JUDGMENT : Master Rogers : Costs Court, 17th December 2004

ABBREVIATIONS

1. For the purposes of this judgment the Claimant will hereafter be referred to as "RWL" and the Defendant as "USA".

THE ISSUE

2. The issue in this case is the extent to which a Costs Judge is permitted to make an interim costs order or certificate in favour of a Claimant prior to the full detailed assessment of his costs following the outcome of an arbitration.

THE BACKGROUND

3. RWL is a well known watch company being a family business originally founded in the late 19th century by two Swiss brothers from the Dreyfuss family after they had moved to England. It is possibly now one of the largest watch companies in the UK market. It entered into distribution agreements in North America with USA, which were of course subject to an arbitration clause in the Distribution Agreement. That clause having been invoked by the parties, being unable to agree on an arbitrator, in September 1998 the President of the Law Society appointed Mr Stephen Gee QC as arbitrator.

4. Those proceedings were protracted and complex resulting in lengthy hearings, both on liability and on quantum. Although the original claims, of US $10 million by USA and a counterclaim of US $5 million by RWL, the net amount ultimately awarded by the arbitrator to RWL was relatively modest.

5. Inevitably in those circumstances the incidence of costs was going to be very important, particularly as it was suggested that USA was a "shell" company, in fact maintained and financed entirely by a Mr Minwalla.

6. Accordingly, during the course of the arbitration proceedings, RWL applied for and obtained security for their costs, both on the basis that USA was impecunious, and because it was outside the jurisdiction. The total sum obtained was £609,750, made up of six separate sums. The first was an undertaking by USA's solicitors in the sum of £62,250, made on 17 May 1999, but the two with which this application is particularly concerned were as a result of a Standard Chartered Bank guarantee and undertaking for £173,000 and £164,500 respectively. The remaining £200,000 or so of the security was made pursuant to three Hermes Bond Guarantees which do not feature in this case, save for the contrast between the wording used to activate them, compared with the equivalent wording in the Standard Chartered guarantees.

7. The important point, and the reason why this application has become urgent, is that the Standard Chartered Undertaking and guarantee expire on 31 December this year, and USA and their solicitors are unwilling to agree to their extension.

THE ARBITRATOR'S COSTS ORDER

8. This was subject to an interim final award dated 11 October 2004, and it is I think important that I quote from that award:

> *"3. I now turn to decide the question of costs of the reference. The costs involved in 23rd September 2004. For RWL's costs I have seen the second witness statement of Mr Woodman dated 22nd September 2004 which gives approximately £750,000 for the liability hearing and approximately £350,000 for the quantum hearing. Both of these sets of figures are costs as between solicitor and client. I accept this evidence as* showing the approximate amounts of costs incurred by each party in relation to each part of the reference.

4. In deciding the question of costs I have directed myself in accordance with section 61 of the Arbitration Act 1996. In this arbitration RWUSA advanced a claim for substantially over US $10 million against RWL. Following the interim award on liability RWUSA served Amended Particulars of Claim on Quantum seeking damages of over US $1.7 million which was substantially reduced to a claim just under US $900,000. RWUSA substantially reduced its claims following the interim award on liability because of the conclusion reached in that award on the renewal issue. Against this RWL advanced a very substantial counterclaim amounting to just over US $5 million set out in the Amended Defence and Counterclaim on Quantum at paragraph 23. In correspondence RWL had threatened to seek redress against Mr Minwalla personally in respect of that counterclaim. Had RWL really wished to pursue such a claim they would have had to sue Mr Minwalla personally. As between RWUSA and RWL, the real importance of the counterclaim was as a means of fending off the claims of RWUSA. The threat to pursue Mr Minwalla in respect of the counterclaim is properly to be seen as a consequence of the need of RWL to use the counterclaim as a means of defence against the claims of RWUSA.

5. I accept that RWUSA was a company in effect funded by Mr Minwalla, and that the company was impecunious. In effect RWL, which is a substantial company was faced by very large claims by RWUSA, and had it not been for the need to defend those claims RWL would not have proceeded against RWUSA in respect of the counterclaim. I think that the overall result of the reference is correctly expressed as being the dismissal of very large claims brought against RWL, a substantial long established family company, by RWUSA, a company with few assets and which was backed by Mr Minwalla. I consider that RWL is the winner of the arbitration, and that this is not just in some technical sense but in the real sense that it has entirely defeated the very substantial claims made against it by RWUSA.

6. However, I decided in the interim award on liability that RWL had repudiated the Distribution Agreement. This was an important aspect of the liability hearing. RWUSA also succeeded in relation to obtaining a credit of US$33,500 on the one part of their claim which succeeded.

7. It seems to me the fairest way of dealing with the costs of the arbitration is to make an award for a proportion of RWL's costs of the arbitration. This would reflect the fact that RWL had won overall but also reflect a fair discount for the success achieved by RWUSA in winning the repudiation issue. As for the US$33,500 whilst it is true that RWUSA succeeded on that aspect of their overall claim, it has also to be taken into account that it was a very small part of their overall claim and more than offset by the counter items in favour of RWL.

8. I have looked at the evidence on costs adduced on behalf of each party and considered the extent to which the costs have been increased by the two matters on which RWUSA succeeded. I have also given effect to the general principle in section 61(2) of the Arbitration Act 1996. This general principle is particularly important in the present case because had there been no claim brought and pursued by RWUSA against RWL I am satisfied that there would have been no arbitration proceedings between them at all.

Interim Final Award

9. Accordingly, by this interim final award on costs, I award and adjudge that RWUSA do pay RWL three quarters of their costs of the arbitration. I reserve to myself all other claims or issues or matters which may arise in this reference."

9. Although that was the date of the substantive costs order, there was argument between the parties as to the exact form of the order, and indeed whether the arbitrator should make an award on account of costs. This was the subject of a further "*decision and order*" handed down on 29 November 2004, following a fully contested hearing before the arbitrator on 26 November 2004. The arbitrator refused RWL's application for payment on account, and made the following Order: *"On the application made by RWL under paragraph 1 of the draft order, the tribunal shall not determine the recoverable costs of the arbitration but instead the recoverable costs of RWL shall be assessed by the High Court pursuant to Section 63(4) of the Arbitration Act 1996."*

10. It seems to me important to emphasise the dates of those two Orders, since one of the arguments submitted by Mr Chapman on behalf of the Defendants, in support of his contention that I ought not to make any order at this stage, was that RWL had had many months in which to prepare a detailed bill of costs for assessment, and therefore at least to have started the detailed assessment procedure in sufficient time for the assessment to be at least started, if not completed. As will be clear from the later part of this judgment, as it happens it would have been possible to complete this assessment before 31 December, surprising though this may seem.

THE STATUTORY AND REGULATORY PROVISIONS RELEVANT TO THIS APPLICATION

11. Section 63(4) of the Arbitration Act 1996 reads as follows:

"If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may –

(a) determine the recoverable costs of the arbitration on such basis as it thinks fit, or

(b) order that they shall be determined by such means and upon such terms as it may specify."

12. Inevitably the arguments also centred on CPR 44.3(8) and 47.15(2) and the Practice Directions relative thereto.

13. Paragraph 44.3(8) reads: *"Where the court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed."*

14. CPR 47.15 reads as follows:

"(1) The court may at any time after the receiving party has filed a request for a detailed assessment hearing –

(a) issue an interim costs certificate for such sum as it considers appropriate;

(b) amend or cancel an interim certificate.

(2) An interim certificate will include an order to pay the costs to which it relates, unless the court orders otherwise.

(3) The court may order the costs certified in an interim certificate, to be paid into the court."

15. Section 41 of the CPD reads as follows:

"41.1(1) A party wishing to apply for an interim certificate may do so by making an application in accordance with Part 23 (general rules by an application for court orders).

(2) Attention is drawn to the fact that the courts power to issue an interim certificate arises only after the receiving party has filed a request for a detailed assessment hearing."

16. It is agreed between the parties that in the generality of cases an order for an interim certificate cannot be made until the points of dispute have been served, which is a condition precedent before the receiving party can issue a valid Notice of Commencement, but RWL's submission is that that is not applicable in this particular case.

THE WORDING OF THE RELEVANT GUARANTEES

17. The operative part of the Standard Chartered guarantee reads as follows: *"Any written demand hereunder must be received at our offices during working hours and include a statement that costs have been awarded against Rotary Watches (USA) Inc. in the proceedings. There shall be provided with such a statement either (a) the written agreement of Sheridans to the amount of such costs, or (b) a certificate issued by the High Court Costs Office that the amount of such costs has been assessed."*

18. This should be contrasted with the wording in respect of the Hermes Guarantee, which reads as follows: *"A certified copy of the relevant order or Taxing Officer's certificate of costs shall be conclusive evidence of the liability of and upon Hermes Kreditversicherungs-AG without further enquiry by it."*

THE CAUSE OF THE COSTS PROCEEDINGS

19. These were started in the Queens Bench Division by a claim form dated 3 December 2004, on an application for substituted service on Sheridans, and sought the following substantive relief:

"The Claimant seeks orders, under Section 63(4) of the Arbitration Act 1996, that:

1) The Claimant's costs in the arbitration proceedings be summarily assessed at the amount of security provided by the Defendant, namely £609,750.00, and the High Court Costs Office do forthwith issue a certificate stating that they have been assessed in this amount.

2) Alternatively, the Claimant having hereby made a request for a detailed assessment hearing of its costs in the arbitration, the High Court Costs Office do forthwith issue an interim certificate pursuant to CPR 47.15 stating that the Claimant's costs have been assessed in the amount of £609,750.00.

3) Alternatively, that, pursuant to CPR 44.3(8), the Defendant do forthwith make an interim payment on account of the Claimant's costs in the sum of £609,750, and the High Court Costs Office do forthwith issue an interim certificate pursuant to CPR 47.15 stating that the Claimant's costs have been assessed in at least the amount of £609,750.00.

4) Further or alternatively, for such other directions as the Court thinks just and convenient so as to ensure that the Claimant is able to enforce the costs order in its favour against the security provided by the Defendant."

20. Substituted service having been granted RWL issued an application notice in similar form seeking the same relief. That application came before Master Miller in the Queens Bench Division, on Friday 10 December 2004, and was adjourned part heard to 8.30 on 14 December. At the end of the hearing Master Miller made an order for a payment on account of costs of £500,000 in favour of RWL, but, in the light of the very specific wording of the Standard Chartered guarantee, he directed that the matter be transferred to the Costs Office, and I heard Counsel for both parties later the same morning, for some 2½ hours.

21. As the arguments developed it occurred to me that there was, happily, an alternative solution to this particular problem, and that was that the costs in issue should be the subject of a detailed assessment, to be completed on or before 31 December this year. As it happens I am on vacation duty on 29 – 31 December in the Costs Office, but, apart from Sitting Master applications, have no listings, and I therefore gave directions, abridging the time for points of dispute, etc, to enable the detailed assessment to be conducted on those three days.

22. Understandably, since this was going to involve both parties, but particularly the paying party, in a considerable amount of work, at a time when court activity is at a minimum, and most people are on holiday, it was agreed that those directions would only take effect if I was minded to dismiss all the applications made by RWL. Having decided that RWL succeed, to the extent indicated below, I caused the parties to be notified of that fact in advance of this judgment, so that they could suspend action pursuant to that alternative order. It also has to be admitted that it would not have been altogether satisfactory to have dealt with the detailed assessment in that way, since a final certificate might not have been available until 31 December, and, bearing in mind the very specific wording of the Standard Chartered guarantee, it is questionable whether the certificate could have reached the relevant branch of the Bank before they closed, presumably a little early for New Year's Eve.

THE FORM OF RWL'S BILL

23. As would be expected between responsible solicitors, there was correspondence to see whether costs could be agreed following the arbitrator's awards in October and November, but these were not successful, and accordingly RWL produced a schedule of costs claiming a total of £1,193,455.30, of which disbursements total £666,944.30, most of which is made up of Counsel's fees. Mr Howe commented that those figures are lower than the corresponding figures submitted in the costs schedule put before the arbitrator by Messrs Sheridans when the issue of costs was being debated before him.

24. Although Mr Howe was confident that that total would not be reduced by any great percentage, he said that his clients were prepared to accept total costs of £609,750, eg the amount of the security granted, simply to bring an end to this long dispute, and prevent yet further, and possibly irrecoverable, costs being incurred in respect of recovering those costs.

25. Accordingly his primary submission before me was that I had the power to, and could, summarily assess those costs, and furthermore, having done that, could direct that a certificate therefor should issue, which would satisfy the Standard Chartered guarantee term. In the alternative he sought an interim certificate, pursuant to CPR 47.15, which he hoped would satisfy the Standard Chartered Guarantee terms, but could see an argument that it might not, and finally, but as very much a third alternative, an order for a payment on account, pursuant to CPR 44.3(8).

26. Mr Chapman resisted all these orders, essentially on technical grounds, based on the wording of the relevant provisions, which I have quoted above. Technical objections are sometimes stigmatised as being less meritorious than defences on the merits, and there is something in that suggestion, but if the technical objection is a good one, then it is the duty of the court to uphold it.

27. I intend to deal with the applications made by Mr Howe in the reverse order.

THE REQUEST FOR A PAYMENT ON ACCOUNT UNDER CPR 44.3(8)

28. As I have already indicated earlier in this judgment Master Miller has already made such an order, although he has referred it to me to enable it to be converted, so to speak, into a certificate which will satisfy the wording of the Standard Chartered guarantee.

29. Mr Chapman submitted to me, as I also believe he submitted to Master Miller, that it was impermissible for either him, or me, to make such an order, the "court" for this purpose being the arbitrator Mr Gee, and he had indeed been invited to make such an order, but had refused to do so, referring the matter to the High Court.

30. Mr Chapman referred me in particular to the specific wording of Section 64(3) of Arbitration Act, which he said incorporated by reference all the rules applicable to a detailed assessment in the High Court.

31. Mr Howe, by contrast, said that once the arbitrator had decided not to make an award, but had instead referred the issue of costs under Section 64(4) to the court, the court had an unfettered discretion to make such order as it thought appropriate, and that if the draftsman of sub-section (3) of the 1996 Act had intended that the limitations put forward by Mr Chapman were to apply, then he should have expressly said so, and he submitted that sub-section (4) was in no way governed by sub-section (3).

32. I consider that Mr Howe's submissions are correct, and that both Master Miller, and indeed I, have the power to make the order sought. However, I cannot go the one further step Mr Howe wishes me to take, and say that such an order can be converted into a certificate. By its very nature it is a payment on account before any detailed assessment has been carried out, and is conventionally made by a trial Judge or arbitrator who is seised of the matter, and in a much better position to decide on the appropriate sum than any Queens Bench Master or Costs Judge. Accordingly, I feel unable to direct the certificate to issue for £500,000.

THE APPLICATION PURSUANT TO CPR 47.15

33. The difficulty which Mr Chapman points out to me against making such an order here, is that no points of dispute have yet been served, and therefore it is premature to talk in terms of a Notice of Commencement.

34. Mr Howe, on the other hand, argues that the application which came before Master Miller, and has effectively been transferred to me, can be treated as if it were a Notice of Commencement. In that respect he relies on the overriding objective enshrined in Part 1 of the CPR, and also on the very wide powers of management given to the court under CPR 3.1.

35. He refers in particular to paragraph 3.1(m) which reads: *"Take any step or make any other order for the purpose of managing the case and furthering the overriding objective."*

36. Although that is a very tempting course to follow, it seems to me that USA should be given the opportunity, before an interim certificate is issued, to put forward their points of dispute. Mr Chapman argued that these might be extensive, and might well reduce the costs below the amount claimed, though I have to say that realistically I do not think that is the case. He argued in particular that proportionality in relation to the counterclaim made by RWL, which largely failed before the arbitrator, might well reduce the costs by a considerable amount. Nor did he accept that the fact that USA's solicitors costs appear to be higher than those now claimed by RWL had any great significance.

37. Having given the matter careful consideration I cannot accept Mr Howe's submission that I can issue an interim certificate without at least some consideration of the points of dispute which could be put forward, and therefore cannot make an order as sought by Mr Howe in that part of his application.

APPLICATION FOR A SUMMARY ASSESSMENT

38. The application by RWL for summary assessment is clearly a pragmatic and sensible approach to adopt, to bring an end to what could be very expensive protracted costs proceedings. I have already rejected Mr Chapman's submission that I am precluded from making any such order, by virtue of Section 63(3) of the Arbitration Act 1996.

39. Two questions therefore remain. The first is whether the figure claimed is a figure which is realistic, and which, if there were a full detailed assessment, would undoubtedly be exceeded. Mr Chapman vigorously submitted to me that that was not proven, and produced some figures to suggest that the figure could be reduced to at least £500,000. Mr Howe in reply sought to suggest that Mr Chapman's figures were misleading, and that I ought not to accept them.

40. It is always difficult summarily to assess costs without a detailed knowledge of the underlying dispute, and the course of the litigation relating to it. However, in the lever arch file which has been supplied to me, I have read sufficient documentation to satisfy myself, as an experienced Costs Judge, that the costs of this arbitration were extremely high, and that even though RWL is to receive only 75% of its costs, nevertheless that figure would undoubtedly exceed £609,750.

41. The last remaining obstacle to giving Mr Howe the relief that he seeks, namely a certificate, is whether in fact on a summary assessment a certificate can be issued. Mr Chapman rightly points out that a summary assessment results in an order to pay within 14 days normally, though that time of course can be extended (or abridged), and that a certificate does not normally issue, such certificates being restricted to interim or final certificates under the framework in the CPR.

42. However, I feel that the overriding objective, and in particular paragraph 3(1)(m) of the CPR not only entitles, but encourages, me to make what may be an unusual order, but ought not for that reason to be refused, namely that a certificate should issue requiring immediate payment of £609,750.

CONCLUSION

43. Accordingly, when this judgment is formally handed down I propose to direct that a certificate issue forthwith for the payment of the costs of the arbitration, as summarily assessed by me, in the sum of £609,750, which can then be produced to Standard Chartered Bank to effect payment under their guarantee.

44. At the same hearing I will deal with any further submissions, notably as to costs, though presumably the parties will need to return to Master Miller to deal with the costs of the hearing before him.

Mr Robert Howe (instructed by Messrs Royds) for the Claimant
Mr Jeff Chapman (instructed by Messrs Sheridans) for the Defendant