Neutral Citation Number: **[2021] EWHC 1850 (TCC)**

Case No: **HT-2020-000192**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **16 April 2021**

Before :

The Honourable Mr Justice Waksman

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Between :

(1) GREP London Portfolio II Trustee 3 Limited **(2) GREP London Portfolio II Trustee 4 Limited (as Trustees for and on behalf of GS Kings Cross Unit Trust)**	**Claimant**
- and -	
(1) BLFB Limited **(2) Lendlease Construction Holdings (Europe) Limited**	**Defendant**

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James Bowling (instructed by **Jones Day**) for the **Claimant**
Andrew Fenn (instructed by **Fenwick Elliot LLP**) for the **Defendant**

Hearing dates: **16th April 2021**

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APPROVED JUDGMENT

The Honourable Mr Justice Waksman **Friday, 16 April 2021**
(**4.10** pm)

Judgment by **THE HONOURABLE MR JUSTICE WAKSMAN**

Introduction.

1. On 28 May 2020, the present claimants, whom I shall simply refer to as "GR", issued the present claim against the defendants, to whom I shall refer collectively as "Lendlease". The claim was followed by what was, in effect, a pre-action protocol exchange between the parties but post action.
2. The claim was issued when it was for limitation reasons. Then following issue it was immediately stayed by consent to allow the PAP exchange to take place. On 29 December 2020, GR intimated to Lendlease that it would be withdrawing the claims. On 1 February 2021, it issued a notice of discontinuance. At the same time, it applied for an order that there should be no order for costs of the proceedings, contrary to the presumption under order 38.6 that the defendant should get its costs.
3. This is my judgment on that application.
4. The application was not accompanied by any documents or witness statement, but Lendlease responded with a witness statement, dated 8 April, from Andrew Davies, its solicitor. That was then followed by two witness statements, ostensibly in reply but in fact the first witness statements for GR, dated 12 April, from Mr Pickavance, GR's solicitor, and Mr Wright, GR's senior director of estates management.
5. The amount of the defendants' costs to which it says it is entitled prior to assessment is about £340,000.

Background.

6. The claims arose in relation to two tower blocks built by Lendlease for a Kings Cross-related company, as offices but then refitted as halls of residence for 1,000 students. There was a 12-year contractual limitation period from the date of practical completion, which itself was late May or early June 2008, so limitation expired, at the latest, in early June 2020 and the claim was issued just before then.

7. The contract was for a full design and build obligation on the part of Lendlease, and the benefit of that was subsequently assigned to GR, as the owner, in 2015. Following the Grenfell tragedy in July 2017, GR started to investigate if there were any fire resistance and related safety issues in respect of the two blocks. Later on, it considered whether Lendlease might have any liability.
8. Of the several claims ultimately made in the claim form, the first to be intimated against Lendlease was so intimated by a letter of 23 August 2019. Further claims were then intimated in March and May 2020, just before the expiry of the limitation period.
9. Lendlease was not prepared to enter into a standstill agreement prior to the expiry of limitation, and GR issued the claim in the absence of that. After the PAP process referred to above, GR decided to abandon all of its claims.
10. Notwithstanding the general presumption in favour of the defendants' costs after a notice of discontinuance, GR says it should not have to pay them. It says so for essentially two reasons, both disputed by Lendlease. One, though the PAP process came after the issue of proceedings, it should be treated as if it came before issue. The claim after all was only issued for limitation reasons and was promptly stayed. Thus, the costs of the PAP exercise should be regarded as in fact attracting no consequences either way because they were not "incidental" to the proceedings within the meaning of the governing provision in section 51 of the Senior Courts Act 1980.
11. It is Lendlease's costs of the PAP process which form almost all of its post action costs now claimed pursuant to CPR38.6.
12. In this regard, GR rely upon the decision of Coulson J, as he then was, in McGlinn v Waltham Contractors Limited [2006] 1 Costs LR 27. Although this argument, that the costs were not incidental, was not formally abandoned by Mr Bowling, I think it's fair to say that the point which he concentrated on at the hearing was the second point. The second point was this, which was that even if these costs are to be regarded as incidental, in the circumstances here, there were cogent reasons for the disapplication of the presumption.

The Law

13. The first essential point to recognise, although it's obvious, is this: if no proceedings are issued, then the court has no jurisdiction to make any costs order at all in relation to, for example, a pre-action protocol, or a PAP exercise, which leads to a settlement thereby avoiding the need for litigation. Hence the reference in section 51 to "The costs of and incidental to the proceedings", and *a fortiori* in CPR38.6, which only comes into play where proceedings which were issued are then discontinued.

14. The second point is that, in principle, where proceedings have been issued, pre as well as post action costs are capable of forming costs incidental to the proceedings. Whether they do in any case is a matter of fact depending on the circumstances; see the decision of Coulson J in paragraphs 6 to 9 of *McGlinn*.

15. Thus, in *McGlinn* itself, Coulson J held that the PAP costs of the defendant incurred pre-action in respect of heads of claim which did not in the event form part of the claim in the action as issued were not “incidental” to it. That being so, the defendant's application, which was made at the CMC, for its PAP costs wasted, as it were, on those matters were not recoverable at all.

16. Coulson J also said that even if they could be described as incidental to the proceedings, he would not, in his discretion, have awarded them. I will return to *McGlinn* later.

17. The next point is that where the PAP is successful pre-action and litigation is avoided, there is then no basis for either side to claim its costs of that process save by agreement. That might seem harsh where the putative defendant has persuaded the claimant during the PAP that its claim was hopeless and should be abandoned now. After all, the putative defendant will have spent time and money vindicating its position. But then that is simply a feature of any form of pre-action ADR which avoids the need for litigation. It's of benefit to both sides that the litigation is avoided.

18. In *McGlinn*, Coulson J was dealing primarily with the narrow and specific point, namely whether the costs in issue were incidental to the proceedings so as to enable the court's jurisdiction to be

triggered. It was not a case where PAP costs had been incurred after litigation started, i.e. following the issue of a claim form.

19. As noted above, Mr Bowling's first contention is that it should follow from *McGlinn* that where the PAP costs have actually been incurred after proceedings have been issued but not taken any further, such costs do not form part of the costs in the sense of being incidental thereto. The PAP costs, as I've said, were the lion's share of the defendants' costs. The defendants' other costs were small; they related to the receipt of the claim form and dealing with the stay. If it made any difference, GR were prepared to pay those costs.

20. The basis for the first argument is essentially the argument that, for these purposes, one should not regard the proceedings as having been issued at all. I disagree. First, that conclusion cannot possibly be drawn from *McGlinn* itself. Secondly, it's wrong in principle. Once proceedings have been issued, for whatever reason and for whatever justification, then the court's costs jurisdiction is engaged. There is no basis for carrying out the sort of exception which GR contends on the first argument exists, and indeed to apply it would be fraught with analytical difficulties.

21. The real question, as always, is that, once the court's cost discretion is engaged by the issue of proceedings, how should it be exercised, taking into account the many different regimes which deal with it, including, in this case, CPR38.6?

22. I therefore turn to Mr Bowling's second argument. First so far as the law is concerned, CPR 38.6 reads thus:

> "Unless the court orders otherwise, a claimant who discontinues is liable for the costs which a defendant against whom the claimant discontinues incurred on or before the date on which notice of discontinuance was served on the defendant."

23. Both sides agree at least this much, that since this is a case of discontinuance, the governing principles on the application of 38.6 are those enunciated by Moore-Bick LJ in the case of <u>Brookes v HSBC Bank plc</u> [2012] 3 Costs LO 285, where I was the first instance judge. The eight principles

I put forward were synthesised into six by the Court of Appeal, although it is not suggested that they disagreed with the content of any of the eight. I read them as follows:

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position.
>
> "(2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so.
>
> "(3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption.
>
> "(4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to lack of confidence in the merits of case will not suffice to displace the presumption.
>
> "(5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed.
>
> "(6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

24. In paragraph 10, Moore-Bick LJ went on to say this:

> "It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances. The reason was well expressed by Proudman J in *Maini v Maini*: a claimant who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is

normally unjust to make the defendant bear the cost of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment."

25. That observation in paragraph 10 has a particular resonance in this case, in my judgment.

26. The *Brookes* principles have been applied in countless cases since and have been the subject of further approval in the Court of Appeal, including in Nelson's Yard Management Co v Eziefula [2013] EWCA Civ 235; [2013] C.P. Rep. 29.

27. In that case, reference was made to my eighth principle, at paragraph 15, where it is said that Moore-Bick LJ's approval of my summary must have encompassed that eighth principle, which was this:

> "The context for the court's mandatory consideration of all the circumstances under CPR44.3 is the determination of whether there is a good reason to depart from the presumption imposed by CPR38.6."

28. I only mention this because there was a suggestion by Mr Bowling that if he succeeded in displacing the presumption, the court would then need to decide what actual costs order to make if the defendant was not going to get all of its costs. Of course, that is correct and the court has that power, and indeed here GR does not seek its costs but simply no order as to costs. Nonetheless, as my eighth principle suggests, the core focus on the parties' context, itself the subject of CPR44, will here be found within the operation of CPR38.6 and the principles which govern that operation.

29. Mr Bowling really invoked the possibility of a subsequent operation of CPR44 so as to say, as it were, that if his arguments on law in this sort of case are correct and the defendant was deprived of its costs, it doesn't necessarily follow that the claimant gets its costs. So there is, as it were, some opportunity for damage limitation so far as the defendant is concerned.

30. Perhaps, but I do not see this as being of any real assistance to GR on its core arguments of principle as to the operation of 38.6.

31. As to the six principles set out by Moore-Bick LJ, Mr Bowling contended that the key principle was number one and the exercise really was all about showing good reason to depart from the presumption that that was a broad proposition. The other principles -- and in particular five and six because two, three and four do not really apply here -- are examples of principle one at work but they are subsidiary and not exhaustive. Accordingly, the only real question is good reason.

32. I disagree with this analysis. Principle one certainly does refer to good reason, but the point within principle one is a burdens point; it's simply that, because there is a presumption, the burden is on the claimant and not on the defendant to disapply it, rather than the other way round.

33. As for principles five and six, the reason why Mr Bowling's point here is important is because he says that for a claimant to escape the presumption, it does not have to show unreasonable conduct on the part of the defendant because, for example, this is not a change of circumstances case. There was no change of circumstances here at all. He says that change of circumstance imports some external circumstance whereas, in truth, all that happened here was that the claimant, GR, decided after the PAP process, that the claim had no merit and should not be pursued.

34. This analysis misunderstands, I'm afraid, the point of principles five and six, which is this: if there are no changes of circumstance and a claimant simply abandons the claim without more, either because it never intended to pursue it or it has thought better of it or obtained proper advice for the first time, any attempt to disapply the presumption does not even get off the starting block. The claimant, by discontinuing, has lost. The defendant has won, and costs follow the event. Therefore, what is needed is some change of circumstance that at least might justify the discontinuance in such a way that the claimant should not be penalised in costs. And what goes with that, first and obviously, is that the claimant has not itself brought about that change of circumstances leading to the abandonment of the claim.

35. More than that, it will be likely to require unreasonable conduct on the part of the defendant so as to provide the good reason for departing from the presumption. True it is that principle five says

"usually" but, in my experience, it is what a claimant who seeks to disapply the presumption inevitably raises in the attempt to disapply it.

36. So in this case, either there has been a change of circumstance affecting the claimant or there has been none at all. As with Mr Fenn, I incline to the view that there has been a change of circumstance. The claimant was persuaded by the defendant it had no case. It was not a unilateral decision to withdraw, minutes after it was made. In fact, it was the outcome of a six-month process which could have ended in a number of different directions, including the continuation of the litigation. The very reason why GR says it discontinued is because, it says, it was Lendlease who persuaded it that there was no merit in the case. Unless it is going to be said that actually GR needed no persuasion at all because it always knew that its claim was hopeless, in which case the issue of a claim form was almost certainly an abuse of process, that is what changed GR's mind. If so, the principles of five and six are engaged in the usual way and we will return to them later.

37. I should add that in *Nelson's Yard*, again, the Court of Appeal in fact described principle six in this way:

> "... that it is the function of the court to consider whether the unreasonableness of a defendant's conduct provides a good reason for departing from the default rule."

38. That, in my judgment, supports the way in which I consider principles five and six should be regarded.

39. But if, contrary to my finding above, GR really was not advancing or subject to any change of circumstances, any argument that still allowed it to displace the presumption would, in my view, have to be extremely unusual, exceptional and compelling on the facts.

40. Mr Bowling does not, at least now, suggest that *Brookes* is wrong in any respect, although at some points he referred to *McGlinn* as an exception to it, but the thrust of his argument really was that *McGlinn* was a gloss upon it, born of circumstances of a kind which were not before me or before the Court of Appeal in *Brookes*.

41. Accordingly, I turn to the *McGlinn* case. I have already referred to the ultimate findings of Coulson J. I need here to refer to paragraph 14, and I read it in total:

> "From a wider perspective, I should add that, in my judgment, it would be contrary to the whole purpose of the Pre-Action Protocols, which are themselves such an integral part of the CPR, if claiming parties were routinely penalised if they decided not to pursue claims in court which they had originally included in their Protocol claim letters."

42. That is a reference to the case before him, where some of the claims that were debated never made it to the claim form:

> "The whole purpose of a Pre-Action Protocol procedure is to narrow issues and to allow a prospective Defendant, wherever possible, to demonstrate to a prospective Claimant that a particular claim is deemed to failure. By inference, that is what has happened here, in respect of the claims against HTA arising out of overpayment and the payment of loss and expense to Waltham. It would be wrong in principle to penalise the Claimant for abandoning claims which the Defendants had demonstrated were not going to succeed, because to do so would be to penalise the Claimant for doing the very thing which the Protocol is designed to achieve."

43. Coulson J said that his alternative, *obiter*, finding that if necessary -- and they were incidental costs -- in his discretion, he would not have awarded them to the defendant anyway, also relies on that paragraph 14.

44. Mr Bowling's overarching point is this. That expression of policy, as he puts it, in paragraph 14, was in the context of a pre-action PAP, and although that is the case, it applies post action to the rubric of CPR38.6 as well and applies equally to this situation. Neither party should be exposed to costs when they did a PAP straight after the claim form was issued and following a stay. For those purposes at least, although the proceedings have begun and the court's powers are engaged, Mr Bowling's contention was that this should be regarded as little more than a technical obstacle.

45. I disagree with that overarching point of applying what he says is the paragraph 14 policy, as a matter of law. And I do so for a number of reasons. First, there is a critical difference between no litigation and litigation. It is up to the claimant to decide whether or not to commence it, and if it does, there are consequences. It may, as Moore-Bick LJ said in paragraph 10 of *Brookes*, win the costs because it has won the case, it may lose the case and lose the costs. It's a risk. Mr Bowling says that GR had no choice. It had to issue proceedings. I don't agree. It certainly had to issue them if it wanted to avoid the effect of a limitation defence and deprive Lendlease of the ability to advance it, and once issued, that defence would have gone.

46. Clearly, if GR, like any claimant, thinks it is in its interests to do that because of a potential claim, it would do so and did do so here. But it is a choice nonetheless.

47. The fact that there is a choice to embark on litigation has been emphasised in a number of cases. I am going to refer briefly to three of them here. They are all decisions of the master or the deputy. They are clearly not binding on me but I agree with the logic of what they say.

48. The first of these is Clydesdale Bank v KFH (unrep., 6 Feb 2014, QBD). Like all of them, it was not a case of notice of discontinuance but it was pretty close because the claim was issued to stop limitation, then there was the PAP and then, as it hadn't been served, rather than a notice of discontinuance, the claimant simply allowed the time for service to lapse and that was the end of it, and then the defendant sought its costs.

49. Having recited arguments and references to *McGlinn* rather similar to those that are made by GR and advanced before Master Bragge by the claimant from paragraph 8 onwards, he then says this in the critical part of his judgment, at 11:

> "I am inclined to think these authorities, although very interesting, are perhaps not directly in point. Section 51 gives the court the power to order a party to pay another party's costs of and incidental. In this claim proceedings were indeed issued and correspondence ensued ... where

the respective positions were set out. Although it is true ... that the correspondence was in the style of pre-action correspondence ..."

50. And I quote this:

> "... it is, however, fundamental, as it seems to me, that it took place after proceedings were issued. It was not in fact pre-action correspondence of the type that was referred to ... The purpose of protocols ... are to focus the attention of litigants on the desirability of resolving disputes without litigation and the other matters that are there set out. So, as it seems to me, this correspondence was not, in truth, pre-action correspondence, even though ... some of it was ... in the style of, or pursuant to, the protocol. …It seems to me that the trigger here is the question of the issue of the claim form, not the service of it. The correspondence refers to and proceeded ... on the basis that there would be cost consequences if there was not a settlement ... This all points, as far as I can see ... to the fact that costs were clearly envisaged as something that were going to be a live issue."

51. In the circumstances, he said that justice favoured the defendant getting its costs.

52. The second case was Charles Geoffrey Whittaker v Ford and Warren (A Firm), unrep 25 Nov 2015. Again the background facts were different, but again there was an argument made based on the case of *McGlinn*, and this is again a case in the context of litigation which had ensued, obviously.

53. Paragraph 43 of the judgment reads:

> "I do not think there is anything in the argument that to allow a defendant the costs order in this case would be to undermine the purpose of the pre-action protocol. The primary purpose of the protocol is to avoid or narrow the scope of subsequent proceedings."

54. The authorities, as I read them, rightly seek to protect the claimant from being penalised from abandoning the claim before he issues. Had the claimant engaged in critical correspondence in a timely fashion, as he impliedly -- or expressly -- said he should have done or could have done, the issue would not arise at all; he would have been able to take advantage of the protection by testing

the matter in correspondence before deciding whether to pursue his claim. He failed to take advantage of that protection and, in my view, took on the risks of cost consequences flowing from that failure by issuing the claim. No doubt he did so because he considered the gamble worth taking compared with letting his claim lapse with no attempt having been made to secure a settlement. The fact that correspondence was entered into along the lines of pre-action protocol does not make this factually pre-action.

55. There was a remaining purpose of entering into the correspondence, to try to limit costs before the claim got underway proper. For example, he might secure an early settlement or to ensure the particulars of claim were capable of being fully formulated. But it did not alter the fact that the parties were corresponding under the pressure of the already-issued claim form and in circumstances where under the law a costs order might be made against either party.

56. I fully accept that there was criticism of the claimant's inability or refusal or unwillingness to enter into the correspondence at an earlier stage, but I do not think that affects the gravamen of the statements of principle so clearly expressed there by District Judge Geddes.

57. Then finally, the case of <u>Webb v Countrywide Surveyors</u> (4 May 2016, unrep., Deputy Master Nurse, Ch D). In this case, the Deputy Master refers to the decision of Tugendhat J, or his analysis which is in the *Citation* case, which I'll make brief reference to a little later on:

> "When he stated that parties should be encouraged to try and settle their dispute:
>
> > “on the basis that it was not incurring a liability to pay the other side's costs if no action was commenced.”
>
> What is clear is that the issue of a claim form fundamentally changes the position. The fact that a claim form may not then be served is only a factor to be taken into account when the discretion under section 51 has to be exercised."

58. All of that emphasises the distinction between the two different positions and the issue of choice to which I have referred. I should make clear that while those three cases are certainly of assistance to me, and support the position of Lendlease, I would have reached the same view without them.

59. The next point that I want to make is this, that because of the distinction between no litigation and litigation, a policy that encourages or even mandates PAP procedure, which is the case, without any of the exceptions applying, so as to avoid litigation, cannot simply be transported to a position once the litigation has started. Mr Fenn said the prior policy of encouraging settlement would bump into or bump against policies as expressed now within the CPR. Mr Bowling thought there wasn't anything in this, but I agree: once the litigation has started, there is complete code governing litigation and its consequences, including costs. It is in that sense a different world. Of course, that does not mean that the courts do not encourage ADR. They do and they should do, every step of the way, but that is a far cry, in my view, from simply transplanting Coulson J's observations, made in a very different factual context pre-action and not involving discontinuance, into the context with which I am concerned.

60. Nonetheless, Mr Bowling said that to transport the policy into CPR38.6 was workable and advantageous and would avoid satellite litigation. I do not agree. This case shows it. Unless one has a blanket rule, which may be what Mr Bowling was really contending for, that where (a) the claimant issues to avoid litigation, (b) then seeks a stay which is consented to and (c) there is a PAP procedure leading to discontinuance, then it should never pay the defendant's costs. Unless that is a submission which is being made, which is far too bold, the court must examine the particular circumstances. Suppose, as the defendant alleges here, the claims are always hopeless. Does that alter the picture? And to what extent will the court investigate it. Bear in mind that even if the claimant might have won, that doesn't of itself entitle it to avoid the presumption. See principle two.

61. Suppose the claimant was dilatory in investigating a possible claim, as the defendant alleges here, so that it only brought upon itself the need to issue the claim form to avoid litigation and without any

time for the PAP, what is the position then? If that factor is relevant, then again this time the pre-action conduct needs to be examined, as indeed it has been before me.

62. Accordingly, although Mr Bowling says this is a narrow and clear exception to or, better phrased, a gloss on *Brookes*, it is not so at all, in my judgment. In truth, there is no need to graft on such a gloss. The principles of *Brookes* provide ample scope, if the facts justify it, to deny the defendant its costs, if it is engaged in unreasonable conduct which has led to circumstances in which the claimant has decided to abandon the claim, but the mere presence of a successful PAP post issue cannot possibly be enough.

63. Mr Bowling also complained that Lendlease had stood back allowing the limitation clock to run. It is entitled to do so. It declined to enter into a standstill agreement. It is entitled to do so. He said that his case was not based on unfairness, but, in my judgment, it really was. What he was saying was that Lendlease's conduct was unfair and forced GR to issue the proceedings. It is not so. And in any event, unfairness *per se* is not the point of the CPR38.6 exercise, though unfairness may, obviously, arise where there has been unreasonable conduct on the part of the defendant.

64. One of the arguments also made by Mr Bowling, which was allied to his reference back to CPR44.3, was that the solution works because the punishment fits the crime. If the claimant has left it late and has to issue proceedings, then any costs of dealing with the proceedings themselves should be the defendant's in any event, and the claimant is therefore paying for his mistake. But that's as far as it goes.

65. I do not agree with that as some kind of general supporting principle. It would only arise if one ever got to the stage of displacing the presumption, in my judgment.

66. Another yet more ambitious argument was that, in truth, both parties, in proceeding with the PAP post issue, were proceeding on the basis that there would be no further litigation and then somehow that one must read into this that they were both acting on a legitimate expectation that there would be no costs consequences of that exercise, at least if the litigation went no further. Both elements of

that are untenable. Neither party knew that litigation would not continue. The fact that both of them wanted to settle or resolve it, if possible, is not the same thing, and it is absurd to suggest that Lendlease really thought that if it persuaded GR to drop the claim, it did not want or did not expect to get its costs once the claim was dropped.

67. It all comes back to the same point: if proceedings have been issued, you cannot pretend they have not. See in that regard the case of *Nomura* at paragraph 47.

68. In the skeleton argument for GR, at footnote 37, Mr Bowling referred to the decision of Tugendhat J in the defamation case of Citation v Ellis Whittam [2012] EWHC 764 (QB). He refers to the fact that Tugendhat J held the purpose of the PAPs was to extend time in which parties can narrow or resolve disputes without attracting cost liability. That, of course, was in the context of avoiding litigation. Although this case was presaged by Mr Bowling, I was not taken to it in any detail by him, nor by Mr Fenn, and there was no detailed discussion about the case.

69. All I would note is what is said by Tugendhat J in the footnote, which was to say that he inferred that, at least in part, the PAP system was designed to extend the period during which each party would conduct its case on the basis it was not incurring a liability to pay the other party's costs if no action was commenced, which is the same thing that was quoted in the *Webb* case at paragraph 34. This is a case where the action did commence, so I don't see that the remarks of Tugendhat J, to the extent I was referred to them, help GR.

70. In any event, we know from *McGlinn* that the costs of pre-action correspondence can constitute the costs of the action as a matter of principle.

71. In his reply, Mr Bowling suggested that one would be sending a very bad message to litigants if one was to say that if the defendant knew they could refuse a standstill agreement with impunity and then, when the claimant issues proceedings, they could negotiate knowing that they will always collect the costs of the action if the claimant drops the claim.

72. First of all, if that is what happens in a particular case, it is not clear to me at all that this is so reprehensible. When the time came for formal negotiations, which there was not time to undertake before, the defendant did engage, and that is the important thing.

73. Secondly, this completely overlooks the limitation feature, which is what runs in the background to all of this case. It is a potential claimant's responsibility to act so as to avoid the effect of a limitation period, especially where it may only be a year or two away. It is for the claimant to manage that risk, not the defendant.

74. So I do not think there is anything in this point. I agree with Mr Fenn that GR's case really overlooks the seriousness and the implications of the limitation period. The reason why GR issued proceedings was not to engage with the PAP. The reason it issued proceedings was to stop time running. Accordingly, in my judgment, there is no need or justification for the sort of gloss on 38.6 which has been advocated by Mr Bowling. One simply operates 38.6 according to the *Brookes* principles in the usual way.

75. That is what I now do.

Analysis

76. One starts with the presumption to which I have referred. The possible merits of the claim clearly do not assist GR here because the reason why the claim was discontinued was because in fact it was appreciated it had no merit. The real argument put forward by GR in the context of the operation of *Brookes* is that (a) it was in truth unable to assess the merits properly without the PAP process but (b) it could not undertake that process until the claim had been issued.

77. In terms of what actually happened, that is undoubtedly true, but in my judgment and consistent with the requirement to show a change of circumstance without a fault of the claimant, these circumstances cannot displace the presumption unless at least it can be shown that there has been unreasonable conduct on the part of Lendlease here that has brought the situation about. It is important to stress that because of the presumption, absent any unreasonable conduct on the part of

Lendlease, the fact that the claimant has acted reasonably is not enough. Any number of unhappy circumstances may lead a claimant to issue proceedings in haste, even if in good faith, which then later have to be abandoned, but absent fault on the part of the defendant, it is a fact of litigation life, as it were, that it may have to pay the costs of the defendant. That is one of the key risks in commencing litigation, and the existence of 38.6 will have been well known to those advising GR, as they ought to be to anyone commencing litigation.

78. I therefore turn first to see what could have amounted to unreasonable conduct on the part of Lendlease. What that issue boils down to here is whether its own unreasonable conduct was the cause, or at least a substantial contributing cause, of the fact that the claim had to be issued ahead of any PAP. An analysis of Lendlease's conduct can only start at the time when GR sought to engage with it. This was in August 2019, when, according to GR, it had, for the first time, received positive advice that Lendlease might be liable. By then, there was less than a year to go until limitation expired. According to GR, Lendlease's initial response was positive but that soon changed, and I made some reference to that chronology earlier on.

79. The first claim, and really the only one that was enunciated in August 2019, was the one concerning fire resistance. On 19 September, Lendlease replied, saying it wanted to understand more about this and visit the property. That visit didn't take place until January 2020 and Mr Wright, who has provided a candid witness statement on behalf of GR, says that is because GR was seeking advice from its experts as to which location should be visited. None of that can be put down to Lendlease.

80. The meeting did take place in January. There was one representative, Mr Tierney. There was no expert. That itself has been criticised by GR, but I do not think that goes anywhere as a complaint. This was, after all, an initial visit. GR says that Mr Tierney agreed with them that Lendlease would look at its records to see if there were any details as to the fire rating of the doors, which was the subject of this particular claim, and he did. But then it seems that Lendlease did not come back.

81. So far as that is concerned, there was, I think, a letter of 22 April where the problem of finding those records was looked into, hard copy records going back to 2008, some now 12 years ago, and of course, when COVID and its restrictions were upon it.

82. I do not think, in all the circumstances, this is a material unreasonable conduct on the part of Lendlease and, in any event, it only went to one claim.

83. That was not the largest claim. The largest claim was made in the context of cladding issues in relation to the external walls for some £17 million-odd. This was intimated by a letter dated 16 March. Lendlease did not respond to this letter. On 7 May, not long before expiry of the limitation period, GR proposed a standstill agreement, as I have indicated.

84. Lendlease responded on 12 May, although it appears that there was an earlier letter of 22 April that seems to have gone to the wrong address. Lendlease agreed to attend a meeting on 15 May but it did not agree to a standstill. Then these proceedings were issued. Then there was cooperation with a stay, and the PAP process began on 28 July, with a response on 27 October, a meeting on 16 December, and then the intimation the claims would be dropped. There is no suggestion that Lendlease dragged its feet through this process.

85. But it follows that the whole PAP process can be said to have taken around six months at least since, obviously, it took some time for GR to prepare its letter of claim. Otherwise, the claim letter would have been issued earlier than 28 July and closer to the issue date of 28 May. The reason I mention this time period is that on that basis, and even assuming that GR had all the information necessary for its letter of claim in January 2020, which it appears it did not, any PAP process would not have completed prior to the expiry of the limitation period unless, of course, a standstill was granted. So there was always going to be a problem.

86. In terms of the claims made, the other ones were not intimated until 7 May, which was just before expiry of the limitation and the necessary issue of the claim. In my judgment, while Lendlease might have acted more swiftly to explain its position in relation to the fire rating of the doors

following the 2020 meeting and to say that it was not possible to obtain any records, that in and of itself, even if that had been provided earlier, was hardly likely to have resulted in a satisfactory PAP process dealing with all of the claims completed before the end of the limitation period.

87. The only other complaint of substance, in my view, is that close to the end of the limitation period Lendlease did not agree a standstill agreement. I have already dealt with that. It did not have any obligation to do so, and while that might have or would have avoided the need for proceedings to be issued, I do not see how that of itself can be regarded as unreasonable conduct. The fact is, as contemplated by paragraph 2.3.2 of the TCC guide:

> "Where the PAP cannot be undertaken because of limitation problems, the correct approach is to issue and then seek an immediate stay."

88. In my judgment, the truth of it is that, whether the fault of GR or not, it was virtually inevitable it was going to run out of time and find it necessary to issue protective proceedings.

89. So far as the early events are concerned and GR's own conduct, although no claim was intimated until August 2019, potential fire stopping-related issues had been intimated or identified to GR in August 2017, shortly after Grenfell. Remedial works were then carried out between August 2017 and January 2018 on stairwells and basements. Following reports, further priority remedial works were carried out between January 2019 and early 2020 and further works in October 2020. The claim letter suggests defects had only recently been identified. That was not correct. It also said that GR might be forced to get in other contractors but in fact the other contractors, Onyx, had been in since January 2019.

90. It seems that investigations into a possible liability on the part of Lendlease only arose after GR's investors wanted to know why Onyx had been instructed and, I infer, such large amounts of money had been spent, and then it was later that we are told that experts suggested a possible breach of the development agreement.

91. GR itself says that it never sought advice from the contractors involved as to the consideration of claims against Lendlease and no such advice was given prior to mid-2019. Mr Wright says that this was because the focus was on safety-related priority work. I, of course, understand the emphasis on and the need for that priority safety work but I don't see why that precluded, quite separately but in parallel, a consideration of whether Lendlease might be to blame at an earlier stage, especially as GR did have lawyers and advisers. In that regard I was taken to a letter of 16 March 2020, in which it was stated in connection with the large claim, the external walls:

> "Following inspection of the external walls, we have been advised there are insulation types in the facade which are not of limited combustibility, which should not have been used for buildings over 18 metres high. We are seeking expert advice to remedial action. Can you provide us with test evidence that they were compliant?"

92. It's not clear that it's true that there was positive advice to that effect then and certainly there doesn't appear to have been any expert evidence. At any rate what was then asked for, very close to the limitation period, was some further information on compliance from Lendlease. So I don't see why GR could not have undertaken a consideration as to whether Lendlease might have been to blame for this at a significantly earlier stage, so it's very difficult in those circumstances to see why that history would be a reason to deprive the defendant of its costs under 38.6.

93. Equally, GR then relies on the fact that it was only in December 2019 that Mott Macdonald, its expert consultants, changed their original advice that the cladding installed posed a manageable risk and now there was a high risk, meaning it should be replaced. But again, while I see how that affected the operations being contemplated, I don't see why that's got anything to do with why there should not have been an earlier investigation of a potential liability of Lendlease, who, after all, were the party that both designed and built the tower blocks, especially as it was known all the while that the limitation clock was running and was going to expire in May or June 2020. When the

claims were made, they weren't made in sufficient detail. Hence it took some time before the detailed letter of claim came along at the end of July 2020.

94. On those facts, not only is it not possible to see a change of circumstances due to Lendlease's unreasonable conduct, there is some basis for concluding that GR did contribute to the position it found itself in, in May 2020, a significant basis, the position it found itself in, which was not having the time to undertake the PAP before issuing proceedings if it wanted to avoid limitation. But in truth, whether it brought all of this upon itself so far as the timing of the PAP is concerned, which I think it did, or whether all of this was just unfortunate, that is no unreasonable conduct on the part of the defendant.

95. I should add, for the sake of completeness, having reviewed what happened here and Mr Bowling's arguments from *McGlinn* in any event, even if the approach was effectively to ignore principles 5 and 6 and simply look broadly at whether there was some overarching good reason which it would be unusual to disapply the presumption, there plainly was no such good reason here.

96. Accordingly, for all of those reasons, I decline to displace the usual presumption. The effect of that must be that the defendant will receive its costs of the action, to include the PAP costs.

97. I've dealt with this matter at perhaps greater length than I had anticipated but that is in deference to the various arguments which were assembled before me by Mr Bowling in his usual persuasive and comprehensive fashion but on this occasion it does not assist his client.

98. I will now deal with consequential matters.