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Case No: HC11 C01773
HC10 C02788

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
7 Rolls Buildings, Fetter Lane,
London, EC4A 1NL.

Date: Friday, 14th October 2011

Before:
MR. JUSTICE MANN

Between:

(1) IKOS CIF LIMITED	<u>Claimants</u>
(2) PHAESTOS LIMITED	
(3) MINDIMAXNOX LLP	
- and -	
HOGAN LOVELLS INTERNATIONAL LLP	<u>Defendant</u>

And Between:

MARTIN JOHN COWARD	<u>Claimant</u>
- and -	
(1) PHAESTOS LIMITED	
(2) MINDIMAXNOX LLP	
(3) IKOS CIF LIMITED	
(4) IKOS ASSET MANAGEMENT LIMITED	<u>Defendants</u>

MR. MICHAEL BLOCH QC and MR. JAMES WALMSLEY (instructed by **Hogan Lovells LLP**) appeared on behalf of **Mr. Martin Coward and Hogan Lovells International LLP.**

MR. CHARLES HOLLANDER QC and MR. JAMES ABRAHAMS (instructed by **Bird & Bird LLP**) appeared on behalf of the **First-Third Claimants/First-Fourth Defendants.**

APPROVED JUDGMENT

Transcript of the Stenographic Notes of
Marten Walsh Cherer Ltd., 1st Floor, Quality House, 6-9 Quality Court,
Chancery Lane, London, WC2A 1HP
Telephone: 020 7067 2900. Fax: 020 7831 6864.
e-mail: info@martenwalshcherer.com)

MR. JUSTICE MANN:

Introduction

1. What is before me is an application made by the defendants in this action, Hogan Lovells, the well-known firm of solicitors, to strike it out. That application as such was abandoned by Hogan Lovells on 5th October of this year and what is left is the question of costs. The claimants in the action and respondents to the application, whom I will call IKOS, seek their costs of the application on an indemnity basis. Hogan Lovells resist that. They accept that they should pay the costs up to 5th October and on the standard basis, but say that thereafter it was so unreasonable to pursue the costs on the indemnity basis that they should have their own costs on an indemnity basis for the period after 5th October. It is those costs questions which I have to decide.

Chronology

2. The claimants provide hedge fund management services to hedge funds and amongst themselves. For the presents purposes they can be treated as one and I call them, taken together, IKOS. IKOS claims to have a computerised trading system which enables beneficial trading transactions to take place without any human judgment being involved. The software involved is said to be extremely good and extremely valuable and IKOS is very sensitive in the matter of its protection. Dr. Martin Coward was involved with IKOS between 1991 and 2009 when he resigned as director and chairman of an IKOS company. He has professed an intention to set up a competing business based in Monaco. IKOS claims that Dr. Coward downloaded a copy of the IKOS software when he had an opportunity to do so and maintains that he has copied it or some of it or intends to do so for the purposes of his competing business. Dr. Coward seeks or sought to put forward his own claims. On 27th August 2010 in this jurisdiction he started copyright proceedings against IKOS and others claiming that certain software and databases written or created by him in a personal capacity during his involvement with IKOS, and amounting to some of the IKOS software referred to above, belonged to him in a personal capacity and seeking a declaration of ownership or co-ownership.
3. The time for service of defences was extended into 2011. The agreed date was 10th May 2011 but before that could happen, on 6th May 2011, Dr. Coward served a notice of discontinuance. IKOS had planned to counterclaim for its own relief claiming copyright, and claiming that Dr. Coward was infringing or intended to infringe that copyright, and they challenged Dr. Coward's discontinuance. They applied to have the notice of discontinuance set aside and Dr Coward conceded the point. Thereafter IKOS pleaded in that action, with the result that that action in this jurisdiction (which is the one before me) is the action in which the parties' competing copyrights are to be resolved. There are other proceedings in Cyprus and perhaps elsewhere, but I do not need to deal with those.
4. IKOS had established that Dr. Coward had downloaded a version of their software, as identified above. This has now been admitted by Dr. Coward but was not admitted for some considerable time. IKOS also formed the view that a copy of what they regarded as their software had been supplied to Hogan Lovells by Dr. Coward. This view has its genesis in a letter of 7th December from Hogan Lovells then, as now,

acting for Dr. Coward, to IKOS' solicitors, Bird & Bird. It informed them that Dr. Coward and his new company were in the process of developing new trading software and proposed an independent inspection of the new software to see the extent to which it corresponded to IKOS's. It went on to say that Dr. Coward's company was subjecting the new software, "to a legal audit by this firm and Queen's Counsel", and went on to say that in the circumstances IKOS had no basis for saying that the new software would be contain any software from IKOS's.

5. Bird & Bird asked for a copy of the audit on 10th December and 22nd December 2010. On 23rd December Hogan Lovells responded that the audit was an on-going exercise and not a document so a copy could not be provided. Bird & Bird responded on 22nd January 2011 by asking for an explanation of the methodology and the basis on which the audit was being conducted, pointing out that an audit would require that the auditor see the details of their clients' proprietary technology, about which they were not keen, to say the least. This request was ignored, as was a chaser on 16th February.
6. On 12th May Bird & Bird pointed out that their point about access being required to their software was being ignored and asked for a straight answer to the question of whether Dr. Coward or anyone on his behalf took, and also then had, a copy of the IKOS software. On 8th May the question was repeated, pointing out that the overwhelming inference was that Dr. Coward had taken and still had the software. They doubtless took the entirely reasonable view that it would be difficult to conduct anything resembling an audit without actually looking at their software.
7. In a letter of 25th May Hogan Lovells said that they declined to answer any questions on those topics when IKOS and others had made criminal allegations against Dr. Coward in Cyprus and Monaco. So far as the audit was concerned Hogan Lovells said that it "has relied on no more than a recollection of features of the IKOS software". It sounds from that as though they were playing it down, having previously played it up.
8. On 27th May Bird & Bird asked Hogan Lovells to confirm that they would keep safe all copies of the IKOS software in their custody and control. Hogan Lovells replied on 31st May that, "Without making any admissions, we confirm that anything we might hold which arguably IKOS have an interest in will be retained within our custody and control". It is apparent that they were still studiously not saying whether they held a copy of the software. When Bird & Bird again challenged them to say whether they had been provided with a copy of the software, Hogan Lovells replied on 24th June that, "To the best of our knowledge and belief, no IKOS software has been accessed in relation to the audit exercise".
9. There was thus a deliberate failure to state clearly whether or not they held a copy of the software. IKOS nonetheless believed that they did and in the course of this correspondence had issued the claim form in the present proceedings against Hogan Lovells on 27th May 2011 in which delivery up of all copies of the software was claimed pursuant to sections 99 and 114 of the Copyright, Designs and Patents Act 1988.
10. On 27th June Hogan Lovells applied to the court to strike out the statements of case as disclosing no reasonable grounds for bringing the claim and as an abuse of process;

alternatively, summary judgment on the footing that the proceedings have no real prospect of succeeding on the claim in issue and there was no other compelling reason why the case should be disposed of at a trial. The costs of the application were expressly sought on an indemnity basis. That is the application which has now been abandoned.

11. There is a short witness statement in support of the application provided by Mr. Adam Cooke, a partner in Hogan Lovells. I need to set out some of its terms because its precise terms are now relied on by Mr. Hollander QC, who appears for IKOS. In paragraph 3 Mr. Cooke deals with the basis on which the statements of case do not disclose the cause of action. He says:

"3. The Claimants seek an order for delivery up under section 99 of the Copyright, Design and Patents Act 1988 ('the Act') as well as an order for forfeiture under section 114 of the Act. The Claimants state that they believe that my firm has infringing copies of the Claimants' software in our possession custody and/or control (see paragraph 19 of the Particulars of Claim). Section 99 of the Act however relates to the situation where "a person has an infringing copy of a work in his possession, custody or control *in the course of a business.*" There is no allegation in the Particulars of Claim that if any infringing copy were held by our firm, it would be held in the course of a business. Anything which my firm may hold on behalf of clients is held in connection with the conduct of legal proceedings and the provision of legal advice. Accordingly, the Particulars of Claim disclose no reasonable grounds for bringing the claim and as a result the Claimants have no real prospect of succeeding on the claim."

The italicised emphasis in that paragraph is Mr. Cooke's.

12. His point, as elaborated in argument, is that liability under the section is confined to cases where the possession is held in connection with the business. That cannot be said of a solicitor who holds the material in order to advise his client; and it is said that Copinger describes a suggestion to the contrary as absurd. Thus, it is said, not only do the Particulars of Claim not contain a relevant averment, also it is said that that relevant averment could not realistically be pleaded anyway because it would be pleading an absurdity.
13. That is the nature of that part of the striking out case. Mr. Hollander draws attention to the careful wording of that paragraph, which again does not actually state whether software is held by Hogan Lovells or not.
14. The statement goes on to deal with a limited part of preceding correspondence and sets out why the proceedings are said to be an abuse of process. Paragraphs 7 to 10 read:

"7. In the Hogan Lovells Action, which was commenced on 27 May, the Claimants base their claim on my firm's letter of 7 December 2010 (see paragraph 17 of the Particulars of Claim)

in which we said that we were subjecting the new software of our client's company, Marmidons (Cyprus) Ltd to legal audit by our firm and Queen's Counsel. The Claimants assert that any sensible legal audit cannot be carried out without a copy of the Claimants' software and, on that basis, they ask the Court to infer that my firm must have been provided with a copy of the IKOS software in connection with any such audit (see paragraph 18 of the Particulars of Claim). Copies of the solicitors' correspondence referring to the audit, from 7 December 2011 to date, are attached as Exhibit ANC-2.

8. On 25 May, two days prior to the issue of the Claim Form in the Hogan Lovells Action, my firm wrote to Bird & Bird to explain that 'the software being created for Dr. Coward's new venture is being created without referring to any IKOS software. Similarly, the IP inspection and arbitration agreement which we have been pressed you on you since December last year relates to an audit which has relied upon no more than a recollection of the features of the IKOS software.'

9. I confirm that no IKOS software has been accessed by Hogan Lovells or counsel in relation to the audit exercise or otherwise. The exercise has been carried out by interviewing those involved in writing the new software and testing the account provided by them without reference to the IKOS software.

10. The Claimants have commenced the Hogan Lovells Action without any letter before action and in the face of an explanation which had been given in relation to our audit (i.e. our letter of 25 May). At the same time they have issued proceedings against our client (i.e. the IP Action) and they have two other sets of proceedings pending against Dr. Coward in Cyprus in respect of essentially the same intellectual property, commenced on 23 December 2009 and 6 May 2011 respectively. In the circumstances, I believe the commencement and pursuit of these proceedings against my client is an abuse of the court's process."

15. Again, Mr. Hollander points to the apparent extreme care with which these paragraphs are worded. Again, they fail to deal in terms with whether any software is held by them and they seem to go out of their way to skirt around the point. I agree with that description of what the words apparently do.
16. I also observe there is an apparent fundamental flaw in the reasoning which is strange in such a carefully crafted witness statement. Paragraph 10 indicates where the abuse of process lies. The abuse is said to arise because the proceedings were started without a letter before action at the same time as there are two other sets of proceedings pending against Mr. Coward and because an explanation had been given about the audit. The poverty of reasoning is clear. None of the factors said to make the proceedings an abuse do so, either separately or accumulatively. The explanation

of the nature of the audit is not a factor which obviously renders the proceedings an abuse. Indeed, the development of the description of the audit is such as to leave one wondering what useful purpose could be performed by it at all and it was certainly not a description which should have satisfied IKOS about anything, much less than one which made section 99 proceedings an abuse. Nor does the mere existence of the other proceedings, which are not described at all, make these proceedings an abuse. All in all it is impossible to see how a solicitor could be responsibly put his name to paragraph 10. In all the circumstances, IKOS were not obliged to take Hogan Lovells' say so against the background of their correspondence that no IKOS software had been accessed in relation to the audit exercise or otherwise. In any event, that factor does not make the present proceedings an abuse.

17. However, I would observe that the point made above in relation to the "course of business" point does not as a point suffer from the same vices. It is not obviously unarguable to put that description at its lowest. There was a response to this evidence in the form of a witness statement from IKOS, but I do not need to read it.
18. The next material event was the service of Dr. Coward's reply in his action, in which Hogan Lovells were still acting, on 26th September. That reply admitted copying some of the IKOS software, apparently in anticipation of a dispute about it, and admitted that a copy of that software was held by Dr. Coward's solicitors. A short exchange of correspondence established, not surprisingly, that those solicitors were Hogan Lovells. Thus, in short order, there was admitted what Hogan Lovells had been skirting around for the previous five months or more.
19. The next material event was that on 5th October, and out of the blue, Hogan Lovells announced that they were abandoning their strike out applications. No reason was given. IKOS could not, of course, resist this discontinuance but they then pressed for their indemnity costs. That has ultimately resulted in the hearing before me.
20. In advance of the hearing, IKOS served a skeleton argument. That argument claimed that in the supporting witness statement Mr. Cooke made it clear that Hogan Lovells did not have a copy of the software in question and that that was the basis of the summary judgment application. That, it was said, could be seen to be untrue once the defence was served. It also took points about the absence of necessary averments in the witness statement. On this basis and because there had been no explanation of the abandonment, IKOS sought indemnity costs.
21. I should add that in their abandonment Hogan Lovells had accepted that they would have to pay standard basis costs up to the date of the abandonment.
22. The response to those assertions in the skeleton argument came in the form of a second witness statement from Mr. Cooke. He resisted the suggestion that he had intended to mislead in his first witness statement, while acknowledging and that his statement was "carefully worded" and that "care was being taken in respect of what was said or not said concerning the software". Then, he went on to seek to falsify the averment that he had omitted certain technical averments himself.
23. At that point he went on to deal with the abandonment. The terms of his witness statement are, to my eyes, very odd. They are as follows:

"13. I wish to indicate, insofar as I am able without waiving any privilege, how the abandonment of the application may be seen to have been made in the interests of saving time and costs.

14. My starting point is that there is no possible legitimate basis for the Claimants having wished to continue these proceedings against HL once the position with respect to the software in question had been pleaded in the UK IP proceedings and the position with respect to what was held by my firm had been confirmed in correspondence [AB2/18/2]. The history of this dispute would not give anyone reason to suspect that the IKOS parties would not demand their cousin costs of any application which was made and not pursued against them, even in these circumstances. However, the costs that have been incurred up to 5th October were likely to be modest in comparison to the irrecoverable costs of pursuing the application and, accordingly, the abandonment of the application at that stage and an agreement to pay costs on a standard basis should have led to a saving for both sides. I of course, had I assumed that the IKOS parties would wish to continue the action and would refuse to accept payment of their costs on a standard basis, would have been better advised to have disposed of any thought of a sensible compromise."

24. The following points should be noticed. The paragraphs do not actually claim to set out the actual reasons for the abandonment. Paragraph 13 indicates that Mr. Cooke is going to suggest theoretical but not necessarily actual reasons for the abandonment (see the words "may be seen"). He does not say that what follows were the actual reasons. This is not mere infelicitous wording, in my view. It is plainly deliberate and we know that Mr. Cooke is given to providing very carefully worded witness statements (as indeed one would expect from any solicitor).
25. Next, what follows does not really make much practical sense, particularly in the context of the present dispute. His first sentence (the action loses its point once the admission is made by Mr. Coward) would, it seems to me, be a reason for continuing the striking out application, not abandoning it. Indeed, later in the hearing on the question of directions Mr. Bloch QC, for Hogan Lovells, submitted that the action had become pointless and ought to be stayed.
26. I also remind myself that the original application notice seeking a strike out claimed indemnity costs, which (if claimed *bona fide* but not merely to raise the temperature) suggested that the whole action was somehow improper. Quite how that sits with the abandonment of the striking out application I do not know. The remainder of paragraph seems to be saying that he knew his firm would have to pay the costs of the application and the costs would be saved if it were abandoned sooner rather than later. It does not say why it was abandoned.
27. The last sentence seems to suggest that Mr. Cooke assumed that IKOS would abandon the action if the striking out application were abandoned ("had I assumed that the IKOS parties would wish to continue the action...") without quite saying that he did

assume that. I find it very hard to accept, and do not accept, that he thought that abandoning the striking out application would lead to the abandonment of the action. Most parties with a claim do not respond to a failed attack on that claim by abandoning it anyway.

The parties' submissions

28. Against that background Mr. Hollander's oral submissions did not go so far as to say that Mr. Cooke had sought to mislead in his first witness statement. He acknowledged that, properly read, the witness statement did not actually deny that his firm held the software. He did however say that Hogan Lovells conduct overall and in this application was "gameplaying of the worse kind" and quite contrary to the spirit of the CPR. He pointed back to the history of their failure to acknowledge that they actually held a copy of the software and the immensely cagey correspondence and witness statements. He said they had never explained why the application to strike out was abandoned.
29. Mr. Bloch's submissions for Hogan Lovells, in the main, sought to criticise the other side for originally suggesting an intention to mislead. His clients had an obligation to protect the confidentiality and privilege of their own client and that put bars in the way of disclosure of certain information. The first Cooke witness statement was, he said, not misleading and indeed no one was misled, as the documents and subsequent conduct of IKOS demonstrated. The conduct of Hogan Lovells in this case was not improper and certainly was not of such a quality as to justify an order for indemnity costs.

The basis on which the indemnity costs can be ordered

30. The Court of Appeal has declined to list the sort of circumstances in which indemnity costs should be ordered (see *Excelsior Commercial and Industrial Holdings v Salisbury Ham Johnson* [2002] EWCA Civ 879). The sort of conduct which would justify such an order has to be conduct which is beyond the norm. Beyond that the court must determine whether it is so bad in its nature, consequences and context as to attract the stronger costs order. Without wishing to be seen to be entering into territory which the Court of Appeal has declined to enter, it seems to me that the relevant circumstances will or may include the extent to which the criticised conduct has actually caused costs to be incurred and whether the conduct is such that *per se*, and whether or not it caused extra cost, is such that it should attract the court's censure in terms of an indemnity costs order. I shall bear in mind those factors among the other factors that I take into consideration.

The determination of the application

31. Filtering out the relevant facts from the above and acknowledging the lower level of which IKOS now puts its case (gameplaying rather than misleading) the position is, I find, as follows. First, I agree that Mr. Cooke was not guilty of misleading in his first witness statement. That witness statements does not suggest that his firm did not hold the software. Second, it is not apparent to me that there is gameplay in the pejorative sense in which Mr. Hollander used that term. The witness statement is, as was conceded, very carefully worded. I think that is true to an extent which is perhaps unfortunate. Care in words is to be commended but that can go too far and lead to

suspicion in certain circumstances, including the present. It may be that, having regard to their client's interest and instructions, Hogan Lovells were not in a position to make an admission at a stage before the service of the Reply as to whether they held the software. On analysis, the witness statement would have allowed the court to decide the striking out case on the assumption that Hogan Lovells held the software without making a finding to that effect. The pleaded case invited that inference and on the striking part of the application the court would have made that assumption. It was however probably unwise to approach the matter in the way in which it was approached in the witness statement. It would have been better if Hogan Lovells had explicitly made the assumption, without making admissions, on which the court was to be invited to approach the point. It was probably asking for trouble to produce the witness statement in the form in which it was produced. However, I repeat, it was not misleading.

32. Third, although Mr. Hollander had accused Hogan Lovells of gameplay he was not able to identify the game that was being played. Nor can I. He referred to the history of Dr. Coward starting proceedings and then discontinuing them and said this was another incidence. But this was not Dr. Coward; this was Hogan Lovells. While Mr. Hollander said that Dr. Coward started and discontinued so as to get publicity for the relevant proceeding arising out of their commencement, and had done that more than once, that cannot be said to have been the purpose of the striking out application. The careful wording in the witness statement is, as I have said, an unfortunate way of going about the matter albeit at a time when their client had not admitted possession of the software so Hogan Lovells could not easily admit their own possession. Some degree of caution was probably justified. I note however that Mr. Cooke did not say this in his second witness statement.
33. Fourth, the striking out application was not on its face, and taken as a whole, hopeless. Although the abuse point is odd (see above), the main point that was to be taken (the course of business point) was not a manifestly bad point for a striking out application. The striking out application was not itself strikeable.
34. Fifth, no proper explanation was advanced by Mr. Cooke for the abandonment of the application. Mr. Bloch sought to give reasons on instructions from his client during the course of submissions but I declined to accept the material in that way. Mr. Cooke had an opportunity to put a good explanation in the witness statement and studiously declined to do so. In those circumstances, I did not allow the case to be supplemented in bald submissions without proper evidence.
35. Sixth, not only has no proper explanation been given, Mr. Cooke has sought to present something which I think he hoped might be taken as some sort of actual explanation but which is not. I do not otherwise see the point of saying what he said in paragraphs 13 and 14. Any potential reason for a discontinuance which is not relied on as actual is irrelevant. Furthermore, what follows is illogical and, as I have observed above, makes a suggestion as to part of an actual explanation which I do not accept. I do not believe that an experienced partner in a firm of hardened litigators, such as Hogan Lovells, in the context of this bitterly fought dispute could really have thought that the action would go away if the striking out application were abandoned. To that extent, I think there is an element of culpable gameplay in those two paragraphs. If Hogan Lovells did not want to give their actual reasons for

discontinuing and relied on privilege, whether theirs or their client's, then they should have said so or said nothing. Those two paragraphs are worse than unhelpful.

36. All this leads to the following picture. There was an application to strike out which had some merits and was not itself improper. It was supported by a carefully worded witness statement which was unwise but not improper. If the application had been fought and lost I very much doubt if it would have attracted an indemnity costs order.
37. Then comes the unexplained and, frankly, puzzling discontinuance. The real question becomes, in my view, whether an unexplained discontinuance of an application, where the application was prima facie proper, should lead to an award of indemnity costs, when coupled with such other abnormal factors as may exist in this case.
38. As a matter of principle, a mere abandonment should not, by itself, give rise to an order for indemnity costs. There ought to be something more before indemnity costs are ordered. I agree that this instance is one which goes beyond the norm, as referred to in *Excelsior*, but that, by itself, is not sufficient. There must be something more than mere departure from the norm. That departure must be sufficient in its nature and its context to attract the further costs order, whether because of the censure of the court or for other reasons.
39. In this case it is not normal to start a striking out application and, indeed, one which seeks indemnity costs in respect of the main action, and which suggests that the action is itself seen to be abnormally improper, and then to abandon it without explanation. It is hard to resist the inference that that abandonment was because of the admission in the reply, but that does not really advance IKOS's claim for indemnity costs. There was doubtless a tactical reason for abandoning the striking-out application which has not been disclosed. However, a party does not have to disclose the reasons for a tactical step and Hogan Lovells have not done so.
40. The matter boils down to an unexplained abandonment of an application, with some unwisely worded witness statements along the way, or in answer to the costs point. In my view, that is not sufficient to attract an award of indemnity costs. The step involved, the abandonment, has not caused costs to be incurred and is not in itself an improper step. Its nature and the lack of an explanation is not sufficient to justify an award of indemnity costs, even against the background of the conduct of the overall dispute hitherto, and does not cast doubt on the propriety of the original application. Therefore, I refuse IKOS's application for indemnity costs. I also reject Hogan Lovells' application for the costs between October 5th and now, and their application for those costs on an indemnity basis.
41. Taking the last point first, in the light of the background and the unexplained discontinuance, and particularly in the light of the approach taken in the first Cooke witness statement, the suspicions and attitude of IKOS were to some extent justifiable. The second Cooke witness statement, albeit coming late, would be likely to make things worse. If Hogan Lovells are to have their costs on an indemnity basis then they will have to establish that which they resisted in the application against them, namely that the pursuit of indemnity costs was itself so improper and outside the norm that it should attract that sanction. In my view, it did not even come close to that standard.

42. Of course, Hogan Lovells can only advance an application for indemnity costs if they otherwise have a costs order in their favour. I have not yet addressed that question. In fact I decline to give them any costs, so the question of indemnity costs is academic. The costs in question are the costs since 5th October. On that date the abandonment was announced. IKOS was entitled to some time to consider the matter and to decide whether just to leave the matter on the basis of standard costs. They are entitled to the costs of that exercise. Having so considered, on the basis of my findings they were not in the end justified in pursuing their application for indemnity costs. They were certainly not justified in pursuing it on the basis of some of the allegations made in the skeleton argument. It would be wrong to give them (IKOS) their costs from the time where they ought to have just accepted the standard costs. However, in all the circumstances, it would be equally wrong simply to consider Hogan Lovells to be the victors on the indemnity costs point and give them their costs of that debate as winners on the point. They have, to a very material extent, brought the debate on themselves by their odd and unexplained conduct. It would be wrong to apply the normal prima facie costs rule in that situation. In my view, the correct order in relation to the costs since the abandonment was notified is that each side should bear their own costs, save that, for the sake of clarity, IKOS should have their costs of and relating to a reasonable consideration of what to do in the light of the abandonment as part of the standard basis costs of the application. I will leave the parties to consider what order is necessary in order to make that point clear.
