Neutral citation No [2021] EWHC 134 (Admlty)
Claim No:AD-2020-000114

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES

QUEENS BENCH DIVISION

ADMIRALTY COURT

Before: Jervis Kay QC, Deputy Admiralty Registrar

B E T W E E N

1. MONJASA LTD
2. MONJASA SA de CV

Claimants

-and-
1. THE VESSEL "ASTORIA"
2. GLOBAL CRUISE SERVICES LTD

Defendants

JUDGMENT
(Handed down 1230 on the 29th January 2021)

The purpose of this judgment

1. The parties require the court to give a decision as to the incidence and quantum of the costs arising out of this claim in which the vessel "ASTORIA" (the "vessel") was arrested and subsequently released following which the Claimants applied for permission to discontinue the claim. Although the Claimants accept that they have a liability for costs arising from the arrest of the vessel a dispute has arisen as to which of the parties should be liable for the further costs incurred before the claim was discontinued largely arising out of what has become known as "the port charges issue".

The issues before the Court

2. The questions which the Court has been asked to address are set out in the Order agreed between the parties and sealed on the 5th November 2020. There had been a hearing fixed for the 5th November but, in order to avoid that the parties put forward an agreed order which was made on the 4th November. Owing to a misunderstanding about the precise terms that was replaced by the Order of the 5th November as appears from paragraph 1 of that Order. Paragraph 2 contains a declaration that no sums were due from the Claimants to the Admiralty Marshal by reason of the undertakings given by the Claimants under forms ADM

4 or ADM 12. Paragraph 3 provides that the Claimants should be permitted to discontinue the claims against the Defendants. The matters which the parties have agreed should be referred to the court are set out follows:

a. Paragraph 4: "*The First and Second Claimants shall pay the First Defendant's costs of these proceedings, except for costs relating to the port charges issue, on the standard basis. Such costs shall be summarily assessed by the court on paper, unless the same are otherwise agreed. The port charges issue means the dispute over which party was liable to pay port charges for the period of the arrest*".
b. Paragraph 5: "*Any liability of the First and Second Claimants for the First Defendant's costs relating to the port charges issue shall be determined on paper and summarily assessed, unless otherwise agreed*".
c. Paragraph 6: "*Any liability of the First Defendant for the First and Second Claimants' costs wasted by reason of the First Defendant's assertion (made in correspondence on 1st September 2020) that the First Defendant would not settle harbour dues for the period of arrest which fall within the classification of Admiralty Marshal's costs shall be determined on paper and summarily assessed, unless otherwise agreed*".

<u>The material before the Court</u>

3. The court has been provided with a hearing bundle divided into 4 sections:
    a. Section A includes the Claim Form, the Acknowledgment of service, form ADM 4 dated the 7th August 2020 which contained the Claimants' usual undertaking to pay the Admiralty Marshal's expenses in respect of the arrest of property, its care and custody whilst under arrest and the release of the property, form ADM 12 dated 30th August 2020 being the Claimants' request to release the vessel which contained identical undertakings, the application for discontinuance dated the 18th of September 2020, two witness statements made by Mr Thomas Moisley of Penningtons Manches Cooper LLP, solicitors for the Claimants ("Penningtons") dated the 18th of September 2020 and 2nd November 2020, the First Defendant's statement of costs dated 17th November 2020 and the Claimants' statement of costs also dated the 18th November 2020.
    b. Section B contains the emails between the Admiralty Marshal, the Port of Tilbury and Penningtons between the 7th of August 2020 and the 1st September 2020;
    c. Section C contains the emails between the Admiralty Marshal and both Penningtons and Hill Dickinson LLP ("Hill Dickinson") between 6th August 2020 and 5th November 2020; and
    d. Section D contains the emails mostly between Penningtons and Hill Dickinson between 5th August 2020 and 3rd November 2020.

4. The Claimants' Submissions on costs prepared by Penningtons and dated 20th November 2020 and the First Defendant's submissions on costs prepared by Mr Neil Henderson, of Counsel instructed by Hill Dickinson, and dated 20th November 2020. The Claimants seek

an order that the First Defendant pays the Claimants' wasted costs arising out of "the port charges issue" in the sum of £31,981.50 together with the costs of preparing its written submissions of £5,010.50. The First Defendant contends that it should be awarded the sum of £14,424.86, being the costs of the claim except for the port charges issue, that the First Defendant is not liable to pay costs associated with the ports charges issue to the Claimants but is entitled to costs of £20,285.50, being its costs of dealing with that issue, and further that it is entitled to recover £6,345 for the preparation of its written submissions.

Factual Background

5. This dispute which has arisen following the Claimants' withdrawal of its arrest and subsequent withdrawal of its claim and its assertion that the costs were increased by the conduct of the First Defendant's solicitors is novel. The Claimants' application to discontinue the claim and seek the assistance of the court is supported by two witness statements but the First Defendant has elected not to provide a witness statement. Neither of the Claimants' witness statements directly address the issues presently before the court and the matter has been complicated because Mr Moisley's first witness statement refers to exhibit pages which are not those provided in the hearing bundle, the email communications have not been provided in a chronological order, they were, in some cases, incomplete and/or were repeated in different sections and some of the emails refer to draft orders which have not been provided. I have not had the benefit of oral submissions or an explanation of the various communications placed in the bundle and in order to understand the nature of the dispute and how it arose it has been necessary to give a detailed consideration to the documents, particularly the various emails. From the documents it appears that the salient facts relevant to this dispute are:
    a. The First and Second Claimants are suppliers of ships bunkers. In these proceedings they are represented by Mr T Moisley of Penningtons. It appears that, at all material times, the registered owner of the vessel was Islands Cruises Tranportes Maritimos Unipessoal Lda, an insolvent company situated in Portugal (the "Owner").
    b. The Administrator of the owning company had leased the vessel to the Second Defendant ("Global") under a bareboat charter made on the 27th June 2014. It was therefore Global which operated the vessel until the charter was terminated as appears below.
    c. As a consequence of the Covid 19 pandemic the vessel was unable to operate and Global became insolvent. As a result the bareboat charter, which was due to terminate on the 25th September 2020, was actually terminated on the 21st July 2020. According to the Owner the vessel was re-delivered to them at that time. The vessel had remained idle from March 2020 and was lying at Tilbury. At some point during that period the vessel was detained by the Maritime and Coastguard Agency ("the MCA").
    d. On the 7th August 2020 the Claimants caused an *in rem* claim form ADM1 and a warrant for arrest of the vessel to be issued. (As appears below apparently the claim was improperly served on the 8th August 2020 and was actually re-served on the 19th August 2020 when the arrest was effected). The claim sought to recover the

cost of the bunkers supplied by the Claimants to the vessel on 5 occasions during 2020 for which no payment was made. As, at the time of the supply of the bunkers, the vessel was operated by Global it was that company which had requested the supply of the bunkers.

e. After the claim was issued the Owner, acting by its Administrator, instructed Messrs Hill Dickinson LLP to advise. On the 17th August 2020 Mr Haddon of Hill Dickinson wrote to Penningtons and informed them that the Owner was under administration, that Global had abandoned the vessel to the Owner on 21st July 2020, that therefore the provisions of s.21 of the Senior Courts Act 1981 could not be satisfied and that the vessel should be released from arrest.

f. On the 18th August the Admiralty Marshal informed Penningtons that the claim (and arrest) had not been properly served and asked whether the Claimants wanted the arrest to be effected in the light of the contents of the email from Hill Dickinson. Penningtons responded that they did and the arrest was effected on the 19th August;

g. Thereafter the Claimants' solicitors advised their clients to have the vessel released and, on the 28th August 2020, Penningtons received instructions by telephone from the Claimants to apply to have the vessel released. On the same day, Penningtons requested the Admiralty Marshal by e-mail to release the vessel. At that time the Admiralty Marshal informed Penningtons that he had no outstanding costs.

h. On the 31st August Penningtons wrote to Hill Dickinson stating that the Claimants had made a request for the release of the vessel but stating that the Claimants were not abandoning their claims "*against the vessel and/or the insolvent estate and/or the demise charterer. Those claims are maintained and all our clients' rights are fully reserved. You are put on notice that our clients do not accept that the demise charter between your client and Global Cruise Services Ltd ended on or around the 21 July 2020 as you have suggested. . . .*".

i. On the 1st September 2020 the vessel was released from arrest upon a solicitors' undertaking to the Admiralty Marshal that his fees and expenses would be paid. Initially it was understood that there were no outstanding charges against the vessel however, on the same day by an email timed at 1703, the Admiralty Marshal informed Penningtons that the port authorities were in fact seeking to recover port fees from 19th August to 1st September. It is to be noted that the email does not specifically state that the port authorities were seeking to recover the berthing costs from the Admiralty Marshal or that he was proposing to pay them if such a claim was made; however his email did contain the following statement: "*I am waiting for the Port to provide an itemised bill but if you have not already you may wish to contact them to ascertain the amount. Once the port has confirmed the final figures you will understand that I will need to come to you to recover these costs as dictated by the undertaking you gave to the court at the time of the arrest.*"

j. Also on the 1st September 2020 at 1919 Mr Philip Haddon of Hill Dickinson sent an email to Penningtons responding to its email of the 31st August 2020 and indicating that the Owner did not accept the matters alleged in that email and that those would be contested. Hill Dickinson also stated: "*At this time we just make one point – you/your client arrested the vessel just 17 days after the bareboat charter*

was repudiated, in circumstances where our clients were thrown into a situation not of their making where the vessel had obviously not been previously under their management. As you can no doubt imagine, there were many issues to be sorted out before the vessel could sail, but the delay since has been down to the arrest instigated by your clients. Harbour dues that need to be settled prior to the vessel being allowed to sail will no doubt be settled by our clients once they know when the vessel can sail – mainly dependent upon when your clients release the arrest, but in any event that will not include the harbour dues for the period of the arrest which fall within the classification of Admiralty Marshal's costs".

k. On the 4th September Penningtons wrote to the Admiralty Marshal stating that they would send an explanation of why they did not consider the Marshal was liable to pay the vessel's berth charges and on the 7th September Penningtons made enquiries of the MCA and were informed that the vessel was still detained by the MCA.

l. It does not appear that Penningtons did provide an explanation as to why they did not consider that the Marshal was liable to pay the berthing charges, however, on the 10th September 2020 at 1145, Penningtons sent an email to the Marshal referring to the vessel's release on the 1st September 2020, stating that they would apply to the Court for an order for discontinuance pursuant to CPR Part 38.2 and confirming that the undertakings would be performed "*in accordance with their proper effect*". Penningtons then referred to the fact that they were still awaiting details of any charges paid by the Marshal and asked for confirmation that no fees were owed by the Marshal. They then proceeded to ask the Marshal to provide information: "*for the purposes of establishing the scope and effect of the undertakings (and the extent and amount, if any, of any liability thereunder),it is important that it is clear whether, why and in what amount any charges fall to be borne or paid by the Admiralty Marshal and/or by this firm pursuant to the undertakings*" and posed a number of questions to the Marshal, in effect requiring him to provide particulars as to the nature of the port charges paid and the reasonableness of the charges.

m. Further on the 10th September 2020, at 1414 and 1421, Ms Rosie Goncare, of Hill Dickinson emailed Penningtons requesting that the Claimants should discontinue the *in rem* proceedings with immediate effect and confirm it by 15th September failing which the First Defendant would make an application challenging the jurisdiction of the court and seeking to recover all its costs on an indemnity basis.

n. On the 15th September at 1421 the Admiralty Marshal emailed Penningtons in response to its email of the 10th September stating, *inter alia*: "*At no time did I contact the Port of Tilbury and request any services of them but I do not ordinarily step in to agree berthing terms with a port following the recent arrest of a vessel unless I am asked by one of the parties or if there is a particular concern about the safety an security of the vessel or those onboard*".

o. Also on the 15th September, at 1515, Mr Haddon emailed Mr Cheuk at Penningtons, reminded him that there was a deadline for the First Defendant to challenge the court's jurisdiction which expired on 18th September and stated that unless the application for discontinuance was served on Hill Dickinson by return that would necessitate the First Defendant to prepare its own application.

p. On the 16th September 2020 the Claimants made an application to the Court for orders: (i) that the court should grant permission to discontinue the claims against both the Defendants; (ii) that the Claimants should pay the First and Second Defendants' costs from 7th August 2020 to 2nd September 2020; (iii) that the Court should reserve the question of the scope and effect of the undertakings given by the Claimants to the Admiralty Marshal on Forms ADM 4 and/or ADM 12; (iv) including the question of any liability of the Claimants to the Admiralty Marshal.

q. On the 17th September 2020, at 1205, the Admiralty Marshal sent an email to Mr Haddon making him aware that the port dues requested by the Port Authority for the period of the arrest was £129,984.96.

r. Following the filing of the Claimants' application of the 16th September referred to above there was some communication between the solicitors as to the date of a hearing and as a result the order referred to above was made.

s. On the 30th September 2020 the court gave directions for a 'CMC' to take place on the 5th November 2020. It is not clear why the order was made for a CMC rather than simply for the hearing of the application but the parties appear to have treated the 5th November as being the date for the hearing of the application and nothing appears to turn on this.

t. On the 27th October Mr Cheuk of Penningtons sent an email to Hill Dickinson referring to the directions and attaching a draft order for agreement between the parties (see p.176 of the bundle). Whether a copy of that order appears in the hearing bundles is not certain however the order appearing at p.188 of the bundles appears to have been the one referred to in Mr Haddon's email of the 29th October at 1846 which refers to Mr Cheuk's email referred to here (see pp.346-347 of the hearing bundle). The first paragraph of that draft is for an order that there are no sums due to the Admiralty Marshal under the undertakings provided to him, the second that the Claimants have permission to discontinue the claims against the Defendants and the third that the First and Second Claimants shall pay the First Defendant's costs incurred by reason of the arrest on the standard basis, such costs to be summarily assessed if not agreed. The fourth paragraph was to the effect that the Claimants' application for "*costs <u>wasted</u> by reason of the First Defendant's assertion (made in correspondence on 1 September 2020, and now withdrawn) that the Admiralty Marshal was liable to pay the port charges incurred during the period of arrest shall be determined on paper and summarily assessed . . .*" (emphasis added).

u. On the 29th October 2020, at 1729, Mr Haddon of Hill Dickinson sent an email to the Admiralty Marshal, copied to Mr Moisley of Penningtons, referring to the email sent by the Marshal to Mr Haddon on the 17th September (by which the Marshal informed Mr Haddon aware of the outstanding port charges amounting to £129,984.96), in which Mr Haddon confirmed that Owner had settled the Port of Tilbury's costs, including those incurred during the period of the arrest. Mr Haddon stated that the Owner was not looking to any other party for a contribution to such costs.

v. Further on the 29th October 2020, at 1846, Mr Haddon sent an email to Mr Moisley in which he referred to the draft order proposed by the Claimants (see above) and

stated that the First Defendant had no objection to the matters set out in the first and second paragraphs of the draft but that paragraphs 3 and 4 were not accepted and proposing that paragraph 3 should read "*The First and Second Claimants shall pay the First Defendants' costs of the Claims from 7th August 2020 to 29th October 2020, such costs to be assessed by the Admiralty Registrar if not agreed*." On the same day, by the email timed at 1856, Mr Haddon sent an unsigned schedule of the First Defendant's costs amounting to £22,547.66.

w. On the 30th October 2020 the Claimants filed a Case Memorandum. In that:
    i. The following are stated as being agreed facts:
        (a) any liability under the undertaking could encompass only the fees of the Marshal any expenses incurred, or to be incurred, in respect of (i) the arrest of the vessel, (ii) the care and custody of it while under arrest, and (iii) the release of the vessel;
        (b) prior to and throughout the period of arrest and until 22nd October 2020 the vessel remained in Tilbury Dock under arrangements made between the First Defendants and the Port;
        (c) throughout the period of the arrest and thereafter, the vessel was under detention by the MCA;
        (d) the vessel was subject to a possessory lien of the Port in respect of port expenses;
        (e) there is no evidence that the Admiralty Marshal entered into any agreement with the Port regarding the payment of the port charges nor requested any services in connection with the arrest.
    ii. It is also stated that there is agreement that the claim should be discontinued and that the only dispute relates to liability of costs in that: (a) The First Defendant claims it costs of dealing with the arrest and of responding to the application for discontinuance and liability under the undertakings and (b) the Claimants claim the costs wasted by the need to make an application for the determination of liability under the undertakings (emphasis added).
    iii. It refers to the evidence provided in Mr Moisley's first witness statement and states that a second will be provided.

    Although the facts are stated to be agreed it is difficult to ascertain from the documents whether the matters set out above were, in fact, agreed between them.

x. On the 2nd November 2020 Mr Haddon sent an email to Mr. Moisley in which, *inter alia*, he pointed out: (a) that the Owner had no objection to the Claimants application for discontinuance; (b) that where there is no necessity for an application to the court the Claimants are usually responsible for the Defendants' costs until notice of discontinuance is given; (c) that in cases where undertakings have been made to the court it is necessary to obtain the consent of the court and the discontinuance is not effective until such order is made so that the Claimants remain liable for the Owner's costs until that time; (d) that there could be no basis for restricting the Owner's costs related to the arrest particularly where, by its email

of the 31st August 2020, the Claimants had specifically not abandoned the claim against the Owner; and (e) that the First Defendant objected to the Claimants' proposed order seeking 'wasted costs' as no application had been made for such an order and there had been no notice that the Claimants would be seeking to recover costs. Furthermore Mr Haddon made 7 points in support of his contention that the Claimants' conduct in making an application to the court regarding port dues was precipitous and, in any event, not influenced by the actions of the Owner. These included: (a) that the Claimants' solicitors were concerned about and had been in correspondence about the port dues prior to the 1st September; (b) that, prior to Hill Dickinson's email at 1919 on the 1st September, the Claimants understood that the port would be looking to the Claimants to recover the dues. That belief was not influenced by the Owner; (c) that on the 1st September, 2020 in circumstances where the vessel was being released from arrest by the Claimants, it was not unreasonable for Hill Dickinson to state that the Owner would not accept liability for port costs which "*fell within the classification of Admiralty Marshal's costs*"; (e) that the application for the court's assistance as to liability for port costs was precipitous and made without any involvement with the Owners; (f) that the vessel departed from Tilbury on the 22nd October 2020. Negotiations with the port, related to port costs, were ongoing until that time and that it was only then that the Owner was in a position to decide whether to pursue a contribution for those costs from the Marshal or the Claimants. The decision not to pursue such a contribution was communicated to the Claimants on the 29th October. On the basis of these Mr Haddon invited the Claimants to drop their very late application for a wasted costs order.

y. On the 3rd November 2020 the emails indicate that there was an element of agreement between the solicitors leading to the Order which was put before the court for approval so as to avoid the hearing. This led to the Order dated 5th November and the hearing on the 5th November being vacated. Thereafter the parties provided their written submissions.

<u>The case put forward by each party</u>

6. *The Claimants' submissions.* Penningtons have made the following submissions:
    a. The Claimants accept that the First Defendant is entitled to its '*costs of the arrest*' up to the date of the discontinuance on the 5th November 2020 in accordance with CPR Part 38.6. They submit that, having instructed an independent costs consultant, the relevant sum to be allowed equates with what the First Defendant has claimed in Part 1 of its costs schedule (for work done from 9th August to the 1st September 2020) together with small portions of the sums claimed for work done between 2nd to the 15th September (Part 2 of the Schedule) and between 30th October to 5th November (Part 3 of the Schedule). The Claimants submit that the appropriate sum to be allowed is £14,424.86.
    b. The second matter is stated to be an issue as to whether the First Defendant is entitled to its costs with respect to a separate claim "*for contribution to port charges*

by the First Defendant against the Admiralty Marshal and/or the Claimants (the port charges issue) raised by them on the 1st September 2020 and abandoned by them on the 29th October 2020". The Claimants submit that, if the port charges issue had not been raised by the First Defendant on the 1st September, the Claimants' application to discontinue would "*have been filed in the normal way, the Claimant would have paid the First Defendant its costs up to the date the notice of discontinuance was issued and none of the First Defendant's Part 2 and Part 3 costs would have been incurred*". At the heart of this submission is the Claimants' contention that because, on the 1st September, the First Defendant emailed to state that they would not be liable to pay the port charges for the period of the arrest and that, on the same day, the Port Authority informed the Admiralty Marshal that they had charges for his account subsequently quantified as being £129,984.96 this began an entirely new issue: "*in effect a claim by the First Defendant for a contribution to the port charges for which they were contractually liable*". The Claimants also submit that they are entitled to recover the costs of defending against the port charges issue effectively raised by the First Defendant.

c. The Claimants also submit that the majority of the First Defendant's costs incurred after the 1st September and all the costs incurred between the 15th September and 29th October 2020 related not to the arrest but to either the port charges issue or the "*MCA detention issue*". In this respect the Claimants have submitted that where, as in the present case the Admiralty Marshal did not request the port for any services the liability for the port charges remains with the owners or demise charterers and that, in the absence of an order for sale the decision in *The Queen of the South* [1968] P. 449 did not apply. Thus, submit the Claimants, the port charges issue should never have been raised by the First Defendant but that, by doing so, the First Defendant "*placed the Claimants in a difficult position in which it had no option but to resist the assertion (that a contribution was due from the Admiralty Marshal or the claimant) made by the First Defendant on behalf of themselves and the Admiralty Marshal*".
d. Consequentially the Claimants assert that "*in order to resist the claim for a contribution (of £130,000) considerable thought had to be given as to how the Court's jurisdiction was to be invoked*" so that Counsel's advice had to be sought and evidence prepared to support the application to determine the port charges issue. The Claimants rely upon the fact that, on 29th October 2020, the Owner acknowledged that they would not be seeking to recover a proportion of the port dues. Thus, so the Claimants submit, all the costs incurred relating to this issue were caused by the First Defendant who should not be entitled to recover their own costs. In support of this proposition the Claimants rely upon CPR Part 44.2(2) to the effect that the unsuccessful should pay the successful party's costs and the guidance given by Waller LJ in *Straker v Tudor Rose* [2007] EWCA 368. In short the Claimants contend that they were the successful party with respect to the port charges issue and they are entitled to their costs.
e. Alternatively, if it is decided that the First Defendant is the successful party (according to the Claimants' reasoning: because it is decided that an issue based

approach is not appropriate) then it is submitted that it is necessary to depart from the general rule and a ground for doing so, by reason of the provisions of CPR Part 44.2(5)(b), "*whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue*", was the conduct of the First Defendant in raising the 'port charges issue' because, so it is averred, it was plain that "*there was no basis in law for the assertion that the First Defendant was entitled to a contribution of (£130,000) to its liability to pay port charges to the Port of Tilbury*". The Claimants contend that "*the best possible evidence that this is so is provided by i) the complete absence of any attempt by [Hill Dickinson] to explain or justify the First Defendant's position and ii) the complete abandonment of the claim toa contribution*". Accordingly it is said that the First Defendant should be deprived of its Part 2 costs and the Claimants are entitled to an award of costs in relation to its costs of the port charges issue.

f. In the further alternative the Claimants contend that, if the court disagrees with the analysis set out above, nonetheless the Claimants should not pay the costs of the MCA detention and that the time spent on documents is excessive. By reference to the First Defendant's schedule the Claimants contend that their own liability for costs should be restricted to £2,773.50 in respect of 'communications' and £3,000 in respect of work on documents, making a total of £5,773.50. The Claimants contend that the balance of Part 3 over the £1,220 allowed (see sub-paragraph (a) above) is not related to discontinuance and therefore is not claimable.

g. Further the Claimants seek to recover what they claim are their "wasted costs" arising from the additional costs to discontinue caused by the need to deal with the port charges issue which are set out in their Form N260 in the sum of £31,981.50. In this respect the Claimants contend that: "*The Claimant had carriage of the application to discontinue, had to seek advice from counsel, and prepared and served evidence on the port charges issue*".

h. Finally the Claimants submit that they incurred £5,010.50 between 6th November 2020 and 19th November 2020 in the preparation of their written submissions making their total claim in costs £36,992.

7. *The First Defendant's submissions.* Mr Neil Henderson has made the following submissions:

a. The Order of the 5th November 2020 provides that the First Defendant is entitled to its costs of the claim except for the costs of the port charges issue. Those costs amount to £14,424.86, being the costs incurred from 9th August 2020 to the 15th September 2020 as set out in Part 1 of the First Defendant's Schedule of Costs dated the 17th November 2020. Mr Henderson submits that these should be awarded in full.

b. Part 2 of the Schedule details the costs incurred by Hill Dickinson from 16th September 2020 to 17th November 2020 amounting to £20,285 and Part 3 sets out the estimate for obtaining counsel's advice as to the liability for costs and preparing the written submissions filed. This amounts to £6,345.

c. Mr Henderson has submitted that the costs in Part 1 should be awarded in full. As it appears from the Claimants' submissions that the figure of £14,424.86 is accepted nothing more is of concern.
d. With respect to the matter as a whole including the so-called port charges issue Mr Henderson has made the following points by way of introduction:
    i. The claim arose from the supply of bunkers to the vessel to the order of Global, the Second Defendant, which had been the bareboat charterer of the vessel since 2014. As a result of the Covid pandemic the vessel had remained in port since March 2020 and Global had become insolvent. As a consequence the bareboat charter was terminated on the 21st July 2020 which was just over 2 months before it was contractually due to end. Incidentally it appears that the Owner of the vessel was also insolvent since 11th March 2016 when a Portuguese judicial administrator was appointed who found himself having to cope with the consequences of the early termination at short notice.
    ii. After the Claimants commenced proceedings Hill Dickinson were instructed to advise and conduct the litigation on behalf of the Owner. This involved considering the claim and arrest and dealing with the complicated cross-border insolvency provisions.
    iii. Hill Dickinson wrote to Penningtons to explain that the claim and arrest procedure did not comply with the provisions of s.21 of the Senior Court Act 1981 and requested that the vessel should be released from arrest.
    iv. Although the Claimants caused the vessel to be released they also began an unnecessary application regarding the potential liability of the Admiralty Marshal for port charges which added costs and further raised the contention that the Claimants had been caused to incur these expenses by the conduct of the First Defendant arising out of a single line in an email from Hill Dickinson dated 1st September 2020. This caused the First Defendant to incur even greater costs to what was, in any event, a misconceived claim which has given rise to the present dispute. Mr Henderson describes the Claimants' allegation as 'bewildering' and has surmised that it may have arisen as a result of Pennington's embarrassment at having commenced a hopeless claim.

e. With respect to the 'port charges issue' Mr Henderson has submitted:
    i. When seeking to arrest property in the Admiralty court a claimant's solicitor must give an undertaking to the Admiralty Marshal to reimburse his expenses in respect of the arrest, care and custody and release of the property. Penningtons gave such undertakings by signing forms ADM4 and 12.
    ii. It is apparent from the early correspondence between Penningtons and the Marshal that the Claimants were expecting that any expenses of the Marshal would be recovered from the proceeds of sale of the vessel. However by his email dated the 21st August 2020 the Marshal indicated that he would not

automatically commit to covering all expenses incurred, that where an owner 'walked away' he would ask the arresting party to cover harbour dues and general running costs, and that he considered it necessary not to commit to costs as there might be a number of creditors.

iii. It appears that Penningtons had the above in mind and on the 25th August Penningtons requested the harbour costs from the Port authority. Further on the 28th August Penningtons asked the Marshal to release the vessel "*as quickly as possible*". On the following day the Marshal informed Penningtons that the port had informed him that there were no costs.

iv. On the 31st August 2020 Penningtons emailed Hill Dickinson stating that although instructions had been given to release the vessel from arrest nonetheless the Claimants would be maintaining their claim against both Defendants and that, on their analysis, the bareboat charter remained in place.

v. On the 1st September the vessel was released from arrest (although Hill Dickinson were not informed until the 3rd September), the Marshal informed Penningtons by email that apparently there were outstanding port dues to which Penningtons responded saying that it was unexpected and that they had discussed this matter with 2 persons (presumably at the port) neither of whom had said "*that the port would be looking to my client to pay berthing fees*". Mr Henderson has emphasized that this exchange was not copied to Hill Dickinson.

vi. Also on the 1st September, and at a time when he was unaware that the vessel had been released from arrest, Mr. Haddon of Hill Dickinson sent Penningtons the email referring to harbour dues upon which the Claimants base their entitlement to the costs of the 'Port Charges Issue'. Mr Henderson submits:

    (a) that the contents of the email were reasonable at that time bearing in mind that Hill Dickinson were unaware that the vessel had been released and it was unclear to what extent the vessel had been or might be further delayed by the arrest and all that Mr Haddon was stating "*was the uncontroversial position that insofar as harbour dues that accrued during the arrest period fell within the Admiralty Marshal's costs the First Defendant would not be paying them*";

    (b) that Penningtons were aware that Mr Haddon and his assistant had just returned from holiday, that the Portuguese administrator was having to grapple with the situation and the need for the First Defendant's team to get up to speed so that they should not have been surprised by the defensive position taken by the First Defendant;

vii. Furthermore Mr Henderson has submitted that the application to the court was not only premature but arose from Penningtons' concerns that the Marshal might be liable for the port charges and that they might have to indemnify him for them and had nothing to do with the wording of Hill

Dickinson's email of the 1st September. In support of these contentions Mr Henderson has drawn attention:

(a) To the nature of the correspondence between Penningtons and the Admiralty Marshal from late August to September;

(b) In particular, to Pennington's email to the Marshal of the 4th September (stating that they did not consider that the Marshal was liable to pay the berth charges and that they would provide an explanation), to the Marshal's acknowledgment on the 7th September, to Pennington's email of the 10th September (effectively 'interrogating' the Admiralty Marshal) and to the email from the Admiralty Marshal dated the 15th of September to Penningtons (identifying the outstanding port charges of £129,984.96 between 19th August and 1st September and stating that he did not request any services from the Port of Tilbury).

(c) To the fact that Penningtons issued their application on the following day, namely the 16th of September.

(d) To the fact that it is surprising that Penningtons did not respond to the 1st September email from Mr Haddon at all, did not challenge Mr Haddon's assertion regarding the Admiralty Marshal's costs and made no attempt to resolve the matter before issuing the Claimants' application on the 16th September.

viii. In short Mr Henderson contends that the costs were caused and compounded by Pennington's failure to address their concerns in an appropriate manner by engaging with the Admiralty Marshal and, so far as necessary, with the Owner as was indeed suggested by Hill Dickinson by their email of the 23rd September; as Mr Henderson has pointed out the vessel had already been released on the 1st September and any liability for costs during the arrest will have ceased at that point. Furthermore it has now become apparent that the Owner and his advisers were working to resolve the matter of outstanding port dues which was effectively completed very shortly before the 29th October when Hill Dickinson informed the Admiralty Marshal and Penningtons that this had been done.

ix. Mr Henderson has drawn attention to the fact that it was not until 30th October that Penningtons wrote to the Marshal, but not copied to Hill Dickinson, stating that the issue of the Port Charges had been caused by the email of the 1st September from Hill Dickinson. Mr Henderson has submitted that this was wrong and was merely an attempt by Penningtons to blame the First Defendant for all their costs.

x. On the 2nd November Hill Dickinson wrote to Penningtons explaining the email of the 1st September and Mr Henderson has submitted that, in the light of that explanation, there is no basis for arguing that the Claimants are entitled to their costs.

f. With respect to the First Defendant's own costs, Mr Henderson has given an explanation of the schedule of costs. The first part relates to the sum of £14,424.86

for the period from 9th August to 15th September 2020. As these have been conceded by the Claimants it is not necessary to consider them in detail. With respect to Part 2 these cover the period from 16th September 2020 until the 17th November 2020. Those amount to £20,285.50 of which £14,738.50 is made up of the work set out in 'narrative' to part 2 attached to the schedule and relate to the work performed by the team of solicitors at Hill Dickinson during that period. Mr Henderson has pointed out that the costs in Part 2 are considerably less than those put forward by the Claimants for the like period and has submitted that they are reasonable. Mr Henderson has also stated, presumably upon instructions, that the costs do not include the First Defendant's costs of liaising with the Port Authority or negotiating the settlement of the port charges.

g. In addition Mr Henderson has submitted that the estimate of costs for preparing the written submissions of £6,345 is 'eminently reasonable'.
h. With respect to the Claimants' claim for 'wasted costs' Mr Henderson has submitted that the Claimants are not entitled to them but, if the court takes a different view, then it should take the following matters into account:
    i. The Claimants should not recover the costs which would have been incurred in any event, namely the costs of the application for permission to withdraw the claim and, because "Astoria" was one of three ships in the port facing excessive port fees, the work done in respect of the other vessels including the costs of instructing counsel should be apportioned;
    ii. The claim for costs of £31,981.50 are unreasonably high and disproportionate, especially when compared with the First Defendant's costs;
    iii. The time spent by the Claimants' solicitors, put forward as being 38.7 hours for a Grade A solicitor and 27.7 hours for a Grade C solicitor is far too high and unjustified where counsel was asked to advise.
    iv. The sums charged in respect of counsel (amounting to about 20-25 hours work) are too high and the court fee claimed was payable in any event.

<u>Consideration</u>

8. I have set out the factual background and the parties' submissions at some length in endeavouring to understand how the present dispute arose and which party should be responsible for paying the costs of what appears to have been largely unnecessary satellite litigation which has little, if anything, to do with the original claim made by the Claimants but has had a significant influence on the costs incurred by the parties.

9. *Applicable principles.*
    a. By CPR Part 44.2 the award of costs in a case is within the discretion of the court. The discretion is to be exercised judicially and, in accordance with CPR Part 1, with a view to coming to a fair conclusion. How that is to be approached has been the subject of guidance from the Court of Appeal in *Straker v Tudor Rose* [2007] EWCA Civ 368 referred to in Cook on Costs 2021 Edition which states that the

proper approach is (i) to consider whether it is appropriate to make an order for costs, (ii) if it is then the general rule is that the successful party should get its costs, (iii) to identify the successful party, and (iv) consider whether there are reasons for departing from the general rule in whole or in part. The White Book also contains copious notes on these aspects. At 44.2.13 (p. 1386) it states: "*As a practical matter r.44.2(2) poses two questions: (1) who is the successful party and (2) when should the general rule be applied? The two questions tend to get conflated and therefore muddled*". The same page also contains reference to the cases where the question of identifying the successful party have been referred to. These indicate that the success is to be regarded in the context of the overall proceedings rather than a particular issue (*Kastor Navigation v AGF MAT* [2004] EWCA Civ 277) and that the court should seek to ascertain who has won as a matter of 'substance and reality' (see Sir Thomas Bingham in *Roache v Newsgroup Newspapers Ltd* [1998] EMLR 161) and by applying 'common sense' (see *Bank of Credit and Commerce International SA v Ali* (1999) 149 NLJ 1734.)

b. CPR Part 38.2(1) provides that a claimant may discontinue its claim at any time however it must obtain the permission of the court in relation to a claim where any party had given an undertaking to the court. Part 38.6 deals with costs upon discontinuance and provides that the discontinuing party will be liable for costs to the date when the notice of discontinuance is served upon him where permission is not required. The note at 38.5.2 of the White Book indicates that where permission to discontinue is required the order granting permission should indicate when discontinuance takes place. However by CPR Part 38.6 the court may make another order but it is to be noted that there is a strong presumption that the defendant should recover its costs and the burden is upon the claimant to show that there is a good reason for departing from that position, see *Nelson's Yard Management Co. v Eziefula* and *Ashany v Eco-Bat Technologies Ltd* [2018] EWCA Civ 1066, referred to in note 38.6.1 of the White Book.
c. CPR Part 44.2(4) sets out the matters which the court should consider in exercising its discretion on costs which includes the conduct of all the parties and CPR Part 44.2(5) sets out what is included as 'conduct'.
d. The Claimants have referred to the lost costs as 'wasted costs' on several occasions. The rule relating to wasted costs orders is CPR Part 46.8. In this respect the Court of Appeal has given guidance as to the three stage test to be applied in *Ridehalgh v Horsefield* [1994] Ch. 205, CA which is, when a wasted costs order is applied for, to consider: (a) whether the legal representative of whom the complaint is made behaved improperly, unreasonably or negligently; (b) if so, did such conduct cause the applicant to incur unnecessary costs; and, (c) if so, would it be reasonable to order the legal representative to compensate the applicant in whole or in part. In general it is to be noted that the rule requires the complaining party to make an application and for the responding party to be given adequate notice and an opportunity to reply.
e. *The Queen of the South.* The Claimants referred to this authority in paragraph 17 of their submissions but submitted that there is no scope for such an order. As this case

deals with the appropriate approach to harbour dues in cases where there is to be an order for the sale of a vessel it is not strictly on point. Nonetheless the judgment of Brandon J, as he then was, considers the competing interests of a harbour authority, with its lien for mooring fees, and the need for the court to be able to sell a *res* in an appropriate case. At the end of the judgment he gave helpful guidance to future cases where points involving harbour dues might arise. What clearly stands out from that dictum is that there can be no doubt that in an appropriate case such fees may be considered as part of the Marshal's costs but that this should be after consultation between the various interests and only after the matter has been referred to the Admiralty Registrar or the Admiralty Judge. This reinforces the principle that although the Admiralty Marshal has custody of an arrested vessel his actions to preserve the property, which may cover a wide variety of scenarios, should only be taken with the sanction of the court itself.

The Straker v Tudor Rose guidance

10. *Whether it is appropriate to make an order for costs*. This case and the explanation in Cook on Costs has been cited by the Claimants and, in my view, reliance upon the guidance referred to provides a helpful means of resolving the present dispute. The first step is to decide whether a costs order would be appropriate. This can be dealt with shortly because the Claimants expressly submit that an order for costs is appropriate and it is clear from the tenor of their submissions that the First Defendant accepts that an order for costs would be appropriate. Even if the parties did not accept this proposition I have no doubt that an order for costs is appropriate in the present circumstances because CPR Part 38 makes it clear that some type of order for costs will usually, if not invariably, be appropriate where a claimant has discontinued a claim brought in the Senior Court.

11. *The successful and the unsuccessful party in the litigation.* The next step arises from the general rule that it is for the unsuccessful party to pay the successful party's costs. That involves establishing who is the successful party and the unsuccessful party. As appears above the Claimants have sought to characterise the dispute as being one relating to the First Defendant's refusal to pay the port charges and that, as the First Defendant abandoned this stance, it must be responsible for the costs arising from that. I cannot accept the Claimants' argument for the following reasons:
    a. In this case the Claimants issued proceedings seeking to recover the purchase price of bunkers supplied to the ship. It was an essential feature of the present case that they decided to proceed *in rem* against the vessel and they caused it to be arrested. As the claim was for bunkers provided to the ship the claim fell within s20(2)(m) of the Senior Courts Act 1981 as being within the jurisdiction of the Admiralty Court. By s.21 of the 1981 Act the jurisdiction may only be invoked *in rem*, ie against the ship itself, where the 'relevant person', namely the person who would be liable in an action *in personam* at the time when the cause of action arose, was

also either the beneficial owner or a demise charterer of the vessel at the time when the action was brought, ie. commenced.

b. When these proceedings were commenced by issuing the claim form on the 7th August 2020 the Claimants were not aware that the demise charter had been terminated. However on the 17th August 2020 Hill Dickinson, acting for the Owner of the vessel, wrote to Penningtons and advised them of the position. The relevant person was the demise charterer of the vessel because it was that charterer which had requested the supply of the bunkers which were the subject of the claim however, unfortunately for the Claimants, the charterer had terminated the charter and surrendered the vessel to the Owner before the proceedings were commenced. In these circumstances it was not permissible to exercise the jurisdiction of the court against the vessel. It is also to be noted that on the 18th August the Admiralty Marshal, who had been copied into the email from Hill Dickinson, sent a message to Penningtons advising them that the original arrest had not been properly served on the vessel and asking whether, in the light of the correspondence from Hill Dickinson, the Claimants wanted him to effect the arrest. Penningtons confirmed that they did and the arrest was effected by the Admiralty Marshal despite having been given the information which should have put them on notice that, if it was correct, must have meant that the jurisdiction of the court could not be invoked by the *in rem* procedure. As it has transpired that was an unfortunate decision because by committing to the arrest the Claimants made themselves subject to the undertaking contained in ADM4 which lies at the heart of the present dispute.

c. Thereafter Penningtons firstly advised their clients to release the vessel from arrest and made the appropriate request to the Admiralty Marshal and subsequently made an application to the court for permission to discontinue their claim. It is common ground that this application was necessary by reason of CPR Part 38.2(2). The claim was finally discontinued by the Order of the Court on November 5th. Having commenced a claim and thereafter discontinued, it follows inexorably that the Claimants were the unsuccessful party in this litigation.

d. That conclusion is underlined by the fact that the rules applying to discontinuance in CPR Part 38 clearly recognise that it is for the discontinuing party to reimburse the other party for its costs arising from the proceedings and it is clear from the notes to CPR Part 38.6 that there is a presumption in favour of the defendant recovering his costs, particularly where it is plain that if the claim had continued it must have failed, and there is a substantial burden upon the claimant to show that the presumption should be displaced. That the Claimants should pay the First Defendant's costs in the present case is clearly the proper order because, had the Claimants not discontinued, the First Defendant would have been entitled to apply for and obtain an order dismissing the claim. If that had occurred there would be no doubt that the Claimants would have been liable for all the First Defendant's costs up to the moment of dismissal most probably to be assessed on the indemnity basis.

12. In my judgment the Claimants' approach to the above aspect was wholly misconceived and does not accord with 'reality' or 'common sense' as referred to in the decisions cited in the

White Book at p1384, referred to above. The 'reality' was that the Claimants were responsible for bringing the claim against the ship when it was not appropriate to do so and they had no sensible alternative except to discontinue the claim which they eventually did. As a matter of 'common sense', if the general rule is applied, the First Defendant is the successful party and is entitled to its costs from the unsuccessful Claimants. It follows that, as they appear to accept in paragraph 10 of their submissions, the Claimants are liable for costs up to the 5th November although they appear to seek to restrict this liability to only the costs of the "arrest". This concentration upon the 'costs of arrest' is a thread which runs throughout the Claimants' reasoning and, in my judgment, is also misconceived. As Hill Dickinson pointed out in correspondence the relevant costs in these circumstances are not only those arising out of the arrest but the costs of defending the claim as a whole. In these circumstances, if the general rule is followed, the Claimants must bear the First Defendant's costs to the date of discontinuance. However that is subject to the last step of the guidance: whether it is proper, in the circumstances of this case, to depart from the general rule and make a different order and, if so what.

13. *Are there reasons for departing from the general rule?* Although I have decided that the First Defendant is the successful party it is still necessary to consider the last stage of the guidance referred to above, namely whether there are any reasons for departing from the general rule. This course is put forward as an alternative case by the Claimants in paragraph 27-30 of their submissions and, in my view, is the proper approach in the present case. The Claimants have submitted that the court may take account of all the circumstances including the conduct of the parties and in particular whether it was reasonable for the First Defendant to raise, pursue or contest the issue of the port costs. As a broad statement of principle this accords with CPR Part 44.2 however it should be borne in mind that the court is not restricted to considering the conduct of one of the parties but may consider the conduct of all the parties in the light of all the circumstances of a particular case. In this case the matter under consideration has been described as "the port charges issue".

The "*Port charges issue*"

14. From the Claimants' submissions it appears to be their case that the so called 'port charges issue' was raised by the First Defendant by their email of the 1st September and that this should never have been occurred because there is no basis for asserting that it was entitled to a contribution (amounting to £130,000) to its liability to pay port charges to the Port of Tilbury. This is said to be so because there is no explanation to justify such a position and the First Defendant subsequently abandoned the claim as appears from Hill Dickinson's email of the 29th October 2020. As a result it is contended that a considerable amount of time and expense has been incurred in relation to this issue and that the Claimants are entitled to recover their own costs arising from it and should not be liable to pay those of the First Defendant despite the fact that the claim has been discontinued.

15. In the correspondence the Claimants appear to be seeking their 'wasted costs' arising from this issue however their submissions avoid referring to wasted costs. This is probably because Penningtons now appreciate that to seek an order for 'wasted costs' requires an application to

be made which has not been made. Nonetheless the nature of the order they require necessitates considering the same type of matters with respect to Hill Dickinson's conduct which would have arisen if an application had been made. As stated above it is noteworthy that to obtain a 'wasted costs' order the Claimants would need to persuade the court that the First Defendant, by itself or its solicitors, had acted dishonestly or, at least, negligently with respect to its conduct of the case.

16. The Claimants' case is that the issue about the port charges was caused by the conduct of the First Defendant. This assertion relies mainly upon Penningtons' interpretation of the words used by Mr Haddon of Hill Dickinson in the email of the 1st September. In paragraph 5 of the Claimants' written submissions it is said that Hill Dickinson wrote to say that the Owner would not pay "*port charges for the period of the arrest*", see paragraph 5 of the Claimants' submissions. That statement is materially inaccurate. In fact Mr Haddon stated that the "*Harbour dues that need to be settled prior to the vessel being allowed to sail will no doubt be settled by our clients once they know when the vessel can sail*". But he added that this "*will not include the harbour dues for the period of the arrest which fall within the classification of Admiralty Marshal's costs*" (emphasis added). That is not a refusal to pay harbour dues but only those harbour dues which form part of the Admiralty Marshal's costs. This statement was made in response to the information from Penningtons' that the vessel was to be released at the behest of the Claimants and was, in my view, both factually correct and a reasonable position for the Owner to adopt.

17. In the majority of cases where a vessel is arrested, judgment obtained and the vessel sold the Marshal's costs are taken from the proceeds of sale as a first charge on the fund. Similarly if the arresting party has incurred costs of the arrest or preservation of the vessel, such as happens where they pay costs of crew repatriation or harbour dues, the arresting party may recover those from the fund in court once the vessel is sold. However where a claim *in rem* is abandoned or the vessel is released at the instigation of the arresting party the Marshal can only recover his costs from the arresting party. That is the reason for the undertaking in both forms ADM4 and 12. In suggesting, as they have, that Hill Dickinson's position, as set out in the email of the 1st September 2020, was incorrect or unreasonable I consider that Penningtons have fallen into a serious error which lies at the heart of this dispute. In this case the Claimants were responsible for the arrest of the vessel. Thereafter they decided to have the vessel released and it follows that, insofar as the Marshal had incurred any expenses arising from the arrest, it was for the Claimants (not the First Defendant) to reimburse the Marshal under the terms of their undertakings for all his expenses incurred during the relevant time.

18. Further in paragraph 5 of their submissions Penningtons state that on the 1st September 2020 the Admiralty Marshal indicated to Penningtons that Tilbury had outstanding charges for his account amounting to nearly £130,000. It is stated "*This was the start of a new issue: in effect a claim by the First Defendant for a contribution to the port charges for which they were contractually liable*". In my view this is an astonishing assertion as Mr Haddon's email, written at a time when he was unaware of the claim put forward by Tilbury, makes no reference whatsoever to seeking a contribution to the port dues from the Claimants or anyone else. The

evidence before me contains not a single intimation by the First Defendant that they might be seeking such a contribution to the harbour dues and the only message referring to a contribution is that from Hill Dickinson dated the 29th October 2020 indicating that the Owner was not seeking a contribution. However the Claimants seek to argue that the wording of that email gives rise to an "*implication*" that the Owners were seeking such a contribution at a much earlier stage. This is an equally astonishing submission because it is impossible to see how the contents of an email dated the 29th October can possibly have led Penningtons to believe that the First Defendant was seeking a contribution or have influenced their actions in any way nearly two months earlier and, in my view, the Claimants' attempt to construct an argument for costs upon such strained logic is unacceptable.

19. That conclusion is also supported by the contemporaneous correspondence between Penningtons and Hill Dickinson provided in the hearing bundle. The starting point for considering this aspect is that on the on the 17th August Penningtons received the email from Hill Dickinson stating that the charterparty had been terminated in July so that, in effect, the court had no jurisdiction to consider the claim and therefore the claim was ill founded. On the 21st August Hill Dickinson filed an Acknowledgment of Service indicating that the claim would be defended and the court's jurisdiction challenged. On the 18th August the Admiralty Marshal reported that the original service of the claim form and arrest documents had been ineffective and asked whether the Claimants required him to re-serve them to which Penningtons responded positively despite the fact that, from an early stage Penningtons were, as is shown by their correspondence with the Admiralty Marshal and others, indicating concerns as to their clients' possible liability for harbour dues arising from the undertaking given to the Marshal in ADM4. On the 31st August Penningtons sent the email which, whilst indicating that the vessel was to be released, stated that the Claimants did not accept that the charter had been terminated and that the claim was going to be maintained. The wording of the that email does not indicate that the Claimants are intending to discontinue and it was reasonable for those at Hill Dickinson to take the Claimants' message at face value and assume that the Claimants intended to continue however poor the Claimants' position was.

20. That remained the situation and, on the 10th September 2020 Ms Rosie Goncare, of Hill Dickinson, emailed Penningtons requesting that the Claimants should discontinue the *in rem* proceedings with immediate effect and confirm it by 15th September or the First Defendant would make an application challenging the jurisdiction of the court and seek to recover costs on an indemnity basis. On the 15th September Mr Haddon emailed Mr Cheuk at Penningtons, reminded him that there was a deadline for the First Defendant to challenge the court's jurisdiction which expired on 18th September and stated that unless the application for discontinuance was served by return Hill Dickinson would have to prepare the First Defendant's application to strike out the claim. At no point since the 1st September had the Claimants intimated that they disagreed with the contents of Mr Haddon's email of that date or that they felt constrained to take steps of any sort arising from what Mr Haddon had stated in that email.

21. The Claimants' application, dated the 16th September 2020, only seeks permission to discontinue the claim and for the assistance of the court with respect to the undertakings given to the Admiralty Marshal. Although, in paragraph 6 of section 10 of the Application form, there is a reference to the fact that the Port of Tilbury 'and possibly other third parties' have expressed an intention to charge or recover from or via the Admiralty Marshal the berth and associated fees for the period of arrest but there is no mention of Hill Dickinson's email of the 1st September 2020 nor any suggestion that the First Defendant had raised any issue with regard to the harbour dues. Furthermore although Mr Moisley's supporting witness statement made on the 17th September 2020 makes reference to Hill Dickinson's 1919 email of the 1st September (in paragraph 37) and Admiralty Marshal's email of the same date timed at 1704 there is no suggestion that these affected the actions of the Claimants in any way other than they wished to ask for the assistance of the court "*in determining the question of liability for (and a determination of the level of) fees and expenses incurred whilst the vessel was under arrest but not incurred because of the arrest and which must be borne pursuant to the undertakings referred to . . .*".

22. At that point it appeared to be common ground that the Claimants would discontinue the claim and it appears that Penningtons sent a draft order for the consideration of Hill Dickinson. On the 23rd September 2020, Ms Rosie Goncare of Hill Dickinson emailed Penningtons to state that the First Defendant could not agree paragraph 2 of the proposed order because the First Defendant was entitled to recover "*all their legal costs in these proceedings to date, not just for the duration of the arrest*". That was, for the reasons already given, clearly correct in principle however Mr Moisley's response, made on the same day at 1804, did not simply accept that principle, as it should have done, but suggested that the costs would be low and that Hill Dickinson should send a costs schedule. It is important to note that Mr Moisley's email did not suggest or even hint that the Claimants were seeking their costs from any issue which they suggested might have arisen from Mr Haddon's email of the 1st September. On the contrary it stated that the issue of discontinuance should be resolved save for one point which was: "*The reservation alluded to above is this: given the Port of Tilbury has reportedly asked the Admiralty Marshal to pay £129,984.96 as port dues, there is an issue concerning the liability of the Marshal to pay the port dues. <u>That issue is, strictly speaking, an issue which concerns the Port and the Marshal</u>, neither of whom is party to this claim. However, for the reasons set out in our Application Notice, we consider the most time effective way of resolving this issue is to ask the court to take jurisdiction over it. If the Court agrees to do so, that means the claim will not be discontinued immediately. However that does not mean that your client has to be involved if the terms of the discontinuance are otherwise agreed*" (emphasis added).

23. In my judgment the above email is important. It is particularly striking that it makes no suggestion that the course so far adopted by the Claimants was, in any way, caused or influenced by the conduct of the First Defendant arising out of the email of the 1st September or otherwise. In addition the author acknowledges, what was undoubtedly the true situation, namely that the problems arising from the apparent claim by Tilbury for port dues was a matter to be resolved with the Port and the Admiralty Marshal. That email clearly demonstrates that, on the 23rd September, the Claimants acknowledged that the problems arising out of the port

dues were entirely a matter which needed to be resolved between themselves, the Admiralty Marshal and the Port of Tilbury. That admission utterly contradicts the whole of the Claimants' present case that the costs of dealing with the problems arising from the potential claim by the Port of Tilbury could possibly be attributed to the First Defendant for any reason at all.

24. The conclusion that the Claimants did not raise the port costs issue as a ground for recovering costs from the First Defendant timeously and only raised it at the last moment gains further support from Mr Haddon's email dated the 3rd November, just two days before the hearing was due to take place. That refers to Mr Moisley's witness statement dated the 2nd November which had just been received from Penningtons and to the draft order proposed by the Claimants. It is clearly apparent from Mr Haddon's email that the draft order contained parts which were not acceptable and novel. In the paragraph numbered 4 in Mr Haddon's email he refers to paragraph 3 of the draft order and reiterates the point made earlier by Hill Dickinson that the First Defendant was entitled to its costs of the claim until discontinuance, not just of the arrest. In the numbered paragraph 5 of the email Mr Haddon states that paragraphs 4 and 5 of the draft order are not agreed. He states: "*First we strongly object to a completely new issue being raised just 3 clear working days before the scheduled CMC. Contrary to what is stated in your draft order 4, there has been no application made by your clients for wasted costs by reason of the First Defendant's assertion that the Admiralty Marshal was liable to pay the port charges incurred during the period of arrest. You have had some 6 weeks since the CMC date was set down to amend the application. You have at no time previously suggested your clients would be looking to recover any aspect of costs and it is totally out of order to suggest that we are to prepare, file and serve written submissions on a totally new aspect of costs by tomorrow*". From the foregoing it is abundantly clear that the first time the Claimants put forward a case (that they were entitled to the costs which they now claim) was in that draft order. It is also to be noted that Mr Moisley's second witness statement contains no material at all which supports the Claimants' present case on costs.

25. In his submissions, Mr Henderson has criticised the Claimants for acting hastily in applying to the Court when they did and suggested that they should simply have waited for the Owner to deal with the Port Authority. I think that is possibly a submission made with the benefit of hindsight but it has some force. The communications included in the hearing bundle appear to indicate that Penningtons had a real concern as to the possible level of dues which might be claimed by Tilbury and became further concerned that, if those were paid by the Admiralty Marshal, they could be included as part of the Marshal's expenses. Although there is no evidence which indicates that the Marshal had committed to paying the harbour dues or that he would actually do so there is one email which intimates that he could look to Penningtons for a recovery under the undertakings. However it is important to note that, pursuant to Brandon J's guidance in *The Queen of the South*, the Admiralty Marshal will not pay such costs without the sanction of the Admiralty Registrar or the Admiralty Judge and, where a party is concerned about such matters the appropriate means of dealing with those concerns is to ask the Marshal to make an application to the Registrar on notice to themselves for directions as to whether the payment should be made or, in the very unlikely event that, he refused to do so, to make an application to the court themselves. That course apparently accords with the advice given to

the Penningtons by counsel. In these circumstances although Penningtons do not appear to have fully engaged with the Marshal on the question of him paying the harbour dues (which would have been the sensible course) they did make an application for the guidance of the court with respect to those dues. Therefore I do not think that Penningtons should be criticised for that *per se*. However it must be recognised that such an application must have been to consider an apparent difference of views between themselves and the Marshal. The necessity to do so, as Penningtons clearly recognised in their email of the 23rd September referred to above, had nothing to do with the Owner but was to clarify the Claimants' own position arising out of their arrest of the vessel. In those circumstances this would simply be a matter arising from the circumstances surrounding the arrest of this particular vessel and there is no reason at all why the Owner should have to face an order for costs with respect to a matter which was not of their making. However that is not to say that the conduct of the Claimants with respect to their handling of this matter overall is without fault and not worthy of criticism as set out below.

26. *Conclusions on the so called 'port costs issue'.* For the reasons set out above I have come to the following conclusions:
    a. The content of Mr Haddon's email of the 1st September 2020 was, in itself, unobjectionable,
    b. The First Defendant did not, as the Claimants asserted, 'raise the port costs issue' either expressly or by its conduct;
    c. Insofar as there was 'a port costs issue' that was a matter which should have been resolved between the Claimants and the Admiralty Marshal;
    d. There is no evidence to support the Claimants' assertion that they suffered 'wasted costs' by reason of the First Defendant's conduct;
    e. On the contrary there are clear indications that it was the conduct of the Claimants which is questionable and caused the costs incurred in: (i) wrongly commencing proceedings pursuant to s.21 of the Senior Court Act 1981; (ii) persisting with the arrest of the vessel in circumstances where, by the 19th August, they had information to indicate that the court had no jurisdiction; (iii) persisting with their claim by, in their email of the 31st August, stating that the Claimants would continue their claims (as to do so was contrary to the provisions of s.21 of the 1981 Act); (iv) not applying to discontinue the claim and agree to pay the First Defendant's costs of the claim timeously and (v) thereafter presenting a claim for costs against the First Defendant on a ground for which there is no legal basis and was, given the clear statement of the Claimants' position set out in the email of 23rd September 2020 referred to above, wholly untenable.

<u>Conclusion</u>

27. It follows that the Claimants are not entitled to recover any of their costs arising out of this matter but the First Defendant is entitled to all of its costs associated with the claim until the claim was discontinued by the Order of the 5th November 2020. In addition the First Defendant is entitled to recover its costs of preparing the written submissions to the court.

Assessment of the costs

28. Neither party has addressed the court as to appropriate basis to be applied in assessing the costs to be recovered. However, even on a summary assessment, it is necessary for the court to indicate upon which basis it is making the assessment. By reference to the cases cited at paragraph 44.3.9 of the White Book, it is appropriate to proceed on an indemnity basis where the conduct of a party or other circumstances of a case take the situation 'out of the norm', see *Excelsior Commercial and Industrial Holdings Ltd* [2002] EWCA Civ 879. In *Holding v Apax Partners LLP* [2018] EWHC 2732 Hildyard J held that, in a case where proceedings have been discontinued, the provisions of CPR Part 44.9(1) do not fetter the power of the court which should not be reluctant to order costs on an indemnity basis if it considers that the case is 'out of the norm'. Further it is not the law that an indemnity order will only be made where the unreasonable conduct of the paying party increased the costs recoverable by the receiving party, see *Phoenix Finance Ltd v Federation Internationale de L'Automobile* [2002] EWHC 1242 (Ch) *per* Sir Andrew Morritt VC.

29. In my judgment the conduct of the Claimants in these proceedings does take the case 'out of the norm, as the Claimants have commenced and persisted in the claim and have also made assertions against the First Defendant which were unfounded as referred to in paragraph 26(e) above. I shall therefore perform the assessment on the indemnity basis, but, having said that, I do not think that applying that basis makes any material difference to the quantum of costs which the First Defendant should recover as I am satisfied that the First Defendant's costs were properly incurred and were reasonable. The Claimants have not contended that those costs were disproportionate and it is clear that they were not. At least when compared with the costs claimed by the Claimants over a comparable period.

30. The First Defendant's schedule of costs is signed and dated the 17th November 2020. Part 1 set out Hill Dickinson's costs to the 15th September 2020 amounting to £14,424.86. Those are the costs until the day before the Claimants issued their application to discontinue. Mr Henderson has submitted that they were reasonably incurred and, in Paragraph 14 of their submissions Penningtons accepted those costs.

31. In Part 2 the First Defendant claims costs amounting to £20,285.50 for the period between 16th September and 17th November. Mr Henderson has informed the court that they do not include costs arising from negotiating and liaising with the Port Authority and having considered the documents schedule I accept that assurance and consider that the work done relates to Hill Dickinson having to deal with the case until it was discontinued and thereafter with regard to the costs claim and was reasonable. In paragraph 30 of their submissions Penningtons have submitted: (i) that the Claimants should not have to pay the First Defendant's costs of the MCA detention and (ii) that the time spent on documents was excessive in circumstances where it has not provided any documents nor served evidence. The only reference to the MCA in the First Defendant's document schedule appears in items 3 and 4. Item 3 is for 1.2 hours of time by a junior member of Hill Dickinson for a review of the grounds for MCA detention arising from the '*Claimants' allegations in their*

witness statement". It also appears that a small part of item 4 may be a reference to some further consideration of this by more senior members of Hill Dickinson which is understandable. It therefore appears that Hill Dickinson's work regarding the MCA was brief and arose from the contents of the Claimants' witness statement. It follows that it related to a matter raised by the Claimants, as part of the dispute between the Claimants and the First Defendant and it is therefore recoverable. Aside from that I can find no other reference to work performed by Hill Dickinson relating to the MCA and I do not consider that Pennington's objection is made good. Further I do not accept Penningtons' submission that Hill Dickinson spent an excessive amount of time working on the documents. The work performed by Hill Dickinson is set out in their schedule and was, in my view, all work directly related to the matters being raised by the Claimants. Furthermore the time spent by the 2 main members of the Hill Dickinson team, Mr Haddon and Ms Rosie Goncare, was 11.9 and 27.4 hours respectively giving a combined total of 39.3 hours. That compares reasonably with the times put forward by Penningtons team of Mr Moisley and Mr Cheuk of about 23.7 and 22.6 hours respectively, totalling 46.3 hours. It is interesting to note that, the senior member of the Claimants' team, Mr Moisley, was engaged for about twice the time that Mr Haddon was involved. In my judgment the Claimants' criticism of Hill Dickinson's time spent has not been made out, the First Defendant's costs were reasonably incurred and it should be awarded the full sum of £20,285.50 claimed for Part 2.

32. Finally in Part 3 Hill Dickinson have put forward an estimated claim of £6,345 for the work done on preparing the costs submissions. For the solicitors most of work was done by Ms Goncare and Mr Martin Rothwell, a costs lawyer. That work apparently included attending upon Mr Henderson, whose fees are put forward as £3,000 for both advising in conference and preparing the costs submissions. When compared with the Claimants' claim for counsel's fees of £8,485 for only advising Mr Henderson's fees appear very reasonable indeed although I accept that he is some 12 years more junior than Claimant's counsel. I accept that it was proper and reasonable for the First Defendant's solicitors to have played a part in the preparation of the written submissions and to charge for that work. In my judgment the sum of £6,345 put forward by Hill Dickinson for the preparation of the submissions was reasonable and is recoverable.

33. In these circumstances I assess that the costs which the First Defendant is entitled to recover from the Claimants in the total sum of £41,055.36. I would be grateful if the parties would agree and order which gives effect to this decision taking account of the matters dealt with in the Order made on the 5th November 2020.

Dated this 29th day of January 2021