Neutral Citation Number: [2020] EWCA Civ 1647

Case No: A3/2020/0726

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Justice Birss
BL-2020-000588

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04.12.2020

Before:

LORD JUSTICE LEWISON
and
LORD JUSTICE McCOMBE

- -

Between:

FREDERICK JOHN WINGFIELD DIGBY	**Appellant**
- and -	
MELFORD CAPITAL PARTNERS (HOLDINGS) LLP and Others	**Respondent**

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- -

Thomas Grant QC and Thomas Munby (instructed by Thomas Mansfield) for the Appellant
Philip Shepherd QC, Bajul Shah and Aidan Eardley (instructed by Kerman & Co.) for the Respondents

Hearing date: 26 November 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Friday, 4 December 2020.

Lord Justice Lewison and Lord Justice McCombe:

1. This is the judgment of the court.

2. This is the appeal of Mr Frederick Wingfield Digby ("the Appellant") brought against part of the Order of 23 April 2020 (sealed on 27 April 2020) of Birss J ordering him to pay the costs of the Respondents (Melford Capital Partners (Holdings) LLP, Melford Capital Partners LLP, being the first two Respondents, and eleven others) of an application by them for an interim injunction restraining use of what they claim to be confidential information, delivery up of a laptop computer and related relief. It was ordered further that such costs were to be assessed immediately (if not agreed), with an interim payment on account of such costs in the sum of £166,384.50 to be paid by the Appellant by 4.30 p.m. on 7 May 2020. The costs schedule (with an accompanying note) delivered by the Respondents in respect of the services of their "English legal team" in relation to hearings on 8 and 23 April 2020 specify total costs of the application at £277,307.50, not including costs of Guernsey lawyers also said to be in respect of work on "these proceedings".

3. Permission to appeal against the material part of the judge's order was given by Arnold LJ by his order of 14 July 2020, with a stay of execution of the costs assessment in the meantime. The Appellant says that Birss J was wrong to make the order that he did and that he should have made an order reserving the costs. The interim order made by the judge has been complied with, and the Appellant seeks an order that that sum be repaid.

4. In what follows, in stating the issues in dispute between the parties, we have drawn upon the pleadings served by them under directions given by the judge. While those pleadings post-date the judge's order, they are a convenient route to some understanding of the issues to be resolved in the action. The issues are complex and, as it seems to us, they were, and are, (as the judge himself accepted) quite incapable of even prima facie evaluation to any satisfactory extent, in interim proceedings. What we now set out as the background facts can be no more than a summary and no doubt, in doing so, one or other side will consider that we are misstating the matter.

5. The Respondents, thirteen of them, are all limited partnerships or corporations forming part of a group, known in these proceedings, and perhaps generally, as "the Melford Group". They are established/incorporated variously in Guernsey, England and Wales, the Isle of Man and Scotland. The two principal Respondents are the First and Second Respondents, established under the laws of Guernsey and of England and Wales respectively. The Group's business has been investment in the real estate market in London and the south east of England, using capital raised from a variety of investors, said to be typically university endowment funds, charitable foundations, and the like. It appears that the business was set up in 2008, initially under the aegis of the Second Respondent, the English LLP, by Mr Harry Hart, Mr James Osborne and the Appellant (Mr Wingfield Digby). The size of the respective interests in the business is in dispute: in the Particulars of Claim of 6 May 2020 the Respondents plead that the Appellant's interest is/was a "15% membership interest" in the First and Second Respondents; the Respondents say that Mr Hart and Mr Osborne own 42.5% each of the equity, with the Appellant having a "junior equity role". That position is said by the Appellant to be more complicated for a variety of reasons, as pleaded in the Defence dated 5 June 2020. The rights and wrongs of the point do not matter for present purposes, save to the extent

of saying that it is just one of the large number of matters hotly in dispute between the parties to which we have already referred.

6. The Appellant says that the Second Respondent (the English LLP) "manages" the Melford Group. In 2017, however, the Group was restructured, it seems primarily for fiscal reasons, with the creation of the First Respondent, a Guernsey limited liability partnership becoming the group holding entity. The Appellant pleads that at that time Mr Hart and Mr Osborne became resident in Switzerland while he remained a UK resident. He says that from that time they typically attended the Second Respondent's London office from Tuesdays to Thursdays only, while he worked there "full time". The Respondents say that the Appellant was responsible initially for finance and administration but that his role was changed in 2018 to assisting with the organisation of investment opportunities. The Appellant describes his initial function as being responsible for the financing of deals and being chief financial officer with a compliance function; from 2018 he says he took over the running of deal origination and execution function. The precise details again do not matter for present purposes; everything is in dispute.

7. It is clear that by the middle of 2019 relations between the Appellant on the one hand and Mr Hart and Mr Osborne on the other had become strained; there were some discussions as to whether the Appellant could leave the business on an agreed basis on payment of a sum of money for his interest. The Appellant contends that the sum that Mr Hart and Mr Osborne envisaged paying significantly undervalued his share. On the other hand, they raised issues as to the Appellant's competence in the discharge of his functions in the business. It seems that by September 2019, Mr Hart and Mr Osborne had decided to take steps to expel the Appellant from participation in the Group's business. To that end, they convened, or purported to convene (depending on which of the parties' cases is correct) meetings of the First and Second Respondent respectively, over the period between September and December 2019 for the purpose of passing resolutions to expel the Appellant as a Managing Member of each LLP with effect from dates between November 2019 and January 2020. The Respondents contend that since that time the Appellant has raised serious and unjustified allegations of impropriety against Mr Hart and Mr Osborne for the purpose of extracting from them an enhanced payment for his share in the business. That too is one of the disputed issues in the action.

8. The provisions of the constitutional documents of the two LLPs have only been seen in outline for the purposes of the appeal; they are clearly convoluted, and their effect is also in dispute. The Appellant denies that the steps taken were effective to remove him from his positions in the two LLPs and, therefore, he contends that, apart from anything else, this action has been conducted, in the names of those two Respondents at least, without proper authority. Further, the Appellant alleges that in the course of the process of his "expulsion" he became aware of matters of concern relating to the setting up of the new structure in 2017 [… *Redacted*].

9. In about July 2019, a laptop computer had been acquired for the purpose of the Appellant's work; it seems to be agreed that it was and is the property of the Second Respondent. In the course of the emerging disputes, by a letter in November 2019, Mr Hart told the Appellant that he was to work at home, rather than at the London office; the Appellant says that he took the laptop with him to enable him to do that and that no request had been made of him to return it prior to the claim made in that regard in the

present proceedings. Counsel for the Respondents confirmed before us that return of the laptop had not been sought prior to the institution of the action.

10. The Appellant, it seems, acknowledges that the computer held information downloaded from the Melford Group's cloud storage, but he denies that such downloading was wrongful, given his position at the relevant times. It seems also that it contained some information personal to the Appellant.

11. The Appellant says that his concerns about the group restructuring led him to consult solicitors and two leading counsel as to the steps that might be open to him to have them investigated. Indeed, it seems that Mr Hart has been prepared for the Appellant's concerns to be investigated by a Mr Bushnell, the non-executive chairman of one or other of the entities in the group. […*Redacted*...]. A […*Redacted* …] dispute, as to impartiality, arises as to the role of the group auditors in valuing the Appellant's interest in the business for the purpose of buying him out.

12. Solicitors for the Appellant and Guernsey lawyers, acting as they no doubt genuinely believe on behalf of the Respondents on the instructions of Mr Hart and/or Mr Osborne, have engaged in correspondence since the early months of 2020. The immediate prompt for the initiation of the action came in late March 2020 (23 March 2020) when the Appellant sought to convene a video conference meeting of limited partners (investors) in the group funds, as he put it, to discuss how to address issues arising out of "possible failings capable of impacting on Limited Partner interests dating back to the March 2017 reconstruction" following "the refusal of Melford to provide answers". The document convening the meeting refers to a "Meeting of the Limited Partner Advisory Committee". The Appellant accepts that he had no power personally to convene that Committee, but he claims that he was entitled to bring his concerns to the limited partners' attention, in the absence of willingness on the part of Mr Hart and Mr Osborne to do so. At the same time, the Appellant's solicitors wrote to the Guernsey lawyers explaining what was intended. On the following day (24 March), Mr Hart and Mr Osborne wrote to the partners stating that the Appellant was "no longer involved with Melford in any capacity and has not been so substantively since November last year". Recipients were asked to ignore the Appellant's communication. It was said that since his departure the Appellant had been involved in "an attempt to coerce us into making a greater financial settlement than that to which he is entitled" and that the letter sent to convene the meeting "represents the latest iteration of his ill-advised and improper course of action".

13. This was followed three days later (27 March) by a long letter from the Guernsey lawyers to the Appellant's solicitors. Demand was made for return of property belonging to the client and an objection was raised to the Appellant using confidential data, provided to the Melford group. The letter required the Appellant and his solicitors to refrain from further contact with investors and counterparties. The letter was written in starkly uncompromising terms, critical of both the Appellant and the solicitors, accusing the firm of complicity in the matter "including the retaining of information that our client considers has been stolen". The Guernsey firm also indicated that a report would be made by their clients to the Law Society in relation to the solicitors' conduct.

14. There followed on 30 March 2020 two communications which came to have significance in the presentation of the interim application. At 1208 Central European

Standard time (CEST) there was an e-mail from the Appellant to those he had contacted on 23 March, referring to the Guernsey lawyers' letter of 27 March and saying:

> "Melford has objected to my contacting you, and threatened legal action should I not agree to refrain from further contact. I do not accept that they are entitled to do this, however to try and find a way forward, I am today offering Melford an undertaking not to have further contact with Limited Partners for a period of 10 days. During this time I have asked Melford to themselves convene a meeting of the Limited Partner Advisory Committee at which I would have the opportunity to be heard, or alternatively to issue proceedings to determine whether or not I am entitled to have further contact with you. I have indicated that I would strongly oppose any such court application,
>
> In the circumstances the call which had been scheduled for 8 April will be vacated and either Melford or I will be in touch with you further once the position has become clearer."

15. Just over an hour later at 13.22 CEST the Appellant's solicitors wrote to the Guernsey lawyers a detailed letter responding to their letter of 27 March and including the following:

> "Turning to your request for an undertaking, our client is willing to undertake, for a period of 10 days, to instigate no further contact with the Limited Partners …provided that within that time scale, you either:-
>
> - agree with us the terms of a notification to the Limited Partners, broadly in accordance with that set out in our letter of 23 March 2020, and ask the General Partner or the Operator of the Funds to convene a meeting of the Limited Partners Advisory Committee to consider our client's demand for an external inquiry; or
>
> - issue proceedings in the High Court in London, for substantive relief as to whether our client remains a Founder member of [the Second Respondent], an English LLP, subject to English law, with an exclusive jurisdiction clause of the English courts, and immediately apply in such proceedings for an interim injunction to restrain [the Appellant] from making contact with the Limited Partners …"

16. At the hearing before Birss J, Leading Counsel for the Respondents told the judge, no doubt unwittingly, that these communications had been made in the reverse order and stated that the Appellant had communicated with the relevant parties *after* the solicitors had offered the undertaking in their letter. This was a point that was taken up by the judge in his costs judgment.

17. On the afternoon of 6 April 2020, solicitors served on the Appellant's solicitors the Claim Form in this action in the names of the Respondents and an Application Notice for a hearing (on short notice), by Skype, of an application for injunctive relief to be held on 8 April 2020.

18. On 7 April 2020, the Appellant's solicitors responded by letter indicating that it was unlikely that their client would be able to be represented at the intended hearing. They set out in the letter a summary of the Appellant's initial reaction to the claim and to the evidence served under a number of headings: 1. lack of standing to cause the Respondents to bring the claim; 2. the substance of the claim, the role of Messrs Hart and Osborne and the funding of the proceedings; 3. cross-undertaking in damages; and 4. the draft order and the way forward in the proceedings. As to the last topic, the solicitors wrote:

> "In the circumstances, it is not accepted that there are good grounds to make an order of the type sort [sic].
>
> But seeking to be pragmatic and to avoid inconvenience, our client would be prepared to countenance the making of an "*ex parte on informal notice"* order of the kind envisaged in the Draft order, pending an initial return date (or an earlier application to set aside or vary without showing change of circumstances, subject the following points in relation to the draft order…"

A number of issues were then raised as to the form of order proposed.

19. As for the laptop computer of which delivery was sought, they said that there was an absence of evidence as to the Respondents' title. Nothing had been said as to the terms on which the machine had been provided to the Appellant or about any prior requests for its return. It was said also that the computer contained some of the Appellant's own confidential information; it was offered that the computer be put in the hands of the Appellant's solicitors to be held to the order of the court. Points were raised as to the extent of the confidentiality claimed. It was indicated that the Appellant wanted service of Particulars of Claim by 13 April 2020.

20. According to the Note of the hearing prepared by the Respondents, they attended before Trower J at 10.30 a.m. on 8 April 2020 by Skype. They did so by leading counsel, two junior counsel and solicitors. The hearing lasted until 11.55 a.m. The judge had been provided with the Appellant's solicitors' letter of the previous day, which he indicated that he had read. In the face of the evidence served by the Respondents and the absence of opposition to the order being made over a return date, not surprisingly, the judge said that he would be prepared to make the order sought, although he sensibly explored some of its terms. At the end, counsel for the Respondents asked for costs; he recognised that such an order would be unusual, but he argued that it was justified in view of the concessions made by the Appellant. The judge reserved the costs, although he is noted as observing that "the Claimants have a very powerful case for costs". No mention seems to have been made of the authorities on costs to which we refer below.

21. By his order Trower J determined that the return date for the order granted should be Thursday, 23 April 2020 and that time for service of Particulars of Claim should be

extended to 6 May 2020. In the meantime, the Appellant was to deliver up the laptop computer to the Respondents' solicitors by 4 p.m. on 15 April. He was required to serve any evidence upon which he wished to rely on the return date by 4 p.m. on Friday, 17 April, with evidence in reply to follow by 4 p.m. on Tuesday, 21 April.

22. The laptop was delivered to the Respondent's solicitors on the afternoon of 15 April but locked in containers thereby preventing access to it. The Application Notice for continuation of the injunction and other orders of 8 April 2020 on the return day was issued on 17 April. After an initial request for an extension of time for service of the Appellant's evidence, in the light of leading counsel's illness, that evidence was also served on 17 April as directed by Trower J's order. The Appellant's witness statement went into the underlying disputes in the case and disputed the Respondent's entitlement to an injunction, but in paragraphs 114 and 115 of his witness statement the Appellant said,

> "114. In all the circumstances, I suggest that the Claimants are not entitled to any form of relief against me, injunctive or otherwise. However, I also recognise that the issues are complex issues, and include bad faith on the part of Mr Hart and Mr Osborne, and cannot be resolved at a short interim hearing without hearing evidence from witnesses. A full and proper consideration of the evidence by the court will be required.
>
> 115. In the interests of saving court time and costs, and with a view to progressing this dispute towards as rapid a conclusion as possible, I am accordingly willing to consent in principle (and against appropriate cross-undertakings in damages) to the continuation until trial or further order of the injunctions granted to the Claimants at paragraph 3 of the Order dated 8 April against me, subject to a number of modifications. In so doing, I make no admission whatsoever that the proceedings are properly brought against me in the name of the Claimants, or that they have any basis in fact or law…".

23. On 18 April 2020, the Respondents' solicitors responded in a letter to paragraph 115 of the Appellant's statement,

> "Your client thereby acknowledges, for the purposes of our clients' applications, that he has unlawfully downloaded and has misused our clients' confidential information…
>
> …If your client does wish to "save court time and costs", as he claims … then it is open to him to consent to the terms of the draft order served on your firm on 17 April 2020 and agree that the 8 April Order should continue without modification…"

24. This letter was an overstatement. The Appellant had not admitted that he had unlawfully downloaded or misused anything. At most, he had acknowledged that the Respondents were likely to establish that publication should not be allowed until trial. The modifications to the order were debated in correspondence over the weekend of 18 and 19 April, but not resolved. On Monday, 20 April, the Appellant's solicitors wrote to the

Respondent's solicitors to say that leading counsel instructed for the Appellant had been struck down by virus and that his father was also seriously ill and was not expected to survive long. Accordingly, they asked that the return date set for 23 April (the Thursday) be adjourned for two to three weeks, with the order of Trower J continuing in the meantime. This request was refused, on the basis that the Appellant had had advice from leading […*Redacted…*] counsel for some months and from an experienced Chancery junior (not apparently Mr Munby, his present junior counsel). It was noted that nothing had been said as to the availability of "your existing counsel team" excluding leading counsel. It was also said that an adjournment could not be agreed because additional orders were urgently needed in respect of disclosure of documents, the Appellant's alleged failure to comply fully with earlier disclosure order and access to, and inspection of, the laptop computer.

25. In these circumstances, the application for continuation of the interim order came before Birss J in the interim applications list, on an apparently busy day, with a somewhat unsatisfactory video hearing facility. Moreover, the hearing, we are told, substantially overran its time estimate. We have had the benefit of a transcript of the proceedings before the learned judge. The initial part of each side's submissions dealt with the "merits" of the disputes, with Mr Shepherd QC for the Respondents, (leading Mr Shah and Mr Eardley) asserting that the restructuring in 2017 had been entirely proper and based on eminent professional advice, that the buy-out provisions for outgoing members were being wrongly contested by the Appellant. It was said that the Appellant's actions in seeking to convene a Limited Partners' meeting had been unlawful.

26. Mr Munby, appearing without leading counsel, for the Appellant submitted that the Appellant's continued membership of the LLPs was in dispute; that dispute, Mr Munby submitted, called in question the basis of the confidentiality claims and the authority of Mr Hart and Mr Osborne to bring the proceedings in the Respondents' names at all. While saying that there was no proper time to address the merits, Mr Munby sought to outline salient features of the Appellant's stance on some of the disputed matters, including an allegation of blackmail that had been levelled against the Appellant. Each of Mr Shepherd and Mr Munby went on to address the modifications to the order sought on the Appellant's behalf.

27. The judge gave a short judgment on each of these points.

28. On Mr Munby's application for a speedy trial, the judge declined to make that order but directed that there should be a CMC in July, because he said it was a case which needed "to be got a grip of" once pleadings were in. He saw that there might be some need for "some sort of speedy trial" at that stage, but he declined to speculate. The judge agreed that information in the Appellant's hands might be used for reporting complaints to regulators, but not to communicate to investors as potential witnesses in the dispute. The judge acceded to Mr Munby's application that the Appellant might apply to vary or discharge the order without need to demonstrate change of circumstances, but with the caveat, urged by Mr Shepherd, that it would be open to his clients to contend that such an application should be refused on the basis that the matter in issue could have been raised at the instant hearing.

29. It should be added that, while the matter does not appear to have been canvassed before the judge, his order as ultimately issued makes provision for the examination of the

laptop by independent counsel for the purpose of identifying such material as might be subject to the Appellant's legal professional privilege and/or unrelated to the Respondents or their partners or to the matters in issue. Counsel was also to make and retain a preserved image of the laptop's drive, subject to the order of the court. At the hearing before us, Mr Eardley explained helpfully that this provision had been negotiated over the weekend following the hearing before the judge.

30. The judge dealt with costs and made the order that the costs of the application be paid by the Appellant, with immediate assessment and payment on account, which is the subject of this appeal. In his judgment on the issue, he summarised some of the features of the orders that he and Trower J had made. He commented that the delivery up of the laptop in a locked bag did not reflect well on the Appellant and that it had been "a stupid thing to do". He then said:

> "3. …[I]t has not been possible or necessary to resolve the underlying merits of what is clearly a hotly disputed case and I should make it clear that I am not resolving who is right and wrong on the underlying issues that these parties are fighting about. There is clearly bad blood now between the individuals behind all of this and it has not been possible to resolve those questions."

31. The judge referred to Mr Munby's citation (in his skeleton argument) of *Desquenne et Giral UK Ltd. v Richardson* [2001] FSR 1 and *Picnic at Ascot v Kalus Derigis* [2001] FSR 2, as authorities indicating that, as interim orders are decided on the balance of convenience, the right order (as the judge put it) is for "costs in the case". As is pointed out in Ground 1 of the Grounds of Appeal, those cases say that the normal order should be "costs reserved", as indeed Mr Munby was arguing, not "costs in the case". The judge went on to refer to CPR 44.2 indicating, he said, that the "usual rule", subject to the court's power to order otherwise, is that the unsuccessful party pays the costs. He then said this:

> "5. Those decisions [i.e. *Desquenne* and *Picnic at Ascot*] were made shortly after the CPR came into force. I suspect the reality is that those two cases have been overtaken, I would say for some years, by the modern approach to costs under the Civil Procedure Rules. In the end, of course, as I said … it is a matter for the court's discretion.
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> 6. If I seek to identify who the successful party is on this application, the answer is the claimants. They have achieved the continuation of the injunctions they sought with some modifications. I do not under-estimate the significance of the modifications from Mr Wingfield Digby's point of view, but the fundamental position is that important injunctions are in place to trial.
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> 7. The point that has concerned me most is whether, if I make the order that the claimants urge me to do, then am I penalising Mr Wingfield Digby for taking a pragmatic approach, not spending two or three days in court arguing the merits of whether

> these injunctions should be continued over to trial, and reserving his rights? I do see the force in that point. On the other hand, as Mr Shepherd points out, these proceedings exist at all and the injunctions were in place because in the correspondence beforehand, Mr Wingfield Digby's solicitors invited the claimants to bring the proceedings. … There was a discussion about an injunction and the only undertaking offered … was an undertaking not to do these things for a short period of ten days. It is notable that a day or so after that undertaking was offered, Mr Wingfield Digby then did write to the investors concerned.
>
> 8. Taking an overall view, this is not a case in which I should do anything other than make what I regard as the usual order, which is that the successful party's costs are paid by the unsuccessful party. That means I am making an order that this application and the costs before Trower J will be paid by Mr Wingfield Digby …"

32. It is, of course, well-known that decisions as to costs lie in the discretion of the judge and this court will only interfere with an exercise of that discretion if, for example, the judge has made an error of principle or has made an order that no judge could reasonably have made.

33. Mr Grant QC, now appearing with Mr Munby, submits that the judge did make a number of errors of principle in this case. He says: 1) The judge proceeded on the misapprehension that the Appellant was asking for an order of "costs in the case" rather than "costs reserved"; 2) The judge wrongly failed to follow the binding authority of this court in *Desquenne*; 3) The judge failed to give sufficient weight to the fact that there had been no concession or determination that an injunction was appropriate; 4) The judge was wrong to dismiss the concern that the Appellant was being penalised for a pragmatic approach to the application; 5) The Judge proceeded by giving undue significance to two particular factual matters; 6) The judge erred in failing to address submissions made as to the disputes (a) as to the authority by which these proceedings had been brought in the Respondents' names, and (b) as to whether the evidence upon which the application had been based was misleading and failed to give full and frank disclosure.

34. Mr Shepherd, again with Mr Shah and Mr Eardley, submits that the judge's decision cannot be properly impugned. He argues that *Desquenne* and *Picnic at Ascot* do not constitute binding authority. It is submitted that, whatever disputes may arise in the action, the application has achieved certain irreversible outcomes in the Respondents' favour: they have recovered the laptop, they have restrained what they consider to have been the unlawful convening of the Limited Partners' meeting and the use of information that they regard as confidential, some of which has been identified and recovered. He argues that this is not one of those cases in which the interim orders have merely "held the ring" until trial when the disputes between the parties can be resolved.

35. We were taken to the authorities. As we have noted, the judge referred to *Desquenne* and *Picnic at Ascot*. Of these two cases, the editors of Civil Procedure 2020 (the "White Book") at para. 44.6.1 say,

> "Where an interim injunction is granted the court will normally reserve the cost of the application until the determination of the substantive issue (*Desquenne*…) However, the court's hands are not tied and if special factors are present an order for costs may be made and those costs summarily assessed (*Picnic at Ascot)*…"

36. In our judgment, that short passage accurately represents the law. We were referred by the Respondents to cases in which different orders have been made, but we do not consider that those cases undermine the statement of the general rule in the White Book, as decided by the two cases. Meeting a submission by Mr Shepherd that this statement no longer represents the modern practice in the High Court which now required adherence to the "pay as you go" principle, we were also referred by Mr Grant and Mr Munby to a number of cases in which experienced judges had made "costs reserved" orders in interim injunction cases, relying upon the decided cases.

37. We set out below certain parts of the two main cases on this topic (*Desquenne* and *Picnic at Ascot*) that, with respect, we consider helpful in considering the exercise of the discretion in this type of case. The other cases to which we were referred are, in our view, only examples of the courts either following the general rule or taking a different course on the facts of individual cases, but we did not find any that provided any significant gloss upon the principles to be applied. We do not accept that the so called "pay as you go" principle has precedence over the decision in the *Desquenne* case in proceedings for interim injunctions.

38. We do not under-estimate at all the difficulty facing the learned judge in this case in making his decision on this important issue, involving large sums of money, in the circumstances that we have already mentioned. However, we consider that he did fall into error saying, "I do not accept that it is a matter of authority. The principles applicable under the CPR are clear …". On the contrary, the *Desquenne* case is an authority of this court as to the normal approach to the question of costs of an application for an interim injunction where the grant of the injunction turns on the balance of convenience. As *Picnic at Ascot* rightly states, the court's hand is not tied to that normal order and "special factors" may call for an order for immediate payment of costs or part of the costs. However, the judge did not identify any such material special factors in this case, apart from his judgment as to who had been the successful party on the injunction application. In our view, he was wrong to draw the contrast with the provisions of the CPR that normally require payment of costs by the unsuccessful party. As *Desquenne* shows the CPR rule upon which the judge drew cannot be directly applied in proceedings of this type.

39. The quest for the successful and unsuccessful party in such cases is usually fruitless. The respondent to the application, like the Appellant in the present case, denies that the claimant is entitled to any relief, because the underlying cases of the parties on disputed facts are diametrically opposed. The Applicant for the grant of interim relief, even if the court holds that the claimant has a good arguable case or is more likely to succeed than not, the applicant still has to persuade the court that the balance of convenience makes the grant of an interim injunction or other related relief more appropriate than its refusal.

40. In the present case, the judge expressly stated that he had not found it necessary or possible to resolve the underlying merits of a hotly disputed case. The Appellant had acceded to the continuation of the broad thrust of Trower J's order, with certain modifications, protesting that many matters remained in dispute, not least the proper authority for the bringing of these proceedings at all and the case that the first order had been obtained without full and proper disclosure on misleading evidence.

41. As Mr Shepherd correctly said his clients had secured the return of the laptop (the return of which they had never asked for before issuing proceedings) and had secured the benefit of preventing (for the time being) the convening of a meeting of limited partners and the use of information obtained either electronically from them or by other means and whether lawfully or otherwise. The second of these benefits is, in our judgment, without significance on the question of costs. Whenever a claimant successfully seeks an interim injunction preventing the defendant from doing something (whether using a right of way, working for a competitor or infringing a patent) the defendant will be stopped from doing whatever it is for the time being. That was precisely the case in both *Desquenne* and *Picnic at Ascot*. However, the judge's decision that he was unable to resolve the merits of the disputes means that the basis on which those orders were obtained and continued, without objection from the Appellant, may prove in the end to have been unfounded. "Success" of this type is only a provisional one. On the other hand, a "costs reserved" order does not mean that claimants generally, or these Respondents in particular, will never recover the proper proportion (if not all) of their claimed costs: the matter is open and the costs have been neither won nor lost by either side at this stage.

42. The judge also misapprehended the factual situation about the timing of the Appellant's communication with limited partners on the day on which he offered his qualified undertaking to the Respondents. As the extracts from correspondence show, before that undertaking was offered, the Appellant had written saying that he was giving the undertaking that day and was accordingly vacating the meeting that he had envisaged holding on 8 April. After that communication his solicitors wrote to the Respondents' Guernsey lawyers a letter including the undertaking. There was no evidence from the Respondents that communications had continued thereafter. The judge thought the position was that the Appellant had written to investors "a day or so after [the] undertaking was offered". This was wrong on the facts, but clearly affected the judge's thinking on the question of costs.

43. The *Desquenne* case involved a dispute about the enforceability of a non-competition clause in an employment contract. After the grant of an injunction without notice, the order was continued after a contested hearing, pending trial of a preliminary issue as to the enforceability which was estimated to last four days. The judge had made it clear that he found that the claimant had a strong arguable case, but after much discussion of the CPR and "the modern rule" the judge made an order for immediate payment of the costs by the defendant. This court (Morritt LJ (as he then was) and Morison J) also considered the CPR rules and their "general rule" that the unsuccessful party will be ordered to pay costs. The court allowed the appeal against the costs order. Morritt LJ said (at paras. 12 and 13):

> "12. I accept of course that the issue was one for the judge's discretion. In my view, this is one of those cases where this court is entitled and indeed bound to interfere with that exercise. I say

> so for basically three reasons: the first one is that the decision seems to me to be inherently unjust. It is quite plain from the passage in the judge's judgment from which I quoted that he granted or continued the [in]junction on the basis of the balance of convenience in order to hold the ring until the dispute between the parties could be properly decided at a trial. It is inconsistent with an order such as that, that there should be successful or unsuccessful parties for the purposes of the rules either new or old.
>
> 13. Second, it seems to me that the judge was wrong, therefore, in determining, for the purposes of rule 44.3.2 [now CPR 44.2(2)] that either Mr Richardson was the unsuccessful party, or alternatively that the employer was the successful party. He was right to consider within the terms of that rule whether to make an order about costs. That was what he did. But the order that he made was, going back to rule 44.3.1(a) whether the costs should be made payable by one party to another. That seems to me to have been wrong: there were no successful or unsuccessful parties at that stage and the proper orders to be considered were those under the practice direction to which I have referred[1]
>
> 14. The third reason for thinking that the judge made an error of law was in the passage in his judgment where he refers to the general rule that the Court will make a summary assessment of costs … For my part, I think, therefore, that each one of those three reasons is a sufficient and good reason for setting aside the judge's exercise of his discretion; in that event the discretion has to be exercise by this Court. It follows from what I have said already that it seems to me that the only proper exercise must be that the costs of both parties are to be reserved to the trial judge because only then can it be determined which party is successful and which is unsuccessful… "

Morison J said that he agreed and said that he thought it was clear that the new rules had somehow or other led the judge unwittingly to make an order which was "manifestly unjust".

44. In *Picnic at Ascot*, Neuberger J (as he then was) made an order for costs of interim injunction proceedings to be reserved, save for the costs of a hearing where, after a long adjournment pending a date fixed for a full hearing of the application, the defendant agreed at a late stage to the grant of an injunction pending trial. Neuberger J set out a number of considerations relevant to the exercise of the court's discretion as to costs of interim injunction proceedings.

45. As the White Book notes, Neuberger J acknowledged the basic position that, in the absence of special factors in an interlocutory injunction case costs would normally be reserved. He said that it would be wrong to treat *Desquenne* as a case tying the court's

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[1] Then PD 44 para. 2.5 – see para. 9 of Morritt LJ's judgment, now Practice direction 44 para. 4.2, as to the variety of orders available in proceedings before trial.

hands, but that it would be undesirable that there should be inconsistency of approach to questions of costs between different courts. He also noted the truth of the statement by Hoffmann J (as he then was) in *Kickers International SA v Paul Kettle Agencies Ltd.* [1990] FSR 436 that,

> "This is a dispute over costs. At one time it might have been said that it was only about costs. But litigation has become so expensive that there is no 'only' about cost any more. The ruling on costs can easily be the most important decision in the case."

46. At paragraphs 11 and 12, Neuberger J said,

> " …
>
> (3) A defendant who accedes to the grant of an interlocutory injunction before a hearing should not for that reason alone, normally be subject of a more disadvantageous order for costs than if he had fought and lost. It would be, as I see it illogical and contrary to the modern approach if a defendant were discouraged from agreeing to a sensible course by knowing that he was likely to be worse off in terms of costs than if he incurred the cost, time and effort in fighting.
>
> (4) There will obviously be circumstances where it is right to depart from the general approach. Thus there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for the interlocutory injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes). "

47. On the other hand, Neuberger J noted that a case may not go to trial and undecided costs issues may make settlement difficult and there is also the problem identified by Hoffmann J in *Kickers* that there can be difficulty for a trial judge in reconstructing how things looked at the time of an interlocutory application. He said that where (unlike in the present case) the court takes substantive merits into account, it must be careful before taking them into account on the question of costs. Then, in a passage relied upon by Mr Shepherd, he said,

> "15. … If, …., the court's view on the merits is based on incontrovertible facts or the construction of a document which is accepted by the parties as governing their relationship, then that is something which the court can, to my mind, properly take into account as pointing towards a more favourable order for costs from the claimant's point of view than costs reserved."

However, as already noted in our case, the judge said expressly that he was unable to take merits into account. Mr Shepherd also relied upon a further passage in this judgment where Neuberger J said that:

> "… in many cases where a claimant comes to court to seek an interlocutory injunction, it transpires, either at the hearing of the interlocutory application or at the final hearing that the defendant brought the proceedings on himself and has left the claimant with no alternative but to bring the proceedings."

Mr Shepherd submits that such is the present case.

48. As we have said, we consider that the judge erred here in failing to have proper regard to *Desquenne* as authoritative in a case where he was expressly deciding that he could not resolve the underlying disputes between the parties. We find that it was wrong to try to identify a winner or loser in these interim proceedings. We consider that he should have regarded the pragmatic approach adopted by the Appellant, both before the application on short notice to Trower J and before the later hearing as very strong grounds on which to reserve the costs.

49. In the light of what we find to be important errors by the learned judge, in the very difficult circumstances before him, it falls to us to exercise our own discretion as to these costs. We are clearly of the view, as Morritt LJ and Morison J were in *Desquenne*, that the decision here was unjust in all the circumstances. In this hotly disputed case, in which the underlying issues were impossible to determine at the interim stage, it is right to follow the normal rule emerging from *Desquenne*. We find no special factors indicating a contrary decision.

50. We would add that it is likely to be helpful to parties endeavouring to make sensible arrangements in cases such as this pending trial that they should know that costs are likely to be reserved. We also think that Mr Grant made a telling point for the Appellant when he pointed out that the transcript shows that the argument on costs covers between six and seven pages only of forty-two pages for the hearing as a whole. On that very short argument, at the end of a difficult hearing, submits Mr Grant, his client potentially became liable to pay over £277,000 in costs. We agree that such a liability needed rather wider consideration than could be given to it on that day and was another pointer towards ordering that the costs be reserved.

51. For these reasons, we allow the appeal and substitute for the costs order made by the judge an order that the costs of the applications dated 6 and 17 April 2020 be reserved to the trial judge. We will also order the repayment to the Appellant of the interim sum already paid on account.