Case No: QB-2019-003176

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MEDIA AND COMMUNICATIONS LIST**

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 25/03/2022

**Before**:

**DEPUTY MASTER FINE**

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**Between:**

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| **(1) DAVID NEIL GERRARD**<br>**(2) ELIZABETH ANN GERRARD** | **Claimants** |
| **- and -** | |
| **(1) EURASIAN NATURAL RESOURCES CORPORATION LIMITED**<br>**(2) DILIGENCE INTERNATIONAL LLC** | **Defendants** |

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**MR. ADAM WOLANSKI QC** and **MR. ROBERT HARRIS** (instructed by **Enyo Law LLP**) appeared on behalf of the **Claimants.**

**MR. DANIEL BURGESS** (instructed by **Payne Hicks Beach LLP**) appeared on behalf of the **Defendants.**

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# Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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**THE DEPUTY MASTER :**

1. There are two applications today before the court. The first application in time is an application by the claimants dated 27th October 2021 seeking an order as between the claimants and the second defendant that there be no order as to the costs of these proceedings until 9th March 2020, and that the claimants pay the second defendants' costs on the standard basis, without affecting any previous costs orders, from 10th March 2020 until 2nd November 2021.

2. The second application is effectively a cross-application by the second defendant dated 19th November 2021, seeking orders that, first, the claimants pay the second defendant's costs of the proceedings until 2nd November 2021 on the indemnity basis and, second, previous costs orders made in these proceedings in the claimants' favour be reversed and the claimants be ordered to repay any sums previously paid by the second defendant to the claimants.

3. Both parties have been represented by counsel, the claimants having been represented by leading and junior counsel and the second defendant by junior counsel. The first defendant has had no involvement in these applications.

4. The claim before the court today was issued in the Media and Communications list and is one of several associated claims between the parties and/or the claimants and the first defendant.

5. In terms of the proceedings, very briefly, the first claimant, Mr. Gerrard, acted as the lawyer of the first defendant, ENRC, between December 2010 and March 2013, initially as a partner at DLA Piper UK LLP and from April 2011 as a partner of Decherts. ENRC is a holding company for a diversified natural resources group.

6. The second defendant was instructed by the first defendant to carry out surveillance upon the claimants. The second claimant is the wife of the first claimant.

7. On 25th September 2017, ENRC issued proceedings in the commercial court against the first claimant alleging misconduct by the first claimant during the course of his retainer, namely that he had encouraged the intervention of the Serious Fraud Office so as to expand his firm’s retainer and thus increase his ability to generate fees. In March 2019 ENRC issued further proceedings in the Chancery Division against the director of the Serious Fraud Office for inducing Decherts to breach its contract with ENRC. These two sets of proceedings were case managed and listed to be heard together pursuant to an order dated 21st February 2020. They were heard before Waksman J during the course of last year. Judgment is awaited.

8. In September 2019 the claimants issued the claim that is before this court today, initially against the second defendant only. Subsequently, a few weeks after issue, the first defendant, ENRC, was added as first defendant and Diligence International LLC became second defendant.

9. The claim concerns acts of covert surveillance of the first claimant and, indirectly, of his wife the second claimant, carried out by the second defendant acting on instructions of the first defendant. The acts of covert surveillance are not disputed. The claimants claimed damages and an injunction.

10. By applications in September and October of 2019 the claimants sought an urgent injunction, which was determined by way of undertakings provided by the defendants and recorded in a consent order of Mr. Richard Spearman QC, sitting as a Deputy Judge of the High Court, dated 17th October 2019.

11. On 3rd February 2020 ENRC made the first Part 36 offer in the proceedings before this court, which they subsequently withdrew on 17th February 2020 when they made their second Part 36 offer. That second Part 36 offer was rejected by the claimants by letter of 20th February 2020.

12. During the course of 2020 several applications came before the court, including applications for strike out, for a stay and, possibly, also for permission to amend statements of case as statements of case have been amended. As I have said, the commercial court trial was heard last year between the months of May and September before Waksman J. and judgment is awaited.

13. On 8th September 2021, the claimants made an open offer to both defendants to settle the proceedings which was rejected. On 4th October 2021 the claimants accepted the Part 36 offer of ENRC which had been made on 17th February 2020. Following that acceptance, the claim against both defendants was discontinued by notices dated 2nd November 2021 and a consent order was approved by Nicklin J, apparently without a hearing, at around that time.

14. CPR 38.6 sets out the provisions as to liability for costs on discontinuance. It provides as follows in 38.6(1), 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."

15. This sets out the general rule which, as noted, is subject to the caveat at the start that it applies “unless the court orders otherwise”. Costs are, of course, always at the discretion of the court as set out in CPR 44.2.

16. The parties are agreed that the governing principles on the application of CPR 38.6 have been set out by Moore-Bick LJ in the case of *Brookes v HSBC Bank Plc* [2012] 3 Costs LO at 285 as set out in paragraph 31 of the second defendant’s skeleton argument and also in the White Book. The governing principles are as follows:

> "(1) when a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 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 the 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."

17. 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."

18. The claimants submit that the court should depart from the usual order and should order "otherwise", as provided for in CPR 38.6, for the following reasons. First, there was a contract between the second defendant and the claimants with regard to costs and courts usually give effect to contractual arrangements between the parties. Second, in the alternative, even if there is no binding contract between the claimants and the second defendant, the court should exercise its discretion, disapply the usual rule in CPR 38.6 and replace it with the order sought by the claimants.

19. The first question is therefore whether there was a contract between the second defendant and the claimants? I turn to the documentation. The first letter in time containing a Part 36 offer, which was subsequently withdrawn, is the letter from Jones Day, the solicitors for the first defendant, to the claimants' solicitors of 3rd February 2020. This sets out that this is a Part 36 offer and at paragraph 6.2 reads as follows:

> "The Claimants shall discontinue any and all claims set out in the APOC as against the First and Second Defendants. In terms of the Second Defendant, the discontinuance would be on the basis of no order as to costs and the Second Defendant consenting to such discontinuance (per CPR 36.15(2)(b))."

20. The claimants' solicitors replied on 6th February 2020 asking for clarification. In paragraph 3 the solicitors wrote as follows, (the reference to "Diligence" being to the second defendant):

> "Diligence - please clarify whether your offer is made on behalf of the ENRC and Diligence. The letter contemplates settlement of the claims against both Defendants and proposes that there

> be no order as to costs as regards Diligence, but does not state explicitly that it is written on behalf of Diligence as well as the ENRC."

21. ENRC's solicitors replied on 17th February 2020, copied to the second defendant's solicitors, Barker Gillette, withdrawing their Part 36 offer but replacing it with a new Part 36 offer in revised terms and writing as follows in paragraph 10 with regard to the second defendant:

> "This revised offer is made pursuant to CPR Part 36 and is intended to be a defendant's Part 36 offer. It is an offer made on behalf of ENRC only. Diligence has informed us that it will provide its written consent to acceptance of the offer (pursuant to CPR 36.15(2)), and" -- and is underlined -- "will further agree that, if an offer is accepted in these terms and the claim is therefore discontinued against Diligence (pursuant to CPR 36.15(2)(a)) it will agree to no order as to costs in respect of the claim against it."

22. As I have said, Diligence's solicitors, the second defendant's solicitors, were copied into that letter and they have never disputed that it was anything other than correct, nor that it was written without their authority. The second defendant's solicitors therefore accept that the offer in the letter from the claimants' solicitors was made on their client's behalf and their client's position, in the event that the Part 36 offer were accepted by the claimants, was as stated on their behalf as an offer.

23. I find that the second defendant's offer was an offer as to their position if the claimants accepted the first defendant's Part 36 offer. The second defendant's position is parasitic on the first defendant's Part 36 offer. If the claimants accepted the first defendant's Part 36 offer, then the second defendant's offer applies, namely that they would provide their written consent to acceptance of the offer and the claimant's discontinuance of their claim against the second defendant, on the basis of no order as to costs in respect of the claim against the second defendant.

24. The claimants, with the second defendant's knowledge, approval and authorisation, were given confirmation as to the terms the second defendant would agree in respect of the second defendant's costs, if the claimants accepted the first defendant's Part 36 offer. A consent order dated 2nd November 2021 was approved by Nicklin J without a hearing, in which the claimants were permitted to discontinue against the second defendant and directions were made with regard to the claimants' costs application dated 27th October 2021. This is one of the two applications before the court today. Subsequently the second defendant issued their application which has also been listed for today.

25. The parties agree that a Part 36 offer, even after it has been rejected, remains open until it is withdrawn. CPR 36.9(2) sets out that a Part 36 offer is withdrawn by the offeror serving written notice of the withdrawal or change of terms on the offeree, unless the offer is stated to be time-limited. This offer was not stated to be time-limited. In this case, therefore, the first defendant's Part 36 offer remained open and was accepted by the claimants on 4th October 2021, some 20 months later. In their letter of acceptance, the claimants' solicitors wrote:

> "1. We refer to the ENRC's Part 36 offer dated 17 February 2020 ('the Part 36 Offer').
>
> "2. We confirm acceptance of the Part 36 offer on behalf of the Claimants pursuant to CPR 36.11.
>
> "3. We note that paragraph 10 of the Part 36 Offer makes clear that Diligence will provide its written consent to acceptance of the offer pursuant to CPR 36.15(2) and will further agree that, upon acceptance of the Part 36 offer, it will agree to no order as to costs in respect of the claim against it.
>
> "4. We look forward to discussing as a matter of urgency the steps that need to be taken so as to bring the settlement into effect."

26. Turning to the first question that the court has to determine, namely whether there was a contractual offer between the claimants and the second defendant, the second defendant submits that there is no contract between these parties on the following bases: first, that there was no offer; second, that the offer had been rejected and therefore was not capable of subsequent acceptance; third, that the offer was only open for a reasonable amount of time and had therefore lapsed; and, fourth, that the offer had been withdrawn prior to acceptance. I will deal with these each in turn.

27. The offer made by the second defendant, as set out in the letter of the first defendant's solicitors dated 17th February 2020 was made, I find, with the knowledge, agreement and authority of the second defendant and their solicitors. There is no suggestion anywhere in the evidence that this offer was not so made. The offer was that if the claimants accepted the first defendant's Part 36 offer, then the second defendant would give their consent to the acceptance of the offer and agree that the claim would be discontinued on the basis of no order as to costs against the second defendant. That was a clear offer and, whilst not conveyed directly by the solicitors of the second defendant, was made with their knowledge and, on balance of probabilities, authority. The second defendant's solicitors were copied into the correspondence and have never suggested that it was not an offer made on their behalf with their authority. The offer is clear in its terms.

28. The second limb of the second defendant's argument is that the Part 36 offer had initially been rejected and the second defendant's offer was therefore not capable of acceptance. Both parties are agreed that a Part 36 offer remains open until it is withdrawn in accordance with the rules. Both parties are also agreed that the offer by the second defendant is not a Part 36 offer. It is a contractual offer and is not bound by the rules. The question is whether the offer by the second defendant had been rejected when the claimants first rejected the first defendant's Part 36 offer. This is not, however, what the second defendant's offer says. The offer says that the second defendant will consent to a discontinuance on the basis of no order as to costs if the claimants accept the first defendant's Part 36 offer. There is no time limit imposed for the claimants' acceptance of the Part 36 offer. There is no condition that the Part 36 offer has to be accepted immediately, or within a certain time or that it cannot be initially rejected. The offer stands if the Part 36 offer is accepted. It was accepted, albeit 20 months later and after an initial rejection of the Part 36 offer, and therefore

the offer still stood. The contractual offer by the second defendant was still capable of being accepted by the claimants when it was effectively accepted some 20 months later.

29. The next challenge to the validity of the offer and whether the offer was binding and capable of acceptance is that the offer was only open for a reasonable amount of time. In this respect, counsel for the second defendant relied on Chitty, and the principle that when the duration of an offer is not limited, it comes to an end after the lapse of a reasonable time, and what is reasonable depends on the circumstances. Here the offer of the second defendant is that if the claimants accept the first defendant's Part 36 offer, then the second defendant agrees to the claimants discontinuing against the second defendant with no order as to costs. The second defendant's offer in these circumstances will stay open whilst the Part 36 offer stays open, unless the second defendant withdraws their offer before it is accepted. The second defendant did not withdraw their offer before the Part 36 offer was accepted and it was reasonable for the offer to remain open whilst the Part 36 offer remained open.

30. The third submission on behalf of the second defendant is that the offer was withdrawn by the second defendant prior to acceptance by the claimants. The second defendant relies on the wording in the letter of the claimants' solicitors on 4th October 2021, in particular paragraph 3, which reads as follows:

> "We note that paragraph 10 of the Part 36 Offer makes clear that Diligence will provide its written consent to acceptance of the offer pursuant to CPR 36.15(2) and will further agree that, upon acceptance of the Part 36 offer, it will agree to no order as to costs in respect of the claim against it."

31. Basically, the claimants are saying: "We are accepting the Part 36 offer on the basis that the second defendant has said that it will consent to the discontinuance with no order as to costs". That was an acceptance of the second defendant's offer by the claimants.

32. The subsequent purported withdrawal of the offer of the second defendant in their solicitors' letter of 6th October 2021 was too late. The claimants' solicitors had accepted the Part 36 offer of the first defendant and had accepted the offer of the second defendant that they would consent to a discontinuance against the second defendant with no order as to costs.

33. Following that correspondence, the second defendant consented pursuant to CPR 36.15(2)(b) to the Tomlin Order and to the discontinuance, although they stated that they were not consenting to the allegedly agreed order as to costs, which is the issue before this court today.

34. I find that there was a contractual offer by the second defendant that was accepted by the claimants. I accept the submission that the courts usually recognise the contractual arrangements as to costs between the parties. There is no reason in this case to depart from that usual basis. The correct order as to costs is therefore as set out in the claimants' application.

35. The claimants have submitted that the claimants and second defendant had not considered what would happen if there were a delay in acceptance by the claimants. The claimants accept in these circumstances that they should be limited to the recovery of their costs up to the end of the relevant period for the purpose of the Part 36 offer. This is on the basis of the officious bystander test. As this aspect had not been considered nor agreed between the parties, what would the officious bystander consider to be the parties' intended objective agreement. Whilst there is a dispute as to the principle of payment of the costs on discontinuance, the submission that the agreement should be limited to the earlier date, and not the date of the notice of discontinuance, is not challenged.

36. I do not need to consider the claimants' second limb of their submission because the claimants are successful on their first ground, but I shall consider the alternative ground in the event that I am wrong in respect of the court's findings with regard to the contractual arrangement between the claimants and the second defendant. Would the claimants have succeeded on their alternative ground that the courts should displace the presumption of costs on discontinuance because the claimants can establish that there is good reason so to do?

37. The second defendant has sought to place emphasis on the other related proceedings before different courts and the evidence that has been given in those proceedings. I accept the submission made on behalf of the claimants with regard to those other proceedings, namely that this court cannot, and must not, guess what another court will do and what decisions or findings of fact they will make. It would be wholly inappropriate for this court do so when there has been no judgment from the other court.

38. It has been submitted on behalf of the claimants, and not challenged directly by the second defendant, that the extracts upon which the second defendant seeks to rely in respect of the first claimant's evidence are highly selective and are not accepted by the first claimant. In any event, I will not become involved in making findings with regard to other proceedings in respect of which judgment is still awaited.

39. It is clear from paragraph 10 of the judgment of Moore-Bick LJ 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."

40. These are unusual circumstances. There is a Part 36 offer by one defendant made on the basis that, alongside the Part 36 offer, there is an offer of the second defendant, that if the claimants accept the Part 36 offer, the second defendant will agree to a discontinuance with no order as to costs. Proudman J states:

> "...it is normally unjust to make the defendant bear the cost of proceedings which were forced upon him..."

41. It is not unjust in this case to make the second defendant bear their costs of the proceedings because that is what the second defendant told the claimants they would agree if the claimants accepted the Part 36 offer of the first defendant. Therefore, it is

in this case not unjust to make the second defendant bear their costs of the proceedings.

42. It is clear that the second defendant intended the claimants to believe that if the claimants accepted the Part 36 offer, the second defendant would agree to a discontinuance with no order as to costs. The claimants were under that understanding and the claimants accepted the Part 36 offer on that basis, as made clear by their letter when they accepted the Part 36 offer and noted the agreement in respect of the second defendant's costs.

43. The claimants discontinued with ENRC on the basis of the payment of damages of £22,000, (the claim being assessed between 10K and 100K), and the first defendant's undertaking to destroy the surveillance material when it was no longer required for the proceedings. The second defendant had already given an undertaking effectively not to carry on surveillance of the claimants and had made it clear in their statements of case that they were doing so for the purpose of the High Court proceedings which have now been heard.

44. Whilst I note the case of *Messih v McMillan Williams* [2010] 6 Costs LR 914 Court of Appeal decision, this was a case brought against two firms of solicitors in respect of financial loss of a commercial lease. Both firms of solicitors had allegedly committed separate failings resulting in the loss of the commercial lease. The claimant claimed the same loss against both defendants. The claimant settled the claim against the first defendant, the first defendant settling the entire claim, and the claimant therefore had no need to pursue the second defendant and therefore discontinued against the second defendant. Patten LJ said that this was not a sufficient reason to not to apply the usual costs provision in 38.6. That is a very different case on its facts to the case before me.

45. In the case before me, a Part 36 offer was made by the first defendant on the basis that the second defendant agreed not to pursue costs if the claimant also discontinued against the second defendant on the basis of the acceptance of the first defendant's Part 36 offer. This very different factual situation falls within the unusual circumstances outlined by Moore-Bick LJ and the test of justice outlined by Proudman J.

46. Even if I had not found that there was a contract, and I have given full reasons for that finding, in the alternative I would have found that in this case, for the reasons given, the claimant has discharged the burden to show a good reason for departing from the presumption in CPR 38.6. The claimants' application is therefore successful.

47. JUDGMENT ON INDEMNITY

48. I now turn to the application by the second defendant dated 19th November 2021 seeking an order that the claimants pay the second defendant's costs of the proceedings on or before 2nd November 2021 on the indemnity basis and the reversal of previous costs' awards in the claimants' favour, to be assessed if not agreed.

49. The relevant period for the costs now sought to be paid on the indemnity basis is from 10th March 2020 to 2nd November 2021. The second defendant submits that these costs should be awarded on the indemnity basis, as there is conduct or circumstances

taking the case out of the norm, and in light of the considerations set out by Tomlinson J in *Three Rivers District Council v Bank of England*, the court should exercise its discretion and award indemnity costs.

50. The second defendant refers to the judgment of Tomlinson J at page 731, when the learned judge set out requirements before an indemnity order can be made. The critical requirement is said to be some conduct or circumstance which takes the case out of the norm and unreasonableness on the part of the conduct of the unsuccessful claimant.

51. The court should consider whether it was reasonable for the claimants to raise and pursue particular allegations and the manner in which they did so. The circumstances which would take a case out of the norm and justify an order for indemnity costs include:

> "(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time; *(b)* Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end; (c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media; (d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case; (e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched."

52. In this case it is not in dispute that the second defendant carried out covert surveillance upon the claimants on the instruction of the first defendant. I have been referred to a pleading in which it is stated that there was trespass on the claimants' land, that those who were coming in and out of the claimants' property were recorded and that attempts were made to record the claimants on holiday on a private island in the Caribbean. The second defendant does not dispute that it carried out such covert surveillance, but seeks to say that it was justified on the basis of allegations of misfeasance by the first claimant.

53. As I have stated, it is not my role today to pre-judge the findings after a lengthy hearing before Waksman J, where judgment is awaited. What I find on the documents before me is that I am not satisfied that the claimants have advanced unreasonably aggressively pursued, serious wide-ranging allegations of dishonesty or impropriety over an extended period of time. The claims were not without foundation. The injunction was dealt with by way of undertakings. There was material obtained by way of surveillance. That material was given up, or solicitors have retained some of it but it will be given up. The claimants have not actively sought to court publicity for their serious allegations. The claimants have not turned by their conduct this case into an unprecedented factual enquiry by the pursuit of an unjustified case and the claimants have not pursued a claim which is thin and farfetched.

54. The claimants were being surveyed covertly and inappropriately by the second defendant. The claimants applied for an injunction which was dealt with by way of undertakings. I find in these circumstances the situations outlined in the case of *Three Rivers District Council v Bank of England* which would support indemnity costs are not made out in this case.

55. In the case of *Aeroflot* Rose J found:

> "I therefore hold that on the basis that these proceedings made serious and consistent allegations of fraud against the Defendants and that those allegations have been entirely abandoned without explanation, the Defendants are entitled to costs on an indemnity basis."

56. That is a different factual matrix from the factual matrix before this court which is that the second defendant instructed by the first defendant did carry out covert surveillance on the claimants which has been admitted. It does not fall within the *Three Rivers* criteria.

57. With regard to the reverse costs orders, the second part of the second defendant's application is to apply to reverse costs orders in respect of the period that I have already outlined. It has been submitted that this applies to the costs of the defendant's strike-out applications and the claimants' amendment application of January 2021. By that order, the judge ordered the defendants to pay 50% each of the claimants' costs of those applications.

58. I will turn first to the authorities. The second defendant submits that there is authority to support previous costs orders being reversed on discontinuance . However, on behalf of the claimant, it is said that the view of Pill LJ in *Safeway Stores Ltd v Twigger* [2010] EWCA Civ. 1472 was obiter and the decision that is not obiter is that of Smith J in Dar Al Arkan Real Estate Co v Al Refai [2016]6 Costs LOS 865 in which Andrew Smith J declined to follow the dicta of Pill LJ and explained why he considered that to be wrong. Smith J's judgment has subsequently been approved by the Court of Appeal in *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ. 3, Simon LJ agreeing that they found compelling the reasoning of Smith J. That is binding on this court.

59. As a matter of general observation, and I am not seeking to go behind any binding authority, if someone makes an application and the court finds that it was ill conceived or that any opposition to it was wrong, it is not immediately obvious why a court would reverse previous costs orders in those circumstances, because the costs order was the order that the court considered to be appropriate in respect of that party's conduct in that matter.

60. Accordingly, as discontinuance does not automatically reverse previous costs orders, I am not reversing any previous costs order, because the judge, when deciding the costs of the defendant's strike-out applications and the claimant's amendment application, made their order as to costs taking into account the parties' respective conduct, the merits of the case and exercised their discretion in the order that they made. I find that it is not appropriate for me to set such orders aside at this stage. The defendant's application is therefore refused.

JUDGMENT ON COSTS

61. The next issue that I have to determine is the question of costs. It is not in dispute that the second defendant shall pay the claimants' costs with regard to the application of the second defendant, but the second defendant does challenge the general principle that the loser pays the winner's costs with regard to the claimants' application.

62. That principle is challenged on the basis that the claimants initially rejected the Part 36 offer and then did nothing for some 20 months, when suddenly they accepted the Part 36 offer. That was their entitlement so to do if the Part 36 offer was not withdrawn.

63. I have made findings of fact with regard to the second defendant's offer, which was parasitic on the first defendant's Part 36 offer and it may well have been that there was a mistake on the part of the second defendants, not appreciating that the Part 36 offer had not been withdrawn, but it had not been withdrawn and nor had their offer.

64. The general principle is that the loser pays the winner's costs and I see no reason to displace that principle in these applications.

The second defendant shall pay the costs of the claimants in the claimants' application dated 27th October 2021 and the defendant's application dated the 19th November 2021.

JUDGMENT ON PAYMENT ON ACCOUNT

65. The next matter that I deal with is the second defendant's application for a payment on account of costs. The court routinely makes payments on account of costs and the court recognises that so to do is the norm.

66. In this case, however, the evidence as to the amount of the costs of the second defendant includes one side of A4 setting out some dates, the solicitors' bill numbers and many items that would not fall within the costs and a statement. The total is £901,000. I have been referred to a witness statement which says that this figure reduces down to £280,000 in respect of the relevant period for the costs awarded.

67. The claim itself settled for £22,500. It was a claim limited to £100,000 and for an injunction. Proportionality will be at the forefront of the costs judge's mind. I am unable to assess any appropriate sum by way of payment on account of costs on the information that I have today. I would be guessing a figure and that would be inappropriate and not doing justice. The second defendant needs to provide some proper documentation so the court can make an informed assessment.

68. I also bear in mind Mr. Wolanski's early submission, namely that during the relevant period between March 20 and November 21, in these proceedings there was relatively little going. This appears correct. There were the applications which have been subject to specific costs orders and which are not part of the general costs of the case. The other proceedings are continuing. Otherwise, in these proceedings, I am not aware of any work of significance during the relevant period.

69. So whilst I recognise that it is unusual, I am not going to make an order on account of costs in this case for the reasons I have given.

## JUDGMENT ON PERMISSION TO APPEAL

70. I refuse you permission to appeal for the following reasons. With regard to the request for permission to appeal the determination of the claimants' application, I gave my reasons as to why the Part 36 offer had remained open and it was that Part 36 offer which was rejected, not the defendant's contractual offer. No reference was made to the second defendant's contractual offer. So, I do not agree that I made an error of law.

71. In any event, it is academic because I also found for the claimant on the second alternative basis of the claimant's case in respect of which permission to appeal is not being sought.

72. I therefore refuse permission to appeal with regard to the claimants' application for these reasons.

73. With regard to the second defendant's application, it is always difficult when there is another application piggybacked onto the listed application and it is briefly addressed at the end of submissions in the light of an enthusiastic time estimate and overzealous preparation of lengthy bundles. However, with regard to indemnity costs, I addressed the description in the *Three Rivers* case, and found that it did not come within that description. I referred to the allegations. I addressed some of the allegations and found that, looking at the totality, this did not come within the description of a case where indemnity costs would be appropriate. I therefore refuse permission to appeal.

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