Neutral Citation Number: [2024] EWHC 11 (Ch)

Case No: PT-2023-BRS-000017

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

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

Date: 8 January 2024

Before :

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

- -

Between :

CHEDINGTON EVENTS LIMITED	**Claimant**
- and -	
1. NIHAL MOHAMMED KAMAL BRAKE	**Defendants**
2. ANDREW YOUNG BRAKE	

- -
- -

Niraj Modha (instructed by **Stewarts LLP**) for the **Claimant**
The defendants in person

Consequential matters dealt with on paper

- -

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 revised version as handed down may be treated as authentic.

……

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2 pm on 8 January 2024.

HHJ Paul Matthews :

Introduction

1. This is another, happily more modest, instalment in this long-running multi-headed litigation. On 25 February 2022, I handed down judgment on liability in this trespass claim (known to the parties as the Possession Proceedings), under neutral citation number [2022] EWHC 365 (Ch). In that claim, I held that the claimant was entitled to possession of a property known as West Axnoller Farm in Dorset, and also to mesne profits for the lengthy period of trespass by the defendants. Permission to appeal was refused by the Court of Appeal on 7 April 2022.

2. The first judgment led to an order dated 18 May 2022, which included an order for an interim payment on account of mesne profits in the sum of £225,000. It also led to a second trial, in May 2023, of the question of the measure of damages for the trespass which I had found to exist. On 10 November 2023, I formally handed down my judgment on that quantum question, under neutral citation number [2023] EWHC 2804 (Ch). On that occasion, I also gave directions for consequential matters to be dealt with, initially by way of written submissions.

3. I received a first round of written submissions from the parties on 14 November 2023, submissions in answer on 17 November, and further submissions on 21 November 2023. There was then a further email exchange from the parties about some of the submissions made. I received many pages of supporting correspondence, interest calculations and so on. I also had to resolve a point about whether I had jurisdiction to extend time for the defendants to file their appellants' notice with the Court of Appeal (in relation to which I gave a short judgment on 1 December 2023; see [2023] EWHC 3094 (Ch)).

4. Because of these matters, and also because of pressure of other work (including a subsequent lengthy trial in London), and the Christmas and New Year break, I have not been able to give my decision – together with reasons for that decision – on consequential matters in this matter until now. I am sorry for this delay.

5. The claimant seeks (1) the discharge of the order dated 18 May 2022 for an interim payment on account of mesne profits in the sum of £225,000, (2) its replacement by an order for payment of the sum of £236,818.27 (which is the amount of the damages which I found to be due in my quantum judgment), (3) an order for the payment of interest on the damages awarded, (4) an order for the defendants to pay the claimant's costs of the quantum trial, on the indemnity basis, and (5) an order for a payment on account of those costs in the sum of £170,000 (or £150,000, if costs are awarded on the standard basis). It is common ground that the defendants have not so far paid any part of the interim payment of £225,000.

6. The defendants have not applied to me for permission to appeal the quantum decision. They have indicated that they are seeking permission directly from the Court of Appeal. However, they do seek an order that the claimant pays *their* costs of the quantum proceedings, to be assessed summarily, initially submitted to be on the standard basis, but later submitted to be on the indemnity basis.

7. As to the orders sought by the claimant, they oppose the discharge of the order dated 18 May 2022 for an interim payment and its replacement by an order for payment of the sum of £236,818.27, they seek a stay of any order for the payment of mesne profits to the claimant, they oppose the application for them to pay the claimant's costs, and they especially oppose the application for any such costs order to be on the indemnity basis. They also submit that the actual sums claimed by the claimant in respect of costs are "completely disproportionate and indefensible".

Discharge of interim payment order and entry of fresh payment obligation

8. The court's powers to vary or discharge an order for an interim payment are found in CPR rule 25.8, PD 25B and PD 40B. In circumstances in which no part of the interim payment ordered has actually been made, the first of these relevantly provides as follows:

> **"25.8**—(1) Where a defendant has been ordered to make an interim payment … the court may make an order to adjust the interim payment.
>
> (2) The court may in particular—
>
> […]
>
> (b) vary or discharge the order for the interim payment;
>
> […]
>
> (4) The court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it.
>
> […]"

9. Paragraph 5 of Practice Direction B to CPR Part 25 provides (emphasis supplied by me):

> "5.1 In this paragraph 'judgment' means:
>
> (1) any order to pay a sum of money,
>
> (2) a final award of damages,
>
> (3) an assessment of damages.
>
> 5.2 In a final judgment *where an interim payment has previously been made* which is less than the total amount awarded by the judge, the order should set out in a preamble:
>
> (1) the total amount awarded by the judge, and (2) the amounts and dates of the interim payment(s).
>
> 5.3 The total amount awarded by the judge should then be reduced by the total amount of any interim payments, and an order made for entry of judgment and payment of the balance.

> 5.4 In a final judgment *where an interim payment has previously been made* which is more than the total amount awarded by the judge, the order should set out in a preamble:
>
> (1) the total amount awarded by the judge, and
>
> (2) the amounts and dates of the interim payment(s).
>
> 5.5 An order should then be made for repayment, reimbursement, variation or discharge under rule 25.8(2) and for interest on an overpayment under rule 25.8(5).
>
> 5.6 Practice Direction 40B provides further information concerning adjustment of the final judgment sum."

10. So far as concerns the last sub-paragraph (5.6), Practice Direction 40B adds nothing of significance for present purposes. It will also be seen that paragraph 5 of Practice Direction 25B is relevant only where an interim payment has actually been made (see sub-paragraphs 5.2 and 5.4). In the present case, none has, so it is in fact irrelevant.

11. The defendants submit that the rules do not allow for an interim payment order to be discharged and a new order made for the total sum. I reject this submission. CPR rule 25.8(2)(b) explicitly confers the power on the court to "discharge" an interim payment order. I accept that paragraph 5 of the practice direction contains provisions designed to allow the payment obligation to be varied by reference to interim payments *that have actually been made*. But, since none has been made here, those provisions simply have no application.

12. The question therefore is whether it is appropriate for the court to make the order sought by the claimant. The claimant says it is less complicated, and more efficient, to have a single payment obligation, attracting a single interest calculation, rather than multiple such obligations each with its own interest calculation. The defendants have no answer to this. In particular, the mental health crisis moratoria into which both defendants were previously entered have come to an end, and are no longer relevant. I will therefore make the orders (1) and (2) sought by the claimant.

Stay of payment obligation

13. The defendants seek a stay of the new payment on two grounds. The first is their intention to appeal my decision in the quantum trial, on the basis of errors said to have been made in relation to the offers which were made by the defendants to leave the property the subject of the claim. The second is that the defendants say that they "have succeeded in the Cottage Eviction proceedings" and "It is highly likely that [they] will be awarded costs and damages which are considerable".

14. In *Hammond Suddards v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, Clarke LJ (with whom Wall J agreed) said:

> "22. By CPR rule 52.7 [now CPR rule 52.16], unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay

> will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

15. In order to secure a stay, therefore, it is not enough that there should be an appeal, or (as here) an intention to appeal. More is required. In *Department for the Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257, the single judge, Sullivan LJ, said:

> "8. … A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
>
> 9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

16. In *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik* [2018] 1 WLR 3014, SC, Lord Wilson (with whom Lords Neuberger and Hodge agreed) said:

> "15. There is no doubt – indeed it is agreed – that, if the proposed condition is otherwise appropriate, the objection that it would stifle the continuation of the appeal represents a contention which needs to be established by the appellant and indeed, although it is hypothetical, to be established on the balance of probabilities: for the respondent to the appeal can hardly be expected to establish matters relating to the reality of the appellant's financial situation of which he probably knows little."

17. There is thus a need for evidence by which the appellant proves the need for a stay. Moreover, it is clear that, in cases where such evidence is not adduced, the application for a stay is likely to fail: see *eg Hincks v Sense Network Ltd* [2018] EWHC 1241 (QB); *Hughes Jarvis Ltd v Searle* [2018] EWHC 2108 (Ch).

18. As to the first point, in the present case, there is no evidence of any irremediable harm that might be done to the defendants if the order to pay damages were made but not stayed. There is in particular no suggestion that the claimant could not repay any damages already paid in the event of a successful appeal. Accordingly, there is no basis for ordering a stay on this ground.

19. As to the second point, the fact that the Court of Appeal reversed my decision in the Cottage Eviction proceedings on a point of law does not amount to the complete success which the defendants claim. The Court of Appeal's order was not that the defendants were to be restored to possession of the cottage (which is what they sought). Indeed, as I understand the matter, the claimant is still in possession. Instead. it was simply to declare that

> "The Respondent [*ie* the claimant's parent company The Chedington Court Estate Ltd] had no right or title at common law to justify any interference with the Brakes' exclusive possession of the cottage without a court order".

As I understand it, the appeal was allowed only to that extent.

20. The Court then remitted the question of remedy (if any) to the High Court in Bristol. This matter is now being dealt with by HHJ Blohm KC, and not by me, so I am not clear what is the present position. But at this early stage I cannot say that it is obvious that the defendants will in future be restored to possession to the cottage, or that substantive damages will be awarded to the defendants (who are after all trustees for their opponent, The Chedington Court Estate Ltd) to be paid by The Chedington Court Estate Ltd (their beneficiary).

21. Moreover, even if damages or costs *were* to be awarded in favour of the defendants against The Chedington Court Estate Ltd, that would not involve any set-off against *the present claimant*, which is a different company. The defendants in their submissions do not address this point. In these circumstances, I cannot see that this second ground, any more than the first, justifies a stay of the payment order in favour of the claimant.

Interest

22. I turn now to the question of interest. I dealt with this in principle in paragraphs [114]-[116] of the main quantum judgment at [2023] EWHC 2804 (Ch). I held that, for the reasons there given, the claimant should be entitled to interest at the rate of 3% per annum from 9 November on the damages for the house and from 1 December 2018 on the damages for the arena, until 16 January 2019, and at the rate of 8% per annum from 17 January 2019 on the damages for both the house and the arena thereafter.

23. In their second written submission, the defendants indicate that the Supreme Court (in recent insolvency litigation with the defendants) has recently awarded the claimant's parent company interest at the rate of 1% over the official Bank Rate of the Bank of England. The defendants go on to say that "It is unfortunate that this [Court] has sought to apply an uncommercial rate of interest because [the claimant] asked for it". This is not correct. The reasons for my awarding the rates of interest were explained in the paragraphs indicated in the earlier judgment, to which the defendants do not refer. The only thing that is unfortunate is that the defendants did not engage with that part of the debate at the time, and contributed nothing. But that ship has now sailed.

24. The claimant calculates that, on the basis set out in my earlier judgment, the total interest accrued from 9 November 2018 to 10 November 2023 amounts to £61,804.22. The defendants have had the opportunity to consider these calculations,

but have not suggested that they are wrong (except for a transcription error by counsel, which has been corrected). I therefore accept them.

The costs of the quantum claim

The general rule

25. As I have said on previous occasions, the rules on costs are well known, and they are set out in the legislation and in many court judgments. The following words are therefore largely borrowed from earlier decisions of mine. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). 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).

26. 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". As a general proposition, the courts prefer to make costs orders covering the entire action (even if then extending only to a proportion of costs), rather than issue-based costs orders. But it is clear that the court may still make an issue-based order if it considers that this better meets the justice of the case.

Cases on discretion

27. The defendants have referred me to a number of cases bearing on the discretion of the court. In *Coward v Phaestos* [2014] EWCA Civ 1256, a total of some £19 million had been spent on costs in a hard-fought intellectual property case. The central issue was the effect of a *Calderbank* offer (from *Calderbank v Calderbank* [1976] Fam 93, CA), made by the claimant to the defendant. In *money* terms, the claimant offered the defendant substantially all that it achieved at trial. However, the judge's costs order was unfavourable to the claimant. Nevertheless, the claimant's appeal against the judge's decision on costs failed.

28. David Richards J (with whom Moore-Bick and Ryder LJJ agreed) said:

> "44. There was no dispute between the parties as to the approach to be adopted by this court in reviewing the exercise by the judge of her discretion as to costs. The relevant principles and approach have been restated many times and it is sufficient for present purposes to cite what Davis LJ said in *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2013] 1 WLR 548, [2012] EWCA Civ 843 at [42]:
>
> > 'Decisions on costs after a trial are pre-eminently matters of discretion and evaluation. Further, it is particularly important to bear in mind that a trial judge – especially after a trial such as this one – will have a knowledge of

> and feel for a case which an appellate court cannot begin to replicate. The ultimate test, of course, for the purposes of an appeal of this kind is whether the decision challenged is wrong. But it is well established that an appellate court may only interfere if the decision on costs is wrong in principle; or it if involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if it is plainly unsustainable'."

29. This is of course all about the approach of an appellate court in considering the decision of the judge at first instance. As such, it does not assist me. But the discussion of the *Calderbank* offer is more helpful. The claimant said that the *Calderbank* offer gave the defendant "substantially all that it recovered at trial and that it was not worth the fight to continue the proceedings." The defendant argued however that there were other material differences between the offer terms and what was achieved at trial, and the judge agreed with four of them. The Court of Appeal disagreed with one of these, but upheld the other three.

30. David Richards J said:

> "69. The upshot therefore is that the judge rightly identified three aspects of the final order which represented substantial improvements on the *Calderbank* offer. She carefully considered the *Calderbank* offer and the submissions on it made on behalf of Dr Coward but, by reason of these differences, she concluded that it would not justify a departure from the usual rule that, if there is to be any order as to costs, the costs should be paid by the unsuccessful party. This exercise of the discretion vested in her by the Rules cannot in my judgment be faulted."

31. *Capita (Banstead 2011) Ltd v RFIB Group Ltd CA* [2017] EWCA 1032 was the case of another appeal against a costs order made at first instance following trial. The underlying claim related to an indemnity given in a Share Purchase Agreement whereby the defendant sold the entire issued share capital of the second claimant to the first claimant. A claim against the second claimant was settled for £3.85 million, and the claimants sought their indemnity. In November 2013 the defendant made a *Calderbank* offer to pay £2.15 million to the claimants, plus contractual interest.

32. The claimants recovered about £2 million at trial, but only in respect of that part of the claim which fell before a certain date. As to the rest they failed. The judge had decided to make an issue-based costs order. He made no order as to costs for the period up to the expiry of the *Calderbank* offer, and ordered the claimants to pay 80% of the defendant's costs thereafter. The claimants appealed.

33. Flaux LJ (with whom Longmore and Henderson LJJ agreed, dismissed the appeal. He held, referring to *Fox v Foundation Piling* [2011] EWCA Civ 790, [45], that, in appropriate circumstances, a *Calderbank* offer may have a similar effect to a Part 36 offer. He then went on to cite what Jackson LJ had said later in the same case, at [62]:

> "There has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in rule 44.3 (2) (a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates."

34. Finally, he also held that

> "43. … there is no principled basis for attacking the judge's judgment. He has stated the applicable principles correctly and then exercised his discretion. The fact that other judges might have exercised the discretion differently is neither here nor there and certainly does not demonstrate an error of principle … "

35. Once again, this simply states the position of the appellate court faced with a costs decision at first instance stating the principles and applying judicial discretion. It does not help me in the exercise of my own discretion. The defendants did refer to one decision where the majority of the Court of Appeal held that the judge had gone wrong in principle and allowed the appeal against his costs order: *Medway Primary Care Trust v Marcus* [2011] EWCA Civ 750. But the difficulty of applying these principles to such an essentially fact-sensitive area as this is shown by the fact that one of the judges of the Court of Appeal (Jackson LJ, as it happens) thought the judge had not gone wrong at all, and would have dismissed the appeal.

36. I was also referred by the defendants to passages in the decision of Briggs J (as he then was) in *Sectorguard plc v Dienne plc* [2009] EWHC (Ch). That was the case of an application by S to commit D and a director of D for contempt of court in respect of alleged breaches of undertakings to the court and (in respect of the director) for making false statements in evidence.

37. Briggs J said:

> "44. It is now well established, in the light of the new culture introduced by the CPR, and in particular with the requirements of proportionality referred to in CPR 1.1(2) as part of the overriding objective, that it is an abuse of process to pursue litigation where the value to the litigant of a successful outcome is so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking …
>
> 45. The concept that the disproportionate pursuit of pointless litigation is an abuse takes on added force in connection with committal applications. Such proceedings are a typical form of satellite litigation, and not infrequently give rise to a risk of the application of the parties' and the court's time and resources otherwise than for the purpose of the fair, expeditious and economic determination of the underlying dispute, and therefore contrary to the overriding objective as set out in CPR 1.1. …
>
> 46. It has long been recognised that the pursuit of committal proceedings which leads merely to the establishment of a purely technical contempt, rather than something of sufficient gravity to justify the imposition of a serious penalty, may lead to the applicant having to pay the respondent's costs …
>
> 47. Committal proceedings are an appropriate way, albeit as a last resort, of seeking to obtain the compliance by a party with the court's order (including undertakings contained in orders), and they are also an appropriate means of bringing to the court's attention serious rather than technical, still less involuntary, breaches of them. In my judgment the court should, in the exercise of its case management powers be astute to detect cases in which contempt

> proceedings are not being pursued for those legitimate ends. Indications that contempt proceedings are not so being pursued include applications relating to purely technical contempt, applications not directed at the obtaining of compliance with the order in question, and applications which, on the face of the documentary evidence, have no real prospect of success. Committal proceedings of that type are properly to be regarded as an abuse of process, and the court should lose no time in putting an end to them, so that the parties may concentrate their time and resources on the resolution of the underlying dispute between them.
>
> 48. In my judgment, viewed in that light, the application to commit Dienne and Mr Hare for breach of Undertaking 5 is just such an abuse. …"

38. It will be observed that this decision is about abuse of the process of the court in the context of committal applications for contempt. The present is not such a case. Obviously, the principles stated are not confined to such applications. They apply elsewhere in the procedural landscape too. But I cannot detect here any such abuse. The claimant had a substantive claim for damages for trespass, which it has fought, and in respect of which it has obtained an award of substantial damages. That is not by itself an abuse. The trespass was deliberate, and lasted several years, and the economic loss to the claimant was significant, not trivial.

39. The mere fact that the award is for less than it sought by the claimant's statements of case does not make the claim an abuse. Nor does the fact that the award was not much more than the interim award of the court. That interim award was made by the court as an estimate of the safe minimum (substantive) award to the claimant for its loss. It was not made as an award of a level below (let alone *near*) which the claim itself would be treated as abusive. I reject the submission that the court ought to treat this claim as an abuse.

This case

40. Returning then to the facts of this case, the first question is to decide (if I can) which is the successful party for the purposes of the costs rules. The defendants say (correctly) that the mesne profits claimed by the claimant's statements of case were in the sum of £697,586.30, but that the claimant has been awarded only £236,818.27. They say that this was a question, not of whether the claimant would recover anything, but of how much it would recover. Thus, having reduced the claim by over £400,000, the defendants say that they are the successful parties.

41. I do not agree. The defendants put forward a defence to the entire damages claim. This was not that there was no liability (for liability had been established by the judgment in 2022). Instead, it was that the trespass had caused no loss to the claimant, because of various matters, including (i) the lack of planning permissions and the unfinished and unsafe condition of the arena, and (ii) the offers made to move to the cottage, and therefore the quantum of damages was zero: see paragraphs 81(ii)-(iv), 84, of the re-amended defence and counterclaim.

42. I held against those contentions (see at [2023] EWHC 2804 (Ch). [51], [62], [74]-[94]). Moreover, I note, from the email sent by the defendants to the court dated 9 November 2023, that the proposed appeal by them to the Court of Appeal will be

limited to the question whether the offers made by the defendants to settle meant that they caused the claimant no loss. Accordingly, in my judgment, the claimant established damages attributable to the defendants, against their unsuccessful argument to the contrary. The claimant is accordingly the successful party.

43. Is there then any reason not to apply the general rule here? Here the claimant claimed damages for trespass. It valued that trespass at nearly £700,000. The defendants said it was worth nothing. I have awarded some £236,818.27. The mere fact that the successful party obtains less – indeed, much less – than it has claimed in its statements of case, is not a sufficient reason to displace the general rule: see *eg ACT Construction v Mackie* [2005] EWCA Civ 1336. There may be circumstances where it is right to reduce the proportion of costs to be paid by the unsuccessful party from 100%, but then the court would be making a "different order". Moreover, the defendants themselves ask that I make an order for their costs to be paid by the claimant. That also would be a "different order". I must therefore consider these possibilities.

44. As I have already said, rule 44.2(4) requires me, in deciding whether to make an order, and if so what, to take into account all the circumstances, including the conduct of all the parties and any admissible (non-Part 36) offer to settle the case. The written submissions before me make much of this or that aspect of conduct on the part of one or other of the parties, and also refer to a number of offers to settle. I will mention those that seem to me to be the most important. But I have read all the submissions, and not mentioning something here does not mean that I have not taken it into account.

Conduct

45. In my judgment, the defendants' conduct of the quantum trial unnecessarily increased costs. The following are the most important points. First, when the claimant agreed to the defendants' request to amend their statement of case, the defendants refused to agree to the usual provision that they pay the claimant's costs of and occasioned by the amendments. (I make clear that I do not rely on any point about the defendants' misleading the court.)

46. Secondly, the defendants took nearly two months to make the formal application, engendering further correspondence and costs. The defendants make the common "*Et tu quoque*" argument: "but the other side did the same". Yet, even if it were the case that both sides behaved badly in the same way (which I am not now deciding), that would not be important in considering, in relation to one party, whether that party should pay the other party's costs. As is well known, two wrongs do not make a right.

47. Thirdly, the defendants failed to meet at least six procedural deadlines, which necessitated extensions of time. There is a pattern of ignoring time limits. The defendants make the same argument: the claimant failed too, though the defendants cite only one particular occasion, when the claimant asked for an extension, to the expert evidence deadline. The defendants also say (correctly) that there were other proceedings going on, and the first defendant was dealing with matters on her own, as a litigant in person, and she was not well. She was also evicted from Axnoller House in the Possession Proceedings, and her only brother died. All this will have had an

impact upon her, but, as has been said before, litigants in person are in general not subject to a special regime. In principle, the same rules apply to everyone.

48. Fourthly, the defendants' evidence did not comply with either CPR Part 35 (expert evidence) or PD 57AC (evidence of fact), and costs were spent on putting that right. Once again, the defendants make the same argument: the claimant failed too, though the defendants do not particularise the defects, and say simply that they "did not have time to challenge them". But in my judgment this takes them nowhere. They were offered the opportunity to do so, but instead chose to do something else, or nothing. If parties do not particularise the failure, I cannot assess its relevance and impact.

49. Fifthly, they interfered with the expert evidence process by asking questions of the claimant's expert which were outside the scope of the relevant rules. The defendants say that this was not "inappropriate engagement". In response to a complaint about it from the claimant, the defendants said (email of 2 March):

> "I will write to whom I please. I will cross examine Mr Marshall on all matters I deem appropriate. It is not for you to limit my legitimate questions."

This style of response is, I am afraid, characteristic of the defendants' approach to this litigation as a whole. In my judgment, the questions were not legitimate, but indeed inappropriate. Yet the defendants were not prepared to recognise this.

50. Sixthly, they did not admit basic facts easily within their own knowledge, such as the date when they vacated the house, and they prevaricated lengthily on procedural requirements, such as failing to state their residential address after leaving the house. This caused unnecessary further costs to be incurred. Again, it is characteristic of the defendants' style of litigating, to make everything as difficult as possible. So far as I can see, the defendants do not deal with any of this in their written submissions.

51. I am well aware that the defendants are not lawyers, and that the first defendant suffers from a number of significant medical conditions. But the first defendant is, as I have said before, an extremely intelligent and quick-witted person, who has been involved in litigation with others in the past and in the present litigation for more than five years now. She knows all the documents extremely well, is a formidable (lay) advocate, and has taken every point she can in order to defeat, or at least delay, the claims of her opponents.

52. However, I do not criticise her merely for playing hardball. Provided that you play by the rules, you are entitled to be tough, if you think that is in your interests (though, in my experience, it usually is not). Nor do I seek to judge her by the standards of professionally qualified lawyers, because she is not one. But even a lay person as experienced, as clever, and as astute as the first defendant knows very well when what she is doing amounts to rule-breaking and poor litigation conduct, and *that* is the standard by which I judge her.

53. As already indicated to a limited extent above, the defendants also criticise the conduct of this litigation by the claimant. But most of their complaints that the claimant conducted itself in much the same way as the defendants are insufficiently particularised to be able to enable me to reach any conclusions. To the extent that any

of them is sufficiently particularised, I do not consider that they have any substance in considering what order to make about costs.

Offers to settle

54. I turn then to consider the question of offers to settle. The claimant made an open offer by letter dated 18 May 2022 to settle all the outstanding legal proceedings between the defendants and the claimant, its parent company and Dr Guy ("the Guy Parties"). This pointed out that the defendants already owed the Guy Parties some £2.1 million in ;iquidated costs orders, with almost a further £1.5 million in costs claimed and subject to detailed assessment, plus an interim damages award of £225,000.

55. The offer involved (i) the compromise of all existing proceedings, (ii) the registration of title to the cottage in the claimant's parent company, (iii) an agreement not to enter land owned by the Guy Parties (even on public rights of way), (iv) the transfer of the Axnoller internet domain to the claimant, and the waiver of associated IP rights, (v) the waiver of any objection to Michelmores' reviewing their file for the claimant and providing documents to the claimant without any review by the defendants, (vi) the agreement of the Guy Parties not to take any action to recover their costs. The offer was expressed to be open until 6pm on 23 May 2022.

56. In an email of 20 May, the defendants raised a number of questions about the terms of the offer. A response to this email was sent by the claimant on 24 May 2022. However, I have been unable to trace any further correspondence relating to this offer, and I assume that it was never followed up by the defendants. Certainly, it did not lead to a settlement, or we would not be here now. But the fact that the offer was made is to be taken into account.

57. The claimant next relies on an open written offer made on 7 September 2022, this time in relation to the possession quantum dispute alone. It was expressed to be subject to contract, consisting of five paragraphs, but amounting to three main points, which I summarise as follows:

> 1. The claimant would not pursue the defendants for the balance of mesne profits which were the subject of its remaining claims in the Possession Proceedings;
>
> 2. Neither the claimant nor the defendants would be liable for any costs up to the date of acceptance of the offer that had not already been assessed or ordered to be assessed in the Possession Proceedings;
>
> 3. The claimant would retain the benefit of the existing judgments and orders in the Possession Proceedings in its favour (thus including the interim payment order of £225,000).

Accordingly, the defendants' liability would be capped at £225,000, with no liability to pay any costs in the quantum proceedings. The offer was expressed to be available for acceptance for one week, expiring at 4 pm on Monday 12 September 2022.

58. Unlike in relation to the earlier, global offer, there then followed detailed email correspondence between the parties, which I have read. For present purposes, I

summarise it in this way. On 9 September, the claimant reminded the defendants about the offer "and look forward to receiving your response" by 12 September. The defendants' response to this (indeed, the content of their entire email), the same day was "And we look forward to your response about the stable partitions". This reply may have given the defendants momentary pleasure, but it did not advance the litigation or assist the court to resolve the dispute.

59. The defendants' next email, at 09:35 on 12 September itself, was to ask the claimant questions about what would happen if they (the defendants) were successful in the cottage eviction appeal. At 10:58, the claimant once more pointed out the 4 pm deadline. The defendants at 11:06 replied "Please answer my question in the email I sent this am. I will then revert to you." The claimant responded with a detailed email at 11:51, answering the questions put.

60. At 13:52 the defendants replied, disagreeing with the analysis of the claimant, and stating that they expected an overpayment in damages, which (they said) would give them a further head of loss against the claimant. The reply then continued "For that reason we accept your offer of settlement, subject to terms." At 15:12 the claimant asked the defendants to confirm that they agreed to the terms set out in the letter of 7 September. Notwithstanding their earlier email, at 15:53 the defendants replied saying "Please would you clarify what cost orders (and their amounts) you believe your client has the benefit of. Subject to that clarification we accept settlement with your clients in the terms set out in (1) - (5) of your proposal."

61. At 10:39 on 13 September, the claimant sent the defendants a list of the outstanding costs orders. It also made clear that in the claimant's view the issues settled in this litigation could not be raised again in other litigation. The defendants replied at 13:34 the same day:

> "I do not believe that a settlement proposal in these proceedings can preclude a party from taking action where they have a legal right to do so in other proceedings. This does not involve re litigating the damages awarded to your client on an interim basis by HHJ Paul Matthews. Interim damages are just that and subject to adjustment. In any event I can confirm that no claims will be made against your clients in these proceedings.
>
> Please draft the consent order."

62. There was then proposed and agreed an extension to the timetable for a disclosure guidance application, which otherwise would have had to be made by 19 September. A draft settlement agreement and order were sent by the claimant to the defendants at 14:57 on 21 September. The defendants responded within one minute, saying they would look at it "and get back to you." But they did not do so that day.

63. The next day (22 September), at 10:04, the defendants wrote that "something went wrong" with their email system the day before, that they had only just received the settlement agreement and order, that they had lost some emails, and finally asking if the claimant had sent anything the day before. However, the claimant pointed out that, not only had it sent the settlement agreement and order by email the day before, but the defendants *had actually responded to it*.

64. In a further email of 22 September, at 15:13, the claimant pointed out that the disclosure guidance application would have to be made by the next day if the parties could not agree the settlement terms, and asked when the defendants would be in a position to make their comments. At 15:29, the defendants replied "I will. I am just out at the moment." But, again, they did not respond that day.

65. At 09:29 the next morning, 23 September, the claimant once again asked when the defendants' comments would be forthcoming. At 10:03 the defendants replied, making three points: (1) the proceedings should not be *stayed* but instead brought to an end, (2) para 6 was too widely drawn, and the defendants intended to redraft it, and (3) paragraphs 8 and 9 would be subject to the mental health crisis moratoria. They said they would agree to a further extension of time for the disclosure guidance application.

66. Paragraph 6 of the draft settlement agreement provided that the parties agreed that they would not bring or pursue proceedings in any jurisdiction "arising out of or in any way connected with the Dispute or its subject matter" except for enforcing their rights under the agreement. The "Dispute" was defined to mean "a dispute between [the parties] in relation to the Defendants' liability to the Claimant for mesne profits". It was therefore tied to a part (that relating to mesne profits) of the Possession claim.

67. At 11:05, the claimant replied, explaining firstly that the stay mechanism was usual for a settlement using a *Tomlin* order, so that enforcement of the agreement did not need a fresh action. Secondly, the claimant was happy to consider any suggested redraft by the defendants of paragraph 6. Thirdly, it agreed that paragraphs 8 and 9 would indeed be subject to the moratoria, suggesting wording to make this clear. The claimant also suggested directions to be agreed in relation to the disclosure guidance application.

68. The defendants' response (at 11:16) was that, on the first point, they did not agree to a stay mechanism, but wanted the proceedings to cease. On the second point, they would come back to the claimant on paragraph 6. At 14:49 the claimant nevertheless asked the defendants to send over the suggested redraft wording for paragraph 6. At 15:18 the reply was "I will do but I am not feeling all that great." Again, nothing followed.

69. Three days later, on 26 September, the claimant's solicitors sent a formal letter to the defendants, setting out the history of the offer of 7 September, and pointing out that they were still waiting for the defendants' suggested redraft of paragraph 6. They said that the claimant was not willing to extend time further for the disclosure guidance application. They warned the defendants that the offer of 7 September would be withdrawn at 4 pm on 27 September.

70. The defendants replied in an email at 18:35 on the same day (26 September). It did not refer to or engage directly with the claimant's letter, but simply carried on with the discussion about the terms of the offer, as if nothing had happened, and raised a further point about the need for the freezing injunction then in place. At 10:45 the next morning (27 September), the claimant replied to the question raised about the injunction, and once more asked for the defendants' alternative wording for paragraph 6.

71. At 13:04 the defendants responded, disagreeing with the claimant about the injunction. They then raised an entirely new query about paragraph 10 of the agreement (which reads "The terms of this Deed do not affect any future Court Orders or judgments in these proceedings"). Finally, they concluded:

> "As to paragraph 6 it should read:"

However, this was not followed by any text, or indeed any sign-off. Strangely, no further email was sent, explaining (if it be the case) that a mistake had been made, and text missed out, or alternatively that a draft email had been sent in error.

72. Instead, at 13:23 the defendants sent another email, reading substantively as follows:

> "I have decided that I am not going to be bullied by Stewarts to accept a deal that I do not fully understand. I am already having to deal with your application regarding the MHCBS (which I should not be having to deal with). You keep imposing tight deadlines when you know about this other work. I am not working very quickly at the moment and you are causing me even more stress than usual.
>
> I will come back to you when I can about this settlement. The trial is a long way away and if we need to agree to extend deadlines that is fine."

73. At 18:19 the same day the claimant sent a further email, summarising the history of the negotiations, and concluding by saying that the offer of 7 September was withdrawn.

74. In their first written submission, the defendants say that this offer was "an attempt by [the claimant] to circumvent the [mental health crisis moratorium] protections" for the second defendant, who was by then entered in his own moratorium (I understand that it ended in August 2023). But this cannot be right (as the claimant pointed out in its responsive submission), because the moratorium rules do not protect debtors against liabilities incurred *after* the moratorium has been entered into, and the second defendant's moratorium was entered into in May 2021.

75. In their third written submission, the defendants accordingly say that the reference to the second defendant's moratorium was a mistaken reference to the "wrong moratorium". This does not say so in terms, but I assume that this means that the correct reference would have been to the *first* defendant's moratorium, entered into by the end of August 2022. So, by deleting the interim payment order of 18 May 2022, and creating a new obligation in September 2022, the claimant would sidestep the moratorium problem. The problem is that, in their third written submissions, responding to the claimant's second, the defendants put forward a new (and different) explanation.

76. They now say that

> "the reason why the [defendants] did not accept the offer in time before it was withdrawn was because [the claimant] wanted the [defendants] to give up any rights to compensation and costs arising from Chedington's unlawful eviction of the [defendants] from West Axnoller Cottage and its occupation of it. It was not possible to compromise the possession proceedings on that basis, given that Tom

> [the first defendant's son] is also involved in the Cottage Eviction Proceedings but has no involvement in the Possession proceedings."

77. This was also the subject of email correspondence following the third round of written submissions. In an email of 21 November 2023 at 17:18, the claimant challenged this assertion by the defendants, including a procedural point that this should have been dealt with in an earlier submission. The defendants responded by email dated 17:33 the same day. I have read this correspondence. Indeed, I have read all the relevant correspondence, as well as the draft settlement agreement put forward by the claimant which in the end was not agreed.

78. The problem for the defendants is not merely that the explanation that they put forward is different from the one given in their earlier submissions, without explaining why it is different. It is also, and tellingly, that it is one that does not appear in the correspondence itself or the settlement agreement. The points raised by the defendants relate to the stay mechanism and the drafting of paragraph 6, as well as a new point on paragraph 10. None of these relates to the questions of compensation or costs in the Eviction proceedings.

79. Indeed, so far as I can see, having read the whole draft agreement, and notwithstanding what the defendants say in their email on 21 November at 17:33, none of the other provisions of that draft would have the effect of giving up any rights that the defendants might have in respect of such compensation or costs. If this *really* had been the defendants' reason for refusing to settle, one might have expected the email at 13:23 on 26 September to have been an ideal place in which to do so. But it does not. The contemporaneous correspondence is silent. Accordingly, I reject the defendants' submission on this point.

80. Subsequently, however, on 20 April 2023, at 14:06, the defendants offered to accept that the damages due to the claimant were £225,000. The defendants added that they:

> "should make it clear that this offer, if accepted, will be taken into account in any amendment to our damages claim in the Cottage Eviction proceedings. This offer is open until [close of business] tomorrow."

81. At 14:23 the claimant responded to this offer, asking about the treatment of costs liabilities. At 14:32, the defendants replied:

> "Parties to bear their own costs of the quantum trial to date. I should be clear that this only refers to the costs associated with the quantum trial thus far and does not include the cost orders already made in the quantum trial; they remain as ordered and dealt with already. I should also be clear that this offer will not mean that there is a 'new debt' per the [mental health crisis moratorium]. Given that the [payment on account] has already been ordered prior to my entry into the Moratorium and is subject to it. Finally nothing in this offer precludes us from reclaiming the costs of the main trial and the quantum trial to date by way of a future amendment to the Cottage Eviction proceedings damages claim, if so advised."

82. At 15:28, the claimant responded, rejecting the defendants' offer "in light of the further detail contained in your further email". However, the claimant's email itself

made a counter-offer, as follows:

> "Our client would be prepared to settle the proceedings in the sum of £225,000 with no further order as to costs, but subject to judgment being entered in those terms."

The main difference between the two offers was that the defendants' offer would not lead, at that stage, to an enforceable court order, because of the first defendant's mental health crisis moratorium (as the defendants' email of 14:32 had pointed out), whereas the claimant's offer, given effect to by a new payment obligation after the entry into that moratorium, would do so.

83. At 16:03 the defendants replied to the claimant's offer, saying that they "do not understand this at all. What do you mean by Judgment being entered?" But they went on to show that they clearly *did* understand, because they then said that a settlement was

> "all normally recorded in a Tomlin Order, and that is not a Judgment. So clearly all you want to do is get a judgment against us so that you can circumnavigate the MHCM and take advantage of my fragility at the moment."

84. On 21 April 2023, at 12:33, the claimant said that it was not prepared to settle on terms that created an unenforceable debt without recovering its costs. The defendants asked for time until 24 April to take advice on the costs question. On 24 April, at 15:29, the defendants wrote to say that they had been unable to obtain advice in the time available, but now for the first time they asked some questions about the costs liability. At 17:19 the same day, the claimant wrote again to set out what it understood the costs position to be, though expressly stating that it was not giving advice, and encouraging the defendants to seek their own.

85. There was then silence until 1 May 2023, when the defendants wrote at 12:01 to ask, without prejudice to their previously expressed position, how much the claimant's costs in fact were. At 14:16 on the next day, 2 May, the claimant referred the defendants to its costs budget, and said that it would seek its costs actually incurred, which would not be less than the budgeted costs. The defendants' reply (at 15:57) was "I asked you a specific question: What are your client's actual costs to date?" I have not seen any response to that email.

86. In my judgment, the claimant's conduct in initiating and conducting the settlement negotiations that I have read was both appropriate and reasonable. They attempted to settle the litigation globally, and, when that did not work, they attempted to settle the immediate claim. In relation to the offer of 7 September 2022, I find that the defendants did not negotiate seriously, and had no intention of settling except on terms which they could treat as a significant success for themselves. When it became clear that that was not going to happen, they simply became as difficult as they could.

87. In relation to the parties' later offers of 23 April 2023, I find that this time *both* sides were negotiating seriously, but that there were genuine differences between the parties as to what they felt able to accept. Looked at objectively, it seems to me that the offer of the claimant was generous in light of all the further costs that had been expended. I accept that the defendants subjectively did not see it that way, and I respect their

decision not to accept it. But that respect cannot prevent a discretionary decision of the court made in accordance with the rules.

Conclusion on costs

88. The claimant obtained a substantive award of damages in respect of the defendants' lengthy and deliberate trespass in its property. The award was greater than the money offers made in September 2022 and April 2023, albeit not by much. Significantly, however, so far as concerns the defendants' earlier offer, the claimant also obtained an order which would be immediately enforceable against the defendants, instead of an agreement backed by a *Tomlin* order, which would require a further application to and decision of the court to be enforced. I do not doubt that, in the context of this litigation, where every claim by the claimant has been resisted, tooth and nail, by the defendants, that was a valuable advantage to have gained. It was after all one which the claimant had unsuccessfully sought in its counter-offer of 20 April. In addition to that, the claimant will be entitled to interest on the sum awarded, which (given the long period of trespass) will be significant.

89. All in all, in my judgment, the claimant has done significantly better at trial than it would have done had the defendants' offer of April 2023 been accepted. Taking into account the parties' conduct and the offers made, both discussed above, I see no basis whatever for ordering the claimant to pay the defendants' costs. Further, I see no sufficient reason to depart from the general rule that the unsuccessful party (here the defendants) pay the costs of the successful (here the claimant), and I will so order.

Standard or indemnity basis?

90. The claimant asks for an order that the defendants pay its costs on the indemnity basis rather than the standard basis. The difference between the two is well known. CPR rules 44.3(1), (2) provide that, where the court assesses the amount of costs on the *standard* basis it will not allow costs which have been *unreasonably incurred* or are *unreasonable in amount*, and will only allow costs which are *proportionate* to the matters in issue. CPR rules 44.3(1), (3) provide that, where the court assesses the amount of costs on the *indemnity* basis it will do the same, except that the test of proportionality will not apply. Moreover, it will resolve in favour of the receiving party any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount.

91. The indemnity basis of costs assessment was discussed by Hildyard J in his relatively recent decision in *Hosking v Apax Partners Ltd* [2019] 1 WLR 3347, [42], [43], to which the claimant referred in its first submission, and the defendants referred in their second submission. There, the judge said:

> "42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.
>
> 43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are (1) the making of serious allegations which are

> unwarranted and calculated to tarnish the commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."

92. The claimant asks for costs on the indemnity basis on the basis that the defendants' case advanced at the quantum trial was "both hopeless and disingenuous". It is said it was hopeless because their pleading was defective. It is said it was disingenuous because their case depended on offers to move to the cottage, which were found to be tactical, to improve their negotiating position. It is also said that the defendants' conduct of the trial "unnecessarily and disproportionately increased costs". The defendants resist the claim for indemnity costs.

93. I do not think that the pleading point takes the matter "out of the norm". However, I agree that reliance on offers which were merely intended to improve the defendants' negotiating position rather than resolve the litigation does so. And, in my judgment, of the conduct matters discussed earlier in this judgment, the cumulative effect of the defendants' (a) failure to meet multiple procedural deadlines, (b) non-compliance with the rules for evidence at trial, (c) interference with the expert evidence process and (d) failure to admit basic facts was also to take the case out of the norm. An incompetent litigant in person might make some of these mistakes, but these experienced and astute litigants in person managed to make all of them. I do not think it was a coincidence. In my judgment, this is a case for the award of costs on the indemnity basis.

Assessment of costs, and payment on account

94. CPR PD 44 para 9 provides:

> "The general rule is that the court should make a summary assessment of the costs—
>
> (a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
>
> (b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim, unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily."

95. In my judgment, in this case, which was tried over several days, it is not appropriate that the costs be assessed summarily, and I will therefore direct a detailed assessment. In those circumstances, CPR rule 44.2(8) provides that

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

Here the defendants say that they have no assets left, bar (they say) the benefit of one costs order. In *Bank St Petersburg PJSC v Arkhangelsky* [2018] EWHC 2817 (Ch), [40]-[42], Hildyard J held that, at least on the facts of that case, the impecuniosity of the paying party was not a "good reason" not to order a payment on account. On the facts of this case, I see no reason to take a different view.

96. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ disagreed with the statement of Birss J in *Hospira UK Ltd v Genentech Inc* [2014] EWHC 1688, that "the task of the court is to ensure that it finds the irreducible minimum, which could be recovered". He said:

> "22. It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'…
>
> 23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

97. In circumstances where I have held that the costs should be assessed on the indemnity basis, the claimant seeks a payment on account of costs of £170,000. The claimant's costs budget, filed on 12 September 2022, provided for costs of £190,041.76. However, there was, for reasons which at present escape me, no court order approving the costs budget. In fact, the claimant says that it has incurred costs of about £214,000 as at November 2023. However, this was stated in submissions, and not by way of partner's certificate, and also without any explanation for the overspend.

98. In the present case I am hampered by the lack of an approved budget, and must make do with the unapproved one, allowing for the fact that it is not approved. I also bear in mind that, on a number of previous occasions when I have summarily assessed costs in favour of the claimant or a related party, I have found the rates charged to be excessive. I do not say that that must necessarily be the case here. Every hearing is different, and trials are generally more difficult and labour-intensive than hearings. Nevertheless, the possibility is to be borne in mind. Finally, I bear in mind that I have awarded costs on the indemnity basis, which means that, although reasonableness still applies (CPR rule 44.3(1)), proportionality is no longer in play (*cf* CPR rule 44.3(2)), and the benefit of the doubt as to reasonableness is given to the receiving party (CPR rule 44.3(3)).

99. I consider that my starting point must be the budget figure of £190,041.76. However, it must be more malleable than usual, on the one hand because not approved, and on the other because said to have been exceeded. I will take a range of £170,000-£210,000, about £20,000 on each side of the budget. Given that it is not a court-approved budget, I would generally look to award a figure at between 50-70%. That would produce a range from £85,000 at the bottom to £147,000 at the top end. I bear

in mind that the sum awarded at the end of the day was £236,818.27, but the decision in favour of indemnity costs pushes my estimate towards the top end of this, because of its effects on proportionality and the burden of proof. In these circumstances, I think a reasonable sum for a payment on account is £140,000, and I shall so order.

Conclusion

100. I shall therefore order that (1) the sum of £236,818.27 be paid by way of damages, together with (2) interest of £61,804.22 to judgment on 10 November 2023, and continuing at judgment rate, and (3) costs to be subject to detailed assessment on the indemnity basis, and (4) a payment be made on account of costs in the sum of £140,000.