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Neutral Citation Number: [2018] EWCA Civ 1264

Case No: A2/2016/2870

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HON MRS JUSTICE WHIPPLE
[\[2016\] EWHC 1478 \(QB\)](#)**

Royal Courts of Justice
Strand, London, WC2A 2LL
31/05/18

Before:

**LORD JUSTICE DAVIS
and
LORD JUSTICE HICKINBOTTOM**

Between:

ATLASJET HAVACILIK ANONIM SIRKETI

- and -

**Appellant/Second
Defendant**

OZLEM KUPELI & OTHERS

- and -

**First Respondents/
Claimants**

**KIBRIS TURK HAVA YOLLARI SIRKETI
(trading as CYPRUS TURKISH AIRLINES)**

**Second
Respondent/
First Defendant**

**Jonathan Adkin QC and Robert Marven QC (instructed by Zimmers Solicitors) for the Appellant
Matthew Bradley and Jamie Carpenter (instructed by Hudson Morgan Williams Solicitors) for the
First Respondents**

The Second Respondent did not appear and was not represented**Hearing date: 15 May 2018**

HTML VERSION OF JUDGMENT APPROVED

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Lord Justice Hickinbottom:**Introduction**

1. This is an appeal against the Order of Whipple J dated 21 June 2016, in which, following a trial of preliminary issues and lead cases in 838 claims against the Second Defendant airline ("Atlasjet") for breach of contract and of the Denied Boarding Regulation (Regulation (EC) No 261/2004 of the European Parliament and the Council of 11 February 2004) ("the EC Regulation"), Atlasjet was required to pay 33% of the Claimants' costs of the trial, and to pay £225,000 on account of those costs.
2. Before us, Jonathan Adkin QC and Robert Marven QC appeared for the Appellant Atlasjet, and Matthew Bradley and Jamie Carpenter, both of Counsel, for the First Respondent Claimants. I thank them all for their helpful submissions. The Second Respondent played no part in the appeal, for reasons that will soon become apparent.

The Law

3. Section 51 of the Senior Courts Act 1981 provides that the costs of and incidental to court proceedings are in the discretion of the court.
4. The proper approach of a court to the issue of costs as between parties is set out in CPR rule 44.2 which, under the heading "Court's discretion as to costs", provides, so far as relevant to this appeal:
 - "(1) The court has discretion as to –
 - (a) whether costs are payable by one party to another;
 - (b) the amount of those costs; and
 - (c) when they are to be paid.
 - (2) If the court decides to make an order about costs –
 - (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
 - (b) the court may make a different order.
 - (3) ...
 - (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
 - (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
 - (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36

apply.

(5) The conduct of the parties includes –

- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
- (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The orders which the court may make under this rule include an order that a party must pay –

- (a) a proportion of another party's costs;
- (b) a stated amount in respect of another party's costs;
- (c) costs from or until a certain date only;
- (d) costs incurred before proceedings have begun;
- (e) costs relating to particular steps taken in the proceedings;
- (f) costs relating only to a distinct part of the proceedings; and
- (g) interest on costs from or until a certain date, including a date before judgment.

(7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead...".

5. In relation to that rule, several points are worthy of note.

i) In considering orders for costs, the court is of course bound to pursue the overriding objective as set out in CPR rule 1.1, i.e. it must make an order that deals justly with the issue of costs as between the parties. Therefore, when considering whether to make a costs order – and, if so, the order it makes – the court has to make an evaluative judgment as to where justice lies, on the facts and circumstances as it has found them to be.

ii) Before an appeal court will interfere with the exercise of that discretion, as with any appeal, it must be satisfied that the decision of the lower court was wrong or unjust because of a serious irregularity in the proceedings below (CPR rule 52.21(3)). No one suggests that there was a serious irregularity in this case.

iii) Before an appeal court concludes that the costs decision below was "wrong", it must be persuaded that the judge erred in principle, or left out of account a material factor that he should have taken into account, or took into account an immaterial factor, or that the exercise of his discretion was "wholly wrong" (see, e.g., Adamson v Halifax Plc [2002] EWCA Civ 1134; [2003] 1 WLR 60 at [16] per Sir Murray Stuart-Smith, adopting (post-CPR) the conventional (pre-CPR) approach he described in Roache v News Group Newspapers Limited [1998] EMLR 161 at page 172).

iv) An appeal court will only rarely find that the exercise of discretion below is "wholly wrong", because not only is that discretion particularly wide but the judge below is usually uniquely well-

placed to make the required assessment, having heard the relevant evidence.

6. Although, as CPR rule 44.3(2)(b), (4), (5) and (6) demonstrate, there may be all sorts of reasons for departing from the principle, in providing that, if the court decides to make an order for costs, the general rule is that "the unsuccessful party will be ordered to pay the costs of the successful party", CPR rule 44.2(2)(a) represents the *prima facie* or starting position (M v The Mayor and Burgesses of the London Borough of Croydon [2012] EWCA Civ 595; [2012] 1 WLR 2607 at [45] per Lord Neuberger of Abbotsbury MR).
7. As a result, the courts have considered the concept of "success" in these circumstances, as follows.
8. It is well-established that the question of who is the "successful party" for CPR purposes requires a fact-specific evaluation by reference to the litigation as a whole (see, e.g. Kastor Navigation Company Limited v Axa Global Risks [2004] EWCA Civ 215 ("Kastor Navigation") at [143] per Rix LJ).
9. In the context of private law claims, in Bank of Credit and Commerce International SA (In Liquidation) v Ali (No 4) (1999) 149 NLJ 1734 ("BCCI"), Lightman J said that:

"For the purposes of the CPR, success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense."

10. In Day v Day, [2006] EWCA Civ 415; [2006] CP Rep 35 at [17], a case involving a dispute as to the beneficial ownership of the net proceeds of sale of a property, having referred to that passage from Lightman J, Ward LJ said:

"I would go further and say that, in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case...".

11. That has been reflected in other money claims. For example, in A L Barnes Limited v Timetalk (UK) Limited [2003] EWCA Civ 402; [2003] BLR 331 at [38] ("A L Barnes"), a commercial dispute, Longmore LJ observed:

"In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure."

12. The notes in the 2016 White Book, at paragraph 44x.3.6, under the heading "Who is the successful party?" summarise these cases without adverse comment; and, at paragraph 22.17, the learned authors of Cook on Costs (in both the 2016 edition that was before Whipple J and in subsequent editions) endorse the A L Barnes approach on the basis that "it has the virtue of clarity and simplicity", and thus prevents "costs wars".
13. Also worthy of note is the observation of Jackson LJ in Fox v Foundation Piling Limited [2011] EWCA Civ 790 (a case to which Whipple J referred in her costs judgment), at [62], which chimes with the view expressed in Cook on Costs:

"There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in CPR rule 44.3(2) [now 44.2(2)] too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates. This unwelcome approach now manifests itself in (a) numerous first instance hearings in which the only issue is costs and (b) a swarm of appeals to the Court of Appeal about costs, of which this case is an example."

14. There are, however, limits to which "the payer of the cheque" must be considered the unsuccessful party in the litigation. In Medway Primary Care Trust v Marcus [2011] EWCA Civ 750; [2011] Med LR 560; [2011] 5 Costs LR 808 ("Marcus"), the claimant claimed that he had had his left leg amputated as a result of the clinical negligence of the defendant. The defendant admitted breach of

duty, but denied causation. On the basis of the claimant's case, quantum was agreed at £525,000. However, the defendant succeeded on the causation issue, and the claimant was awarded only £2,000 for pain and suffering. There had been no offer on quantum by the defendant, either in Part 36 form or otherwise. The trial judge ordered the defendant to pay 50% of the claimant's costs. The majority of the Court of Appeal (Sir John Thomas PQBD and Tomlinson LJ) considered that no rational person would have pursued the proceedings to recover only £2,000, and the real claim had failed. The defendant was therefore the successful party. Nevertheless, although the absence of a Part 36 offer was not a reason for reducing the costs, it was relevant that the defendant had not made a Calderbank offer of a small amount, together with costs proportionate to the recovery. In the circumstances, the claimant was ordered to pay 75% of the defendant's costs.

15. However, as an illustration of how strong the direction of money transfer may be taken to reflect success for these purposes, it is noteworthy that Jackson LJ, in a dissenting judgment in that case, found that the defendant ought to have made a Part 36 offer, and, in its absence, the claimant had succeeded in the action, so that the starting point should be that he was entitled to his costs – albeit with some considerable discount, the award of 50% made by the judge below being (in Jackson LJ's view) "generous".

The Factual Background

16. CTA was the national airline of the Turkish Republic of Northern Cyprus; but, on 21 June 2010, the Turkish Aviation Authority revoked its air operator's licence, thereby suspending its operations and grounding its air fleet. It never flew again, going into administration and then insolvency.
17. The Claimants had booked flights with CTA to travel after 21 June 2010. On suspension of CTA's operator's licence, Atlasjet entered into an agreement with the Government of Northern Cyprus to transport stranded passengers to their destination ("the Protocol Agreement"). Unfortunately, despite efforts, none of the Claimants was given a replacement flight, so that they were each put to the expense of purchasing new tickets with other carriers or were simply unable to travel and so lost the value of the CTA tickets they had purchased.
18. On 7 August 2012 the Claimants – eventually some 838 in number – commenced proceedings in the High Court against both CTA and Atlasjet to recover their losses. CTA played no part in the action.
19. The proceedings were never formally incorporated into a Group Litigation Order ("GLO"); but the claims were joined and managed together. One firm of solicitors (Hudson Morgan Williams) represented all the Claimants, following advertisements in the Turkish press by a charitable organisation which serves the London Turkish Cypriot community. Potential claimants were invited to meet the solicitors, who then agreed to act for them on a conditional fee basis (with provision for a 100% success fee) but without the benefit of after the event insurance. The circumstances in which potential claimants came to be signed up by the solicitors are described in more detail in the judgment of Lewison LJ in Kupeli v Atlasjet Havacilik Anonim Sirketi [2017] EWCA 1037; [2017] 4 Costs LO 517 (which concerned an unrelated aspect of the case) at [11].
20. The Claimants claimed against Atlasjet on the basis of two separate causes of action, namely that their losses were recoverable (i) under the EC Regulation as implemented in the United Kingdom by the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005 No 975), and (ii) for breach of contract.
21. In relation to the contractual claim, the Re-Amended Particulars of Claim filed on 16 March 2015 identified three categories of Claimants, namely:

Category 1: those who claimed that they had been issued with Atlasjet flight tickets that were not honoured, but rather unilaterally cancelled, by Atlasjet (49 Claimants);

Category 2: those who did not have Atlasjet tickets, but claimed that travel agents acting on Atlasjet's behalf had informed them that their CTA flights would be operated by Atlasjet and they should attend the relevant airport with the CTA flight tickets (95 Claimants); and

Category 3: those who claimed that travel agents acting on Atlasjet's behalf had promised that they would be provided with replacement tickets by Atlasjet, but never received such tickets (694 Claimants).

22. The contract claims were put on several bases. All the Claimants claimed to be entitled, as third parties, to enforce rights under the Protocol Agreement. They also claimed that contracts had been formed between themselves and Atlasjet by way of a notice issued by CTA on its website. The Category 1 Claimants claimed breaches of contract as a result of Atlasjet failing to honour their (Atlasjet's) flight tickets. The Category 2 and 3 Claimants claimed breaches of contract said to have been formed on the basis of representations made to them by travel agents on behalf of Atlasjet.
23. Atlasjet denied any liability on the basis of the EC Regulation, the Protocol Agreement, notice on the website or agency. It denied that it had any contract with any of the Category 2 or 3 Claimants.
24. Atlasjet also denied any liability in contract to the Category 1 Claimants, in respect of whom there were two issues. First, many of the Category 1 Claimants did not have a conventional flight ticket issued by Atlasjet. Atlasjet asserted that, without such a ticket, there could be no contract. Second, in its Re-Amended Defence, Atlasjet accepted that it had an obligation to carry those to whom it had issued a flight ticket; but it did not admit – and at trial, as I understand it, it denied – that it had refused to honour any such ticket. A crucial issue in these cases was therefore not whether Atlasjet had a contract with the Claimant – which, at least where there was a conventional flight ticket, Atlasjet accepted it did – but whether, in breach of contract, Atlasjet had cancelled that ticket without good cause.
25. That was essentially a fact-specific question, in respect of which Atlasjet relied particularly upon the evidence of its Assistant Sales and Marketing Director (Yusuf Ilkan Teker) who, at the relevant time, had been a booking management specialist with Atlasjet's Route and Revenue Management Department. Mr Teker gave detailed evidence as to Atlasjet's booking procedure; and, relying upon apparently formidable documentary support from Atlasjet's own internal systems and computer records, it was his evidence that:

"I did not process any bookings, cancellations, or amendments [to any ticket] without having received an email request from the travel agent or passenger" (paragraph 19 of his statement dated 25 November 2015).
26. Specifically, in respect of the Category 1 lead Claimant Mrs Nazife Atesogullari, he said he had cancelled the tickets at the request of an identified travel agent – named in the transaction records – although he could not recall the reason (paragraph 75). In respect of Sedar Ozkes, another such Claimant, Mr Teker said that the computer records showed that his ticket was cancelled because of "Wrong date"; and, whilst it was not clear from the transaction history who had requested the cancellation, he said he would only have cancelled a flight upon a request from the travel agent or passenger (paragraph 63 of his statement).
27. It was the Claimants' case that Mr Teker (and Atlasjet's records) were inherently unreliable and that the tickets or confirmed reservations of each of the Category 1 Claimants were indeed cancelled without their request or consent. Arising out of that allegation, although not pleaded as such, the Claimants said that the cancellations (or some of them) were a result of systemic overbooking of flights by Atlasjet.
28. On 6 March 2015, there was a case management hearing before Master McCloud, who directed an initial trial of both legal issues and lead claims ("the Part 1 trial").
29. In a list attached to the Master's Order, sixteen legal issues were identified for determination at the Part 1 trial. They covered three topics, namely (i) the liability of Atlasjet to the Claimants under the Protocol Agreement; (ii) the liability of Atlasjet for the acts and omissions of CTA as Atlasjet's agent; and (iii) issues arising out of the EC Regulation.
30. In respect of the lead claims, the Order directed the Claimants to select up to thirteen claims across the three categories identified. In the event, the Claimants selected ten individual cases; but one of those Claimants failed to attend the trial, and his case was dismissed for want of prosecution. Of the

remaining nine, there were three Category 1 cases (those of Mrs Atesogullari, Mr Ozkes and a Mrs Gulhan Akguc, each of whom was travelling with several family members), two Category 2 cases, and four Category 4 cases.

31. The trial of the lead cases and issues was heard by Whipple J over seven days in February 2016. She gave judgment on 25 April 2016 ([\[2016\] EWHC 930 \(QB\)](#)) ("the main judgment"), in which she found as follows.

i) By the time of the trial, the Claimants had abandoned all of the issues in the list of issues, except a generic claim under the EC Regulation. That issue was determined by Whipple J, who held that the EC Regulation did not apply in the circumstances of these cases, because it only applied to passengers who had a confirmed reservation at the time of check in and thus applied to none of the Claimants. In any event, she found that, in a contractual claim, credit would have to be given for any compensation due under the Regulation. Therefore, even if it had been applicable, it is unlikely that the Regulation would have made any substantive difference to any of the claims. She therefore found in Atlasjet's favour in respect of the EC Regulation. All the claims based upon the Regulation consequently failed.

ii) Turning to the lead actions, in respect of the contractual claims, Whipple J found that a crucial factor was whether the Claimant had a confirmed booking with Atlasjet or not, only the former being able to prove a contractual relationship with (and thus a cause of action in contract against) Atlasjet.

iii) None of the Claimants in Categories 2 and 3 could establish that they had a confirmed booking. Their claims consequently failed.

iv) In respect of the Category 1 Claimants, Whipple J held that a contract between Atlasjet and a Claimant came into existence at the moment the booking was confirmed, and not if and when a conventional ticket had been issued. The issue in each Category 1 case was therefore whether the Claimant had proved breach of contract by showing that the reservation had been unilaterally cancelled by Atlasjet without the Claimant's consent.

v) In respect of the two main evidential issues contested before her, as identified by the judge herself, Whipple J found (a) that some flights were in fact overbooked, but there was no evidence of systemic overbooking; however, (b) the documents disclosed by Atlasjet purporting to show passenger numbers disclosed many inconsistencies; and she concluded that some or all of those documents were unreliable in material respects, which was indicative of a wider problem with Atlasjet's systems for recording passenger numbers and details. Further, she found Mr Teker's evidence to be essentially unreliable. She said:

"I was left with the impression that Mr Teker went into the reservation system and changed entries on that system pretty much at will. Mr Teker reacted to circumstances as they arose, and took what he perceived to be corrective action by cancelling or changing flight reservations where he thought that was appropriate. It was not his invariable practice to check with the passenger or the travel agent before making changes. Because of the defective notification system, any such changes were not notified to the passenger or the agent and in truth remained 'internal' to [Atlasjet]. To be fair to Mr Teker, he had been extremely hard pressed in the weeks after [Atlasjet] started carrying CTA passengers and I accept that he was just trying to do his best to cope with the many requests for replacement flights which he tried to process. But the system was disorganised, and mistakes got made. I reject Mr Teker's evidence that he would never cancel a confirmed reservation without an express written request from the passenger or agent: there are examples within the documents of him doing precisely that. More generally, I conclude that he reacted to events, sometimes in a rather haphazard way, and I can place little faith in what he now says would have been his 'usual practice'".

vi) Whipple J found that, despite Mr Teker's assertion to the contrary, he did cancel the confirmed reservations of Mrs Atesogullari and Mr Ozkes without any request or consent to do so, and consequently in breach of contract (see [93] and [107] respectively). She found that Mrs Akguc's

Atlasjet flight was cancelled by a travel agent, for whom Atlasjet had no responsibility (see [116]-[118]).

32. The claims of Mrs Atesogullari and Mr Ozkes and their travelling family members (a total of fourteen individual claims) thus succeeded. As a result of the main judgment, judgment was entered for Mrs Atesogullari and her group in the sum of £2,648.81 (being a total of £1,700 for three replacement tickets, £365 for the cost of one of the original tickets, £140 taxi costs, and interest), and for Mr Ozkes and his group in the sum of £5,954.65 (£4,832.60 for twelve replacement tickets, £120 for mileage, and interest). Mrs Akguc's claim failed.
33. The balance of the Category 1 claims were transferred to the County Court at Central London. The Category 2 claims were dismissed. Although for the purposes of the costs application, Whipple J proceeded on the basis that all Category 3 claims failed, the Category 3 Claimants were in fact given time to reconsider their claims, and make an application on the basis that, as they had confirmed reservations with Atlasjet, they ought to be recategorised as Category 1; otherwise, they too were to be dismissed. That was the position at the time of the hand down of the main judgment.
34. Rolling forward, in addition to the fourteen claims directly determined by the Part 1 trial, there were eventually 76 claims, all categorised or recategorised as Category 1, that were transferred to the County Court, the rest of the claims being dismissed on the basis of the main judgment. On 13 November 2017 the County Court claims were effectively settled on the basis of a Tomlin Order, under which Atlasjet provided a return ticket to each Claimant from a United Kingdom airport to a destination in Turkey or Northern Cyprus on terms as to availability. If Atlasjet failed to comply with those terms, it became liable to the Claimant in the fixed sum of £400.

The Costs Application

35. Both parties made submissions in relation to costs at the hand down of the main judgment. Although, in his submissions to Whipple J, Mr Bradley sought to draw a distinction between the Claimants' "generic costs" (i.e. those costs which related to issues common to all or most of the claims, including those attributable to case management) and "individual costs" (i.e. costs exclusively referable to the particular claim), neither party pressed the judge to make an issues-based costs order. Each party submitted that the appropriate starting point was CPR rule 44.2(2), namely that an unsuccessful party will be ordered to pay the costs of the successful party; and they each submitted that they had been the successful party in the trial.
36. Mr Adkin submitted that A L Barnes and the other cases referred to above (see paragraph 10-12 above), that suggest that the unsuccessful party is the party who pays money to the other, were distinguishable because they were claims involving individual claimants and defendants, whereas this was a group claim. Atlasjet had succeeded on (i) all of the preliminary issues, which were the focus of the litigation at the time the matter was listed for trial; (ii) all of the claims in Categories 2 and 3; and (iii) eight of the ten lead cases. In the circumstances, he submitted, Atlasjet was clearly the successful party; and the Claimants ought to be ordered to pay Atlasjet's costs of the trial, subject only to a small discount to reflect the fact that the Claimants had succeeded in two of the ten lead cases.
37. However, relying on the A L Barnes line of authorities, Mr Bradley contended that the Claimants were the successful party. Atlasjet was "the paying party"; and, although only a minority of the lead claimants had been successful, Mr Bradley submitted that there would have had to have been a trial covering much the same ground covered by the Part 1 trial for any single case to have succeeded. Furthermore, Atlasjet had taken a stance in which it was not prepared to consider settlement or realistic ADR, and had made no offer to settle under Part 36 or otherwise. He submitted that the Claimants should be awarded their generic costs in respect of Categories 1 and 3, and the successful Category 1 Claimants should be awarded their individual costs. There should be no order in respect of any other costs. If a percentage order of total costs was considered appropriate, he submitted that the Claimants should be awarded no less than 50% of their costs.
38. In a second, reserved judgment ([\[2016\] EWHC 1478 \(QB\)](#)) ("the costs judgment"), Whipple J largely favoured Mr Bradley's submissions.

39. At [8] of the costs judgment, relying on Jones and Others v Secretary of State for Energy and Climate Change [2012] EWHC 3647 (QB); [2013] 2 Costs LR 230 (the Phurnacite Workers Group Litigation, or "the PWG Litigation") at [12], Whipple J confirmed the common submission before her that CPR rule 44.2(2) – the reference by the judge to "CPR 44.3" is clearly intended to refer to that paragraph of the rules – represented "the right starting point". Consequently, at [9], she said that there were two main issues for her to determine on costs:

"They are: (i) who was the successful party? And (ii), should the successful party's costs be discounted, reduced or subject to any offset by way of a costs order in the opposite direction, to reflect particular aspects of the case."

40. At [10]-[17], she proceeded to address the first question, "Who is the Winner?". Having set out the parties' submissions, which I have recounted above (paragraphs 36-37), including the authorities to the effect that the successful party will be the one who receives money as a result of the substantive judgment, she continued as follows.

"13. Mr Adkin argues that these authorities are distinguishable because they are not concerned with group litigation, but rather with individual claims where the assessment as a matter of common sense is different.

14. I see no reason to distinguish the authorities on which Mr Bradley relies, which apply regardless of the number of claimants involved. The broad principle for which all these authorities stand is that common sense must be applied to reach a realistic evaluation of who has won and who has lost, and that one highly relevant factor is whether, at the end of the day, one party will receive money from the other.

15. I agree with Mr Bradley that the Claimants are the winners because at the end of the day, they will receive a cheque from the Defendant.

16. In assessing the extent of that success, I disagree with Mr Adkin's evaluation that his client has succeeded at least to the extent of 94% (comprising the total number of Claimants in Categories 2 and 3: see paragraph 25.3 of his submissions dated 21 April 2016). The Part 1 Trial litigated the overarching principles applicable to the claims by reference to test claims drawn from each category. The number of claims in each category did not affect the trial or preparation for trial in any meaningful way. A more realistic approach is one or other of the following: two out of ten of the test Claimants succeeded in their actions and walked away with damages in their favour, which equates to 20% success (if a percentage is to be adopted); alternatively, one out of three categories of claims succeeded, namely Category 1, which equates to 33% success. Mr Adkin argues that the Category 1 cases were not disputed in principle, because Atlasjet accepted that a contract had existed with the Category 1 Claimants (cf paragraph 55 of the main judgment). But Atlasjet maintained its defence to all the Category 1 claims on the facts. And so the Claimants in Category 1 still had to come to Court, within the Part 1 Trial, to prove the viability of their claims (accepting of course that the Part 1 Trial did not extend to determining each and every one of the Category 1 claims on their own facts). But as a category of claimants, they were successful. I conclude that the Claimants' success is not so modest that it can or should be treated as immaterial. I reject Atlasjet's arguments to the contrary.

17. For those reasons, I conclude that the Claimants are the winners in the Part 1 Trial. As a starting point, Atlasjet should pay the Claimants' costs."

41. At [18]-[25], Whipple J proceeded to deal with the second question, "Should the Winner's Costs be Discounted, Reduced or Offset?".

"18. It is here that I believe Atlasjet's arguments have greater traction. There are two broad matters which tend to reduce the amount payable by Atlasjet to something less than 100%. The first is the fact that the Claimants lost every one of the List of Issues, either because that issue was abandoned before trial (true of most of them) or because I determined the

issue in Atlasjet's favour. I accept that the List of Issues occupied a substantial part of the trial preparation, although they occupied only a modest part of the trial itself. Under CPR 44.2(4)(b), these are parts of the case on which the Claimants have not been successful.

19. The second is the fact that the majority of the contractual claims were indeed lost at trial, with only a minority succeeding. This too is relevant under CPR 44.2(b). However, care must be taken in determining the extent of the discount for this reason: the majority of the evidence and argument I heard at trial would have been required, even to establish just one of the claims in Category 1. That is because the key to the Claimants' success on the Category 1 claims was the unreliability of Atlasjet's own records, systems and witnesses. That unreliability was established as a result of the extensive evidence called to deal with booking systems, systems for cancelling reservations, allegations of systemic overbookings, Atlasjet's claim to the Court of Audit and the documents generated by the Court of Audit. These were generic areas of evidence not related specifically to the claims. But this evidence turned out to be very important to the successful Category 1 claims, and the Claimants should in principle recover their costs associated with it."

42. She said she had considered whether either or both of those matters should be reflected in an issues-based costs order; but, mindful of CPR rule 44.2(7), she had concluded that it was "practicable and preferable" to make a percentage costs order in favour of the Claimants under rule 44.2(6)(a). In addition to avoiding the practical difficulties in assessing the costs of issues, she said (at [20]) that a percentage costs order:

"... avoids the spectre of what I would consider to be an undesirable and unfair outcome, namely of the Claimants' overall win (as I have found it to be) being eradicated (in effect) by [Atlasjet's] costs attributable to particular issues. It is much better to determine the end position on costs now...".

43. She then continued to consider a variety of allegations, which she described as "a mass of accusation and counter accusation going to each party's conduct in the case" (see [22]). She found that two matters of Atlasjet's conduct should be taken into account in the Claimants' favour, namely:

i) The fact that Atlasjet failed to make disclosure of logbooks (that went to establish passenger numbers on flights) until after Ali Murat Ersoy started to give evidence at trial. (Mr Ersoy was at all material times the President of Atlasjet.)

ii) Atlasjet resisted all attempts at discussion or negotiation of the case, which was "crying out for some sensible attempt at negotiation before costs racked up and the parties' attitudes hardened" (see [25] of the costs judgment). Atlasjet did not respond to the pre-action protocol letter, nor to a Calderbank letter dated 24 April 2015 in which the Claimants offered to settle all their claims for £200,000 cash as a lump sum, or a flight voucher to the value of £250 to each Claimant, together with a contribution of £480,000 towards the Claimants' costs. The Claimants did not better that offer, but the judge considered that it was an admissible offer to which she should have regard in the Claimants' favour under CPR rule 44.2(4)(a). Atlasjet had "simply refused to engage, preferring to take the view that it [would] see its opponents in court" (see [25]).

44. Whipple J concluded (at [26]):

"Weighing these various factors, I conclude that Atlasjet should pay 33% of the Claimants' reasonable costs of the Part 1 trial on the standard basis. I believe this percentage reflects the overall outcome of the case, the outcome on particular issues in the case, and the conduct of the parties in relation to the case."

45. It is that order, and various consequent orders, against which Atlasjet now appeals.

The Grounds of Appeal: The Parties' Contentions

46. There are several grounds of appeal, including the contention that the judge was wrong to take the two matters of Atlasjet's conduct into account in favour of the Claimants; but Mr Adkin's core submission

was that, in the circumstances of this case, Whipple J erred in her approach the concept of "success" for the purposes of CPR rule 44.2(2).

47. Whilst who "receives a cheque" at the end of a trial may be an appropriate indicator of success in a unitary claim, the Part 1 trial involved a group claim in which sixteen issues and ten lead claims were to be determined. Mr Adkin submitted that the fact that, as a result of the Part 1 trial, Atlasjet was required to pay small amounts of money to fourteen Claimants was not a true marker of success. One had to look at the litigation as a whole. Atlasjet had been successful in all of the issues and in eight of the ten lead claims. It had been successful in respect of two of the three categories of case identified. As the trial was intended to give guidance in respect of the balance of claims, it was also appropriate to consider the effect of the Part 1 trial on them: on the basis that all the category 3 claims failed as a result of the trial – the basis upon which the judge proceeded for costs purposes – the Part 1 trial resulted in fourteen claimants "receiving a cheque", 32 claims continuing but remaining unresolved, and 792 claims failing. Fourteen Claimants represented 1.9% of the cohort of 838 Claimants. 46 Claimants represented 5.5%. As a result of the Part 1 trial, the Claimants had failed and Atlasjet had succeeded in 94.5% of the 838 claims.
48. In all the circumstances, the judge was wrong where, in [15] of her costs judgment, she equated receipt of a cheque by the Claimants with "success" in the litigation. Looked at as a whole, Mr Adkin submitted, Atlasjet had clearly been the "successful" party in the Part 1 trial; albeit, he readily accepted, not wholly successful, so that some discount from full costs might be appropriate.
49. The judge's error is exposed, Mr Adkin submitted, in [16] of her costs judgment, where, in considering the extent of the Claimants' success, Whipple J referred to the Claimants succeeding in two out of ten lead claims as equating to "20% success" for them; and their succeeding in one out of three categories of case as equating to "33% success". Putting to one side altogether the preliminary issues (in respect of which Atlasjet were wholly successful), he submitted that the judge had left out of account Atlasjet's own success in respect of the lead claims and categories. Taking those into account, as a matter of mathematics and principle, in respect of the lead claims overall Atlasjet was 60% successful, and in respect of the categories of claim overall it was 33% successful. Even that did not reveal the true picture, Mr Adkin submitted; because in relation to the Category 1 Claimants, there was no dispute of principle, and so the only success obtained by the Claimants was on the individual facts of a relatively few cases.
50. The fact that "the number of claims in each category did not affect the trial or preparation for trial in any meaningful way" is not to the point: because it did not affect the extent to which Atlasjet was successful, looking at the litigation realistically and as a whole. The fact that the judge took into account Atlasjet's success when considering the amount of appropriate discount of the Claimants' costs did not alter the fact that her starting point (i.e. that Atlasjet should pay all the Claimants' costs) was wrong. Mr Adkin submitted that the correct starting point should have been that the Claimants should pay the costs of Atlasjet (as the successful party), subject only to a modest discount for the matters in which the Claimants, and not Atlasjet, were successful, notably the lead cases of Mrs Atesogullari and Mr Ozkes.
51. Mr Bradley submitted that the judge was both entitled and right to proceed on the basis that the Claimants were the successful party. She was correct to follow the judgment of Swift J in the PWG Litigation, which confirmed that the CPR did not advocate a different approach to the concept of "success" in a group claim from that in a single party claim. The AL Barnes line of authority therefore equally applied in this case. It could therefore properly be said that the Claimants were the "successful party" because, as a result of the Part 1 trial, they received a cheque from Atlasjet.
52. However, in assessing who was successful, the judge had also taken into account the extent to which each party has been successful and unsuccessful looking at the matter as a whole (see [16] and [19] of her costs judgment). She had also properly taken into account the fact that the Claimants had been successful on the evidential issue which dominated the trial, namely Atlasjet's internal records, which the Claimants had to show were inherently unreliable if they were to succeed on a single claim. They had succeeded in that "Herculean task".

53. Mr Bradley submitted that it is clear that the judge took all relevant matters into account from [26] of her costs judgment, in which, having provisionally concluded that Atlasjet should pay 33% of the Claimants' costs, she had looked at the matter as a whole and had made the judgment that "this percentage reflects the overall outcome of the case, the outcome on particular issues in the case, and the conduct of the parties in relation to the case".
54. Consequently, he contended, neither the judge's approach nor her conclusion can be said to be wrong.

The Grounds of Appeal: Discussion and Conclusion

55. One can only have sympathy for the trial judge who, having dealt with the substantive issues between the parties comprehensively, compellingly and unimpeachably in her main judgment, was then faced with the challenging issue of costs of the Part 1 trial, in respect of which both the Claimants and Atlasjet asserted they had "won" and "won" by some margin.
56. The costs of the Part 1 trial for these purposes of course included all of the associated costs culminating in the trial itself.
57. Both the Claimants and Atlasjet agreed that the correct approach was for the judge to determine which party had been successful in the Part 1 trial for the purposes of CPR rule 44.2(2); and the judge cannot be criticised for following that approach. However, in my view, it required considerable caution, because it is self-evident that, whilst both the Claimants and Atlasjet had had some substantial success, no party had been wholly successful in the trial. It was essential, to do justice between the parties, that their respective success was reflected appropriately in the final costs order made. It is here where I consider that the judge, unfortunately, went wrong, much in the manner suggested by Mr Adkin.
58. I do not find the section of the judge's judgment dealing with the identification of the successful party for the purposes of CPR rule 44.2(2) (i.e. [10]-[17]) entirely easy, because she concludes that the Claimants were successful in both [15] and [17], with [16] intervening. However, even if not as the only relevant matter, Whipple J clearly identified what she considered to be the determinative factor in respect of the issue in [15] of the judgment where, after considering the AL Barnes line of cases and (at [14]) indicating that there was no reason to depart from them in relation to a group claim, she said:

"I agree with Mr Bradley that the Claimants are the winners because at the end of the day, they will receive a cheque from the Defendant.

Although, in the immediately preceding paragraph (i.e. [14]), the judge said that the authorities require "common sense" to be applied "to reach a realistic evaluation of who has won" – with the issue of whether one party receives money from the other being only "one highly relevant factor" – in using the causal word "because", that paragraph is clear that the determinative, if not sole, factor that hallmarked success in the Part 1 trial was that the Claimants had received a cheque from Atlasjet at the end of it. However, with respect, I agree with Mr Adkin's submission that that is too crude an approach to such litigation as this.

59. It is uncontroversial that, in assessing costs as between parties, the court must look at the litigation as whole. The AL Barnes line of authorities each relate to a claim for money between two individuals. In such claims, who pays whom may well be a straightforward and easily identified mark of who the unsuccessful party might be for the purposes of CPR rule 44.2(2), even if that party has been successful in respect of some issues which might warrant (say) a percentage reduction in his recoverable costs, the CPR encouraging percentage awards rather issues-based awards on grounds of practicality (see CPR rule 44.2(7)). But in a group claim, looking at the litigation as a whole, there are other material factors.
60. First, in a group claim such as this, whilst the defendant may be unitary, the claimants are not. In his submissions, Mr Bradley referred to this group claim as a "unitary claim"; but that is to misdescribe it. In this case, there were 838 individual claims, albeit joined and managed together because, without that mutual support, clearly none would be viable. As a result of the Part 1 trial, Atlasjet was successful (or, in relation to Category 3 claimants, deemed successful) in 792 claims, in which the individual Claimants were reciprocally unsuccessful. On the basis of CPR rule 44.2(2), as a starting point,

Atlasjet was entitled to its costs from those Claimants in relation to those individual claims. It seems to me that that is particularly so in the absence of a GLO.

61. Second, a group claim is managed so that any trial not only conclusively determines any lead claims. The trial is intended and designed to determine matters, through the vehicle of preliminary issues and/or lead claims, that will determine or assist in the determination of the balance of the claims by agreement or later individual small-scale trials. Consequently, the direction any money travels as a result of a group claim trial may not always properly reflect "success". Looking at the litigation as a whole, whether a party is "successful" is an issue which has to take into account both the extent to which a party has been successful in such issues and the consequences of the trial for the balance of claims. These are, quite clearly, material considerations so far as the issue of costs as between the parties is concerned.
62. These factors can be taken into account in a variety of ways, each of which involves an assessment which is quintessentially fact-specific.
63. Thus, in BCCI, hundreds of employees sued their employer bank for breach of the trust and confidence term in their contracts of employment by the bank conducting illegal activities. Five employees were chosen to bring lead claims to trial. Lightman J held that, although the bank was in breach of contract as alleged, none of the lead claimants had suffered loss as a result. In dealing with who was successful for costs purposes, he considered context was critical; and "unhesitatingly" held that "honours were even". Whilst the lead claimants had all failed, they had proved breach of contract and had opened the door to possible claims by other employees and, for the benefit of all concerned, had "cleared the way for a more expedited resolution of such claims". He made no order as to costs.
64. In other group claims, orders have been made in respect of costs dependent upon whether individuals have been successful or not, with generic costs being apportioned amongst the individuals who have benefited from the generic work done (see, e.g., Nash v Eli Lilly & Co [1993] 1 WLR 782, and Nationwide Building Society v Various Solicitors [1999] 1 All ER 850).
65. In the PWG Litigation, there was a GLO in respect of 183 claims for a variety of malignant and non-malignant diseases brought by former workers at the Abercwmboi Phurnacite Works, Aberaman, South Wales. Eight lead cases were chosen to represent the various diseases. In the case of bladder cancer and basal cell carcinoma, Swift J held that causation had not been proved. In respect of the other conditions, causation depended on the particular circumstances of the claim. As a result, four of the eight lead cases succeeded and four failed. Of the 175 non-lead claims, nine failed whilst 166 proceeded for a determination of whether causation could be proved on their individual facts.
66. In the costs application, it was common ground that the defendants should pay the claimants a proportion of their costs. The claimants submitted that the judge should look at the litigation as a whole, and, if anything make only a small deduction in respect of the issues that they had lost; whilst the defendants contended that it was inappropriate to look at the litigation as a whole, but the judge should rather look at who has succeeded in relation to each of the main generic issues, before determining the overall percentage of costs payable to the claimants.
67. Swift J preferred the former approach. Citing Kastor Navigation and BCCI, she said (at [14]) that it was clear from the authorities that the question of who is the "successful party" must be determined by reference to the litigation as a whole, "success" for the purposes of the CPR being "not a technical term, but a result in real life". She then broadly considered the main issues before her, not just at the trial itself but throughout; and concluded (at [19]) that "viewed overall, the claimants were successful at trial and are *prima facie* entitled to their costs". She did not consider the time spent on various issues at the trial to be a reliable guide for the reduction in the claimants' entitlement to costs; which, on a broad-brush assessment, she considered should be 20%. She ordered the defendant to pay 80% of the claimants' costs.
68. I do not consider that this authority is of any great assistance to Mr Bradley. Unlike the case before us, in the PWG Litigation the defendant accepted that it must pay some costs to the claimants, i.e. the claimants were the "successful party" for the purposes of CPR rule 44.2(2). Given the outcome of the trial, that concession is unsurprising. The case concerned the proper approach to the assessment of the

reduction in those costs that would, in all the circumstances, be appropriate. In making that assessment, Swift J rightly considered that she should take look at the litigation as a whole and not simply consider (e.g.) the time that was spent on particular issues at the trial. Her approach was plainly correct. The case is not arguably authority for the proposition that, in assessing "success" for CPR purposes, group claims are to be approached on the same basis as unitary claims – indeed, it makes clear that that is not the case – let alone that the principle derived from the AL Barnes line of authorities is simply transferrable across to group claims such as this.

69. In my view, unfortunately, Whipple J was wrong to equate "who receives the cheque" with the successful party for the purposes of CPR rule 44.2(2) in the context of this complex group claim. She was required to consider who was successful, in the context of the group litigation as a whole; and that was not truly reflected by the fact that a limited number of Claimants were successful in and as a result of the Part 1 trial.
70. The judge's observations about the percentage success in [16] of her judgment made after her conclusion in [15], apparently based on who paid whom, are expressly made "in assessing the *extent* of that success" (emphasis added). However, I accept the submission of Mr Adkin that they betray a misunderstanding of "success" in this context: the judge took into account the success of the Claimants but not the success of Atlasjet. The group claim comprised many individual claims. In a large proportion of those claims (792 claims), as a result of the Part 1 trial, for the purposes of the CPR, Atlasjet (and not the Claimants) were successful. Similarly, with the lead claims and the categories of claim. In the majority of each, Atlasjet had been the successful party.
71. That had to be reflected in the analysis of costs; but, in the section in which the judge dealt with the issue of success (i.e. [10]-[17] of her judgment), she did not do so. Having fixed her starting point (i.e. the Claimants, as the successful party, were *prima facie* entitled to their costs), the judge's consideration of Atlasjet's success in relation to the appropriate reduction in costs, in [19], was clearly inadequate to remedy that error. Nor, in my view, is the position rescued by the judge, at [26], indicating that she considered that the percentage award of 33% of the Claimants' costs properly reflected the outcome of the case and issues and the conduct of the parties. In my view, the fact that the judge's starting point was wrong is fatal to her analysis and her conclusion. The fact that the judge adopted the wrong approach to "success" for CPR purposes, also explains why the spectre she feared – of the Claimants' overall win being eradicated by Atlasjet's costs (see [20] of her costs judgment) – was illusory, the Claimants' success as she found it to be being built on a false foundation.
72. As I have indicated, I do not accept Mr Bradley's submission that the reference to Atlasjet's success in [19] of the costs judgment was part of the judge's analysis of who was the "successful party" for CPR purposes: it was expressly concerned with the assessment of any reduction to the Claimants' costs, on the basis that they were overall successful. Nor do I accept the submission in the Claimants' Respondents' Notice: that the judge concluded that most of the evidence and argument explored at trial would have been necessary to secure judgment for any single Claimant, and that was an alternative basis upon which this court could uphold the judge's finding that it was the Claimants who were the "successful party". The evidence to which Mr Bradley refers is that relating to the issue of reliability of Atlasjet's records; and, whilst that was an important factual issue at the trial itself (and the Claimants' success in it is clearly a material factor in consideration of costs as between the parties), to determine overall success on the basis of that alone would be to ignore other issues with which this litigation, looked at as a whole, was concerned, including the preliminary issues, the issue concerning systemic overbooking and the majority claims that failed as a result of the Part 1 trial.
73. For those reasons, I consider the costs order to be wrong; and it must be set aside.

Disposal

74. In those circumstances, each party urged this court not to remit the matter but to assess the appropriate costs order itself. That, given the history of the matter, is clearly the correct course.
75. In making that assessment, I have considered the litigation as a whole; and which party (if either) was the successful party in the Part 1 trial. In doing so, I have particularly taken into account the following matters.

i) In respect of the preliminary issues, designed to give guidance for the determination of the cohort of claims, Atlasjet was entirely successful.

ii) In respect of the three categories of claim and the lead claims themselves, there were mixed fortunes. Atlasjet was successful in the legal issues which led to the dismissal of all the Category 2 and 3 claims, the majority of the total. On the other hand, the Claimants were successful on the issue of principle left in relation to the Category 1 claims (i.e. whether the issue of a conventional flight ticket was required for there to be a contract between Atlasjet and a Claimant); and they were successful in two of the three lead claims. Furthermore, that success led to 32 further claims being left open for consideration on their individual merits.

iii) I am acutely aware that Whipple J heard several days of evidence from the relevant witnesses, and we have heard none. She made some clear findings of fact, which are not challenged and are unchallengeable. In respect of the main factual issue live at the trial (i.e. the reliability of Mr Teker's evidence and of Atlasjet's records), she found firmly for the Claimants. That issue occupied much trial time and effort. However, on the other factual issue (i.e. as to overbooking), which also featured heavily at the trial, she found for Atlasjet, in the sense that she found there to have been no evidence of systemic overbooking, although there was some overbooking in practice. Whilst there was no doubt overlap in the evidence required for these issues, the judge was entitled and (on her findings of fact) right to conclude that the Claimants were in principle entitled to recover their costs associated with the reliability of records issue. However, equally, Atlasjet was in principle entitled to its costs associated with the systemic overbooking issue.

76. In the Part 1 trial, it is clear that neither party had anything close to complete success, and indeed that honours were fairly even.
77. Pausing there, although by CPR rule 44.2(2)(a) it is the general rule that an unsuccessful party will be ordered to pay the costs of the successful party, rule 44.2(2)(b) provides that "the court may make a different order". It seems to me that, where the concept of overall "success" may be a necessarily ambivalent concept (as in a complex group claim trial, in which opposing parties each have considerable success), a search for an overall "winner" may be a largely fruitless exercise. In any event, it is clear from CPR rule 44.2 that, in assessing costs as between parties, the court must first determine whether to make a costs order at all. BCCI (see paragraphs 9 and 63 above) illustrates that, where the court considers success and determines that no party was successful – in the sense that "honours were even" – it might be appropriate to make no order as to costs.
78. Before considering whether any costs order is appropriate in this case, it is necessary to return to two further grounds of appeal upon which Mr Adkin relied.
79. In paragraphs 5.4 and 5.5 of its Grounds of Appeal, Atlasjet submits that the judge erred in taking into account, for the benefit of the Claimants, two aspects of Atlasjet's conduct. First, it is said that she was wrong in finding that Atlasjet was blameworthy in failing to disclose certain flight logbooks until the trial. Those related to the Claimants' allegation of systemic overbooking, which was never pleaded as such; and the logbooks were only requested when Mr Ersoy referred to them in his cross-examination. However, in my view, the judge was entitled to conclude (as she did in [24] of her costs judgment) that it was plain long before trial that the Claimants wished to establish passenger numbers on Atlasjet's flight from the United Kingdom and that Atlasjet were at fault in not disclosing them earlier. I reject this as a distinct ground of appeal. It is a matter that is properly taken into account in determining costs as between the parties.
80. Second, Mr Adkin submits that the judge erred in taking into account the fact that the Claimants had made a Calderbank offer on 24 April 2015, which the Claimants did not beat but to which Atlasjet made no counteroffer. There is no proper basis, he submits, for punishing a party in costs for failing to make an offer or counteroffer. However, I am unpersuaded that this ground has any force. The offer was an admissible offer to settle, to which the judge had proper regard under CPR rule 44.2(4); and, as Marcus (see paragraph 14 above) illustrates, whilst the absence of a Part 36 offer is not material to costs as between parties, where a party fails to make an appropriate Calderbank offer, that may be relevant. It was certainly open to the judge to conclude that Atlasjet's conduct in failing to engage in

attempts to compromise this litigation, in circumstances which were "crying out for some sensible attempt at negotiation before costs racked up and the parties' attitudes hardened", was a matter which should be reflected, against Atlasjet, in consideration of costs as between the parties. That too is a matter which, on the basis of the findings of the judge, I consider is properly taken into account on the question of costs.

81. Having considered all of these matters, it seems to me that it would be appropriate to make no order as to costs as between the parties. To the extent that Atlasjet had any slight success over and above the success obtained by the Claimants at the trial, in my view that is offset by its conduct as found by the judge.

Conclusion

82. For those reasons, subject to my Lord, Davis LJ, and to any submissions on the precise terms of the order, I consider that no order as to costs would both be compliant with the letter and spirit of the CPR and be the just and appropriate order as to costs of the Part 1 trial as between the parties.

83. I would therefore allow the appeal, quash paragraphs 8 and 9 of the Order of Whipple J dated 21 June 2016 and, in their place, make an order that there be no order as to costs.

Postscript

84. Although not directly bearing on the issues with which the appeal is concerned, I consider it would be remiss if I did not express my dismay at the way in which the costs of the parties have so vastly, and so obviously, exceeded any substantive claim that the Claimants may have had.

85. We do not have precise figures for the costs expended by the parties in this litigation. However, we were told that Atlasjet's costs of the Part 1 trial were in the region of £800,000; and the Claimant's costs, including success fee, appear to be in a similar region, if not somewhat more. The total costs could not have been far shy of £2m.

86. I fully understand that the money claimed by each Claimant was not insignificant for them. We were told by Mr Bradley (and, for my part, I accept) that the Claimants are "modest folk" – Mr Bradley's term – for whom the loss of the money spent on flights not made would have had a real impact. For example, the evidence of Mrs Atesogullari was that she had not been back to see her family in Turkey for ten years, and was taking her three children with her, two of them to see their natural mother's grave. When Atlasjet reneged on its contractual commitment to carry them, she purchased three flight tickets with Turkish Airlines for a total of £1,700, but could only afford to take two of her children. One had to be left behind. I do not for a moment minimise the impact of Atlasjet's default on individual Claimants. However, for each Claimant, the sum claimed in the proceedings was very modest, in the low hundreds. The Calderbank offer made by the Claimants, that sought a settlement on the basis of a flight voucher for £250 per Claimant, paints the general picture.

87. We do not have details of the CFA between the Claimants and their solicitors; but we do know (i) that the solicitors must have regarded the claims as being high risk, as the success fee was put at 100%; and (ii) the Claimants did not have the protection of after the event insurance. On any view, this litigation, for the Claimants, presented a very high commercial risk out of all proportion to the potential prospective rewards.

88. On the other hand, knowing that the claims were necessarily very modest in amount, Atlasjet refused to consider any form of compromise, until shortly before the trial, when, in effect, its efforts were both too little and too late. The judge correctly observed that this case cried out for some early, sensible consideration of compromise.

89. From a very early stage, the main driver of these proceedings was clearly not the substantive sums claimed but costs. In the circumstances, although playing no part in my ultimate conclusion, or my analysis leading to it, it seems to me that no order as to costs is particularly appropriate.

Lord Justice Davis:

90. This is a melancholy tale. It is reasonably evident that the main issue in this litigation has for a while in truth been the issue of costs.
91. In matters of costs, the appellate court will ordinarily be very slow indeed to interfere with the exercise of the judge's discretion: the more so when, as here, the judge had also had the advantage of conducting the trial. However, in my opinion the judge, in the present case, erred in principle in, in effect, determining the issue of who was the successful party by focusing on which party ended up writing a cheque. That simply does not reflect the reality of the outcome of this particular group litigation for the reasons given by Hickinbottom LJ in his judgment, with which I entirely agree.
92. That conclusion entitles this court to exercise the discretion afresh. I further agree that, looking at matters overall, the appropriate order as to costs in the proceedings below is no order as to costs.
93. I desire to add that I share the concerns expressed by Hickinbottom LJ in the postscript to his judgment. The potential risks to the individual claimants, of modest means and pursuing claims for relatively modest sums but without any GLO and without any after the event insurance, were very significant. At the same time Atlasjet were, it would seem from the judge's findings, to a degree intransigent in not endeavouring at an early stage to achieve a pragmatic and cost-effective solution. The consequence, overall, has been one which (in terms of the incurring of costs) has been out of all proportion to the practicalities. As I see it, neither side comes out of all this with much credit.

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