letter contained in the documents before me and it has not been suggested that there was one.
- (u) It is said that it is an important letter because it shows that Longstaff suggested the very course which the Master said should have been taken. He is criticised for not referring to it and for not dealing with the submission based on it. Whilst it is accepted that a judge does not need to deal with every submission made by counsel or with every document, it is said to be very unsatisfactory that something so significant should have been omitted from the judgment. I shall return to this contention later.
- (v) On 23 April, DAC wrote to MN. It would have been sensible if, at that stage, they had responded to MN's suggestion of a stay of proceedings in the warranty action. Had they done so, it is possible that some, but not all, of the costs which have been incurred since that date would not have been incurred.
- (w) On 7 May, DAC wrote to MN asking to inspect the documents referred to in the particulars of claim. This was something they were entitled to do under CPR r 31.14. Counsel for Longstaff complains that this was an unreasonable request. It was not, in my judgment, an unreasonable request: even if a stay had been agreed, Mr Lewis would still have needed to know precisely what the case against him was. Mr Lewis was entitled to see the documents on which Longstaff relied: it was not, or should not have been, a difficult request to comply with. It is said that Mr Lewis must have had these documents already but I see no reason to think that that was so. It is highly likely that Ms Evans had them, but I would not be at all surprised to find that Mr Lewis did not himself have copies. It is inherently unlikely that DAC would have asked for the documents if their client had them and was able to provide them himself.
- (x) On 21 May, the defence in the Cuba Street debt action was served. Most of the claim was admitted and a payment of over £226,000 was made on that day. In particular, paras 8 and 11 of the defence aver that the balance of the Cuba Street debt should be repaid and that arrangements are in hand to effect the repayment.
- (y) At that stage, *both* parties should have realised that there was no substance left in the warranty action: it was apparent from that defence that the debt was repayable immediately. It was therefore a "current asset" all along and the basis of the breach of warranty allegation was not made out which should have been apparent to the lawyers on both sides. The particulars of claim in the warranty action were nonetheless correct: they asserted in para 27 that *if* Cuba Street was correct in its contention (which had up until then been made by Ms Evans) that the Cuba Street debt was not due, then there was a breach of warranty.
- (z) On 21 May, DAC went on the record for Ms Evans too. On that date, an application was made by her and Mr Lewis to strike out Longstaff's claim alternatively for summary judgment to be entered against Longstaff. It does not appear that, prior to that application being issued, DAC had either asked MN to discontinue Longstaff's action or warned MN that it would seek to strike out or seek summary

judgment unless it agreed to withdraw the claim. The application states as its grounds for relief that the Particulars of Claim disclose no reasonable grounds for bringing the claim, alternatively that the Claimant has no reasonable prospect of success. Ms Evans and Mr Lewis sought, in their application form, the costs of the application and of the claim. In part C of the application for, are set out four paragraphs under the heading *"We wish to rely on the following evidence in support of this application":*

- (i) para 1 refers to the particulars of claim and briefly to the nature of the claim.
- (ii) para 2 refers to Longstaff's claim that Ms Evans and Mr Lewis have breached certain warranties, arising from the failure of Cuba Street to repay the loans.
- (iii) para 3 refers to the Cuba Street debt proceedings stating that Cuba Street has admitted liability and that substantial payment has been effected.
- (iv). para 4 is in these terms:

  "As set out in paragraph 27 of the [particulars of claim], the alleged breach of warranty is contingent on the monies not being due and payable from [Cuba Street] until sale of a certain property. That property has not yet been sold. This contingency does not therefore arise (see paragraph 3 above) and therefore these proceedings are without foundation."

  The para 27 referred to simply sets out the breach of warranty viz that the accounts did not conform with GAAP or reflect the true position of Redwell (ie because, although not expressly stated in para 27, the Cuba Street debt was not in fact due and payable or payable on demand).

  At para 21 of his judgment, the Master concluded that this:

  ". . . is wholly to misunderstand the purpose of the proceedings. It is precisely because the contingency had not yet arisen that there was a breach of the warranty and that it was necessary to issue proceedings. Therefore, that application was doomed to failure and costs were wholly unnecessarily incurred."

- (aa) It has to be accepted that para 4 is poorly drafted. But I cannot agree with the Master that it is misconceived since that is to read it in a way in which I do not think it can be read. I approach it this way:
- (i) The first sentence is correct in that the warranty *is* contingent (using the word in the sense of "dependent") on the Cuba Street debt not being immediately due and payable but only payable on sale of 1–3 Cuba Street.
- (ii) The second sentence is correct – although irrelevant.
- (iii) As to the third sentence, if the first "therefore" is omitted, it, too, is correct. The reference "see para 3 above" shows that the Cuba Street debt is admitted so that it is correct that the contingency (ie that the debt is not due) referred to in the first sentence is not fulfilled. It is the second sentence and the inclusion of the first "therefore" in the third sentence which causes a linguistic difficulty but I do not consider that they show that the paragraph is misconceived by asserting that there could be no breach of warranty until the property is in fact sold.
- (iv) Further, the Master seemed to think that a sale of the property would cure the breach of warranty. But it would not: if the Cuba Street debt was not a current asset, there was a breach of warranty which would not have been cured by a sale of the property. True, the debt would then become immediately repayable and be transformed into a current asset, but the pre-existing breach of warranty would remain (albeit with perhaps insignificant financial consequences).
- (v) I do not consider, therefore, that there can have been any real doubt about the nature of the application. In any event, Part C of the application form is meant to be concerned with evidence and not argument – para 4 was therefore strictly unnecessary. Further, any obscurity in para 4 could have been amended to make clear the case which could properly be made; and paras 1 to 3 by themselves – without need to rely on para 4 at all – form a sufficient foundation to establish that the Cuba Street debt was a current asset and thus that there was therefore no breach of warranty, thereby justifying a strike-out application. Moreover, even if strike-out was not justified, the position by the time of the

issue of the strike out/summary judgment application was that the facts were such that summary judgment should have been available.

- (vi) Accordingly, I do not consider that the Master was right to say that the application was doomed to failure and that costs were (at least for that reason) wholly unnecessarily incurred.
- (bb) On 25 May, Longstaff applied for judgment in default. As the Master points out, (i) that was impermissible under the CPR after a strike out application had been made, and (ii) it was a futile step because even if a default judgment had been signed, the end result would be to cause an application to set the default judgment aside to be made, running up further costs. The court itself picked up the error very early on so that Ms Evans and Mr Lewis incurred no costs in respect of it. Whilst Longstaff accepts that it cannot recover for its costs of this, it says that that is as far as the court should go in relation to that application.
- (cc) On 3 June, MN wrote a letter to DAC making points which had been made before. They stated that the strike-out/summary judgment application was misconceived. MN put forward two ways to resolve the issue. First for Longstaff to discontinue upon terms that its costs of the action and the application were paid; second, for the action to be stayed pending the outcome of the Cuba Street debt action. The first proposal seems to recognise that there was no longer any point in pursuing the warranty claim – there was no point because the Cuba Street debt had been repaid and could be seen, if anyone had thought about it, to have been a current asset. The second proposal is one I find curious. Although the Cuba Street debt action was one which was to continue between the parties as the result of outstanding issues about interest and set-off, the admissions in the Defence showed that there was nothing in the warranty claim. Quite apart from that, even if there had technically been a breach of warranty, the amount admitted (and paid) by Cuba Street to Redwell was enough to meet the amount shown in the accounts and thus render further pursuit of the warranty claim pointless. The reality, I consider, was that the warranty action served no purpose and should have been discontinued within a reasonable time after 21 May when Cuba Street's admission in its defence was made.
- (dd) DAC replied on 10 June, which was followed by another letter to MN dated 11 June. DAC said that the pursuit of both actions was wholly unjustified and that both were doomed to failure. In fact there are outstanding issues relating to interest and set-off in the Cuba Street debt action, but it is true to say, that on 11 June, it was pointless to pursue the warranty action – which is not to say that on discontinuance Longstaff would not have been entitled to claim costs (as indeed they did before the Master and on this appeal). DAC proposed a stay of both actions to allow **mediation** to take place.
- (ee) Counsel for Longstaff says that this proposal for stay was one which ought to have been acceded to in April. Whether or not that is right, it is even more the case that the parties should have addressed their minds to disposing of the proceedings in the warranty action once the Cuba Street debt had been admitted. But that was not the attitude the parties took. Thus we find MN writing to DAC on 17 June (second letter) in an aggressive way. As well as placing conditions on the **mediation** suggested by DAC – as to attendance by the full board of Cuba Street and an authorised representative of Sector, conditions which DAC considered unreasonable for reasons given (and with which I agree) in their reply dated 18 June – MN stated that unless there was agreement to the conditions previously set out, preparation for the hearing on 28 June (the date fixed for the strike-out/summary judgment application) would continue. Instead of running up costs in relation to opposing that application, Longstaff and its advisers would more sensibly have thought about what possible reason there could be to allow the warranty action to continue and should have realised that there was none.
- (ff) Then, on 22 June, MN sought to impose another condition on the **mediation** which was that the defendants pay the costs of both actions. It is hard to believe than anyone putting forward a proposition of that sort at that stage had any genuine intention to pursue **mediation** in good faith.
- (gg) On the other side, letters were sent by DAC putting the case of their clients in a way which was, to put it at its lowest, unhelpful. For instance, on the second page of their second letter dated 18 June, they say that Longstaff's allegation in the warranty action that there was an actionable warranty because the sums (ie the Cuba Street debt) were not due is extraordinary and unsustainable. But that fails to acknowledge the reality that Longstaff had to issue proceedings because they had been told by

Ms Evans that Cuba Street did not accept that the debt was due; and it fails to acknowledge that the Particulars of Claim (see paras 26 and 27) were carefully worded to assert the warranty claim *only* if Cuba Street was correct in its contentions that the Cuba Street debt was not due and that the proceedings were simply protective.

- (hh) On 23 June, the Longstaff action was at last discontinued. That brought an end to the strike-out/summary judgment application.
- (ii) There followed some correspondence concerning vacation of the hearing date for the application.
- (jj) At this stage I should mention Sector. Since Sector was resident out of the jurisdiction, it was not served with the warranty proceedings at the time of issue in April. Instead, an application for leave to serve out of jurisdiction was made and an order obtained on 3 June – 2 weeks *after* the admissions in the defence from Cuba Street in the Cuba Street debt action and payment of the £216,000. Sector had played no part in the proceedings up to that point. I am not clear whether this was drawn to the attention of the Master – he certainly did not mention it in his judgment. For my part, I do not think it was reasonable for Longstaff to have brought Sector into the action at this late stage.
- (kk) On receipt of service, Sector, then without legal representation, asked MN, perfectly politely, for (i) a copy of the Application Notice (ie for leave to service out of the jurisdiction) and (ii) any documents before the court on the application. The remarkable reply received read: "We are under no obligation to provide you with the documents that you request. We suggest that you either ask the court or the other defendants for them." A reply designed to be less helpful is hard to imagine. No doubt the Master formed his own view of this behaviour and took it into account.

[10] While all this activity was going on, another issue was both generating additional separate correspondence and lengthening some of the correspondence mentioned above. MN detected a possible conflict of interest in DAC acting for both Cuba Street on the one hand and for Ms Evans and Mr Lewis on the other hand. The conflict was this: it was in Cuba Street's interest to argue (if it were properly arguable) that the debt owing to Redwell was not immediately due; whereas it was in Ms Evans' and Mr Lewis' interests to argue that it was in fact immediately due so that there could be no claim on the warranty on the basis that the debt was not a current asset. Counsel for Ms Evans and Mr Lewis deals with the conflict issue in his skeleton as follows:

". . . there is the Appellant's solicitors' dogged pursuit of an alleged conflict of interest point. The accusations made against the Respondents' solicitors that they had a conflict of interest were refuted more than once in correspondence. The Respondents' solicitors were told that the Appellant's solicitors had 'taken up' their allegations with the Law Society. The Respondent's solicitors, not surprisingly, asked to be sent a copy of the complaint, so that they could write to the Law Society and explain its lack of substance. In fact, it now seems clear that the statement that a complaint had been 'taken up' with the Law Society was, at the least, much less than wholly frank. [Footnote: The Appellant's skeleton says that it is 'highly unsatisfactory' that the Master did not 'spell out' his criticisms of its solicitors in more detail. In the context of this litigation, the previous litigation and the satellite litigation spawned by the latter, it is, perhaps, unsurprising that the Master chose not to do so.] Mr Sewell has subsequently said that 'a request for guidance and information was made to the Law Society by telephone' [Footnote: . . . He also states that 'Communications between this firm and the Law Society are privileged'. The basis of this statement is simply not understood.] Moreover, such 'guidance' as seems to have been provided by the Law Society was not followed through. Threats were made of an application to prevent the Respondents' solicitors from acting, but no such application was ever made.

These baseless allegations of conflict of interest led to a considerable volume of correspondence and unnecessarily added to the costs. It is submitted that it is this which the Master had in mind when he referred in his judgment to 'lengthy, voluminous and very expensive correspondence . . . simple though matters should by that stage have become'."

[11] I agree entirely with those submissions and in particular with the conclusion that the Master had this material in mind in reaching his decision, except that "baseless" (in counsel's skeleton) might be overstating the position when the complaint was first raised.

[12] In para 16 of his judgment, the Master identifies the ordinary rule on discontinuance. He says, perfectly correctly, that the rule is:

". . . that a party discontinuing is liable for the defendants' costs up to the date of discontinuance, but by CPR rule 38.6 the court may order otherwise. That power to order otherwise is not infrequently used when supervening events have made proceedings academic for one reason or another so that there is no longer any purpose in pursing them to trial. Usually, or at any rate often, in those circumstances the court will order that there be no order as to costs. Normally without a trial it is not possible to know whether the discontinued claim would have succeeded or not and therefore there can be no grounds for ordering what is sought today by the claimant, that the defendants actually pay them the costs of the discontinued action."

[13] He goes on:

"17. In the present case, however, if the Defendants are right in their assertion that the Redwell debt was not payable on demand in the relevant sense, then it seems that the warranty claim would have succeeded so I think I could properly as a matter of discretion have made an order, unusual though it would have been, that the Defendants pay the costs of the discontinued proceedings, and I am not limited to simply saying that there should be no order as to costs.

18. I have no doubt that I should at the minimum say that there should be no order for costs in the Defendants' favour . . ."

[14] At the beginning of para 19 he says: "It seems impossible to criticise Longstaff for having issued the warranty proceedings. . ." and proceeds to give reasons why there can be no criticism.

[15] The Master is plainly right, I think, when he says that it is impossible to criticise Longstaff for having issued the warranty proceedings. Indeed, that is not, in any event, challenged by Ms Evans and Mr Lewis. Longstaff was faced with a situation under which it was being said on behalf of Cuba Street that the debts were not yet due and could not be demanded. Moreover, that statement was being made by Ms Evans on behalf of Cuba Street and, I think, there can be no doubt that Mr Lewis was aware of what was being said: in any case, by the time that proceedings were issued, Mr Lewis had consulted DAC and clearly knew the nature of the claim being made against him and the position Cuba Street was taking. Perhaps, on behalf of Cuba Street, Ms Evans was simply playing for time and knew that the debts were actually due, a speculation which would seem justified by what actually happened once the Cuba Street debt proceedings were commenced. But as between Longstaff and Ms Evans/Mr Lewis, Longstaff was entitled to proceed on the assumption that what it had been told (ie that the loans were not due or payable on demand) was correct. In those circumstances, it is clear that Longstaff had no alternative but to issue proceedings in the absence of any agreement to extend the time limit under the Settlement Agreement otherwise the warranty would have expired or, if that is wrong, the risk could not be taken that it would not expire.

[16] The Master then expresses his conclusion at para 20 in these words:

"Therefore, to the stage of issue of the proceedings it seems to me clear that Longstaff had acted properly and there should be no order as to costs."

As to that, it seems that the Master was expressing a view about the appropriate costs order if matters had stopped there. He was not, at this stage, looking at the position overall and taking into account subsequent conduct. It was therefore open to him, in looking at the overall position at the end of the day, to take a number of courses. In particular, he could have made different costs orders in relation to the different stages (ie up to issue of proceedings and thereafter); or he could have made one overall order (eg costs against Longstaff, costs against the Respondents or no order at all). I turn, then, to what he actually did.

[17] First, he dealt with a submission, which he rejected, that the proceedings should not have been served but held in abeyance to await (at least during the period of four months allowed for service) the outcome of the Cuba Street debt action by Redwell against Cuba Street. I do not think that the Master can be criticised for rejecting the submission that the proceedings should not have been served but held in abeyance. Without needing to go as far as agreeing that "it is heavily frowned upon for claim forms to be issued and then just kept in one's pocket", Longstaff was perfectly entitled to serve the proceedings and were not unreasonable in doing so.

[18] Next, he dealt with the applications for strike-out/summary judgment and for judgment in default of defence, which I have already considered. He said this, in para 23:

"The solicitors then indulged in lengthy, voluminous and very expensive correspondence between them simple though the matter should by that stage have become. It seems to me that in those circumstances it would be wrong for me to make any costs order in favour of either party. The costs are costs which should not have been incurred anyway, and with reasonable co-operation and sense on the part of the solicitors would not have been incurred. I should not reward the solicitors for that sort of pointless activity by making an order for costs in favour of either of the parties. Therefore, there will be no order as to the costs of the proceedings."

[19] That paragraph, apart from the last sentence, seems to me to be focussing on the costs incurred after issue of the proceedings. They clearly include the costs of the correspondence which he is referring to in that paragraph; and it seems reasonable to conclude that he is also referring to the costs of the two applications which, as he had previously indicated, were in his view either doomed to failure or should never have been made. All of those are the costs which "should not have been incurred anyway". But the costs up to issue are not at that stage of his judgment being considered by him and cannot be costs which he is describing as ones which "should not have been incurred anyway" since, as the Master expressly decided, it was reasonable for Longstaff to commence proceedings and must have incurred expenses in doing so.

[20] The Master then expressed his overall conclusion that "there will be no order as to costs of the proceedings". Having formed the provisional view that there should be no costs up to issue of proceedings, and having decided that he should "not reward the solicitors for that sort of pointless activity" it is hardly surprising that his overall conclusion was that there should be no order as to costs. Although he did not expressly state that he had considered post-issue conduct in relation to his decision on costs incurred pre-issue, that does not mean that he did not, in judging the matter overall, take account of that conduct.

[21] In summary, the Master can be seen to deal with costs in two stages. The costs up to issue are dealt with in para 20 (". . . there should be no order as to costs") and costs thereafter are dealt with in para 23 (". . . *I should not reward the solicitors for that sort of pointless activity by making an order for costs in favour of either party*."). The last sentence of para 23 is his overall conclusion that "there will be no order as to costs of the proceedings". But the Master, I am sure, had in mind the submissions that Ms Evans' and Mr Lewis' conduct before issue should entitle Longstaff to an order for costs in its favour in respect of the entire action, both before and after issue; and likewise, I am sure that he had in mind that conduct post-issue could have an impact on the appropriate order to make in respect of costs prior to issue. Taking all that into account, the Master decided that the appropriate and fair result was that there should be no order at all.

The court's approach on appeal

[22] The general approach of the court on an appeal is to be found in the decision of the Court of Appeal in ***Tanfern Ltd v Cameron-MacDonald*** [2000] 2 All ER 801, [2000] 1 WLR 1311. See in particular 1317 and 1321 paras 30–33 and 50. The appeal court will only allow an appeal where the decision of the lower court was wrong, or where it was unjust because of a serious procedural or other irregularity in the proceedings in the lower court. Where a discretion is concerned, attention was drawn to the decision of the House of Lords in ***G v G (Minors Custody Appeal)*** [1985] 2 All ER 225, [1985] 1 WLR 647: the appeal court should only interfere when it is considered that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the appeal court might or might not have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible. Where the judge of first instance has taken into account inadmissible factors or has failed to take into account relevant factors, there is also an irregularity which may entitle to the appeal court to interfere with the exercise of his discretion.

[23] There is very significant reluctance to interfere with costs orders, unless the substantive judgment is being varied. As is well known, orders for costs are very rarely disturbed: see Judge LJ in ***Voice & Script International Ltd v Alghafar*** [2003] EWCA Civ 736 at para 3. In ***Adamson v Halifax plc*** [2002] EWCA Civ 1134 at [paras] 16, 18; [2003] 4 All ER 423, [2003] 1 WLR 60, Sir Murray Stuart Smith, giving the leading judgment, formulated the test as follows:

"16. Costs are in the discretion of the trial judge and this court will only interfere with the exercise of that discretion on well-defined principles. As I said in **Roache v News Group Newspapers** *[1998] EMLR 161, 172:*

'Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in scale.'"

(Approved in ***AEI Rediffusion Music Ltd v Phonographic Performance Ltd*** [1999] 2 All ER 299, [1999] 1 WLR 1507, 1523, per Lord Woolf MR.)

[24] These principles have been approved and applied since by the Court of Appeal in other cases, including ***Islam v Ali*** [2003] EWCA Civ 612) where Auld LJ, with whom Mummery LJ agreed, said:
"The Court of Appeal should only interfere with the judge's exercise of [his wide discretion as to costs] if he has 'exceeded the generous ambit within which reasonable disagreement is possible'."

[25] Whilst I of course bear all those statements in mind, I also remind myself that the Master did not conduct any sort of trial. He was dealing only with a costs application and was therefore in a very different position from a judge who is making a costs order at the end of a trial. And he dealt with the application on precisely the same material as is before me.

Grounds of appeal

[26] The grounds of appeal contain four paragraphs:

- (a) The Master failed to take into account the fact that the defendants and Cuba Street had acted unreasonably before the issue of proceedings in (a) disputing the validity of the demand (b) refusing to agree an extension of time in which to issue proceedings (c) failing to mediate in accordance with the share sale agreement and (d) failing to repay the loan before issue of the Cuba Street proceedings (which were relevant in determining whether Longstaff should have its costs of issuing the present proceedings).
- (b) The Master rightly considered that, after issue, the correct step would have been for proceedings to be stayed. He overlooked, however, the fact that this had been suggested by Longstaff in MN's letter dated 16 April 2004 and not taken up by DAC.
- (c) The Master erred in failing to consider the costs incurred after issue of proceedings which were incurred by the defendants seeking disclosure from Longstaff and issuing an application to strike out the action which was made on a misconceived basis.
- (d) The Master failed to take into account all the matters he was bound to consider and therefore misdirected himself in concluding that there should no order as to costs in relation to the proceedings and the application.

[27] Before turning to those grounds in detail, I note that the Master had before him all the material which was before me and, in particular, had the letter dated 16 April. He was taken through that material by Counsel in much the same detail as I was taken though it.

[28] As to paragraphs (a) to (d) of the first ground of appeal, I see nothing to support the suggestion that the Master did not take each and every one of these matters into account. The first three matters were raised in counsel's skeleton argument before the Master as was the fact of the repayment. It is inconceivable that these points were not made in oral submission. They are each referred to in the judgment.

[29] As to paragraph (d), it is not, in any case, clear to me why it is relevant that Cuba Street had failed to make payment before the issue of the Cuba Street debt proceedings. The most that would have been necessary for the purposes of the warranty proceedings would have been that Cuba Street should admit liability since that was all that was required to make the debt a "current asset" not that it should also actually discharge that liability. But Cuba Street's conduct in denying that the debt was due cannot, in my view, be raised against Ms Evans, Mr Lewis and Sector as criticisms to be brought into account in making a costs order; the complaint, so far as concerns costs, in the warranty proceedings should not be that *Cuba Street* was denying its liability but that Ms Evans and Mr Lewis appear to

have adopted *for themselves* the position that Cuba Street was not liable and thus to have forced Longstaff to commence proceedings. I have no doubt that the Master did take that aspect into account. He was also quite clearly of the view that it was reasonable for Longstaff to issue proceedings and to my mind it is impossible to think that he did not have in mind Longstaff's case on each of paragraph (a) to (d) in reaching that conclusion. It was unnecessary for him to deal expressly with each of those matters. It is a different matter whether, having taken them into account, he could properly have come to the conclusion on costs which he did. I shall return to that later.

[30] As to the second ground of appeal, it is true that the Master did not expressly refer to the letter of 16 April. But he did not refer to any of the correspondence between issue of proceedings and date of application to strike out on 21 May except in the general reference to "lengthy, voluminous and very expensive correspondence". Longstaff says this letter is so significant that the Master was bound to refer to it and the fact that he did not leads to the inevitable inference that he had overlooked it; and, if overlooked, it is said that there was an irregularity which vitiates the Master's decision and entitles me to review the case.

[31] Whilst the letter is, of course, significant, it is not of the overarching importance, in my judgment, which Longstaff would have the Master and me attach to it. If Longstaff had been as keen as is now suggested to achieve a stay, one would have expected a chasing letter, email or phone call. Further, the letter does not seem to have been of such importance to MN at the time that they thought it right to send it also to Ms Evans and to Sector. Moreover, Longstaff did not itself apply to the court for a stay as it could have done. Quite apart from that, what importance it did have was superseded by the defence and payment in the Cuba Street debt proceedings, following which *both* parties should have stopped running up costs in the warranty action and sought to stay or discontinue it at an early stage. I do not, therefore, consider that a failure to mention this letter means that the Master overlooked it.

[32] As to the third ground of appeal, it is hard to believe that the Master did not have both of these matters in mind. They had been the subject matter of submissions to him and the fact of the disclosure request and of the application to strike out were apparent from the papers before him. He made express mention, in any event, of the strike out/summary judgment in his judgment, describing it as misconceived. It is impossible to think that he did not take account of it in making the costs order which he did; and in this respect, it must be noted that he compared that application with the equally extraordinary application made by Longstaff for judgment in default. In relation to the disclosure request, this was something which Mr Lewis was entitled to ask for and was, for reasons given, a reasonable request. In relation to each of those issues, it does not appear to me that the costs were likely to have been significant.

[33] As to the fourth ground of appeal, Longstaff alleges that the Master failed to take into account all the matters which he was bound to consider under CPR 44.3 and therefore misdirected himself. I am not aware of any factors, other than those referred to in grounds 1 to 3, which it is alleged that the Master failed to take into account. The Master clearly directed himself correctly as to the existence of his discretion under CPR r 38.6. He had drawn to his attention the relevant provisions of CPR r 44.3, in particular the relevance of conduct in deciding about costs. The fact that he did not expressly refer to r 44.3 does not to my mind suggest that he in any way misdirected himself in relation to that rule. Indeed, he clearly did take conduct into account and reached the ultimate conclusion that he should make no order.

[34] Counsel for the Respondents to this appeal himself relies on other conduct not mentioned by the Master in support of his decision:

- (a) the direct contact which was made with directors of Cuba Street by MN well after they knew that DAC was acting for Cuba Street; and

- (b) what counsel describes as a wholly misplaced and oppressive claim alleging a separate breach of warranty.

I do not consider that either of these has any bearing on the ultimate decision as to costs in this action. The first, if it is a matter for complaint at all, is one of professional conduct: it would not be

appropriate to visit a costs penalty on Longstaff for it. The second relates to an entirely separate matter and is not relevant conduct for the purposes of the costs of this action. Even if those matters were appropriate to take into account, I would attach very little weight to them.

[35] Accordingly, in my judgment, the Master's judgment can be attacked successfully only if the manner in which he exercised his discretion is "wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale" or because he has "exceeded the generous ambit within which reasonable disagreement is possible". It is a strong thing to make such a finding. Further, his decision would also be open to review if he had adopted a wrong approach; and this would be so even if the *result* of the wrong approach is one which could have been reached had he adopted the correct approach.

[36] The Master's approach, which one sees in para 20 of his judgment, was that, at the stage of issue of the proceedings *". . . Longstaff had acted properly and there should be no order as to costs"*. The question, it seems to me, is whether that is a permissible approach or whether he should to the stage of issue of proceeding have decided, in the light of Ms Evans' and Mr Lewis' conduct pre-issue, that a costs order should be made in favour of Longstaff.

[37] As to that, the starting point is that Longstaff was reasonable in commencing proceedings. But it does not necessarily follow from that that Ms Evans and Mr Lewis should pay the costs. The following factors are particularly relevant:

- (a) I have already rejected Longstaff's criticism of Ms Evans (and implicitly also of Mr Lewis) in relation to the proposed **mediation** prior to the issue of proceedings so that Longstaff cannot pray that in aid.
- (b) The mere fact that Cuba Street asserted that the debt was not due would not mean that Ms Evans and Mr Lewis should be liable for the costs of the warranty proceedings even though the issue of those proceedings was reasonable. For instance, if they had ceased to be involved with Cuba Street and themselves asserted that Cuba Street was liable to make immediate payment, it may be that either the usual rule should apply (ie the Respondents should have their costs) or that there should be no order as to costs.
- (c) However, on the facts of the case, Ms Evans herself made the representations on behalf of Cuba Street that the debt was not due and Mr Lewis knew of this but did not dissent. Neither of them said that they disagreed with Cuba Street's stance. They did not assert, on their own behalves, that the Cuba Street debt was, contrary to Cuba Street's own assertion, in fact due.
- (d) It was proposed on behalf of Longstaff that an amendment should be made to the Settlement Agreement. This proposal went beyond what was necessary to protect Longstaff's position and was rejected. Unfortunately, neither party focused expressly on a more limited extension. It can, however, be seen that Ms Evans' approach was to insist on **mediation** taking place in accordance with the Settlement Agreement and it is quite possible that she would have rejected an extension of the time limit on the warranty claim even if limited to the issue in hand but that is speculation.

[38] Looking at the pre-issue stage in isolation, the question I turn to now is whether the Master adopted an impermissible approach in para 20 of his judgment in concluding that up to that stage there should be no order as to costs. I do not think that his approach was impermissible or that the result, up to that stage, was one which fell outside the generous ambit which is allowed. In other words, his provisional view on costs up to that stage, if matters had stopped there, is not one which in the light of all the factors would fall outside the permissible range. I have identified in more detail than did the Master in his judgment the relevant material; the Master had all that material before him and I see no reason to think that he did not take it into account. This is not a case where the action would have succeeded had it gone to trial, but the trial was made unnecessary because supervening events have made a trial unnecessary. In some such cases, it may well be appropriate to make a costs order in favour of the claimant. Rather, this is a case where the action would, as we now know, have failed because there was no breach of warranty. If Cuba Street had denied (through a human agency other than Ms Evans and Mr Lewis) that the Cuba Street debt was due, it would still have been reasonable for Longstaff to

commence the warranty action even if Ms Evans and Mr Lewis were themselves asserting, contrary to Cuba Street itself, that the Cuba Street debt was due. But it would then be difficult to see why Ms Evans and Mr Lewis should be made liable for Longstaff's costs on discontinuance and, indeed, they would have arguments for a costs order in their favour. The issue is essentially whether Ms Evans and Mr Lewis are to be punished by a costs order against them because Ms Evans had, on behalf of Cuba Street, asserted that the Cuba Street debt was not due and because Mr Lewis, knowing of Ms Evans' assertion, did not register any dissent from it. While different minds might take different views on that issue, I do not consider that the Master can be said to have adopted a wrong approach.

[39] As to costs post-issue, again looking at these in isolation, the Master, unfortunately, reached his conclusion after taking what, in my view, was a wrong view of the strike-out/summary judgment application: see 9aa above. I think that counsel for the Respondents is correct in his submission that, had the strike-out/summary judgment proceeded to a hearing (in the event that the proceedings had not been discontinued) they would have succeeded in that application. Counsel submits that they would also have obtained a costs order in their favour and that they have been deprived of those costs by the discontinuance and have thereby been penalized by the Master's order. It is far from clear that that is correct. In their application, Ms Evans and Mr Lewis, as I have pointed out, claimed their costs of both the application and the action. If Longstaff had not discontinued and had forced the application to a hearing then the costs order might well depend on what was being disputed. Thus:

- (a) If Longstaff had agreed to the strike out or to summary judgment being entered but only on the basis that its costs of the action up to the date of the application were paid, that would have been a reasonable stance to take. If that had been refused by Ms Evans and Mr Lewis and the application proceeded to a hearing to resolve the costs issue, then I think that there would have been a real prospect of Longstaff recovering its costs of the action and of the application.
- (b) In contrast, if Longstaff had adopted the position that there was still a cause of action pursuant to which it was continuing to seek damages, it would, in my judgment, have lost the strike out/summary judgment application.

In fact, Longstaff, on 3 June, did offer to discontinue the action on the basis that its costs of the action and the application were paid. And whilst it might be said that there were elements of the costs which Ms Evans and Mr Lewis might reasonably object to, they made no counter-proposal. Instead, on 10 June, DAC wrote saying that both actions were doomed to failure. I think that the court hearing the application in those circumstances might be rather unimpressed with a claim by either side for the costs of the application. I, at least, am not prepared to proceed on the basis that either side would clearly have been entitled to the costs of the application if it had not been pre-empted by the discontinuance.

[40] The Master considered that there should be no order for costs in relation to the period after issue of proceedings. He reached that conclusion even taking the view which he did that the application for strike out/summary judgment was doomed to failure. Again, I think that, taking the view which he did of the merits of that application, his decision is unimpeachable: the material which I have identified established clearly, in my judgment, that his decision was within the permissible range. *A fortiori*, he would clearly not have thought that Longstaff should have its costs in relation to that period if he had taken the same view as me in relation to the strike out/summary judgment application.

[41] Accordingly, in my judgment, the overall decision which the Master made is not one with which I should interfere. And in reaching that conclusion, I emphasise what I have already said in para 20 above that, although the Master did not expressly state that he had considered post-issue conduct in relation to his decision on costs incurred pre-issue, that does not mean that he did not, in judging the matter overall, in fact take account of that conduct.

Exercise of discretion afresh

[42] Although I have reached the conclusion in para 38 that the Master's (provisional) decision about costs up to the date of issue of proceedings is not an impermissible approach, I should, in case I am wrong in my conclusion, state how I would determine the costs issue were it for me to exercise a discretion.

In this context, it must again be borne in mind that I have reached a different view of the merits of the application for strike-out/summary judgment. Counsel for the Respondents has quite properly taken the position that, although his clients do not agree with the Master's determination, it is not one which he feels able to challenge in the light of the wide discretion which the Master had. However, if I were to be free to exercise my own discretion, I must, of course, take into account all relevant factors which would include the merits of that application.

[43] In my judgment, this is a case where it is not appropriate to make separate costs orders in relation to the period up to the date of issue of proceedings (or to any other date such as 21 May 2004 when the defence in the Cuba Street action was served and payment of the Cuba Street debt was made) and the costs thereafter. I do not consider that the conduct before and after issue of proceedings can or should be neatly compartmentalised in that way. Nor do I consider that it is necessary for me to express a view about what the appropriate costs order would have been if matters had stopped at such a date and then to see whether conduct thereafter affects the order which I would have made up to that date (eg a provisional view in favour of an order in favour of Longstaff up to issue of proceedings with subsequent conduct disentitling it from recovering those costs). I prefer to view matters in the round, taking account of all conduct in relation to the overall costs order which is appropriate. I have earlier in this judgment identified what I see as the relevant factors. Criticism was made of both parties by the Master about the conduct of the case. Counsel for Longstaff complains that the Master did not identify his criticisms sufficiently. I have attempted to identify all relevant criticisms earlier in this judgment in considering the chain of events leading to this costs application and do not need to repeat them, although, in the case of Longstaff, they include the application for judgment in default, the treatment of Sector, the inappropriate pursuit of the conflicts point and the attempt to impose unreasonable conditions on **mediation.** Taking all factors into account, I would make no order as to the costs of the action in favour of or against Ms Evans and Mr Lewis. I would make the same order even if the Master were correct and I were wrong in the approach to the strike out/summary judgment application.

[44] However, so far as concerns Sector, it was not reasonable, for the reasons already given, to serve it as late as 3 June (or shortly thereafter). Were I exercising my own discretion, I would make a costs order against Longstaff in favour of Sector.

Conclusion

[45] Accordingly, this appeal fails.

P Downes for the Applicant
A Maclean for the Respondents
McClure Naismith;
Davies Arnold Cooper