Neutral Citation Number: [2023] EWHC 214 (Ch)

Case No: HC-2017-0002125

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE

The Rolls Building
7 Rolls Buildings,
London, EC4A 1NL

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email.

The date of hand-down is deemed to be as shown opposite: Date: 08/02/2023

Before:

MASTER KAYE

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Between:

(1) INEOS UPSTREAM LIMITED **(2) INEOS 120 EXPLORATION LIMITED** **(3) INEOS PROPERTIES LIMITED** **(4) INEOS INDUSTRIES LIMITED** **(5) JOHN BARRIE PALFREYMAN** **(6) ALAN JOHN SKEPPER** **(7) JANETTE MARY SKEPPER** **(8) STEVE JOHN SKEPPER** **(9) JOHN AMBROSE HOLLINGWORTH** **(10) LINDA KATHARINA HOLLINGWORTH**	**Claimant**
- and -	
(1) ~~PERSONS UNKNOWN ENTERING OR REMAINING WITHOUT THE CONSENT OF THE CLAIMANT(S) ON LAND AND BUILDINGS SHOWN SHADED RED ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM~~ **(2) ~~PERSONS UNKNOWN INTERFERING WITH THE FIRST AND SECOND CLAIMANTS' RIGHTS TO PASS AND REPASS WITH OR WITHOUT VEHICLES, MATERIALS AND EQUIPMENT OVER PRIVATE ACCESS ROADS ON LAND SHOWN EDGED ORANGE ON THE~~**	**Defendant**

~~**PLANS ANNEXED TO THE AMENDED CLAIM FORM WITHOUT THE CONSENT OF THE CLAIMANT(S)**~~

(3) ~~**PERSONS UNKNOWN INTERFERING WITH THE RIGHTS OF WAY ENJOYED BY THE CLAIMANTS AND EACH ITS AND THEIR AGENTS, SERVANTS, CONTRACTORS, SUB-CONTRACTORS, GROUP COMPANIES, LICENSEES, EMPLOYEES, PARTNERS, CONSULTANTS, FAMILY MEMBERS AND FRIENDS OVER LAND SHOWN SHADED PURPLE ON THE PLANS ANNEXED TO THE AMENDED CLAIM FORM**~~

(4) ~~**PERSONS UNKNOWN PURSUING ANY COURSE OF CONDUCT SUCH AS AMOUNTS TO HARASSMENT OF THE CLAIMANTS AND/OR ANY THIRD PARTY CONTRARY TO THE PROTECTION FROM HARASSMENT ACT 1997 WITH THE INTENTION SET OUT IN PARAGRAPH 10 OF THE ORDER**~~

(5) ~~**PERSONS UNKNOWN COMBINING TO COMMIT THE UNLAWFUL ACTS AS SPECIFIED IN PARAGRAPH 10 OF THE ORDER WITH THE INTENTION SET OUT IN PARAGRAPH 10 OF THE ORDER**~~

(6) JOSEPH BOYD

(7) JOSEPH CORRÉ

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ALAN MACLEAN KC (instructed by **FieldFisher**) for the Claimants
BLINNE NÍ GHRÁLAIGH AND JENNIFER ROBINSON(instructed by **Leigh Day**) for the **Sixth Defendant**
STEPHEN SIMBLET KC (instructed by **Bhatt Murphy**) for the **Seventh Defendant**

Hearing dates: 11 November 2022

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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.

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MASTER KAYE

Master Kaye :

1. This is a judgment about the liability for costs in relation to five injunctions originally granted in 2017. All five injunctions have since been discharged and the claims either dismissed or discontinued.

2. Pursuant to CPR 44.2 (1) the court has a broad discretion in relation to costs and whether they are payable by one party to another, the amount of those costs and when they are paid. The general rule is that an unsuccessful party will usually be directed to pay a successful party's costs unless the court, in the exercise of its broad discretion, makes a different order.

3. The starting point is for the court to determine who it considers to be the successful or more successful party. That is itself a fact sensitive, nuanced decision in which it is the court's perception of the matters set out in CPR 44.2(4) which determines who is the successful party and what, if any, order for costs the court decides to make.

4. If the court determines there is a successful or more successful party, it must then consider whether to exercise the court's broad discretion to make a costs order in favour of that party in whole or in part or whether to make a different order. Any decision will depend on all the circumstances and is, of course, case and fact specific.

5. In exercising that discretion the court takes into account all the circumstances, weighing them up and determining the overall justice of the case or the application keeping in mind the overriding objective.

6. The approach is one that requires the court to stand back and take a common sense, broad-brush and pragmatic approach and determine where the overall balance lies as between the parties. It is not the role of the judge to analyse at a granular level every issue or argument that was pursued and determine who is successful on each. It is not a points based system. The cases in which one party will have been wholly successful on every argument or issue are vanishingly small. The court should look at the substance and reality of who is overall the successful party.

7. Where a party has pursued a specific discrete issue or claim unsuccessfully or unreasonably it may be appropriate for the court to depart from that general approach and consider an issues or percentage costs order but the court should be cautious of such an approach save in the clearest case given the often overlapping nature of claims/issues and always have in mind that the approach to determine who is the overall successful party is a pragmatic and common sense one.

8. This approach has developed over time and there are numerous authorities and texts which consider how to apply the costs rules in particular circumstances at the conclusion of an application or a hearing. The parties referred me to some of the more well-known authorities including *BCCI v Ali (No 3)* [1999] NLJ 1734 Vol 149, *BCCI v Ali (No 4)* CA 2 March 2000, *Budgen v Andrew Gardner Partnership* [2002] EWCA Civ 1125 at [35], *Travelers Casualty v Sun Life* [2006] EWHC 2885 (Comm) at [12] and *Fox v Foundation Piling Limited* [2011] EWCA Civ 790 Jackson LJ at [12]. In addition Mr Maclean referred me to "*Civil Procedure: Principles of Practice 4th Ed* at [28.73] in which Professor Zuckerman also concluded that the court may

take into account the extent of any particular party's success when determining the appropriate costs order.

9. What one can draw from the authorities is that each case turns on its own particular circumstances and the weight to be applied to a particular factor or argument will vary from case to case. That is why the court's discretion is so broad and why the court has to stand back and take a common sense approach when determining the reality of who is overall the successful party and/or the party in whose favour a costs order should be made.

10. Here the court is reconsidering a first instance costs order made by Morgan J in December 2017 in light of the events that have occurred since that order was made. In determining what order to make the court will have to exercise its discretion afresh.

11. In this judgment for ease of reference I will refer to the claimants as either the claimants or Ineos and I will refer to Mr Boyd and Mr Corré as D6 and D7 or the defendants. When I refer to D1 to D5 I shall do so by reference to D1 to D5.

12. I have had the benefit of detailed written and oral submissions from Mr Maclean KC, Ms Ní Ghrálaigh and Ms Robinson and Mr Simblet KC which I have taken into account even if each and every argument or submission is not fully set out in this judgment. At a CMC in July 2022 I had directed sequential submissions to enable the parties to set out and respond to their respective positions on costs. For what was essentially a narrow costs argument, the written submissions were substantial. The bundle for the hearing extended to nearly 2000 pages in addition to an authorities bundle. There was no doubt that the parties had taken the opportunity to fully set out their positions.

13. The claim has a long history. The detailed background and history are set out in a number of judgments and can be found in (i) the judgment of Morgan J of 23 November 2017 at **[2017] EWHC 2945 (Ch)** and his subsequent costs judgment of 21 December 2017 at **[2017] EWHC 3427 (Ch)**, (ii) the judgment of the Court of Appeal on 3 April 2019 at **[2019] EWCA Civ 515**, and (iii) the decision of HHJ Klein sitting as a High Court Judge on 25 March 2022 at **[2022] EWHC 684 (Ch)**. I do not intend to set it out again save to the limited extent necessary for the purposes of this judgment.

Brief Background:

14. In 2017 the claimants applied prospectively for injunctions against Persons Unknown in relation to number of proposed fracking sites. The claim was brought against five categories of Persons Unknown each by reference to particular characteristics (D1 to D5).

15. On 28 July 2017 Morgan J heard the without notice application for the injunctions and granted the claimants quia timet interim injunctive relief against D1 to D5 until a return date fixed for 12 September 2017 ("**the First Interim Injunction Order or FIIO**"). In 2017 the law in relation to the use of quia timet injunctions against Persons Unknown, particularly in the area of protest activities, was a developing area of law. Whilst injunctions of the type sought against D1 and D2 were more common (trespass and private nuisance) the injunctions sought against D3 to D5, which it appears were

intended to create a broader level of protection for the sites including in relation to the supply chain, were not. Ineos was quoted in the press as saying that the injunctions were "the most wide-ranging injunction of its kind secured by the shale industry."

16. The FIIO permitted anyone served or notified of it to apply to discharge or vary it on notice to the claimants. On 24 August 2017, D6 filed an Acknowledgment of Service and became a defendant. On 6 September 2017 he applied to discharge or vary the FIIO. D7 did not file an Acknowledgment of Service but issued an application on 6 September 2017 seeking to discharge the FIIO. D7 was added as a further defendant at the hearing before Morgan J on 12 September 2017, when the FIIO was modified but continued, with the further order being perfected and sealed on 20 September 2017 (the "**Second Interim Injunction Order**" or "**SIIO**"). A substantive return date hearing was then fixed for the end of October 2017.

17. D6 and D7 both say that they sought to participate in the claim because they were concerned about the scope of the FIIO which they considered to be an infringement against the fundamental right to protest as enshrined in Articles 10 and 11 of the European Convention on Human Rights ("**ECHR**") and the Human Rights Act 1998 ("**HRA**"). They were concerned that the FIIO would severely restrict their own and others legitimate protest and campaigning activities.

18. Although D6 and D7 became defendants it was recorded in the recitals to the SIIO and subsequent orders that unless their own actions brought them within the scope of the categories/descriptions of Persons Unknown for D1 to D5 as newcomers, no relief was sought against them. It highlights the unusual nature of the proceedings in that the only remaining active defendants are ones against whom no claim was ever made, and no remedy was ever sought.

19. In March 2022 HHJ Klein noted that there had apparently been no one who fell within the Persons Unknown categories of D1 to D5 (save at the margins) when the claim commenced and that there had not been any newcomers. This is perhaps less surprising than it might appear given the history of these sites and fracking operations in the UK more generally after the FIIO.

20. D6 and D7 took an active role in the hearing at the end of October 2017. It is clear from the substantive judgment, the costs judgment, and the transcripts that numerous issues were raised and hotly contested during the course of the hearing. However, Morgan J continued the injunctions in modified form against D1, D2, D3 and D5 only discharging the injunction against D4 (the "**Third Interim Injunction Order**" or "**TIIO**").

21. He subsequently determined the position in relation to costs, on paper following written submissions, as set out in his costs judgment of 20 December 2017. Having set out the parties' submissions at [2]-[7] he set out his assessment and conclusion in relation to the costs issues at [8] and then concluded that there should be no order as to costs as between the parties at [9] as follows:

> "8. In response to these submissions, my assessment of the position is as follows:

(1) as regards the question of success or failure in relation to the Claimants' application for injunctive relief against Persons Unknown, the Claimants were not successful in all respects but were significantly more successful than the Sixth and Seventh Defendants in relation to the arguments which were put before the court;

(2) if the Claimants' application for injunctive relief had sought that relief against the Sixth and Seventh Defendants, there would have been a case for giving the Claimants a part of their costs against the Sixth and Seventh Defendants and there would not have been a case for giving the Sixth and Seventh Defendants any part of their costs against the Claimants;

(3) in view of the fact that the Claimants' application was for injunctive relief against Persons Unknown, the Claimants had to come to court in any event to obtain that relief;

(4) the opposition presented by the Sixth and Seventh Defendants to the Claimants' application lengthened the hearing (as compared with a case where no one appeared on behalf of the Defendants) but the participation of the Sixth and Seventh Defendants was of assistance to the court in a case of public importance;

(5) the Claimants are not entitled to their costs of their application for injunctive relief against the Sixth and Seventh Defendants (and they do not seek them) and the Sixth Defendant is not entitled to his costs against the Claimants of that application (and he does not seek them) and I consider that the Seventh Defendant is not in principle (subject to the possibility considered and rejected in (6) below) entitled to his costs against the Claimants of that application;

(6) I do not consider that the Seventh Defendant's criticisms of the Claimants' conduct of the application are well founded and they do not persuade me to make an order for costs in favour of the Seventh Defendant;

(7) as regards the Seventh Defendants' claim for his costs of his application of 6 September 2017, I do not consider that that application succeeded on 12 September 2017 when the court continued the earlier order with some modifications;

(8) as regards the Claimants' application for their costs against the Sixth Defendant of his application, there is a case for saying that the Claimants should have those costs; in so far as the Sixth Defendant sought a variation of the earlier order it is not clear that it was necessary to apply for a variation of the earlier order as distinct from opposing the further order being sought by the Claimants; further, in so far as the Sixth Defendant's

> application was based on his contention that the Claimants had been in breach of their duty of candour on the earlier ex parte application, that contention failed; however, on balance, I consider that the right approach to the Sixth Defendant's contention as to the duty of candour is that it should not be separated out as an issue which should carry an order for costs but instead that contention should be considered as one of the many issues which had to be determined and it should be dealt with in the same way as all of the issues arising;
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> (9) as regards the Claimants' application for their costs against the Seventh Defendant of his application, I take the same view as in the case of the Sixth Defendant.
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> 9. Taking all of the above matters into account, I have reached the conclusion that the fair result is that there should be no order for costs in respect of the Claimants' application of 31 July 2017 and no orders for costs in respect of the Sixth and Seventh Defendants' applications of 6 September 2017."

22. Morgan J's costs order was not appealed. However, in light of subsequent events it is that decision that I have to reconsider. Notably, although Morgan J only discharged the injunction against D4, modifying but continuing the injunctions against D1, D2, D3 and D5, he considered that the claimants had not been successful in all respects, although he considered that they had been more successful than the defendants on the arguments before him resulting in him concluding that the balance between the parties resulted in no order for costs.

23. The defendants each sought permission to appeal which was granted on limited grounds. The TIIO continued in the meantime.

24. The Court of Appeal hearing took place in March 2019. On 3 April 2019, the Court of Appeal discharged the TIIO in relation to D3 and D5 and dismissed the claims against them. It maintained the injunctions against D1 and D2 (the "**Third Amended Interim Injunction Order**" or "**TAIIO**") pending reconsideration by the court below as to whether interim relief should be granted in light of section 12(3) HRA and if it was so granted, what temporal limit was appropriate.

25. On 20 June 2019, the Court of Appeal ordered the claimants to pay D6 and D7's costs in the appeal but directed that the costs below be remitted to the judge on the remission hearing. Thus the intention was that the judge reconsidering the position in relation to D1 and D2 would also reconsider the costs order made in December 2017 in light of the position as it then stood.

26. No remission hearing took place whether in 2019 or at all. In March 2022, HHJ Klein determined D7's application to strike out dated 8 December 2021 and the claimants' cross application dated 11 March 2022 for a stay of the proceedings based on a material change in circumstances.

27. HHJ Klein discharged the TAIIO against D1 and D2 but did not strike out the claims against them. He ordered the claimants to pay D7's costs of and incidental to the December and March applications which he summarily assessed.

28. On 6 July 2022 I gave the claimants permission to discontinue the claims against D1 and D2. The remitted S12(3) HRA and the temporal limit issues had not been and will not be determined. This left outstanding the reconsideration of the costs below as remitted by the Court of Appeal and what to do with the claim.

29. There had been an argument between the parties as to whether D6 and D7 should be treated as akin to intervenors or defendants for the purposes of costs. However, it was accepted by the claimants that the characterisation of D6 and D7, whether as intervenors or defendants, did not affect the ability of this court to make costs orders. It was therefore an arid argument for these purposes.

30. HHJ Klein explained in his judgment the complexities and procedural difficulties that had arisen in some protestor cases from having defendants who were Persons Unknown and differentiated or defined by certain characteristics. A number of decisions in the High Court and Court of Appeal (including this case) since the FIIO in 2017 have sought to clarify the limits, scope and requirements of such injunctions. The landscape in which such injunctions are sought and granted has developed and matured since 2017 and the limits, scope and requirements for such injunctions have been more clearly defined in the authorities.

31. However, whatever the position would be if the claimants made their application now, it is accepted by all parties that I should proceed on the basis that Morgan J was wrong in relation to the injunctions he granted in respect of D3 and D5.

32. In December 2017, the injunctions against D1 and D2 had been modified but to a lesser extent than the modifications that were made in relation to D3 and D5. The more substantive modifications between the SIIO and TIIO were in relation to D3 and D5 which would have been superfluous if the injunctions were discharged by Morgan J. The TAIIO reflects the position after the Court of Appeal decision and absent any remittal hearing therefore reflects the starting point for this decision.

33. At a minimum therefore I start from a position where three of the five injunctions were discharged and the claims in respect of them were dismissed. There is, however, a difference between the parties as to how to approach the position in relation to D1 and D2.

34. Whilst I cannot (and do not need to) speculate about the likely outcome had the two remitted issues been determined I still need to reach a decision about costs and in doing so I am exercising the court's discretion afresh.

35. I have carefully considered the submissions made by all parties. However, it seemed to me that in the heat of the dispute between them about fracking and the right to lawfully protest that they had lost sight of the core decisions that had to be made.

36. At this stage I am only reconsidering and determining the costs order to be made in light of the Court of Appeal's decision. Separately I will have to decide the liability for the costs of the remitted costs decision. And finally I intend to make a decision

about the claim as a whole, what should happen to it and the associated costs consequences. The position between D6 and D7 may be different in relation to the costs of the claim as a whole in the period between 2019 and 2021 as D6 did not apply to strike out the claim and are not therefore covered by the costs order made by HHJ Klein but again that does not appear to me to have any particular significance in relation to the reconsideration.

37. However, those are four separate issues and many of the submissions seemed to me to overlap and/or not distinguish clearly between the different considerations that might be relevant to the different issues.

Conclusions:

38. For the reasons set out in this judgment I have concluded as follows:

    i) in the exercise of my broad discretion in relation to costs the claimants should pay the defendants' costs in respect of the remitted costs order on a standard basis such costs to be the subject of a detailed assessment;

    ii) in the exercise of my broad case management powers and in particular under CPR 3.3 and CPR 3.4 (2) and CPR 3.1(2) (m) I intend to strike out the claim;

    iii) the parties should seek to agree an order that reflects those decisions and seek to agree the costs consequences;

    iv) if they are unable to do so then either at a consequentials hearing or on paper I will determine:

        a) what if any interim payment on account should be made in relation to the remitted costs order;

        b) what costs order should be made in relation to the costs of the remitted costs hearing including the costs of the CMC;

        c) what costs order, if any, should be made in relation to the proceedings as a whole.

Submissions:

39. In summary, the claimants argued for the status quo submitting that no order for costs still fairly reflected the balance between the parties. The defendants sought a costs order in their favour on the basis that they were now the successful party. Neither party sought an issues based or percentage costs order, but the claimants relied on arguments raised by the defendants on which they had been unsuccessful whilst the defendants relied on criticisms of the claimants' conduct as an additional factor supporting a costs order in their favour. D6 sought indemnity costs.

40. Mr Maclean argues that the reconsideration of the costs order should be considered against a background where (i) Morgan J was wrong to continue the injunctions in the form permitted in relation to D3 and D5 but (ii) was correct as a matter of law to make and continue the injunctions in relation to D1 and D2 despite the applications to

discharge made by the defendants. The injunctions against D1 and D2 were not, he argues, improperly granted.

41. In seeking to maintain no order as to costs Mr Maclean submits that D6 and D7's applications in September 2017 were a root and branch attack on the FIIO/SIIO which were largely unsuccessful at the time. He argues that the defendants did not simply complain about the scope of the injunctions against D3 and D5 but pursued a number of discrete arguments in relation to which they were unsuccessful either before Morgan J, on their application for permission to appeal, or before the Court of Appeal, including their criticisms of the claimants' approach to their duty of candour, an argument about the form of the claim, arguments about Persons Unknown, and HRA arguments.

42. Whilst the Court of Appeal discharged the injunctions and dismissed the claims against D3 and D5 they did so on the basis that the injunctions and the remedies sought were too widely drawn and lacked the necessary degree of certainty, but not because they were fundamentally flawed in concept. Further that the injunctions against D1 and D2 were not discharged but maintained subject to reconsideration of the S12(3) HRA issue and the addition of any temporal limit. Thus he argues that the defendants were not the successful parties.

43. The defendants consider the effect of the remission of the two issues in respect of D1 and D2 more negatively than the claimants arguing it would have required a wholesale reconsideration of the TAIIO not just a review of the two issues. Mr Simblet emphasised that the Court of Appeal had determined that the injunctions against D1 and D2 should only be maintained pending remission to the judge to reconsider (1) whether interim relief should be granted in light of S12(3) HRA arguing that this was something more substantial that just reconsideration of the S12(3) issue. However, Mr Simblet's approach seemed to me to be based on an assumption that the outcome of any reconsideration would be favourable for the defendants whilst Mr Maclean's approach assumed it would not. Whilst the defendants remain confident that had the S12 (3) HRA issue been (re)considered they would have been successful in discharging the injunctions against D1 and D2 that is speculation – there has been and will not be a reconsideration or determination of that issue in these proceedings.

44. The defendants argue that on reconsideration, at a minimum, the court would have set a temporal limit on the injunctions against D1 and D2. Mr Maclean relies on the terms of the TIIO which provided for a review hearing within 3 months of the making of the TIIO or within 28 days of the resolution of the Appeal. The claimants argue there was an inbuilt review/temporal limit. However, it seems to me that the claimants' reliance on that review process as providing some form or temporal limit is undermined by their failure to list the remittal hearing in accordance with it or at all instead leaving the injunctions against D1 and D2 in place until March 2022 nearly 5 years later.

45. HHJ Klein found that by August 2021 at the latest there had been a sufficient change in circumstances to justify the discharge of the injunctions against D1 and D2. Yet the claimants did not apply to do so. It was only on 11 March 2022 just two weeks before the hearing to determine D7's strike out application that they did anything at all and then it was to apply for a stay.

46. However, although HHJ Klein was critical of the claimants' delay and conduct in relation to the listing of a remittal hearing he did not strike out the claims against D1 and D2.

47. However, the claimants argue that it is important to recognise when considering the costs position that the injunctions against D1 and D2 were discharged on the claimants' application on the basis of a material change in circumstances and not on the basis of a decision on the two outstanding remitted issues. The claimants say that the change in circumstances was a consequence of the imposition of a government moratorium on hydraulic fracturing in 2019 which meant that they were unable to commence work on the sites. They then allowed planning to lapse in relation to two of the sites. Thus the claimants say that the defendants were not successful in respect of D1 and D2 on any of the grounds pursued by them.

48. Although not pursuing an issues or percentage costs order Mr Maclean sought to demonstrate how much time was spent on the various issues raised by the defendants on which they were not successful by reference to the transcripts and the skeleton arguments. He argued that the claimants had been put to extra cost and time by the defendants' applications which had been mostly unsuccessful. He explained that it was for that reason the claimants had sought costs orders against the defendants on the defendants' applications before Morgan J.

49. However, I note that Morgan J who heard those arguments concluded in his costs judgment that in relation to D7's application although the argument in relation to breach of candour failed it could not be separated out as an issue that would carry its own discrete costs consequences. And whilst that was not what Mr Maclean sought to do, he did seek to weigh it in the balance in respect of the overall costs position as supporting his argument for no order as to costs.

50. He argues that the claimants had to go to court to maintain their injunctions in any event and consequently they had not sought a costs order against the defendants in relation to the claimants' own applications even though the issues pursued by the defendants increased the costs and length of hearing. Further given the defendants' relative lack of success in relation to their applications and the claimants' relative success, including the maintenance of the injunctions against D1 and D2, the claimants should be seen as the overall successful party.

51. Finally, he submits that when considered in that context Morgan J's no order for costs was overly generous to the defendants in 2017 Any reassessment of the position now does not mean that no order for costs would now be unfair as between the parties despite the decision of the Court of Appeal. In substance his submissions can be reduced to a submission that the defendants are rewriting history and that no order for costs would be a fair outcome as between the parties looking at their relative success when one takes into account the decision of the Court of Appeal.

52. Further he argues that many of the defendants' arguments said to justify costs orders have already been addressed by the costs orders already made in favour of the defendants in respect of the Appeal, and the costs order in favour D7 in respect of the March 2022 hearing, which HHJ Klein said was a proportionate penalty for the claimants' poor conduct in failing to pursue the remittal after April 2019.

53. However, HHJ Klein also concluded that the claimants were at fault for inexcusable delay between April 2019 and August 2021, although he did not conclude that the delay prior to August 2021 was an abuse of process in the sense that is applied to strike out applications. And whilst he found that from August 2021 the claimants had had a positive duty to apply to the court expeditiously to apply to discharge the injunctions against D1 and D2 and sets out at [51] the factors he took into account in determining that from August 2021 the claimants' conduct was improper, he was not prepared to strike out the claim at that stage. He penalised the claimants in costs making a costs order in favour of D7. The defendants submit that the delay and improper conduct as found by HHJ Klein is nonetheless a factor to take into account when considering the costs order to make now. And of course so far as D6 is concerned those delay factors as against them have not resulted in any costs order in their favour.

54. Importantly though at [53] HHJ Klein found that the consequences of the delay were the delay in a determination in relation to the costs since August 2021.

55. D7's submissions were adopted and supplemented by D6. The defendants remind me that all the injunctions have now been discharged and the claims against D1 to D5 have either been dismissed or discontinued. The defendants submit that without their intervention, including their applications to discharge or vary, there would have been nothing to check the draconian nature of the injunctions obtained by the claimants.

56. The injunction against D4 was discharged on the first occasion it was opposed in 2017. The injunctions against D3 and D5, the exclusion and supply chain injunctions, were out of the ordinary, novel and an unwarranted restriction on lawful protest. They were not narrow and focussed in their scope but broad and vague and took effect against the whole world.

57. Although the injunctions against D1 and D2 were more conventional D6 points to the extensive nature of the modifications to all the injunctions following the intervention of the defendants, including the discharge of the injunction against D4 and the modifications to the injunctions against D3 and D5 which the defendants argue provided clarity about what activities would be caught by them. Those injunctions were substantially redrafted in 2017 before being discharged by the Court of Appeal in 2019.

58. The defendants argue that it was their intervention that provided the counter arguments which caused the amelioration of the worst excesses of the injunctions even if they were not wholly successful in having them all discharged. The defendants argue that they were therefore successful.

59. By contrast the claimants argue that the process of clarification and refinement of the injunctions including in respect of D1 and D2 was part of the process of reviewing the injunctions on the return date.

60. I note however that Morgan J directed that if the claimants applied for a further injunction against D4 it would have to be expressed in clear and precise terms specifying the matters which were to be restrained.

61. When the Court of Appeal considered the appeal in 2019 it became one of the earlier decisions in a series of decisions which have since clarified the law in the area of injunctions against Persons Unknown. The decision established principles to be considered when seeking a quia timet injunction in protest cases and the balance with Article 10 and 11 ECHR.

62. The defendants rely on both the importance of the Court of Appeal decision and the recognition by both the Court of Appeal and Morgan J of the assistance provided to the court by the defendants in what Morgan J described, in 2017, as a case of public importance. D6 argues that the position of the defendants was akin to the role of those intervening in *Canterbury County Council v Persons Unknown and Friends, Families and Travellers* [2020] EWHC 3153 (QB) in which Nicklin J said at [48]

> "It would be regrettable if the regime of costs and the limited resources of these groups who are seeking to assist the Court in "Persons Unknown" cases combined to disincentivise their valuable participation".

63. The defendants further rely on the failure of the claimants to list a hearing to determine the remitted issues after April 2019 and HHJ Klein's findings in respect of the delay in doing so.

64. The defendants see their role in these proceedings as akin to that of an intervenor in judicial review proceedings acting in the public interest or akin to that of a defendant in a claim by a public authority where the defendant makes the counter arguments to ensure that there is a proper consideration of any Human Rights issues. D6 argued that the claimants should have considered declining to seek any costs orders against the defendants given the important public interest role they played in challenging the injunctions. Although the claimants do not seek a costs order against the defendants now, D6 argues that their conduct in seeking costs orders in 2017 and/or threatening to seek adverse costs orders during the course of the proceedings was inappropriate and sought to stifle D6's ability to fully participate in the proceedings in the public interest.

65. However, these are neither judicial review proceedings nor proceedings involving a public authority. Although it may be that the courts' approach to the weight to be applied to some of the factors taken into account as part of the exercise of its discretion may differ, even in judicial review cases the starting point is still that the court should determine who is the overall successful party and that the unsuccessful party should pay the successful party's costs unless the court, in the exercise of its broad discretion, orders otherwise.

66. For the claimants this was a commercial claim related to their business activities and interests and driven by a desire to protect those interests. It is clear that the defendants approach these proceedings from a different perspective. The defendants say that they are driven by a deep-seated concern about the limits that were placed on freedom of expression and the right to protest by the injunctions. They say that the court should consider the initial intentions of the parties and what they have achieved when looking at who is the successful party and what costs order to make.

67. They consider that the FIIO was an unprecedented attack on the fundamental right of persons to lawfully protest and as such constituted a breach of Article 10 and 11 of the ECHR. Unchecked, the injunctions would have had a chilling effect on those rights and been a violation of the fundamental rights of freedom of expression and assembly. Any consideration of the appropriate costs order should be viewed in that context.

68. They consider that the claimants' failure to relist the remitted issues after the decision of the Court of Appeal and/or to apply to discharge the injunctions notwithstanding the developments in the law as it related to Persons Unknown following subsequent cases (for example the more recent decision of the Court of Appeal in the *LB of Barking and Dagenham v. Persons Unknown* [2022] EWCA Civ 13), and despite the Government moratorium and the expiry of their planning permissions to be further evidence of what D6 considers to be abusive behaviour.

69. Further they argue that the claimants' conduct (including their aggressive approach to costs) sought to deter and suppress those seeking to uphold and/or exercise their fundamental rights and/or seeking to fulfil a public interest role. D6 says that unlike D7 he was deterred from issuing an application to strike out due to the fear and threat of adverse costs orders. The defendants submit that the claimants should not benefit from using costs as a litigation tool. The claimants noted however, that the defendants and those supporting them had not been deterred from appealing where their combined costs were in the region of £500,000.

70. The defendants criticised the claimants at a granular level of detail for example referring me to the claimants' failure to tick the box on the claim form saying the claim included a Human Rights issue despite acknowledging that the Human Rights issues they were concerned about were raised in the skeleton argument before Morgan J when the FIIO was granted.

71. Finally, the defendants say that ultimately all five injunctions have been discharged and the claims dismissed or discontinued and that the court cannot ignore the discharge of the injunctions against D1 and D2. They submit that when these factors are taken into account the defendants are clearly the overall successful party or more successful party. Further or alternatively that the conduct of the claimants in light of the matters they have identified is such that the balance is firmly in their favour even if the court did not conclude that they were otherwise the successful or more successful party.

Discussion:

72. In exercising the court's discretion afresh what is the appropriate costs order in this case?

73. The claimants applied for injunctions against D1 to D5. The defendants applied to vary/discharge those injunctions. As I come to reconsider the position on costs there are no injunctions and the claims against D1 to D5 have either been dismissed or discontinued.

74. Standing back and looking at matters afresh it seems to me that objectively the outcome is not a success for the claimants but rather that the common sense reflection of the outcome is that the claimants have been unsuccessful and that none of the

matters I have been referred to provide any basis for departing from the usual order. However, arguably that is an oversimplification even though for the reasons I give my conclusion is that the defendants should have a costs order in their favour.

75. When reconsidering the costs order I need to reconsider the position as if the TAIIO and the Court of Appeal order had been substituted for the TIIO. In those circumstances the court would have been faced with a situation where the injunctions against D3 to D5 had been discharged and the claims against them dismissed. The injunctions against D1 and D2 had been modified and continued pending further consideration of the two remitted issues. The court's starting point where there are outstanding matters that may affect the incidence of costs would usually be to reserve the determination of the appropriate costs order until the determination of those outstanding issues. Unsurprisingly that is the broad effect of the Court of Appeal order.

76. Even if one views this through the lens of Morgan J in 2017 the most likely starting point would have been to reserve the determination of costs until the additional issues had been determined. But those two issues were never determined so no judge is ever going to be in a position to carry out the assessment that the Court of Appeal anticipated when it remitted the determination of the costs below in 2019. The starting position is therefore unsatisfactory - three injunctions were discharged and two were maintained pending further argument which never took place.

77. The defendants were successful at least the extent that three of the five injunctions were discharged which would seem to me to put them ahead on a pure numbers game. The claimants focus on the retention of the injunctions against D1 and D2.

78. But it seems to me that to ignore entirely the absence of the remittal hearing and what happened next has an air of unreality about it. That is particularly so when the court's discretion is broad in relation to costs and consistent with the overriding objective it is necessary to stand back and take a common sense and pragmatic approach to the determination of the appropriate costs order.

79. Whilst it is not necessary for the court to have determined the two remitted issues nor it is necessary to speculate about the outcome, I do consider that I have to take into account that the primary reason the remitted issues were not determined was the claimants' own failure to relist them in 2019 or at all. The consequent delay resulted in findings by HHJ Klein of improper conduct up to August 2021 and abusive levels of delay thereafter. It is a factor in the overall consideration of the appropriate costs order to make and when determining who can be said to be the successful party. It weighs against the claimants.

80. However, I also have to keep in mind that the Court of Appeal has already made orders in relation to the costs of the appeal and that HHJ Klein has made an order in relation to D7's costs arising out of the strike out application. I should be cautious not to penalise the claimants twice over, but I also need to keep well in mind that this decision does not determine either the costs of the proceedings as a whole nor the costs of the costs of the remittal. This judgment is focussed on what costs order should be substituted for Morgan J's costs order in light of the events that have occurred.

81. Had Morgan J discharged the injunctions against D3 to D5 in 2017 but left over consideration of the two outstanding issues in relation to D1 and D2 to a further hearing, as I say, the most likely outcome at the hearing before him would have been that he would have reserved determination of the costs to that further hearing so that he would be able to undertake the balancing exercise necessary to determine whether there was and if so who was the successful party for the purposes of any costs order.

82. The claimants argue that the retention of the injunctions against D1 and D2 should be treated as a positive factor in the claimants' favour tending towards no order for costs or they fall out of consideration in determining who was successful at all as they were discharged on the claimants' application for different reasons.

83. But whilst the court cannot speculate about the outcome of the remitted issues and their likely effect on the injunctions against D1 and D2 this approach seemed to me to be over generous to the claimants. It is unrealistic for the claimants to argue that the eventual discharge of the injunctions against D1 and D2 due to a material change in circumstances is a matter that is either neutral as against the claimants or weighs in their favour given nature and purpose of the proceedings. But in any event, such an argument does not appear to me to appropriately balance the discharge of the injunctions against D3 to D5 which also form part of the court's consideration when determining who is the overall successful party.

84. Costs were incurred by all parties in seeking to maintain, discharge or vary the five injunctions before Morgan J. Whilst I am to proceed on the basis that the injunctions against D3 to D5 were discharged, I also need to have regard to the fact that the parties raised both general overarching arguments that applied to all five injunctions during the course of that hearing as well as some arguments of detail specific to particular injunctions. Although submissions were made about the amount of time taken up by particular unsuccessful arguments, quite rightly neither party in fact was seeking an issues or percentage based order. At best therefore these arguments go to the overall balancing exercise.

85. It appears to me that the court should take into account when undertaking that balancing exercise that not only were the injunctions against D3 to D5 discharged but the injunctions in respect of D1 and D2 were also modified. The general modifications were overlapping and the specific modifications in relation to D3 and D5 were superseded by the discharge of those injunctions. However, they were nonetheless the product of a debate between the parties and the Judge about the scope and extent of the injunctions during the course of the hearing in 2017. The defendants clearly played a significant role in that process even if they were not wholly successful in achieving a discharge of all five injunctions. It is the nature of such a hearing that where the parties are trying to assist the court it becomes an exercise in drafting by committee. Further although the defendants were not successful in respect of all of the arguments that they raised before Morgan J or in their applications for permission to appeal or before the Court of Appeal both Morgan J and the Court of Appeal acknowledged the value of the defendants' role.

86. In the absence of these defendants it seems to me unlikely that the same critical eye would have been brought to bear on these injunctions and their scope despite the claimants' submissions. And, of course, I also have to take into account and weigh in

the balance the failure to relist the remittal, particularly in light of the findings of HHJ Klein.

87. It appears to me that at its lowest the discharge of the injunctions against D1 and D2 should be treated as a factor that is neutral as against the defendants. But it appears to me that more realistically it should be considered to be a factor that positively weighs in their favour as ultimately resulting in the outcome the defendants sought.

88. The authorities are clear about the nature of the exercise the court is to undertake. It is not a granular points based exercise but an overall common sense assessment of who is the overall successful party. Both parties pursued some arguments on which they were not successful. The claimants argue that the consequence is that the balance between the parties should still be no order for costs. I do not agree.

89. The defendants were not successful in all respects but were to my mind significantly more successful than the claimants overall. Three of the injunctions were discharged, two were subject to further argument which did not take place but were ultimately discharged at the claimants' request. All of the injunctions were modified as a consequence of the parties and Morgan J's consideration of them in 2017 and again by the Court of Appeal. They may have been considered by Ineos to be the most wide-ranging injunctions of their kind when they were granted but the process of amendments, variations and modifications in 2017 and 2019 were part of a process that sought to limit and/or refine the scope of the injunctions and provide more precision in relation to the drafting which was part of what the defendants sought to achieve. Indeed that can be seen clearly from the addition in TIIO of the requirement for more precision if a further injunction were sought against D4 and from the judgment of the Court of Appeal.

90. Further the injunctions in respect of D3 to D5 were those that were the more wide-ranging, novel, cutting edge injunctions against Persons Unknown and the ones which the defendants say they were particularly concerned about. Whilst the obtaining and the discharge of them started a process of clarifying the law and the requirements for such injunctions more broadly, and the defendants would say was a matter of public importance, that would not itself be a reason to depart from the usual position when considering who was the successful party but would be a factor to weigh in the balance when considering whether a different order should be made.

91. Unlike the injunctions against D3 to D5, the injunctions against D1 and D2 were not unusual in concept. However even they were modified in terms of scope and definition and still required further consideration given the remitted issues.

92. Mr Maclean's reliance on the provisions in the TIIO to fix a review hearing which never took place does not to my mind provide any additional assistance to the claimants and is misplaced. Whilst it may have provided a date for further consideration of the injunctions that did not take place because the claimants did not pursue the listing of the review hearing or the remittal. The Court of Appeal left in place the injunctions against D1 and D2 only until that further consideration which in accordance with the terms of the TAIIO and/or the Court of Appeal order should have occurred shortly after April 2019 but did not. That leaves the court in the position of being unable to speculate about what might have happened. In footballing terms one

might consider that the position in relation to D1 and D2 was at best so far as the claimants were concerned a no-score draw but with the replay still to come.

93. I consider that in this case given the particular facts it is necessary to take into account what subsequently happened to the injunctions in relation to D1 and D2 and why. Even if the discharge of D1 and D2 was at the claimants' request due to a change in circumstances that is no different from choosing to discontinue or withdraw a claim. The usual consequences in such circumstances unless the court were to order otherwise would be an adverse costs order. The reconsideration of the appropriate costs order is taking place now and there would be an air of unreality about the process if the court could not take into account and or had to completely ignore the subsequent events when the remittal did not take place because of the claimants' own delay and conduct. When one does that, it appears to me that any possible argument that the claimants had any element of success to weigh in the balance falls away. It makes it even clearer that D6 and D7 were the overall successful party on any realistic assessment of the position in relation to the applications before Morgan J in 2017.

94. It seems to me then, that in reconsidering the costs order made by Morgan J it is necessary to take into account that (i) the injunctions against D3 to D5 have now been discharged and the claims dismissed and (ii) the injunctions against D1 and D2 have been discharged and the claims discontinued. Whilst the injunctions against D1 and D2 were not discharged as a result of a determination of the remitted issues, their discharge was ultimately a consequence of the claimants' late cross application in March 2022 and the findings of HHJ Klein in respect of the claimants' conduct.

95. Many of the additional criticisms and conduct issues raised by the defendants focus not on the position in relation to the application for the injunctions but conflate the broader issue of conduct in relation to the proceedings as a whole with conduct in relation to the injunctions. On the basis of HHJ Klein's findings the delay in determining the costs order arising from the remitted issues only became abusive in August 2021. Whilst the delay was considerable, I have to recognise that certainly as against D7, HHJ Klein says he has addressed that in the costs order he made in March 2022.

96. Taking all the various matters into account and standing back I consider that when one takes a realistic common sense approach to the question of the appropriate costs order the defendants were on balance the successful party even without consideration of the position in relation to D1 and D2 but that any consideration of the subsequent discharge and discontinuance in relation to D1 and D2 tips the balance more firmly in favour of the defendants.

97. Therefore in the exercise of my broad discretion in relation to costs and for the reasons set out I consider that the defendants were the overall successful party and that there is no reason in this case for the court to depart from the usual costs order in such circumstances. The appropriate costs order is that the claimants should pay D6 and D7's costs of responding to the injunction applications including D6 and D7's own application costs.

Indemnity Costs:

98. However, D6's submission that the claimants should pay those costs on an indemnity basis appears to me to confuse the conduct of the claimants in applying for the injunctions which were ultimately discharged and a more general complaint in relation to their conduct.

99. An order for indemnity costs is one that is made where the court is satisfied that the parties' conduct falls outside the norm.

100. Here there is confusion in the submissions between the conduct that relates to the application for the injunctions, the conduct relating to the delay in progressing the remittal and the proceedings overall. From a costs perspective all three have to be treated as different phases or stages in the proceedings since different costs orders have or will be sought in relation to them.

101. The claimants made an application for five injunctions. The applications were broad and in combination Morgan J and the Court of Appeal cut them down both in number and scope. There was no suggestion in the judgments of either Morgan J or the Court of Appeal that the claimants' conduct fell outside the norm or was liable to some sanction. The Court of Appeal, which ultimately discharged the injunctions against D3 and D5, was not asked for and did not consider it appropriate to make an indemnity costs order. The conduct which gave rise to that order has already been sanctioned by it. Morgan J in his judgment on costs and in his judgment does not identify any areas of conduct that might take the claimants' conduct outside the norm and whilst I am exercising my discretion afresh, I note that he positively rejected the arguments in relation to the (unsuccessful) allegations of breach of candour which may have in fact weighed against the defendants rather than the claimants.

102. The complaints about the claimants' subsequent conduct and their threats of adverse costs orders, if they are of relevance, are not for this costs order. HHJ Klein says that he took into account that conduct in relation to the order for costs in favour of D7. D6 says they did not apply to strike out as D7 had done because of the threat of adverse costs orders. But D7's application to strike out was in fact unsuccessful. It was unclear therefore how D6's submission was intended to assist me in relation to the costs I am reconsidering. Whether the argument has any weight in relation to arguments about costs of the proceedings as a whole remains to be determined.

103. The problem that is highlighted in this case is a clash between the public and the private. Whilst the law has developed further in this area since 2017 the position still remains that there is a balance to be struck between private rights, public rights and human rights such as those relating to freedom of expression and the right to lawfully protest. This does not preclude the claimants from actively seeking to lawfully limit the extent of such activities in relation to their fracking sites, just as it does not prevent the defendants from opposing such action by the claimants. It is by that mechanism that the balance is found, and the law develops.

104. The courts manage such processes using the case management tools that they have and applying the overriding objective to enable cases to be determined justly and at proportionate cost. When considering costs as part of the court's broad discretion the court can take into account conduct generally and factors such as the importance of

the matter to the parties, its novelty or difficulty when determining either the appropriate costs order or the amount of costs. This provides the court with the flexibility to recognise the public importance of proceedings by applying the factors in CPR 44.2(4) and CPR 44.4 as part of the exercise of the court's broad discretion in an appropriate case. However, what it does not do is to provide an indemnity for defendants (or those supporting them) who choose to intervene in proceedings whether as an intervenor or as a defendant. The starting point is that the same costs rules apply in civil litigation whoever the defendant might be. It is always a matter for the discretion of the court what costs order should be made, not a pre-determined indemnity.

105. If D6' submissions were intended to suggest that any person intervening in proceedings who considered they were furthering the public interest was to be immune from any adverse costs order in all circumstances but able to take the benefit of any positive costs order that would seem to me to be muddled thinking.

106. If the defendants had issued hopeless applications that had been wholly unsuccessful they would have been at risk as to costs. It is far from unusual in the types of cases that are daily seen in these courts for parties to highlight to each other the adverse costs risks associated with making an application. Such conduct of itself does not justify an award of indemnity costs there must be something more.

107. I am not persuaded that the conduct of the claimants is so far out of the norm that an indemnity costs order is appropriate. This is important and hard fought litigation being conducted by well represented parties whose solicitors and counsel are familiar with the ways of conducting such litigation, even if they were representing defendants whose reasons for becoming involved in the proceedings were a wider concern about their chilling effect on lawful protest. It seems to me that again the position is overstated.

108. D6 referred me to the authorities in relation to claims against Persons Unknown which make it clear that a substantial delay in progressing such claims to a final hearing may of itself be found to be abusive. HHJ Klein considered that issue and has already determined that the delay beyond August 2021 was abusive and as a consequence made a costs order in favour of D7 which he considered to be the appropriate sanction. I take this into account when considering whether there are any issues of conduct which either affect the primary incidence of costs or whether the claimants conduct is such as to justify an indemnity costs order. I also, however, take into account that it is necessary to approach such an argument with some caution in relation to the reconsideration of the Morgan J costs order rather than whether it has some weight in relation to the proceedings as a whole. It seems to me that it is a matter that is for consideration in relation to the costs of the proceedings as a whole to the extent that it has not been addressed by HHJ Klein. I come back to the caution to be attached to the overlapping nature of the submissions in relation to costs and the costs orders already made.

109. The claimants made what was on any view a largely unsuccessful application for five injunctions. However, not every unsuccessful application justifies an order for indemnity costs there has to be something more which takes it outside the norm.

110. The points raised by D6 do not, either individually or cumulatively with the overall lack of success of the application, appear to me to take this outside the norm nor to tip the balance in favour of indemnity costs in respect of the remitted costs order.

111. The order for costs against the claimants in respect of the remitted costs should therefore be on the standard basis.

Strike Out:

112. The next question that arises is what should happen to these proceedings. There is no longer a purpose to them. The claims against D1 to D5 have either been dismissed or discontinued. However, D6 and D7 remain defendants. It is at this stage that the slightly unusual nature of the defendants' role came to the fore. Mr Maclean argued that on a strict analysis of CPR 38 it was not possible for the claimants to discontinue as against the defendants as there had never been a claim against them. It did not therefore fall within CPR 38 and there was nothing for the claimants to discontinue. He referred me to *Galazi v Christoforou* [2019] EWHC 670 (Ch), a decision of Chief Master Marsh at [42]-[44] which itself referred to *Kazakhstan Kagazy Plc v Zhunus* [2016] EWHC 2363(Comm) and *XX v YY* [2021] EWHC 3014 (Ch) at [94]-[98] in which Miles J followed the reasoning of Chief Master Marsh.

113. Whilst I was not entirely persuaded by the claimants' argument that they could not find a way to discontinue the proceedings against D6 and D7 I accept that it is arguable that they cannot do so. That does not provide the claimants with a good reason for not bringing these proceedings to an end and/or for the parties not being able to come to an agreement as to how that might be achieved.

114. These proceedings no longer serve any useful purpose and once I have determined these costs issues there is nothing left in them. They plainly disclose no legally recognisable claim against D6 and D7 and never did. There is no possible benefit in allowing them to remain and continue in any form. Now that the injunctions have been discharged and the claims against D1 to D5 have been dismissed or discontinued the proceedings are abusive and it is neither unjust nor inappropriate to strike them out.

115. It is neither good case management nor consistent with the overriding objective to leave them unresolved and risk the costs and time of a strike out application in the future. To do so is not only a waste of the parties' time and costs but a waste of the courts' time and resources. I intend to strike out the claim under the court's inherent power under CPR 3.3 and CPR 3.4 and CPR 3.1(2) (m).

116. In so far as there are any costs that are not otherwise covered by the various costs orders already made in these proceedings my preliminary view is that those costs should follow the event and it appears to me that the claimants should in those circumstances pay D6 and D7's costs but I will consider any further brief submissions on that issue if the position cannot be agreed at any consequentials hearing or deal with it on paper if required.

117. In addition, if the parties are unable to reach agreement, I will have to determine the costs of and occasioned by this hearing and the CMC directed by HHJ Klein in respect of which the costs were reserved.

118. I will hand down this judgment remotely. In advance of that the parties should seek to agree an order that reflects the terms of this judgment and seek to agree the position in relation to the other outstanding costs issues.