Neutral Citation Number: [2023] EWHC 2031 (Ch)

Case No: BL-2022-BRS-000031

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 4 August 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

ANDREW HICKS ENGINEERING LIMITED	**Claimant**
- and -	
(1) JENK ASSOCIATES LIMITED	**Defendants**
(2) KINGSLEY PLASTICS LIMITED	

- -
- -

John Dickinson (instructed by **Tozers LLP**) for the **Claimant**
Claire Thompson (instructed by **Bertram Fairbanks**) for the **Defendants**

Hearing dates: 10 July 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……

This judgment was handed down remotely at 10.30am on 4 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on applications the subject of two notices, one by the claimant, dated 12 April 2023, and the other by the defendants, dated 4 July 2023. Both concern the appropriate costs orders to be made in proceedings which both sides agree are now unnecessary and can be brought to an end. Happily, the parties agree that the claimant should serve a notice of discontinuance under CPR rule 38.3, but that the court should order (under rule 38.6(1)) that, subject to the other points discussed in this judgment, the claimant should not be liable to the defendants for the costs of the claim. At the hearing, I indicated that the court would make that order. Unhappily, they disagree about two other aspects of the costs of the proceedings. One of them was in fact dealt with at the hearing. This was whether the defendants should pay the claimant's costs of an application dated 10 January 2023 for an extension of time in which to serve its particulars of claim. For reasons given shortly at the hearing I dismissed that application.

2. The other aspect of the costs liability was however more substantial, at least in terms of the time taken at the hearing to argue it. It concerns the costs of an application for an interim injunction sought by the claimant by notice dated 28 September 2022, which went to a hearing before me on 5 October 2022. This hearing resulted in no injunction being granted, as the defendants gave certain undertakings, and the application was adjourned generally with liberty to restore. However, time for the service of the claimant's particulars of claim was extended to 20 January 2023, and the costs of the injunction application were reserved to me at a future hearing to be listed if necessary. The parties thereafter managed to negotiate a solution to their dispute, which covered almost everything. The only matters remaining unagreed were those dealt with at the hearing before me on 10 July 2023.

BACKGROUND

Western Barn Industrial Estate

3. Before I can deal properly with the costs issue remaining, I must set out some of the background to the dispute between the parties. It concerns a small industrial estate called the Western Barn Industrial Estate, in Hatherleigh Road, Winkleigh, in Devon. An aerial photograph appears below.

4. It will be seen that a U-shaped (private) access road dropped down from two points on the public highway, and surrounded three industrial units, numbered 1, 2 and 3, from top to bottom, so that 1 (the largest) was nearest the highway, and 2 and 3 (which were contiguous) were furthest from the highway. Unit 4 was to the east of unit 1, but on the other side of the access road. Between unit 1 and the access road to the east, there was space for large vehicles to turn. This was convenient for vehicles for both unit 1 and unit 4, and was referred to as the "turning circle". South of unit 4 was a triangular area used as a car park. On both sides of the access road at the bottom of the loop were areas which could be used for storage. To the north-east of unit 4 was a further building referred to as "the Office".

5. In 2002 the then freeholder of the estate granted a lease of unit 1 to the second defendant. In 2005 the freeholder granted a five-year lease of unit 4 to Mr and Mrs Hicks, the shareholders in and directors of the claimant, a company specialising in steel fabrication. On 19 June 2008, the freeholder sold the freehold of unit 4 to Mr and Mrs Hicks. The transfer to the Hicks contained express provisions as follows:

> "1. Full and free right at all times hereafter and for all purposes connected with the use and enjoyment of the Property (in common with the Transferor and all other persons having the like right) to pass and re-pass at all times of the day and night with or without vehicles over and along the access way from the Property to the publicly maintained highway to the north of the Retained Land SUBJECT TO paying a fair proportion according to user of the cost of maintaining such accessway.
>
> 2. The right to free and uninterrupted passage and running of water soil gas and electricity to and from the Property through the pipes wires drains or cables now laid or within 80 years from the date hereof (the perpetuity period) to be laid in under through or over the Retained Land with power

> upon giving prior reasonable notice (except in case of emergency) to enter upon the Retained Land with or without workmen and equipment to cleanse repair maintain renew and relay any pipes wires drains or cables doing no unnecessary damage in the exercise of such right and making good forthwith any damage in fact caused and SUBJECT TO the payment of a fair proportion of the expense of the repair and renewal of any common pipes wires drains or cables … "

6. In September 2008, the Hicks granted a 20-year lease of unit 4 to the claimant. In 2013 the freeholder sold the remainder of the freehold of the estate to the first defendant, whose sole shareholder and director is a Mr Down. Some time thereafter there were discussions between Mr Down and Mr and Mrs Hicks as to terms on which the Hicks and the claimant might relocate and the whole estate be redeveloped as residential property. However, negotiations and indeed relations between the parties broke down, and no agreement was reached.

The first proceedings

7. On 25 June 2021, Mr and Mrs Hicks and the claimant issued proceedings against the defendants in the County Court at Exeter. I will call these the "first proceedings" or the "first claim". These proceedings were later transferred to the County Court at Bristol, and, on 19 January 2022, from the County Court to the High Court, Bristol District Registry. Those proceedings made a number of claims on behalf of all three claimants against the present defendants. I will set these out in a moment. On 24 March 2023 the claimants' solicitors made a Part 36 offer to settle the first proceedings. I will come back to the terms of this offer. On 16 June 2022, the defendants accepted the offer, and, on 9 August 2022, the court in its order recorded that acceptance, but also dealt with certain costs matters which had arisen.

The statements of case

8. The claim form stated that the claim was "for injunctive and other relief in respect of wrongful interference with the Claimants' property rights". The particulars of claim, dated 21 June 2021, asserted (at [2]) that the first and second claimants were the owners of the freehold of unit 4, (at [12]) by virtue of a transfer dated 19 June 2008, and (at [7]) that the third claimant was the occupier of the unit, initially under the lease granted in 2005, and (at [17]) latterly under the lease granted in September 2008.

9. The particulars of claim further alleged (at [8]) that under the 2005 lease the third claimant was granted certain rights in relation to parts of the industrial estate other than unit 4, namely rights of way over the access road, and (at [9]) rights to use the electricity cables, electricity substation, the water pipes, sewage drains and the sewerage pump of the industrial estate. In addition, it was alleged (at [13]) that the 2008 transfer included an express grant of a right of way over the entire access road, main gate and back gate, and (at [15]) an express grant for the benefit of unit 4 of a right to use the electricity cables, the electricity substation, water pipes, the sewage drains and the sewerage pump of the industrial estate. It was also alleged (at [16]) that the 2008 transfer did not

exclude the operation of section 62 of the Law of Property Act 1925, and that accordingly "all the uses and/or liberties, privileges, easements, rights and advantages appertaining to or reputed to entertain to Unit 4 and enjoyed through the occupation of Unit 4 by the First and Second Claimants through their agents the Third Claimant under the 2005 lease" were included in the 2008 transfer.

10. The particulars of claim went on to allege (at [18]) that the first and second claimants in January 2015 acquired the Office from the first defendant's predecessor in title, and that the transfer granted rights for the transferee in connection with the use and enjoyment of the Office to the free and uninterrupted passage and running of water soil gas electricity and other services to and from the Office through installations now or later laid over under or through the rest of the industrial estate (now owned by the first defendant).

11. It was then further alleged (at [22]) that there was an agreement reached between the claimants and the first defendant whereby the claimants would support the first defendant and the first defendant would provide alternative premises for the third claimant nearby. This was referred to as the "Informal Agreement". It was then alleged (at [23]) that the first defendant had reneged on the Informal Agreement, and was wrongly interfering with the claimants' rights in relation to unit 4.

12. The particulars of claim then went on to set out a number of actions attributed to the defendants between June 2020 and May 2021 which were alleged (at [24]) to amount to

> "a breach and/or threatened breach of and wrongful interference with:
>
> (1) The Unit 4 express right of way over the Access Road and Back Gate granted in the 2008 Transfer.
>
> (2) The Unit 4 express rights to use the electricity cables and Electricity Substation, the sewers and Sewerage Pump in the 2008 Transfer.
>
> (3) The Unit 4 rights to park in the parking area and to store materials in the areas shown on the plan at Annexure Five under the implied grant in the 2008 Transfer.
>
> (4) The Office express rights to use the electricity cables and Electricity Substation, the sewers and Sewerage Pump granted in the 2015 Transfer."

13. The defence of the defendants and counterclaim of the first defendant were dated 30 July 2021. Paragraphs 2 and 12 of the particulars of claim were admitted (at [2] and [11]). As to paragraph 7, the third claimant's occupation of unit 4 was admitted, but the formal grant of the 2005 lease was denied (at [6]). Paragraph 17 was admitted (at [16]). Paragraph 8 was largely denied, except for a right of access from the main gate over the access road to unit 4, and a limited permission (not amounting to a property right) to use the remainder of the access road and car park area (at [7]). Paragraph 9 was partly admitted, but the formal grant of the 2005 lease was denied, and it was also denied that the 2005 lease referred to either the electricity substation or the sewerage pump (at [8]).

Paragraph 13 was admitted as to the terms of the 2008 transfer, but denied as to its effect over the main part of the access road (at [12]). Paragraph 15 was admitted as to the terms of the 2008 transfer, but denied as to the references to the electricity substation and the sewerage pump (at [14]). Paragraph 16 of the particulars was largely denied, although it was admitted that the 2008 transfer did not expressly exclude the operation of section 62 (at [15]). Paragraph 18 was not admitted, and denied to the extent that it alleged that the Office had any right to the supply of electricity or water (at [17]). As to paragraph 24, it was denied (at [27]) that the matters complained of amounted to an actionable nuisance as alleged or at all.

14. Whilst dealing with the defence, I need to add this. The final two sentences of paragraph 23 of the defence stated as follows:

> "The Claimants' said conduct includes a course of dealing culminating [sic] these proceedings, whereby the Claimants assert that Unit 4 enjoys rights over Western Barn that would stultify the proposed development, and they thereby seek to ransom the proposed development, contrary to the Informal Agreement. The Defendants refer, without limitation, to the valuation obtained by the Claimants claiming that the ransom value of Unit 4's alleged rights over Western Barn is £500,000."

15. The claimants' Reply and Defence to Counterclaim was dated 27 August 2021. Paragraph 6 of the Defence was denied. Paragraph 7 was mostly denied. Paragraphs 8, 12, 14, 17 and 27 appeared not to be pleaded to. Some parts of paragraph 15 were denied. Paragraph 23 (referring to the valuation report) was denied.

16. As a result of the statements of case, it appears that the main issues between the parties were:

(1) the claimants' rights to use (a) the remainder of the access road (*ie* round the loop to the back gate), (b) the car park and (c) the storage areas;

(2) the claimants' rights to use the electricity substation and sewerage pump;

(3) the effect of section 62 of the Law of Property Act 1925 on the transfer of the freehold of unit 4 to the Hicks in 2008 (and consequently on the rights granted under the 2008 lease).

In each of the first and second case the claimants claimed to have those rights, and the defendants denied that they had them. In the third case the defendants denied that section 62 added anything in favour of the claimants.

The Part 36 offer and the settlement

17. As I have said, the first proceedings were settled by the defendants' acceptance of a Part 36 offer made by the claimants. The terms of this offer were set out in a letter sent by the claimants' solicitors to the defendants' solicitors dated 24 March 2022, headed as follows:

"Hicks & Ors v Jenk Associates Limited & Ors

In the Business and Property Courts in Bristol, Claim no. H31BS912."

18. The relevant terms were as follows:

> "Our client is willing to settle the entire proceedings, including any actual or proposed counterclaims, in the matter referred to above on the following terms:
>
> - Your client to pay our client, within 14 days of accepting this Offer, the sum of £500,000 (the settlement sum), by electronic transfer into the following account:
>
> TOZERS LLP CLIENT ACCOUNT
>
> [bank account details]
>
> - Forthwith on receipt of the settlement sum our client will execute a transfer in favour of your client … of the whole of the land in registered freehold title no. [details of registered title to unit 4].
>
> - This Offer takes account of any counterclaims that your client may have against ours.
>
> - The settlement sum does not include costs, and, as mentioned above, your client will be liable to pay our client's costs on the standard basis, to be assessed if not agreed, up to the date of service of notice of acceptance if this Offer is accepted within the relevant period.
>
> - The settlement sum is inclusive of interest until the relevant period has expired. Thereafter, interest at a rate of 8% will be added."

19. The letter refers to "our client" and "your client", although in fact there were three claimants and two defendants. In addition, the rights claimed by the three claimants were not exactly the same. The rights claimed by the first and second claimants were said to arise under the 2008 transfer of the freehold. So they would be freehold rights. On the other hand, the rights claimed by the third claimant were said to arise under the 2008 lease. So they would be leasehold rights, albeit granted out of the freehold taken by the first and second claimants under the 2008 transfer.

20. The third witness statement (dated 10 January 2023) of Jill Headford, the claimant's solicitor, made in the present claim, said (at [10]) that the first claim was one "in trespass/nuisance for damages for interference with *freehold* rights … " whereas "in the present action, the Claimant as Tenant of Unit 4 seeks relief against the defendants … in relation to its *leasehold* rights … " (emphasis supplied). This is not correct, as the defendants' counsel pointed out in her skeleton argument (at [43]-[44]). The present claimant was also a claimant in the first claim, and claimed by virtue of its leasehold rights. Moreover, the

section 62 "enhancement" to the freehold claimed in the first action, and denied by the defendants, was also in issue. In any event, even if the leasehold rights claimed in the second claim had not been in issue in the first one, they could not be greater than the freehold rights under the transfer, which the claimant accepts were the subject of the settlement.

21. Nevertheless, the terms of the offer included (i) the payment of £500,000 by the first defendant to the Hicks, (ii) the transfer by the Hicks to the first defendant of the freehold interest in unit 4, as well as (iii) the settlement of "the entire proceedings". The immediate focus of the parties thereafter was very much on the payment of the money and the transfer of unit 4, and much less (if anything at all) on what settlement of "the entire proceedings" involved. The transfer was duly completed on 5 August 2022, so that the first defendant became the freeholder of the whole estate, but with the present claimant as its tenant of unit 4, under a lease which still had about six years to run.

The correspondence between the parties after the settlement

22. It appears that at that stage the defendants considered that the whole estate *other* than unit 4 could be sold to a developer, but that the claimant was seeking to persuade the defendants to accept a surrender of the lease so that the *entire* estate could be redeveloped. There then followed a lengthy correspondence, usually between the parties' solicitors, sometimes involving several communications a day, dealing with various subjects, and often expressed (on the claimant's side) in unfortunately bellicose terms. It is not necessary for me to deal with the whole correspondence. For present purposes, the following summary will suffice.

23. The defendants complained in a letter of 31 August 2022 of conduct by the claimant which they said were causing difficulties for their potential purchaser. The letter referred to the first proceedings and the settlement of those proceedings, and then said:

> "Those rights claimed by your clients in the proceedings, referred to in short form in this correspondence as the turning circle, car parking area (and areas of the car park for storage) and use of the through road ('the Claimed Rights') were given up by virtue of the settlement.
>
> […]
>
> Your clients have continued to purport to exercise the Claimed Rights and you have stated, bizarrely, in correspondence, that the Claimed Rights were not given up by your clients as part of the settlement between the parties."

I note in passing that this summary does not refer to any rights in connection with the flow of electricity or sewage.

24. The claimant by email of 12 September 2022 in turn complained of conduct by the defendants which it said infringed the claimant's rights under the lease "including those over the wider area of Western Barn", in particular by padlocking the gate at the rear entrance to the estate. As to the defendants' case that the rights were given up by the settlement, the claimant said:

> "The proceedings consisted of a claim and a counterclaim with both sides seeking declarations as to the extent of the rights of access, storing, parking, services etc. Your clients have never explained why they say that the terms of compromise of the claim and counterclaim should be said to include an implied declaration in the terms sought by one side as opposed to those sought by the other."

25. By letter of 13 September 2022 the defendants again said that that the rights now claimed by the claimant had been given up by the settlement of the first proceedings, and threatened further injunctive proceedings. On 15 September 2022 the claimant wrote again to seek written undertakings that the defendants would not "obstruct, impede or interfere with the rights of our client's access, storage and parking at Western Barn as rightfully enjoyed under the 2008 Lease", failing which injunction proceedings would be issued. On 21 September 2022 the claimant wrote again to inform the defendants that proceedings were being prepared by counsel, but "in a last effort to reach agreement and avoid further costs" the request for written undertakings was repeated, and draft undertakings were enclosed.

26. On 22 September 2022 the defendants replied, enclosing a copy of the claimant's Part 36 offer, and drawing the claimant's attention to the terms of the offer, including the words "our client is willing to settle the entire proceedings…" It went on to say once more that the claimant had "in consideration for the payment of £500,000, given up the 'claimed rights'." The letter concluded by making clear that the defendants had "no intention to offer the undertakings that are sought". On the same day, the claimant wrote again, to complain about further alleged obstruction of the claimant's rights under the lease. It concluded with the words "if injunction proceedings are to be avoided we do need to hear from you urgently please". A postscript to this letter stated that "This has crossed with your own letter of today but there is still time for your clients to reconsider their actions". It is therefore clear that the defendants' letter arrived before this one was sent.

27. On 27 September 2022 the claimant wrote again referring to the earlier letters of 15, 21 and 22 September 2022. This letter attached a draft claim form and an application for interim injunction which it was said would be issued if the written undertakings sought were not received by 4 PM on that day. On the same day the defendants responded by email, again saying that the rights claimed by the claimant were part of the claimant's pleaded case in the earlier claim, which was settled on the terms of the Part 36 offer.

28. The tone of the whole correspondence on each side is very different. On the defendants' side, the solicitors' letters and emails are generally short, straightforward, and polite. On the claimant's side, the correspondence is lengthy, complex and tendentious, indeed sometimes aggressive. Everything is argued out at length. Of course, solicitors must defend their clients' interests, but litigation by correspondence is to be avoided. It is both time-consuming and expensive, it unnecessarily raises the temperature (which makes settlement more difficult to achieve), and it does not decide anything.

THE SECOND CLAIM

Details of the claim

29. On 28 September 2022 the claimant both issued the present (second) proceedings and also applied for an interim injunction. As to the former, the endorsement on the claim form stated that:

> "The claimant's claim is for relief in respect of nuisance and/or derogation from grant since on or about 17 June 2022 by way of substantial interference with the Claimant's rights and easements over Western Barn Industrial Park … as Lessee under a Lease dated 16 September 2008 of premises situate at and known as Unit 4, Western Barn Industrial Park … occupied by the Claimant for the purpose of its steel fabrication business, against the First Defendant, the Freehold Owner of Western Barn, and/or the first and second defendants, the joint Freehold Owners, and the reversioners to the Claimant's lease, of Unit 4 aforesaid … "

So the claim is one for interference with rights derived from a lease granted out of the freehold as transferred to the Hicks in 2008.

30. The claim form stated that the particulars of claim were "to follow". In fact, they never did, because the immediate problem was dealt with by undertakings, as set out below, and thereafter the parties negotiated for the surrender of the lease of unit 4. This means that the only *formal* statement of the terms of the second claim is the general endorsement on the claim form itself. It also follows that no defence has ever been filed in the second proceedings. Nevertheless, details of the claims which may have been intended to be made can be seen from other materials before me.

31. These materials include the first witness statement (dated 26 September 2023) of Jill Headford, the claimant's solicitor, in which she said (at [40]) that, since the settlement of the first claim, the defendants

> "began to object to [the claimant's] continued exercise of its rights of access, storing and parking. Since 14 September 2022 the Defendants/Respondents have been obstructing the Claimant's operations by first of all padlocking the back gate and then blocking it off with large kiosks … to stop [the claimant's] vehicles and delivery vehicles coming in or going out and also by a fence they have erected close to the Unit 4 lease boundary".

This statement of the claimant's complaints refers only to rights of access, storage and parking. Electricity and sewerage are not mentioned.

32. The materials before me also include the earlier correspondence between the parties, in particular the letter of 21 September 2023 from the claimant's solicitors to the defendants' solicitors, enclosing draft undertakings with a plan attached. These (in summary form) appear to have been intended to protect the following claimed rights:

1. Right of way over the *whole* of the access road, and not just the part leading immediately from unit 4 to the main gate.

2. Right of way through the back gate to the public highway.

3. Right to use the turning circle and areas of the estate as set out in the attached plan.

4. Right of loading and unloading in certain areas of the estate as set out in the attached plan.

5. Right of parking in the car park.

6. Right of storage of goods in certain areas of the estate as set out in the attached plan.

7. Right to free passage of electricity through the cables and other apparatus under the estate, including the use of the substation.

It will be noted, first, that the right to passage of electricity has been added to earlier statements of the rights claimed, but, second, that rights to the use of sewage pipes and the sewerage pump are apparently not sought to be protected at all.

Application for an interim injunction

33. As I have said, the application for an interim injunction was issued on 28 September 2022. It was listed for a hearing before me to take place on the morning of 5 October 2022. (In the event it was heard at 2 pm, and because of a transport strike, it took place remotely.) On 26 September 2022 Jill Headford, the claimant's solicitor, made her first witness statement in these proceedings. In that witness statement she explained that the claimant "was willing and able to give a cross undertaking in damages". She said that it owned an office building worth between £160,000 and £170,000, and that it had a current bank balance in excess of £450,000, but had no long-term liabilities other than a "bounceback" loan of £43,000.

34. On 27 September 2022 the defendants sent an email to the claimant, reiterating their position. This included a statement that

> "The rights which are alleged to have accrued to the company under its lease were pleaded at paragraph 16 of the POC [in the first claim]. Your client [the claimant] is seeking to bring an identical claim, which is an abuse of process by virtue of the acceptance of your client's Part 36 offer".

On 29 September 2022 the claimant wrote a lengthy letter to the defendants responding in detail to the points made by the defendants in their email of 27 September 2022. On 30 September the defendants suggested mutual undertakings to secure the position of all the parties in the short term, and to last 28 days. The claimant replied by return email that the undertakings should not be time-limited, but terminable on 28 days' notice.

35. On 3 October 2022 the defendants responded that they would agree to give most of the undertakings sought "to protect the position pending compromise of the disputes between the parties or pending further reference to the court", to be terminable on 14 days' notice. Further negotiations on the terms of the undertakings were carried out between the parties in correspondence on 3 and 4 October 2022. In particular, a letter from the defendants' solicitors to the claimant solicitors sent on 4 October 2022 raised the question of the ability of the claimants to support the cross undertaking in damages which would be required for an interim injunction. On the same day, Jill Headford made her second witness statement, in which she expanded upon the financial position of the claimant, exhibiting bank statements evidencing the claimant's bank balances.

36. The existence of the further negotiations between the parties was specifically adverted to in the claimant's then counsel's skeleton argument sent to the court on 4 October 2022. (Their existence may well also explain why the defendants did not file any evidence.) The claimant's skeleton argument also submitted (at [57[(1)) that there was a serious issue to be tried, and (at [64]) that "the balance of convenience militates in favour of the grant of the injunctive relief the Claimant seeks". These are part of the well-known *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 criteria for the grant of an interim injunction. Agreement between the parties on all of the undertakings sought led to the application being dealt with by consent, on the basis of those undertakings being given by the defendants to the court and to the claimant, terminable on the basis of 14 (not 21) days' notice.

37. The substance of the order made by the court on 5 October (which was expressed to be made by consent) was summarised in paragraph 2 above. The terms of the important paragraphs were as follows:

> "2. The said Application be adjourned on the Defendants' attached undertakings with liberty to restore.
>
> 3. The Claimant's time for service of Particulars of Claim be extended by consent in accordance with CPR 2.11 to 4pm on 20 January 2023.
>
> 4. The costs of the Application dated 28 September 2022 be reserved to HHJ Paul Mathews at a hearing to be listed if necessary."

Negotiations for the surrender of the lease of Unit 4

38. The parties continued thereafter to negotiate on the terms of a surrender of the lease. This was finally agreed in writing on 8 November 2022, but was not due to be implemented by January 2023 (when time for service of the particulars of claim would expire). On 3 January 2023 the claimant sought a further agreed extension of time to 14 April 2023. The defendants replied substantively on 9 January 2023 that they could not consent to an extension longer than 28 days. There was further correspondence, but the claimant issued an application on 10 January 2023, and on 19 January 2023 DJ Markland made an order extending time until 14 April 2023.

39. The completion of the surrender of the lease of unit 4 by the claimant took place on 31 March 2023. The form TR1 employed states that the "transfer" (*ie* the surrender) was "not for money or anything that has a monetary value", although the claimant was released from all the tenant covenants of the lease and any subsisting liabilities for breach of them. The claimant subsequently vacated the unit and moved away.

The present application

The order sought

40. On 12 April 2023 (two days before the deadline for filing particulars of claim) the claimant issued the present application. It seeks "Disposal of the Claim and summary assessment of the Claimant's costs – see draft order". The substance of the draft order is as follows:

> "1. The Claimants' time for filing and service of Particulars of Claim be extended to the date of this order.
>
> 2. The Defendants pay the Claimant's costs of its application dated 10 January 2023 summarily assessed in the sum of £975.00 and payable within 14 days.
>
> 3. The Defendants pay the Claimant's costs of its interim injunction application dated 28 September 2022 and its application dated 12 April 2023, together summarily assessed in the sum of £[ ] and payable within 14 days.
>
> 4. The Claim be discontinued with no further order as to costs other than as provided herein."

41. As I have already said, at the hearing on 10 July, the costs order at paragraph 2 was refused, and the substance of that at paragraph 4 was granted by consent. (For clarity, I add that the court does not *order* a discontinuance. The *claimant* must discontinue by notice filed and served, under rule 38.3, but the court orders, under rule 38.6(1), that the normal order that the claimant pay the defendants' costs does not apply.) I made no order on paragraph 1, because in light of the intended discontinuance there was no point in it. That left the application for costs of the interim injunction application dated 28 September 2022.

The valuation report issue

42. I referred above (at [14]) to paragraph 23 of the defence and counterclaim. On 12 January 2022 the claimants applied by notice to strike out the final sentence of this paragraph, on the basis that it referred to a valuation report which was subject to "without prejudice" privilege. On 19 January 2022 DJ Taylor gave directions to trial in this claim, and also ordered that the application to strike out be listed before him on the first available date after 14 days. However, on 17 March 2022 the same judge ordered that this application, together with another dated 18 February 2022 be listed together in a half day hearing, but with the

strike out application heard first. In fact they were not listed before the judge until 9 August 2022, when no substantive order was made on the application, but the defendants were ordered to pay the claimants' costs of it. I do not have the benefit of any judgment or other reasons why the judge so decided. But nothing appears to turn on this.

43. At the hearing before me, counsel for the claimant submitted that I should not look at the report, on the basis that it was subject to "without prejudice" privilege, having been prepared for the purposes of negotiations between the parties. The evidence filed on behalf of the claimant does not, so far as I can see, support that submission. I have looked through all five of the witness statements made by Jill Headford, the claimant's solicitor, in these proceedings, and I cannot find any reference at all to the circumstances in which this report came into existence. Counsel for the claimant certainly did not refer me to any. The terms of the report itself do not disclose circumstances appropriate to attract "without prejudice" privilege. They say only that the makers "have been asked to provide a valuation of the property in consideration of a possible disposal to a developer". They also say that the report "is confidential to the Client and Client's representatives". At the time the report was prepared, in January 2021, the parties were in dispute, and indeed proceedings were issued in June 2021. But there is no suggestion, and it was not submitted to me, that any kind of privilege other than "without prejudice" privilege could be claimed.

44. The original report, from the surveyors to the claimants in the first proceedings, was not a "without prejudice" communication. There was no dispute between them. On the contrary, it was professional advice which the claimant sought for their own purposes and to inform their own decision-making. That report was copied to the defendants on 18 February 2021. However, as I say, there is no evidence that this was part of a without prejudice negotiation between the parties. Nor is there any evidence of any other express or implied agreement between them that the contents of this report should be inadmissible in any subsequent legal proceedings between them. In these circumstances, in the absence of such evidence, I cannot see how the claim for "without prejudice" privilege can be maintained. But, even if I were wrong about that, and the privilege would otherwise be available, in my judgment "without prejudice" privilege does not apply to this report for another reason.

45. Counsel for the defendants referred me to Passmore, *Privilege*, 4th ed 2020 at [10.154], and to *Oceanbulk Shipping v TMT Asia* [2011] 1 AC 662, SC. In *Oceanbulk*, the Supreme Court, in a chamber of seven judges, unanimously decided that there was a further exception to "without prejudice" privilege, namely, to enable otherwise privileged material to be taken into account in construing a contract which could have been taken into account if it were not subject to such privilege. In my judgment, that is this case. In considering what was being acquired by the defendants in the contract formed by the acceptance of the Part 36 offer, the expert opinion of the valuation surveyors as to what the freehold of Unit 4 was worth, (i) simply as a building, and (ii) with the benefit of the rights to prevent the redevelopment of the whole estate, is clearly relevant, given the amount actually demanded and paid. Counsel for the claimant submitted that the *Oceanbulk* exception applied only in relation to a subsequent

contract. I do not accept that submission. In my judgment, even if this report were prepared in such circumstances as to attract "without prejudice" privilege, it is nevertheless admissible in these proceedings under the *Oceanbulk* exception.

46. The valuation report referred to in paragraph 23 of the Defence is dated 28 January 2021, and was prepared by Underwood Wright, chartered surveyors. At paragraph 6.8, headed "VALUATION", they say this:

> "1. Having regard to the foregoing we consider the Market Value (MV) of Andrew Hicks Engineering Ltd, Unit 4 Western Barn Industrial Park … as at 28 January 2021 is fairly reflected in the sum of £350,000 … Freehold assuming vacant possession.
>
> As stated this is our opinion of value for the property's [sic] disregarding any development value for residential.
>
> 2. However from our enquiries and researchers but without undertaking a full residual appraisal, our attention is drawn to outline planning permission granted 18 April 2018 for 70 dwellings … without any affordable housing provision and which was based on an Affordable Housing Statement prepared by Boonbrown Planning Consultants acting for the adjacent site owner. The Statement claimed that the proposed housing scheme, on land incorporating all of the subject property plus the Kingsley Plastics site adjacent would … have a residual land value of £2.8 million if there is no affordable housing requirement …
>
> […]
>
> … In very simple terms this may suggest that the MV of Kingsley Plastics disregarding its development value is no higher than approximately £1,200,000 … but taking into account its actual condition it may be less.
>
> On the basis of legal advice now received, for the additional residual development value as claimed by Boonbrown to now be released, there would have to be agreement between Kingsley Plastic and Andrew Hicks. The effect of section 62 of the Law of Property Act means that the housing scheme as proposed cannot be implemented without such rights under section 62 being relinquished and is therefore in the control of Andrew Hicks Engineering.
>
> A very simple analysis of the position can thus be set down as follows:
>
> […]
>
> Uplift as a result of planning consent for residential £1,250,000
>
> In a ransom scenario the share to the controlling party, following the Wrotham Park case would be 40% of profit but can be argued to be 50/50 where the parties are both equal to the agreement in a Marriage Value scenario.

> As such it is considered that in connection with the planning application for the whole of Western Barn Industrial Estate, the share of the additional uplift in value accruing to Andrew Hicks Engineering Ltd based upon the above figures, should be not less than £500,000."

As I have already said, the sum paid by the defendants to the claimant under the Part 36 offer was £500,000, rather than the £350,000 said to represent the market value of the actual building.

The arguments

Claimant

47. The argument for the claimant that it should have its costs of the injunction application was that this was a clear case for an interim injunction to be granted, and, if the defendants had not given undertakings, the court would have granted one. So, the defendants should have offered the undertakings as soon as they were sought, and thus saved the costs of the actual court hearing and its preparation. All that would have been needed was the drafting and submission to the court of a consent order. In the claimant's skeleton argument for the present application, the matter is put in this way:

> "19. … the claimant needed to apply for an interim injunction due to the conduct of [the defendants]. [The claimant] is the successful party as it obtained at the hearing the undertakings it had sought before the claim and application were made. [The defendants] could have avoided all costs of the proceedings had those undertakings been given when asked.
>
> 20. The fact that the undertakings were given by consent and that no costs order was made does not detract from these points. [The claimant] obtained all it needed from the injunction application …
>
> 21. Had the hearing proceeded on 5 October 2022, rather than being dealt with by consent based on the undertakings offered and given the evening before, then the court would have made an order … "

48. In support of the final point, that the court would have made an order, the claimant urges the following points (in my summary):

> (1) the defendants filed no evidence or skeleton argument, whereas the claimant had its evidence in place;
>
> (2) the claimant's skeleton argument showed "a strong claim to the interim injunction";
>
> (3) the claimant had a better than arguable case for the rights asserted, and the balance of convenience firmly favoured preserving the status quo, and damages would not adequately have compensated the claimant for being unable to trade, whereas damages would easily have compensated the defendants for any losses;

(4) the fact that the defendants gave the undertakings constituted an admission that the application was properly brought and the relief claimed appropriate.

49. The claimant relies on passages from Bean, Harry and Burns, *Injunctions*, 14th ed 2022, at paragraphs 5-38 to 5-42. I will not set out these paragraphs *in extenso*, but I will reproduce here two short but useful passages, in paragraphs 5-40 and 5-41, the second of which was particularly relied on:

> "5-40. … The court may reserve the interim costs to the trial judge. This option may be appropriate where the application is decided on the balance of convenience and the judge is simply 'holding the ring' pending a trial or other determination (*Desquenne et Giral UK Ltd v Richardson* [1999] C.P.L.R. 744; [2001] F.S.R. 1; see also *Picnic at Ascots Inc v Derigs* [2001] F.S.R. 2 where Neuberger J suggested that the usual order where a claimant obtained an interim injunction was for costs to be reserved).
>
> 5-41. However, a court may order that the claimant should recover his costs in any event where the merits of the application were so obvious that it should not have been contested or when it is clear that a trial is unlikely to take place. The defendant may get his costs if the injunction application was concluded by undertakings which could have been obtained by pre-action dialogue (*Pathology Group Ltd v Reynolds* [2011] EWHC 3958 (QB))."

Defendants

50. The defendants argue three main points:

(1) The claim was an abuse of process, because it sought to relitigate issues which had been compromised in the first claim by the acceptance of the Part 36 offer. Hence there was no serious issue to be tried. Accordingly, the defendants should have their costs against the claimant.

(2) The defendants stood to lose a development deal worth several million pounds. The claimant could not have given the required cross-undertaking in damages, so the balance of convenience would not have lay in granting the interim injunction.

(3) There having been no trial, and no sufficient admission of facts, the court cannot assess whether the undertakings were given on the basis of assumed facts which turned out to be true. Hence (if the court would not order the claimant to pay the defendants' costs under (1) above) the correct order is no order as to costs, which was what the defendants offered two days after the present application was issued.

THE LAW

Serious issue to be tried

51. For the law on the question whether there was a serious issue to be tried, I need refer only to the recent decision of the Court of Appeal in *Boydell v NZP Ltd*

[2023] EWCA Civ 373, where earlier decisions such as *Arbuthnot Fund Managers Lyd v Rawlings* [2003] EWCA Civ 518 and *Planon Ltd v Gilligan* [2022] IRLR 684, CA, are discussed. I am plainly bound by that decision. In that case an employee resigned from his employment with a 'niche' pharmaceutical company to work for a competitor. His employer sought to enforce restrictive covenants in his employment contract against him. At first instance the judge granted an injunction in relation to one covenant but refused it in relation to the other. The employee (but not the employer) appealed. The appeal failed.

52. Bean LJ (with whom Macur and Coulson LJJ agreed) referred to the earlier cases I have mentioned, and said this:

> "15. … In *Arbuthnot Fund Managers Lyd v Rawlings* [2003] EWCA Civ 518, Chadwick LJ said:-
>
> > 'The first task of the court – faced with the contention that post-termination restraints on an employee's ability to engage in future business activity are not enforceable – is to construe the contract under which those restraints are said to be imposed. That, as it seems to me, is a task which the court ought to carry out on an application for interim relief (if there is one) if it can properly do so. Unless the court is satisfied that there are disputed facts which bear on the construction of the relevant contractual terms, and that those facts cannot be resolved without a trial, the court at the interlocutory stage is as well able to construe the relevant contractual terms as a court will be at a trial. There is no need to put off until trial determination of the question - what do the contractual terms mean? The court can, and should, determine the scope of the restraints which, as a matter of construction, the contractual terms seek to impose.'
>
> […]
>
> 19. … If the court, even making the assumption that any disputes of fact would be resolved at trial in the Claimants' favour, concludes that on its proper construction … the relevant clause is plainly unenforceable, it should say so. In such a case it cannot be said that there is a serious issue to be tried.
>
> […]
>
> 21. Mr Nicholls KC accepted that his appeal could only succeed if it is plain and obvious that the covenants are unenforceable. His case before the judge and before us was, he said, in the nature of a strike out application. I agree with him that this is the proper approach in a case of this kind."

Cross undertaking in damages

53. In *Fleming Fabrications Ltd v Albion Cylinders Ltd* [1989] RPC 47, CA, the plaintiffs sought an interlocutory injunction in a patent action. It was conceded by the defendant that there was an arguable case for patent infringement, and an

injunction was granted. On appeal, it was held that the judge was in error in holding that the plaintiffs would be able to pay any damages under the cross undertaking given by them. The court accordingly exercised its discretion afresh.

54. May LJ, with whom Dillon LJ agreed, said (at 57):

> "I fully appreciate that if one simply does the damages exercise, to which reference is so often made when *American Cyanamid* is quoted, the result might seem to be that no interlocutory injunction should go in the circumstances of the instant case. On the other hand, when one bears in mind that that is only part of the balance of the risk of doing an injustice and looks at all the other considerations - to which I have referred and which are also in my mind but which I have not gone into in detail which are clear on the papers - I think that that balance in the circumstances of the instant case does require the grant of an interlocutory injunction against the appellants."

55. Accordingly, even if it were the case that the claimants would not be able to pay the full amount of any damages due on the cross undertaking, that is not the end of the matter. The court must still consider where the balance of convenience lies.

Costs

Costs generally

56. The general rules on costs are not controversial. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). However, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4). If the general rule applies, it requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue".

Costs after a settlement

57. In *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, a claim for copyright infringement went to trial, but settled after the first day of the hearing, except for the question of costs. There was then an argument about costs, which resulted in the trial judge making a complex order. The claimant was aggrieved by the costs order and appealed. The Court of Appeal dismissed the appeal. A general theme in the two judgments which were given, by Mummery and Chadwick LJJ respectively) was that the appellate court should

not interfere in a costs order save in cases of manifest injustice, which this was not.

58. In his judgment, however, Chadwick LJ also made a number of important comments on the basic rules concerning costs, with which Brooke LJ expressly agreed, and there is nothing inconsistent with them in the judgment of Mummery LJ. Chadwick LJ said this:

> "22. The power to make an order as to the costs of civil proceedings is conferred by section 51(1) of the Supreme Court Act 1981. It is in the discretion of the court whether, in any particular case, that power should be exercised. That is made clear by CPR 44.3(1)(a). It finds expression in the opening words of CPR 44.3(2) – '*If the court decides to make an order about costs* –'. The first question for the court – in every case – is whether it is satisfied that it is in a position to make an order about costs at all.
>
> 23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party – CPR 44.3(2)(a). But the court may make a different order – CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to 'the general rule' - or should make 'a different order' (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs.
>
> 24. In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether - having regard to all the circumstances (including conduct) as CPR 44.3(4) requires – the order for costs should be limited in one or more of the respects set out in CPR 44.3(6). But where there has been no trial – or no judgment – the judge may well not be in a position to reach a decision on those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. …
>
> 25. It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear

> that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that, as Lord Justice Mummery has pointed out, the judge will not be asked to decide that question. It will be agreed as one of the terms of compromise.
>
> 26. The cases in which the judge will be asked to decide questions of costs - following a compromise of the substantive issues – are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs. … "

59. In *M v Croydon London Borough Council* [2012] EWCA Civ 595, the Court of Appeal gave guidance on costs orders in judicial review claims where the claim is compromised without a final hearing, and an order is made by consent (though with judicial approval). Lord Neuberger MR (with whom Hallett and Stanley Burnton LJJ agreed) referred, at [48]-[49], to the judgment of Chadwick LJ in *BCT Software*. He referred with approval to the second sentence of paragraph 25. Then he went on to say this:

> "49. … Given the normal principles applicable to costs when litigation goes to a trial, it is hard [to] see why a claimant, who, after complying with any relevant Protocol and issuing proceedings, is accorded by consent all the relief he seeks, should not recover his costs from the defendant, at least in the absence of some good reason to the contrary. … "

60. Of course, the relevant facts in judicial review cases, turning as they do on known administrative decisions and actions, are usually not (or not seriously) disputed. And the *Croydon* case itself was settled (as were many others) after a decision by the Supreme Court reversed the Court of Appeal on a point relevant to that case, so causing the relevant respondents to reconsider their positions. Essentially it was a point of law.

61. I note that in *Shahi v Home Secretary* [2021] EWCA Civ 1676, another case about costs after settlement of a judicial review claim, the *Croydon* decision was extensively discussed, and the majority of the court (Newey and Elisabeth Laing LJJ) held that the fact that the claimant achieved all he wanted by the interim order made at first instance did not make him the successful party for costs purposes. Dingemans LJ agreed that a successful order for interim relief in an action would not, without more, justify an order for costs where the parties had not agreed the issue of costs and had left it to be determined by the court.

Costs of interim injunction hearings

62. Turning then to cases of interim inunction applications, in *Desquenne et Giral UK Ltd v Richardson* [2001] FSR 1, an employer obtained an interim injunction to restrain alleged breaches by an employee of restrictive covenants in his employment contract. This was granted by the judge on the balance of

convenience. However, the judge also ordered the defendant to pay the costs of the interim injunction application. The defendant appealed, and the Court of Appeal reversed the decision on costs.

63. Morritt LJ (with whom Morrison J agreed) said:

> "12. 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 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, 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 terms of the practice direction to which I have referred.
>
> 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 as reflected in the practice direction paragraph 4.4.1. It seems to me that the judge there confused the decision on whether or not to make an order within 44.3.1(a) with the question of whether, having made such an order, he should then make a summary assessment of the costs so as to ascertain the quantum that would fall within it. 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 exercised 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."

64. That decision was followed by Neuberger J in *Picnic at Ascot Inc v Kalus Derigs* [2001] FSR 2. Here the claimant sought an interim injunction against the defendants in relation to infringement of design right and breach of fiduciary duty. Initially the defendants opposed the application, but eventually gave undertakings over to trial, and suggested that the costs be reserved to the trial judge. The claimant however sought to make the defendants pay the costs of the interim application. Neuberger J held that the costs should be reserved.

65. He said:

> "7. (1) In a case without any other special factors, where a claimant obtains an interlocutory injunction on the basis of the balance of convenience, the court normally reserves the costs. While one can see an argument, particularly under the new regime, for saying that an order more favourable to the claimant should be made on the basis that the claimant has won the issue in respect of which the costs have been directly incurred—namely, whether an interlocutory injuction should be granted or not—it seems to me that the reasoning of the Court of Appeal in the so far unreported case of *Desquenne et Giral U.K. Ltd v. Richardson*, November 23, 1999, indicates that an order reserving the costs is appropriate.
>
> […]
>
> 9. One can see the force of that, particularly when one bears in mind that the balance of convenience will often be determined by reference to facts which may be contested, and the court may at trial conclude that it had been persuaded to grant an interlocutory injunction on the basis of assumed facts which turn out to be inaccurate, or even in the context of a claim which should never have been brought.
>
> […]
>
> 11. (3) A defendant who accedes to the grant of an interlocutory injunction before the hearing should not, for that reason alone, normally be the 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.
>
> 12. (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)."

66. In *Albon v Naza Trading SDN BHD* [2007] EWCA Civ 1124, the claimant obtained an interim anti-suit injunction against the defendant pending the resolution of a question as to the genuineness of a joint venture agreement, which was alleged to be a forgery. The judge awarded the claimant his costs of the application. The defendant appealed both decisions. The Court of Appeal upheld the grant of interim relief. On the question of costs, Longmore LJ (with whom Waller LJ and Sir Peter Gibson agreed) said:

> "21. The argument for Naza on this issue is that costs are not usually ordered on applications for interim injunctions since it is not until trial that it can be known whether the claimant has the right which he asserts he has,

> see *Picnic at Ascot v Kalus Derigs* [2001] FSR 2 and Bean, *Injunctions* (9th Ed) paragraph 5.41. This is not, however, an invariable rule. The narrow issue in the present case is what is to happen while the forgery issue is being determined; that does not depend on the claimant being right on the forgery issue. Granted that the forgery issue is to be determined in England, Naza was perfectly able to form a view as to the likelihood of their persuading the court that the arbitration should continue meanwhile. The judge was entitled to conclude that they miscalculated and should suffer the consequences. This is very much a matter for the judge's discretion and I would refuse permission to appeal on this question."

67. In *Fox Gregory Ltd v Spinks* [2006] EWCA Civ 1544, the employee of an estate agent left, and went to work for a direct competitor nearby. The former employer sought an interim injunction to restrain the ex-employee from disclosing its confidential information to the new employer, who was also joined to the proceedings. Some undertakings (but not all those requested) were given by the new employer, and confirmation was given that all material handed over to it by the first defendant had been delivered up to the claimant. Before the return date on the application, the claimant intimated that it would not be proceeding any further with the application. Indeed, as between the claimant and the second defendant, the claim was dismissed. Both of these parties claimed that the other should pay the costs of their dispute. The judge held that as between them the second defendant was the successful party, and ordered the claimant to pay its costs.

68. Arden LJ (with whom Tuckey agreed) gave a lengthy extempore judgment, in the course of which she said:

> "28. The next question is whether it would be possible to say who was the winner and who was the loser. The only issue, in my judgment, was whether interim relief in the form of the undertakings would have been given if the undertakings had not been given. That, as I see it, is the substance of the issue before the court on 29 November. As I have explained, no significant costs were incurred on the other matters. In my judgment, if one looks at that issue then it is clear that the winner was Fox Gregory, rather than Hamptons, because Hamptons had to give those undertakings, and for this reason I would take the view that the judge was wrong in principle to say that Hamptons was substantially the winner.
>
> […]
>
> 32. In all these circumstances I consider that the court has to re-exercise the discretion that was available to the judge. In my judgment Fox Gregory should have had the costs of the application on 25 November and they were, moreover, entitled to continue the proceedings until they obtained the affidavit evidence and considered it. In my judgment they withdrew as soon as they had had a reasonable chance to consider that evidence and, having done so, they should not be penalised in costs.

69. It is to be noted that the *BCT Software* decision *was* referred to by Arden LJ, but neither of *Desquenne* and *Picnic at Ascot* was. I assume that they were not cited to the court by counsel. However, what is also to be noted is that the interim injunction sought, and the undertakings actually given, were not simply 'holding the ring' in the meantime, but also requiring the positive action of handing back confidential information. So it was not an ordinary "balance of convenience" case.

70. A subsequent decision of the Court of Appeal that makes this distinction clear is that in *Koza Ltd v Koza Altin Isletmeleri AS* [2020] EWCA Civ 1263. The defendant obtained an interim injunction against the claimants, a company and its sole director, restraining the first claimant's use of certain of its assets for a particular purpose. The claimants appealed, but the injunction was upheld on appeal. The defendant sought its costs of the appeal. Popplewell LJ (with whom Moylan and Asplin LJJ agreed) said:

> "3. Koza Altin was the successful party in the appeal and costs should follow the event.
>
> 4. The appellants rely on the judgment of Neuberger J in *Picnic at Ascot Inc v Derigs* [2001] FSR 2 as establishing a principle that where an applicant obtains an interlocutory judgment on the balance of convenience, the court should reserve costs. However Neuberger J's judgment was not to the effect that there is a general rule applicable in all such cases and there is no invariable practice as is illustrated by *Albon v Naza Motor Trading SDN BHD* [2007] CLC 782. Neuberger J's reasoning was that an interlocutory injunction was normally to hold the ring until trial, and the resolution of the issues at trial would often cast light upon the merits of the respondent having resisted the interim injunction at the earlier stage. In this case, however, the injunction is not of a holding the ring type, and the issues which were ventilated upon the application will not be revisited as part of the substantive dispute. That was the very complaint which underpinned the appellants' resistance to the application. Moreover we are concerned with the costs of an appeal, not of the application at first instance. The appeal involved the appellants re-running the same arguments and failing on them. Koza Altin is entitled to the costs of that exercise which we have decided was not justified by the arguments the appellants chose to advance on the appeal."

71. In *Digby v Melford Capital Partners (Holdings) LLP* [2020] EWCA Civ 1647, the appellant and two other individuals had created a group of limited partnerships and companies (the respondents) to invest in English land. The appellant and the other individuals had fallen out, and the respondents (controlled in practice by the other individuals) had purported to expel the appellant from membership of the respondents, and had obtained interim injunctions restraining the use of allegedly confidential information, delivery up of a laptop computer, and other relief. The judge ordered the appellant to pay the costs of the interim injunctions. The appellant appealed, arguing that the judge went wrong in principle in so ordering, and in particular failed to follow the binding authority of *Desquenne*.

72. The court (Lewison and McCombe LJJ) said:

> "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. …
>
> 38. … 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."

73. Lastly, in *Tradition Financial Services Ltd v Bilta (UK) Ltd* [2023] EWCA Civ 112, the parties entered into a confidential settlement after proceedings were issued but before the trial. The agreement provided for the judge to determine limited issues, and also the costs of the whole proceedings. However, no liability was admitted by the defendants. The judge decided that he could not hold that the claimants were the successful parties, and that he could not decide who would have won if the case had gone to trial. Subject to a particular adjustment, he made no order as to pre-settlement costs. He made a nuanced order as to post-settlement costs. The costs appeal was solely in relation to the former. The *BCT*

Software and *Croydon* cases, amongst others, were cited to the Court of Appeal. The court dismissed the appeal.

74. Lewison LJ (with whom Stuart-Smith and Falk LJJ agreed) said:

> "167. In *R (M) v Croydon LBC* [2012] 1 WLR 2607 Lord Neuberger MR differentiated between cases where the claimant had achieved all the relief that he sought, and cases in which the claimant had achieved part of the relief he sought. In the latter kind of case, he said at [50]:
>
> > 'The outcome will normally be different in cases where the consent order does not involve the claimant getting all, or substantively all, the relief which he has claimed. In such cases the court will often decide to make no order for costs, unless it can without much effort decide that one of the parties has clearly won, or has won to a sufficient extent to justify some order for costs in its favour. Thus the fact that the claimant has succeeded in obtaining part of the relief he sought may justify his recovering some of his costs, for instance where the issue on which the claimant succeeded was clearly the most important and/or expensive issue. But in many such cases the court may consider that it cannot fairly award the claimant any costs because, for instance, it is not easy to assess whether the defendants should have their costs of the issue on which the claimant did not succeed, and whether that would wipe out the costs which the claimant might recover in relation to the issue on which he won.'
>
> […]
>
> 172. ... Although I consider that there is considerable force in the argument that the terms of the settlement may in some cases provide a good proxy for deciding who is the successful party without having to second guess the result of a contested trial, this is not, in my judgment, a case of complete success, but of partial success. In addition it is, I think, necessary to consider the judge's costs order in the round in order to decide whether it was 'manifestly unjust'.
>
> […]
>
> 174. As Lord Neuberger said in *Croydon*, in cases of partial success it may not be easy to assess whether the defendants should have their costs of the issue on which the claimant did not succeed, and whether that would wipe out the costs which the claimant might recover in relation to the issue on which he won.
>
> 175. … Accordingly, even where the claimant does recover money from the defendant, a judge is not necessarily wrong in making no order for costs.
>
> […]
>
> 177. … Thus even in a case where the claim was for money, and the claimant had recovered a substantial sum, it would not have been an error

> of principle for the judge to have declined to make an order for costs. The mere fact that one party pays money to another does not necessarily mean that the receiving party is the successful party …"

75. As I have already said, I was also referred to Bean, Harry and Burns, *Injunctions*, 14th ed 2022, at paragraphs 5-38 to 5-42. At paragraph 5-41, in an extract set out above, the authors say:

> "The defendant may get his costs if the injunction application was concluded by undertakings which could have been obtained by pre-action dialogue (*Pathology Group Ltd v Reynolds* [2011] EWHC 3958 (QB))."

76. That was a case where proceedings were brought to restrain former employees from breaching restrictive covenants in their employment contracts by working for competitors. An application for interim injunctions was dealt with on undertakings, but before the return day the claim was settled, save for costs. Each side sought an order that the other should pay its costs. The defendants said the claimants had pursued the claim too aggressively, and settlement would have occurred sooner and at less expense if they had not done so. The claimants said that they achieved a beneficial result which they would not have achieved otherwise.

77. HHJ Seymour QC, sitting as a High Court judge, concluded thus:

> "34. So at the end of it all, did the claimants achieve something which was of value to it? Answer: yes, it would seem so. Was it necessary for the action to be commenced, first of all, and be pursued as aggressively and at substantial expense as actually happened? Almost certainly no. So in the outcome it seems to me that the appropriate order to make in relation to the costs of the action as a whole (apart from the two applications that I have already dealt with separately) is that the defendants should have their costs to be paid by the claimants."

So, so far from the *claimants* obtaining their costs when the matter was concluded after undertakings given at the interlocutory stage, in that case it was the *defendants* who obtained their costs, because of the over-aggressive way in which the litigation had been conducted.

Principles

78. From this regrettably lengthy citation of authority, I derive the following principles, sufficient for the purposes of this case:

(1) Costs are in the discretion of the court, which must be exercised judicially.

(2) The court must have a proper basis to be able to make a costs order at all; otherwise, the proper order is no order.

(3) That proper basis is facts which have been (i) found on the evidence, (ii) admitted or averred by a party, or (iii) properly inferred from (a) such found or admitted facts, or (b) – in some cases, at least – from the terms of the settlement

agreement (if this is available to the court), though the mere fact that under the settlement the defendant pays money to the claimant is not enough.

(4) Where there is sufficient material on which the court can ascertain which is the successful party and which the unsuccessful, the general rule applies, and the unsuccessful pays the costs of the successful unless there is good reason to decide otherwise.

(5) Where the matter settles after an interim injunction application has been dealt with simply on the "balance of convenience test", whether by imposing an injunction or accepting undertakings, there will not normally be a proper basis for making a costs order at all, let alone ascertaining the successful and unsuccessful parties, and the proper order is no order.

(6) For this purpose, there is no distinction drawn between the case of an interim injunction obtained without notice, and one obtained (or undertakings given) after a hearing on notice.

(7) A costs order made at first instance will not be overturned by an appellate court unless it is "manifestly unjust".

APPLICATION TO THE FACTS OF THE CASE

Serious issue to be tried

79. If the court is able on the material before it to conclude that the claims made by the claimant are an abuse of the process, because they have already been the subject of proceedings which have been settled, then it cannot be said that there is a serious issue to be tried for the purposes of granting an interlocutory injunction. Here the defendants' complaint is that the present case substantially overlaps the first proceedings, which was settled by the acceptance of the Part 36 offer.

80. The rights claimed by the claimant are rights arising under the lease granted out of the freehold as claimed to have been enhanced by section 62 of the 1925 Act. The claim of enhancement of the freehold by section 62 was raised in the first proceedings, and denied by the defendants, and was accordingly settled by the compromise between the parties. The claims to use the right of way over the whole access road (and not just the short stretch between unit 4 and the main road) to use the turning circle, to be able to load and unload and to store goods in various parts of the estate, and to park in the car park, as well as to the free passage of electricity and the use of the substation, were all raised in the first proceedings, and (with the exception of the right of free passage of electricity through the cables, which was admitted) were all denied by the defendants. These issues between the parties (including the present claim) were also settled by the compromise.

81. The effect of the compromise was raised by the defendants' solicitors in correspondence at least by 31 August 2022. The only coherent answer made by the claimant's solicitors was:

> "Your clients have never explained why they say that the terms of compromise of the claim and counterclaim should be said to include an implied declaration in the terms sought by one side as opposed to those sought by the other."

The answer to this is that the *claimants* brought the claim, alleging that they had certain rights, and the *defendants* denied that they had (at least some of) those rights, thereby joining issue with the claimants. By the settlement, *all* the claimants gave up their various claims to the disputed rights (but not to the undisputed ones). No declaration was needed in order to record that.

82. In my judgment, the claims made in the second proceedings were an attempt to relitigate matters which had already been litigated and indeed settled. Accordingly, they were an abuse of the process. In these circumstances, there could not have been a serious issue to be tried for the purposes of the *American Cyanamid* test, and no interlocutory injunction would have been granted.

Cross-undertaking in damages

83. The defendants submit that the claimant would not have been able to pay substantial damages on the cross undertaking. On the assumption that that is correct (which I do not need to decide), that would not have been an absolute bar to an interlocutory injunction's being granted. It would simply have been a factor to take into account. I am not now in a position to decide that an injunction would not have been granted on this ground. However, because of the other matters which I can decide, this is no longer important.

Costs

84. In the present case, the undertakings were given in lieu of an injunction which (it is clear from the claimant's skeleton argument for 5 October 2022) would have been sought by the claimant on the basis of the *American Cyanamid* 'balance of convenience' test. Subject to the defendants' argument that the claim was an abuse of process, and that therefore there was no serious issue to be tried, I am in no doubt that the fact that the undertakings were given at that stage and there was no contested hearing does not give the court a sufficient basis for deciding either whether to make an order for costs at all, or, if so, what order to make.

85. The parties disagreed, and still disagree, strongly about the underlying facts which would show where the merits lay, and to date they have neither been resolved nor determined. Nor is it a case where (in accordance with paragraph [12] of the judgment in *Picnic at Ascot*) the balance of convenience was so clear that the hearing would have been a waste of time. The correspondence shows that the defendants were well aware of the arguments based on abuse of process, which in the event I have held to be correct. In addition, here was the problem of the claimant's ability to give a meaningful cross-undertaking in damages. If I had not already decided that there was an abuse of process, and therefore no serious issue to be tried, I would have decided that it was appropriate to make no order as to costs.

CONCLUSIONS

86. In my judgment, the second proceedings were an abuse of process, and the claimant must pay the costs of the defendants of the interim injunction application.