Neutral Citation Number: [2024] EWHC 357 (Ch)

Case No: PT-2018-000933

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 21st February 2024

Before :

Andrew Twigger K.C. sitting as a Deputy Judge of the High Court

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Between :

BROOKE HOMES (BICESTER) LIMITED	**Claimant**
- and -	
(1) PORTFOLIO PROPERTY PARTNERS LIMITED (Co. No. 06940414) In Administration **(2) P3 ECO (BICESTER) HIMLEY LIMITED (Co. No. 07361204) In Administration** **(3) DESIMAN LIMITED** **(4) DESIMAN 2 LIMITED** **(5) CFJL PROPERTY PARTNERS LIMITED (Co. No. 10685994) In Administration**	**Defendant**
AND	
(1) DESIMAN LIMITED **(2) DESIMAN 2 LIMITED**	**Petitioners**
- and -	
BROOKE HOMES (BICESTER) LIMITED	**Company**

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- -

Mr Michael Jefferis (instructed by **HA Law**) for the **Claimant/Company**
Mr Robert Amey (instructed by **Underwood**) for the **Third & Fourth Defendants/Petitioners**

Hearing dates: 23 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Andrew Twigger K.C. sitting as a Deputy Judge of the High Court

Mr Andrew Twigger K.C. :

1. This is an application to determine two sets of costs. First, the costs of a winding-up petition (the "Petition") issued on 10 August 2022 by Desiman Ltd ("Desiman") and Desiman 2 Ltd ("Desiman 2"). In some of the documents to which I refer below, the term "Desiman" has been used to refer to the third and fourth defendants collectively, but I shall use the term "the Desiman parties". Secondly, an application issued on 6 December 2022 (the "Brooke Application"), within an action ("the Main Action") commenced in 2018 by Brooke Homes (Bicester) Ltd ("Brooke Homes"). As well as being the claimant in the Main Action, Brooke Homes is also the company which is the subject of the Petition. The Desiman parties are the third and fourth defendants in the Main Action. The other defendants to the Main Action are not parties to this dispute about costs, but they played an important role in the background to that dispute. The circumstances in which the costs fall to be determined are somewhat convoluted and I will need to set them out in a little detail.

The Main Action and the December 2021 Order

2. Between 9 and 18 October 2021 Mr Hugh Sims KC, sitting as a Deputy Judge of the High Court, heard the trial of the Main Action. The claim concerned the development of certain land in North-West Bicester.

3. The facts underlying the Main Action, with some inevitable over-simplification, are in essence as follows. The first two defendants, Portfolio Property Partners Ltd and P3 Eco (Bicester) Himley Ltd, which had directors and a principal shareholder in common, had been granted options by third parties to acquire certain land. Three agreements were entered into between those two defendants and Brooke Homes, with the intention that those defendants would exercise the options and then sell on some of the land thus acquired to Brooke Homes. Brooke Homes was incorporated specifically for the purpose of purchasing that land for development; it had, and has, no other business. Mr Sims held that the effect of the three agreements was that the parties were obliged, amongst other things, to use all reasonable endeavours to enter into a final binding agreement for the purchase of the relevant land and that Brooke Homes was to be given exclusivity for a certain period.

4. At a later stage, the fifth defendant, CFJL Property Partners Ltd, was incorporated, with the same directors as the first two defendants, and it also became involved in the purchase of some of the land which was intended to be sold on to Brooke Homes. The first, second and fifth defendants have been referred to collectively in the documents as the "P3 parties" (or sometimes the "P3 Companies").

5. In the event, one 10 acre parcel of land (with title number ON339648) ended up in the legal ownership of the second defendant, another 30 acre parcel of land (with title number ON273022) ended up in the legal ownership of the first defendant, and a final 59 acre parcel of land (with title number ON360325) ended up in the legal ownership of the fourth defendant, Desiman 2. I will refer to the three parcels of land together as "the Land".

6. Desiman's role was as lender to the P3 parties for purposes connected with their purchase of the Land. It had the benefit of a first charge over the first and second parcels of land to secure the sums lent to the P3 parties. Mr Sims ultimately held that

what he described as the "curious transaction", by which the third parcel of land ended up being held by Desiman 2, was to be viewed as an assignment by way of security for the sums lent by Desiman. He granted declaratory relief to the effect that Desiman 2 held the third parcel of land as mortgagee and that the equity of redemption was vested in the P3 parties.

7. As matters transpired, no binding contract for the sale of any of the Land to Brooke Homes was concluded and Brooke Homes initially began proceedings against the first two defendants before the "curious transaction" referred to above. The other defendants were joined later. Brooke Homes asserted a number of claims. On 11 November 2021 Mr Sims gave a detailed judgment running to 119 pages ("the Main Judgment"). He concluded, in briefest outline, that although Brooke Homes' proprietary claims failed, its claim against the P3 parties for breach of the three agreements referred to above succeeded, and he awarded damages in the sum of £13.4 million against the P3 parties. Brooke Homes' claims against the Desiman parties, however, failed.

8. In paragraph 62 of the Main Judgment Mr Sims observed that Underwood Solicitors LLP ("Underwoods"), who had originally acted for the Desiman parties, were by the time of the trial "*somewhat unusually*" acting for all the defendants. He added, "*The Defendants have signed a conflict waiver to enable Underwoods and counsel to act for them all. Desiman has taken the unorthodox approach of funding the litigation and has even gone so far as to advance a funding line to the P3 parties to help them defend the claim, negotiate a settlement with [Brooke Homes], as well as advancing a personal loan to Mr Nardelli.*" Mr Nardelli was the principal shareholder and one of the directors of the P3 parties.

9. Following a hearing on 17 November 2021, an order was made on 10 December 2021 consequential upon the Main Judgment ("the December 2021 Order"). Amongst other provisions, it included the following:

    i) There was a recital recording an undertaking by the P3 parties to keep Brook Homes informed of any steps taken to sell, charge or grant any interest in or over any part of the Land.

    ii) There were declarations concerning the parties' interests in the Land.

    iii) By paragraphs 3 and 5, the P3 parties were ordered to pay Brooke Homes the principal sum of £13.4 million, plus interest.

    iv) Paragraph 4 dismissed Brooke Homes' claim against the Desiman parties.

    v) Significantly, for the purposes of the application before me, two costs orders were made (subject to various immaterial matters). First, the P3 parties were ordered to pay 75% of Brooke Homes' costs of the Main Action on the indemnity basis. Secondly, Brooke Homes was ordered to pay Desiman's costs of the action on the standard basis.

    vi) Paragraph 7 granted Brooke Homes "*Final Charging Orders*" over the interests of the P3 parties in the Land until further order, or until completion of a sale of part of the Land which was then contemplated (see below), upon

which the charging orders were to be released (pursuant to some machinery set out in paragraphs 10 to 12).

vii) Paragraph 8 provided as follows: "*The parties shall use their reasonable endeavours to work together to bring about the satisfaction of the judgment as soon as reasonably practicable, with [Brooke Homes] being secured by the Final Charging Orders in the meantime, but the First, Second, Fourth and Fifth Defendants shall be permitted to exchange and complete the sale ("the Sale") of the part of the Land shown edged in red on the plan attached to the Defendant's further written submissions sent by email on 6 December 2021 at 15:59 ("the Sale Land") to Countryside Properties (UK) Limited ("Countryside") for the sum of £27,500,000.00 and grant various easements and licences to occupy over other parts of the Land…*"

viii) Paragraph 13 provided for a further hearing to be fixed on 14 February 2023 ("the Further Hearing") to determine whether the Final Charging Orders should continue. It also imposed a stay of all further steps to enforce the judgment and orders for costs until the Further Hearing or further order in the meantime. The parties were given permission to apply regarding enforcement of the December 2021 Order or for further directions generally and any applications were to be listed, if possible, before Mr Sims (although the matter was not reserved to him).

10. Part of the logic underpinning the December 2021 Order was self-evidently that all the sums payable pursuant to the order, whether by the P3 parties or by Brooke Homes, would be funded out of the proceeds of the proposed sale of the "*Sale Land*" to Countryside, and so, crucially, payment would be postponed until that sale occurred and the price had been paid. That was why the defendants (still all represented together by Underwoods and by the same counsel team) obtained a stay of the charging orders granted to Brooke Homes until completion of the proposed sale.

The February 2022 Order and subsequent events

11. By the time the Further Hearing envisaged by the order of December 2021 Order took place on 14 February 2022, however, the sale to Countryside had gone off. There appears to be a dispute about whose fault it was that the sale went off and whether the court was accurately informed about that, but I am unable to make any findings (and I do not consider that it matters for present purposes). A further development was recorded in the recitals to the order made at that hearing ("the February 2022 Order"), namely that the fifth defendant had entered administration on 11 February 2022, so that no claim against that defendant could be continued without the permission of the administrator or the court (pursuant to paragraph 43 of Schedule B1 to the Insolvency Act 1986). Accordingly, the fifth defendant was not represented at the hearing on 14 February 2022, but the first four defendants were still represented by Underwoods and shared one counsel.

12. In addition to the recital just referred to, the February 2022 Order included the following provisions, amongst others:

i) There was a recital noting that "*the undertaking given to the Court as recorded in the recitals to the [December 2021 Order] ran to the date of the Further Hearing but shall not continue to run…*" This appears to be a reference to the undertaking by the P3 parties to keep Brook Homes informed of the steps taken to sell the Land, or any part of it. If so, the matter "*noted*" in the recital is curious, because the undertaking in the December 2021 Order was expressed to run "*until satisfaction of [Brooke Homes'] judgment, interest and costs…*" Nevertheless, I shall assume that the undertaking was discharged as a result of the February 2022 Order.

ii) The Final Charging Orders as defined in the December 2021 Order were to continue "*and hereafter be treated as final charging orders.*"

iii) Paragraphs 8 to 12 of the December 2021 Order dealing with the sale to Countryside "*shall not be continued and shall cease from the date hereof.*"

iv) The stays of enforcement in paragraph 13 of the December 2021 Order were not continued.

v) The P3 parties were ordered to pay Brooke Homes £316,000 on account of their liability for costs arising from the December 2021 Order.

vi) Except for the fifth defendant, which was in administration, the P3 parties were to pay Brooke Homes' costs of the Further Hearing, but "*insofar as they are separate from the costs of the [P3 parties]*" Brooke Homes was to pay the Desiman parties' costs of that hearing.

13. Thus, at this stage, the order no longer necessarily contemplated that payment of all the sums due pursuant to the December 2021 Order would be postponed until there was a sale of the Land (or some part of it). Nevertheless, Brooke Homes had the benefit of the charging orders, which it could enforce against two of the P3 parties (although not the fifth defendant, which was in administration). So, any attempt by Desiman to enforce the costs orders in its favour against Brooke Homes, would likely be met by enforcement action by Brooke Homes against the P3 parties, which would obviously interfere with any sale of the Land, contrary to the interests of both the P3 parties and the Desiman parties. It, therefore, remained in all parties' interests to proceed on the basis that Brooke Homes and the Desiman parties would wait to be paid until the Land (or part of it) was sold.

14. On 25 February 2022, however, the other two P3 parties entered administration. The same individuals, Messrs Richardson and Avery-Gee of CG&Co, Manchester, were appointed as joint administrators of all three P3 parties. In the case of all three P3 parties, the appointment was made by Desiman, pursuant to its security. One obvious effect of these appointments was to prevent Brooke Homes from taking any further steps to enforce its judgment against any of the P3 parties, at least without first obtaining the permission of the administrators or the court.

15. On 10 March 2022, soon after they had appointed administrators over the P3 parties, the Desiman parties filed a notice of commencement of detailed assessment proceedings against Brooke Homes in relation to the order for costs in their favour contained in the December 2021 Order. On 22 July 2022 Costs Judge Brown issued

an interim costs certificate requiring Brooke Homes to pay £133,000 to Desiman by 5 August 2022. In addition, Brooke Homes was ordered to pay £5,000 as the costs of the application for the interim costs certificate. Since Brooke Homes' only asset is the judgment debt against the P3 parties, it could not, and did not, pay the sums ordered by Costs Judge Brown by 5 August 2022, or at all. Nor had the P3 parties paid Brooke Homes either the judgment sum of £13.4 million, or the sum of £316,000 which they had been ordered to pay on account of costs.

16. Nevertheless, it is apparent from the joint administrators' progress report made around a year later, on 10 March 2023, that the primary asset of the P3 parties is the Land, and that bids for the whole of that Land received in August 2022 had ranged from £41 million to £100 million on a variety of terms and conditions. The P3 parties' indebtedness to Desiman was stated to be a little over £25 million. Consistently with these figures, the joint administrators' opinion expressed in the progress report was that the outcome of the administration would be that all creditors (including Brooke Homes) would be repaid in full, with statutory interest.

The Petition issued by the Desiman parties

17. On 10 August 2022 the Desiman parties issued the Petition. The Petition alleged that Brooke Homes' was unable to pay its debts, based on its failure to pay the sum ordered by the interim costs certificate.

18. On 12 September 2022 HA Law, the solicitors acting for Brooke Homes, wrote to Underwoods, still acting for the Desiman parties. The letter said that Brooke Homes would oppose the petition on the basis that the Desiman parties had adequate security for their claim. After explaining the history and referring to the likelihood that the sale of the Land by the P3 parties would result in sufficient proceeds for all creditors, including Brooke Homes, to be paid in full, the letter continued, "*We confirm that if and to the extent it is necessary, our clients will provide the administrators with authority to account to Desiman from the share of the distribution due to them on completion of the sale of the property in order to discharge the petition debt.*" The letter also confirmed that Brooke Homes' "*only other external liability is a fully serviced bounce back loan of £50,000 in favour of Lloyds Bank.*"

19. The following day, 13 September 2022, Mr Holleran, a director of Brooke Homes, produced a witness statement to explain the grounds on which the Petition was being opposed. This statement also confirmed Brooke Homes' "*undertaking to provide the administrators with authority to discharge the Petition Claim from the distribution due to*" Brooke Homes.

20. The response of Underwoods was contained in a brief letter dated 20 September 2022. Amongst other things, it said, "*It is quite clear that our client does not have adequate security for the petition debt. We do not agree with various assertions made in your letter of 12 September 2022 nor many made in the statement of Mr Holleran. Importantly, we do not accept that there is any valid basis upon which your client can oppose the petition and we are accordingly instructed to pursue the winding up order against your client.*" The letter concluded by suggesting that the parties agree directions for the future conduct of the Petition, in advance of a hearing listed for the following day.

21. That letter did not suggest that there might be some form of undertaking which Brooke Homes could give, on the basis of which the Desiman parties would not proceed with the Petition but would instead be content to wait to be paid until sufficient proceeds had been obtained from sale of the Land for the P3 parties to pay Brooke Homes the judgment sum. On the contrary, in my judgment, the letter sent a strong message that the Desiman parties were not interested in discussing any compromise. There was nothing improper in that stance, but the Desiman parties were taking a hard line: knowing that Brooke Homes was unable to pay, they sought immediate payment, or else a winding-up order.

22. At the hearing on 21 September 2022 ICC Judge Mullen gave directions for the filing of evidence in relation to the Petition in the normal way. At the hearing before me, some criticism was made of Brooke Homes for not promptly seeking some relief, such as dismissing or staying the Petition, at the hearing before ICC Judge Mullen. In my judgment, that is not a valid criticism in circumstances where Underwoods had only responded to HA Law's letter the day before the hearing, and where the complex history of the matter might have been difficult to convey in a short procedural hearing. Moreover, the December 2021 Order had contemplated that applications regarding enforcement would be dealt with pursuant to the permission to apply contained in that order, and that such applications would, if possible, be listed before Mr Sims.

The issue of the Brooke Application and subsequent events

23. On 6 December 2022 Brooke Homes issued the Brooke Application in the Main Action. The application notice included a time estimate of 2 hours and suggested the application should be listed before "*Trial Judge (H Sims KC)*". I have been told that the application was made on an urgent basis, although it did not, in fact, come on for hearing until over a month later (see below). It did not only seek a stay. The application was, in fact, rather unusual in that it attached two draft orders: first, an "*Interim and Directions Order*" and, secondly, a "*Final Order*".

24. The draft "*Interim and Directions Order*" provided for:

    i) First, permission of the court to bring the application against the P3 parties pursuant to paragraph 43 of Schedule B1 to the Insolvency Act 1986 ("the Permission Application").

    ii) Second, until further order, a "*stay of execution (whether by Winding Up Petition or howsoever otherwise) of the costs Order*" made in favour of the Desiman parties in the December 2021 Order ("the Stay Application").

    iii) Third, disclosure of various documents relating, in broad terms, to (i) the conduct of the P3 parties in relation to the sale of the Land and (ii) the sums said to be due from, or already paid by, the P3 parties to the Desiman parties ("the Disclosure Application").

    iv) Finally, directions leading to a final hearing, to be listed before Mr Sims if possible.

25. The first two paragraphs of the draft "*Final Order*" provided for similar relief to that referred to in the first two paragraphs of the draft "*Interim and Directions Order*" (summarised in the preceding paragraph), except that the stay was described as remaining in place "*…until after the satisfaction of the judgment made in favour of [Brooke Homes]*" by the December 2021 Order. Additional declaratory relief was also sought concerning (i) the validity or effect of an assignment of a certain option agreement entered into by the fifth defendant, (ii) an inquiry as to alleged breaches by the fifth defendant of the undertaking given in the December 2021 Order, and (iii) permission to appeal out of time in relation to an aspect of the quantification of damages in the Main Judgment.

26. Meanwhile, on 5 December 2022 an application had been made by a third party, Cassadian Homes (Bicester) Ltd ("Cassadian"), to replace Messrs Richardson and Avery-Gee as joint administrators of the P3 parties. As explained below, this application had some impact on the later hearings relating to the Petition and the Brooke Application.

27. On 6 January 2023 the joint administrators of the P3 parties exchanged contracts with Cala Management Ltd. ("Cala") for the sale of part of the Land described as "Phase 1". The report of the joint administrators dated 10 March 2023 explains that the consideration for this sale was payable as to £5 million on exchange of contracts, with further payments on 21 June 2023 of £15 million, 21 February 2024 of £10 million, and 21 February 2025 of a further £10 million. The report goes on to express the view that the proceeds of this Phase 1 sale will be sufficient to repay secured creditors in full, which I understand to include Brooke Homes, although the Desiman parties will be paid first, because their security has priority. Nothing has yet been paid to Brooke Homes.

The January 2023 Order and subsequent events

28. On 12 January 2023 the Petition and the Brooke Application both came before Mr Sims. There is no transcript of the hearing, or his rulings. His order ("the January 2023 Order") begins with certain recitals, including one which recorded that the court held that it did not have jurisdiction to grant permission to appeal out of time. The order is then divided into two sections. The first section was described as concerned with the Brooke Application in so far as it concerned the Desiman parties, whereas the second section addressed the application in so far as it concerned the P3 parties. The first section of the order included the following provisions:

    i) The Disclosure Application was refused.

    ii) Paragraph 3 provided that, "*There be a stay of execution (whether by winding up petition or howsoever otherwise) of the interim Costs Order and Certificate (and any further payment orders made in the detailed assessment proceedings), in favour of the [Desiman parties], against [Brooke Homes] until the hearing of*" the Petition.

    iii) However, by paragraph 2, Brooke Homes' application made orally at the hearing to stay the detailed assessment proceedings commenced by the Desiman parties was refused, subject to the stay of execution in paragraph 3. So, the Desiman parties were able to proceed with the detailed assessment

process in order to obtain a final costs award, but they were not able to enforce payment of that award, or any sums, without further order.

iv) The Stay Application was otherwise adjourned and directed to be heard with the Petition, and directions were given, including that the hearing be listed before Mr Sims, if available.

29. At the hearing before me, no one was able to tell me why Mr Sims dismissed the Disclosure Application. I observe, however, that in paragraph 29 of the transcript of his rulings given on 27 June 2023 (referred to below), Mr Sims said "*I note that in my previous order of 12 January 2023 there was an application for disclosure. I refused that. My memory, and we do not have a transcript of the hearing before me, is that the disclosure application was not purely focused on the stay, but also concerned other issues as well. And of course, at that time, there was also the potential overlap concerning the removal application [by Cassadian]. Some of the points raised on this application involve allegations about Desiman's role in the administration process, and that forms part of the evidence and submissions that Mr. Jefferis seeks to rely on in relation to the stay application.*"

30. Mr Sims' reasons for refusing the Disclosure Application in January 2023 appear, therefore, to have been straightforward and brief, so that the Disclosure Application appears unlikely to have taken up a great deal of time at the hearing on 12 January 2023. Moreover, it is apparent from the words quoted that Mr Sims regarded the Stay Application as the central relief sought by the Brooke Application.

31. The second part of the January 2023 Order, dealing with the Brooke Application in so far as it concerned the P3 parties, was more straightforward. The Permission Application was stayed for three months with the relevant parties having permission to apply.

32. On 24 February 2023 Costs Judge Nagalingam issued a final costs certificate following the detailed assessment of the costs Brooke Homes had been ordered to pay to the Desiman parties by the December 2021 Order. The amount assessed to be due, inclusive of interest and the costs of the detailed assessment, was £261,467.94. It is common ground that this does not include the £5,000 costs of the application for the interim costs certificate which were awarded by Costs Judge Brown on 22 July 2022, so the total principal amount owed is £266,467.94.

33. By a consent order dated 5 May 2023 Cassadian withdrew its application to remove the joint administrators of the P3 parties. It appears that Brooke Homes then suggested that it might issue its own application to remove the administrators. This led to a letter dated 11 May 2023 from Underwoods to HA Law protesting at the issue of such an application, which was described as an "*obvious tactic*" to delay a decision on the Petition. Amongst other things, Underwoods said "*…now that [Cassadian's] Applications are withdrawn, there is absolutely no justification for any further stay on enforcement action against your client. It must either pay or be wound up.*" Later Underwoods added, "*Your client has confirmed in its own evidence, sworn by a statement of truth, that it is insolvent and unable to pay its debts as they fall due. A winding up order must therefore be made.*"

34. In my judgment, this is another indication that the Desiman parties were not interested in a compromise which involved them waiting to be paid when Brooke Homes received the judgment sum from the P3 parties.

The hearing on 27 June 2023

35. On 27 June 2023 the Petition and the Brooke Application came on for hearing before Mr Sims. There is an approved transcript of his *extempore* judgments from that hearing. It is apparent from that transcript, and from the parties' skeletons for the hearing, that the only aspect of the Brooke Application which was engaged at this hearing was the Stay Application.

36. Mr Sims began by dealing with a preliminary matter concerning some of the evidence which had been filed and served by Brooke Homes shortly before the hearing. There were a number of objections to that evidence taken by the Desiman parties, many of which are immaterial for present purposes, but they included a submission that Brooke Homes was inappropriately seeking to rely on witness statements and documents sourced from Cassadian's application to remove the joint administrators, in breach of the restrictions on collateral use in CPR 31.22 and 32.12. The essence of Mr Sims's decision was that, if he went on finally to decide the outcome of the Petition and the Brooke Application at that hearing, he would not permit Brooke Homes to rely on the late evidence; but that if the outcome was not finally decided at that hearing, the question of whether Brooke Homes could rely on the evidence would require reconsideration at a later date.

37. When Mr Sims turned to the substance of the applications, one of the issues he identified was whether the Petition was an abuse of process because its purpose was not for the benefit of a class of which the petitioner formed part, but to prevent Brooke Homes from being able to litigate, or to stifle potential litigation for an improper purpose. Brooke Homes submitted that there would need to be oral evidence and cross-examination on that issue. The Desiman parties submitted that Brooke Homes' case was so weak that the issue could be decided against it at the hearing on a summary basis; but if that was wrong, the Desiman parties accepted that there would need to be oral evidence.

38. Another issue Mr Sims was required to consider was whether it could be said that Brooke Homes had offered a sum or asset to secure the judgment debt to the reasonable satisfaction of the Desiman parties. In that connection, having recorded (at [46]) that it was common ground that Brooke Homes has no assets other than the judgment debt owed to it by the P3 parties, he commented (at [64]) that, "*The realisation process [in relation to the judgment debt] is, somewhat unusually, being undertaken by the [Desiman parties], in conjunction with administrators of the P3 parties, such that the [Desiman parties are] involved in the realisation exercise. As a result any monies arising in relation to the principal assets of [Brooke Homes] will come via Desiman, or certainly be under its control as secured lender, and what has been offered so far by Brooke Homes is that there would be an undertaking that in effect, as Mr. Jefferis put it, they would have "first dibs" over those monies for the purposes of paying their judgment debt.*"

39. Mr Sims then referred to HA Law's letter of 12 September 2022, mentioned above, in which it was confirmed that Brooke Homes would authorise the administrators to

account to the Desiman parties from the share of the distribution due to them from the P3 parties on completion of the sale of the Land. He referred (at [65]) to a submission made on behalf of the Desiman parties to the effect that the offer was not expressed to be irrevocable. He said that he had explored with Mr Michael Jefferis, counsel for Brooke Homes (who also appeared before me), "*whether or not what was intended to be on offer was something which was irrevocable, and which would provide security to [the Desiman parties], being an irrevocable undertaking …, and Mr Jefferis confirmed that it was.*"

40. At that point in his ruling, Mr Sims concluded (at [67]) that the appropriate course would not be to decide the issues before him at that hearing, but to order a brief adjournment, "*initially to allow the parties to see whether or not they can compromise the matter by way of the undertaking …and, if that fails, then to bring the matter back on for a hearing for determining the issues raised.*"

41. Mr Sims nevertheless went on to explain why he had concluded that Brooke Homes' case was sufficiently arguable to preclude any summary determination in favour of the Desiman parties at that hearing. It is plain from the words in which he expressed his reasoning on these points that he was not finally deciding anything. Nevertheless, Mr Jefferis relied on certain passages from this reasoning.

42. Mr Sims considered that there was a real prospect that Brooke Homes might establish that the Petition was an abuse of process for two reasons. The first (considered at [69]) was that there was no obviously useful purpose in a winding-up order being made. There was no reason for thinking that a liquidator of Brooke Homes would be in a better position to obtain payment of the judgment debt owed by the P3 parties, or to realise it more quickly. All a liquidation would achieve would be to add an additional layer of cost. Mr Jefferis relied on Mr Sims' comments about there being no useful purpose to a winding-up order, but I do not understand Mr Sims to have made any final decision to that effect.

43. The second reason why Mr Sims considered that an abuse of process argument had a real prospect of success (at [71] to [73]) was the frank explanation given by counsel for the Desiman parties as to one of their motivations for the Petition. That motivation was a frustration that Brooke Homes might bring further litigation seeking to remove the joint administrators or challenge the conduct of the Desiman parties in circumstances where that might result in adverse costs being incurred, which might reduce the pool available for creditors overall. Mr Sims said that this might amount to an abuse of process, and "*the facts of this case do not appear to be far removed from the classic cases where abuse of process has been established.*" Mr Jefferis relied on the admission concerning the Desiman parties' motivation in support of his submission that the Desiman parties were not interested in a compromise based on an undertaking from Brooke Homes. Whilst not a substantial factor, I consider that this is further evidence that the Desiman parties had not, prior to the hearing on 27 June 2023, been prepared to withdraw the Petition for anything short of payment in full.

44. Mr Sims then turned (at [75]) to whether the Stay Application had a real prospect of success. He did not decide the issue raised by the Desiman parties whether or not a stay granted under CPR 83.7(4) would, as a matter of law, be effective to prevent the Desiman parties proceeding with the Petition. Rather, he said that it could not seriously be argued that if there were "*special circumstances*" within the meaning of

CPR 83.7(4)(a) justifying a stay, that was not a relevant factor to take into account in assessing whether Brooke Homes should be wound-up on the unusual facts of this case. He referred, in particular, to two features of the case.

45. First, he pointed out that the Desiman parties were not merely a secured creditor of the P3 parties at the date of the December 2021 Order; further advances had been made with the effect of "*Brooke Homes being pushed further and further and further back down the line so far as when it may receive payment.*" As I understand it, the point being made here is that Desiman had made subsequent advances which were all secured by its first charges, so that more of the proceeds of any sale of the Land would have to be paid to the Desiman parties before Brooke Homes stood to receive anything, and since the Cala transaction envisaged payment in stages, the delay before any money came to Brooke Homes would be increased. I note, in this connection, that there is some evidence suggesting that a further advance of £500,000 was made by Desiman to the P3 parties in December 2021, on terms which involved an obligation on the P3 parties to pay Desiman a 20% sales fee. There was a suggestion in Mr Jefferis' submissions that the magnitude of this sales fee may subsequently have increased, although I was not shown any evidence about that.

46. The second unusual feature of the case referred to by Mr Sims was that Desiman had funded the legal costs of the P3 parties as well as the costs of the Desiman parties. Mr Sims rejected (at [80]) an argument raised by Brooke Homes to the effect that the "*indemnity principle*" had been breached; in other words, it did not follow from Desiman's funding of the P3 parties' costs of the Main Action that the P3 parties had not, in fact, incurred any liability to Underwoods which could be recovered from Brooke Homes. Nevertheless, Mr Sims pointed out (at [82]) that there was a potential analogy to cases where a costs order had been made against a non-party, such that Desiman might be held liable for the P3 parties' liability to pay Brooke Homes' costs. If that were right, then there would be an unfairness in Brooke Homes being required to pay the Desiman parties' costs, when the Desiman parties had not paid Brooke Homes' costs.

47. Mr Sims concluded (at [87]) that the "*lack of any other relevant creditor action, the fact that this is a company which has no other assets, is an SPV with just one asset sitting there, which is closely proximate to Desiman, does, in my submission* [sic]*, put this into a category where there are substantial grounds for opposing the petition.*" Mr Jefferis relies on this as a finding of fact that the P3 parties are "*closely proximate to Desiman*". I am not sure these words were intended as anything more than shorthand for the relationship between those parties which Mr Sims had described, but even if it is a finding, I do not consider that it helps to decide the incidence of costs in this case.

48. Accordingly, Mr Sims adjourned the Petition and the Brooke Application with a view to the parties exploring whether they could reach a compromise involving Brooke Homes giving undertakings along the lines it had previously offered, but in language including the word "*irrevocable*" which would satisfy the Desiman parties.

The August 2023 Order

49. The hearing was accordingly adjourned, and the parties were able to agree an order dated 7 August 2023 ("the August 2023 Order"). The recitals define the sums owed

by Brooke Homes to the Desiman parties as "*the Desiman Debt*" and the sums owed by the P3 parties to Brooke Homes as "*the Brooke Debt*". The sale of part of the Land to Cala is referred to as "*the Land Sale*" and it is recorded that "*it is anticipated that Brooke Homes will be entitled to a substantial payment in February 2025 from the final deferred payment due pursuant to the terms of the Land Sale ("the Deferred Payment").*"

50. The recitals then record certain undertakings given to the Court by Brooke Homes, to which I will refer as the "Undertakings". They read:

"*... UPON Brooke Homes hereby undertaking to the Court that:*

(1) it will pay to the Desiman Parties the Desiman Debt plus interest accrued thereon, and any costs order made in favour of the Desiman Parties pursuant to paragraph 2 below (if any) (the "Further Costs"), in full from any monies it is entitled to receive from the Deferred Payment; and

(2) it hereby irrevocably authorises the Desiman Parties, the Administrators of the P3 Companies (the "Administrators") and the P3 Companies when proposing to, or obliged to make any payment of any part of the Brooke Debt to Brooke Homes, whether from the Deferred Payment or otherwise, to first pay to the Desiman Parties, or permit the Desiman Parties, the Administrators or the P3 Companies (as applicable) to withhold sufficient monies from the Deferred Payment or any other intended payment, the sum required to satisfy the Desiman Debt and the Further Costs (if any) in full together with interest at 8% per annum calculated as follows:

a. On the sum of £5,000 from 22nd July 2022; and

b. On the sum of £261,467.94 from 8 March 2023;

c. On the Further Costs (if any) from the date of the Order;

(together "the Total Sum").

(3) Before Brooke Homes deals with the Brooke Debt by way of sale, assignment or charge or otherwise Brooke Homes will provide the proposed purchaser, assignee, chargee or other party with a copy of this Order and will ensure that as a condition of any such dealing, the proposed purchaser, assignee, chargee or other party enters into a Deed of Undertaking materially identical to the form of Deed of Undertaking annexed hereto to preserve the Desiman Parties' position in respect of payment of the Desiman Debt.

(4) it will execute a deed of undertaking, in the form annexed hereto, confirming the terms of this undertaking, by no later than 25 July 2023."

51. The operative part of the order then provided in paragraph 1 that the Petition and the Brooke Application were to be adjourned, whilst the parties sought to agree the costs. By paragraph 2, the parties were required to inform the Court if they were able to agree the costs and "*upon receipt of such notification the Petition will be dismissed without further order.*" Nothing was said about what was to happen to the Brooke Application in that scenario.

52. Paragraph 3 of the August 2023 Order then provided that, "*If the parties are unable to agree costs in respect of the Petition and/or the Brooke Application by 4 August 2023, then the parties have permission to file and serve evidence and submissions on costs by 4.00 pm on 25 August 2023 and there will be a further remote hearing as to costs on a date convenient to the Court and the parties after 25 August 2023.*"

53. There are two oddities about this provision. First, the deadline for agreeing costs was given as 4 August 2023, which is before the date on which the order was made. This appears to be a slip of some kind, and nothing turns on it. The second oddity initially troubled me, since the order does not provide for the disposal of the Petition or the Brooke Application in circumstances where the costs are not agreed, which is what has happened. It appeared to me potentially difficult, if not impossible, to determine the costs of the Petition and the Brooke Application without knowing what final order had been made in respect of them, or whether, in fact, any final order had been made. After I had discussed the point with the parties, however, they were able to agree that the Petition was to be dismissed and that "*no further order*" was to be made in relation to the Brooke Application.

The listing before me

54. Since the parties were unable to agree the costs, evidence and/or submissions were filed by the parties by 25 August 2023, as envisaged by the August 2023 Order. For reasons which I have been unable to determine, the matter rested there for some time, until it was listed before me on 23 January 2024. It will be noted that the August 2023 Order did not contain any wording reserving the matter to Mr Sims, or even indicating that it should be listed before him if possible, as had been stated in previous orders. Nor did the parties say anything to the court when the matter was listed. As a result, it came before me. The day before the hearing, upon learning that Mr Sims would not be the judge, Brooke Homes politely asked me in correspondence to direct that the matter be re-listed before Mr Sims in due course. The Desiman parties, however, objected to an "*adjournment*", on the grounds that the issue was straightforward, the costs of the hearing (and, in particular, briefing counsel) had already been incurred, and that Brooke Homes had (it was alleged) repeatedly and improperly sought to obtain a stay of the proceedings against it.

55. I, therefore, heard argument as to whether I should determine the costs, rather than having the matter re-listed. I decided to determine the costs for reasons I gave *extempore*, but in brief outline, whilst recognising that Mr Sims had heard the trial of the action and most of the subsequent disputes between the parties, and so was bound to have more familiarity with the issues than I could hope to achieve in the time available, I considered that:

    i) First, Mr Sims did not, in fact, determine the substantive issues before him on 27 June 2023. He decided only that certain points were arguable and encouraged the parties to reach agreement based on undertakings, which they did. I am as able to take into account the reasons Mr Sims gave for holding that there was a real prospect of Brooke Homes succeeding as he would have been.

    ii) Secondly, the two main hearings before Mr Sims in relation to these matters, in January and June 2023, each lasted no more than a day, dealt with relatively

confined points, and resulted in most issues being adjourned for another day. The costs with which I am concerned are, therefore, relatively modest in amount by comparison with the trial costs: I was told around £120,000 for the Desiman parties and very slightly more for Brooke Homes. Moreover, those costs do not relate to a large number of complex issues of the kind which would be in play at a trial.

iii) Thirdly, even the most recent hearing conducted by Mr Sims happened in June 2023, around 7 months prior to the hearing before me. The hearing preceding that was around a year prior to the hearing before me, on 12 January 2023. In those circumstances, Mr Sims was (without any disrespect) less likely to recall all the detail now than he would have done closer to the time.

iv) Fourthly, as the Desiman parties had pointed out, through no fault of either party, costs had been incurred in preparation for the hearing which would largely have been wasted if the matter had been relisted for another day. There was a real risk that the costs of arguing about the costs would become disproportionate to the amounts at stake.

v) Finally, having made enquiries, I understood that Mr Sims was unlikely to be available to hear this matter until April 2024 at the earliest. The costs of this matter have been outstanding too long and I took the view that they ought to be resolved.

The Law

56. By r.12.41 of the Insolvency (England and Wales) Rules 2016, CPR Pt. 44 applies to the costs of and in connection with insolvency proceedings. The same approach can, accordingly, be applied to the Petition as to the Brooke Application.

57. Both parties urged me to adopt the normal approach taken to costs pursuant to CPR Pt. 44, namely to start by identifying the successful party and then to consider whether the general rule, that the unsuccessful party will be ordered to pay the successful party's costs, should be disapplied or modified. I was referred to a number of authorities which are too well-known to require detailed citation here, but I observe in particular that, when identifying the successful party, success is "*not a technical term but a result in real life, and the question as to who succeeded was a matter for the exercise of common sense*" (Bank of Credit and Commerce International v Ali (No. 3) (1999) 149 NLJ 1734).

58. I raised with the parties whether that normal approach is appropriate in the circumstances of this case, which may be thought to be closer to the situation in which all the issues in the proceedings have been settled except costs, but there are matters relevant to the exercise of the court's discretion as to costs which have not been resolved either by the court's findings or the terms of the settlement (see the notes in the White Book at paragraph 44.2.17). I had in mind, in particular, the guidance given by the Court of Appeal in BCT Software Solutions Ltd v C Brewer & Sons Ltd [2003] EWCA Civ 939, in which Chadwick L.J. said at [23], "*Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to 'the general rule' – or should*

make a 'different order' (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all."

59. Chadwick L.J. suggested that, on the facts of the BCT Software case, the judge would have been wise to point out to the parties that, if they had not reached an agreement on costs, they had not settled their dispute, and the action must proceed to judgment. I observe, however, that the Court of Appeal ultimately upheld the judge's decision to do what both parties had asked him to do, namely to decide what order to make about costs on the material before him and without determining disputed facts. The Court of Appeal rejected the complaint that the judge had applied a "*broad brush*" approach, saying that it was difficult to see what other approach he could have adopted.

60. In this case, each of the parties urged me to decide the costs issues in their favour, based on an application of the normal approach summarised above. Both agreed that I was not in a position to, and should not, attempt to make any findings on disputed matters going beyond the facts which had already been determined, either by agreement or by findings previously made by Mr Sims. As explained above, at the hearing before me the parties reached agreement as to the disposal of the Petition and the Brooke Application (namely that the Petition should be dismissed and that no further order should be made on the Brooke Application).

61. In my judgment, in the light of these matters, it is appropriate and in accordance with the Overriding Objective for me to take the course which I am invited to take and to do the best I can to decide the costs issues based on an application of the normal approach, without determining any disputed facts. It would be wasteful of time and money to require the parties to proceed to a final hearing of the Petition and the Stay Application, the costs of which might well exceed the costs already in issue. The August Order plainly contemplated the possibility that the parties might be unable to agree about costs and that, in that event, the Court would do its best to adjudicate on the basis of the information it had.

The parties' submissions

62. The parties' positions are diametrically opposed. On behalf of the Desiman parties, Mr Robert Amey submits that Brooke Homes should be ordered to pay the Desiman parties' costs of the Petition and the Brooke Application. In contrast, Mr Jefferis submits that the Desiman parties should pay Brooke Homes' costs. Indeed, at the end of his skeleton argument, he goes further and says those costs should be paid on the indemnity basis.

63. Mr Amey's starting point is that orders have been made in the Desiman parties' favour requiring Brooke Homes to pay quantified sums in respect of costs and Brooke Homes remains in breach of those orders. He points out that a winding-up petition is a standard method of enforcement in such circumstances. The fact that Brooke Homes is owed substantial sums by the P3 parties is, Mr Amey says, irrelevant. Desiman was a lender to the P3 parties, but it does not follow that they are, as he put it, "*pulling the strings*" of the P3 parties, which are in administration and under the management of licensed insolvency practitioners. Moreover, Mr Amey has reminded me that a petitioner's motives are irrelevant (citing *Mann v Goldstein* [1967] 1 W.L.R. 1091).

64. Mr Amey submits that it is common for winding-up petitions to be settled on the provision of security for the petition debt. The offer which Brooke Homes made by way of HA Law's letter of 12 September 2022 (to give the administrators authority to account to the Desiman parties from the share of the distribution due to Brooke Homes on completion of any sale of the Land in order to discharge the petition debt) was not an offer of security which it could accept. It was crucial, Mr Amey said, that any undertaking given was "*irrevocable*", because it is only then that, as a matter of law, a security interest is created which is potentially binding on third parties. I understood Mr Amey to have in mind the principle that a revocable mandate is insufficient to create an equitable assignment, whereas an irrevocable instruction to a debtor to discharge his obligation by payment to a third party might create such an assignment (see Chitty, *On Contracts*, 33rd edition at 19-022 and 19-023, which was not cited to me). There was no exploration of that legal reasoning at the hearing before me, nor was there any debate as to whether the Undertakings did, in fact, create a valid security interest. I am prepared to assume that they did, and I did not understand Mr Jefferis to take issue with that approach.

65. Thus, Mr Amey says, it was only when Mr Jefferis confirmed in his submissions to Mr Sims on 27 June 2023 that an irrevocable undertaking was on offer that it became possible for the debt to be fully secured, leading to the Petition being dismissed by consent. The Undertakings were not, said Mr Amey, something which Brooke Homes would have offered if the Petition had not been issued. In answer to the point that the Desiman parties could have asked for an irrevocable undertaking at an earlier stage, Mr Amey said that Brooke Homes was run by sophisticated business-people with the benefit of legal advice; the suggestion that they did not know what language to use was not one which the court should accept.

66. The Undertakings provided security over the debt which the P3 parties owed to Brooke Homes, which Mr Amey described in his oral submissions as, "*a receivable worth considerably in excess of our debt, so there ought not to be any doubt about the debt being paid full.*" Consequently, Mr Amey submitted, the Undertakings should be regarded as equivalent to payment. He referred to the fourth edition of *Applications to Wind Up Companies* by Derek French, paragraph 5.193 of which states amongst other things that, "*If a creditor petitioner's debt is paid before the hearing and no winding-up order is asked for at the hearing then, provided the petition has been gazetted, the petition will be dismissed and the company will be ordered to pay the petitioner's costs … The petitioner is also entitled to the costs of any interim applications, unless there is good reason to the contrary.*" Since the Petition was advertised, the general rule should apply. Mr Amey also relied on the fact that, at the hearing on 27 June 2023, Brooke Homes' argument about the indemnity principle had failed.

67. So far as the Brooke Application was concerned, Mr Amey pointed out that, apart from the Stay Application, none of the relief sought was granted. The Disclosure Application was refused and there was no jurisdiction to give permission to appeal out of time. Brooke Homes had been refused permission to rely on the evidence it had served shortly before the 27 June 2023 hearing.

68. Even the Stay Application achieved very limited success, in Mr Amey's submission. Brooke Homes' oral application to stay the detailed assessment process failed. Although Brooke Homes was seeking what Mr Amey described as an "*indefinite*

stay", at the hearing on 12 January 2023 it obtained only a stay of enforcement until the next hearing. Moreover, said Mr Amey, nothing was going to happen until the next hearing in any event, since there was no enforcement action being taken apart from the Petition. Consequently, the stay in the January 2023 Order was pointless. No further order has been made on the Stay Application thereafter because Brooke Homes offered security which led to the Desiman parties agreeing that the Petition should be dismissed. Therefore, Mr Amey submitted, the costs of the Stay Application should follow the costs of the Petition and Brooke Homes should pay the Desiman parties' costs.

69. Mr Amey, whilst accepting that I should not make any new findings of fact, also relied on Brooke Homes' conduct in three respects. First, he said that I should proceed on the basis that Brooke Homes had inappropriately sought to rely on documents derived from Cassadian's application to remove the joint administrators in breach of CPR 31.22 and 32.12. Secondly, he submitted that the time estimate for the Brooke Application had been inadequate (2 hours, when a day was required) and that it had been listed as urgent when it was not. Finally, Mr Amey complained that the Undertakings required Brooke Homes to provide a deed of undertaking by 25 July 2023, but that the deed was not provided until 14 September 2023.

70. For Brooke Homes, Mr Jefferis submitted that the principal relief sought in the Brooke Application was always the Stay Application, and that had been successful because the making of any winding-up order had been postponed throughout the period until the Petition was dismissed. The stay sought had not been "*indefinite*"; rather the draft Final Order attached to the Brooke Application provided for a stay "*until after the satisfaction of the judgment made in favour of [Brooke Homes]…*" That was equivalent to the effect of the Undertakings and the dismissal of the Petition, which would result in the Desiman parties being paid once Brooke Homes had been paid by the P3 parties.

71. So far as the Petition was concerned, Mr Jefferis said that, until the hearing on 27 June 2023, the Desiman parties had not been interested in security. He referred to Mr Sims' observation that Brooke Homes were "*being pushed further and further and further back down the line*" and suggested that the Desiman parties were improving their position at Brooke Homes' expense. Mr Jefferis suggested that the Desiman parties wanted Brooke Homes to be wound-up to "*get us off the board*"; in other words, to prevent Brooke Homes questioning the Desiman parties' influence over the administrators in their conduct of the sale of the Land. I note that, in reply, Mr Amey criticised this submission, saying there was no basis on which the court could find that the administrators would act improperly. The reason the Desiman parties ultimately accepted the Undertakings, submitted Mr Jefferis, was because it became clear to them at the hearing on 27 June 2023 that there was a real risk that Mr Sims might consider Brooke Homes' offer of the Undertakings to be adequate security and dismiss the Petition.

72. Although I could not decide who would have won if the Petition had been determined, Mr Jefferis said that I could decide whether the Desiman parties ultimately benefitted from its having been issued. The Undertakings were of no real benefit to the Desiman parties, because even without the Undertakings, in practice they had control over the sale of the Land and the means to ensure that they would be paid from the proceeds. The outcome of the Petition was insufficient to have made it worthwhile.

Who is the successful party?

73. In my judgment, standing back from the detail and looking in the round at the outcome of the Petition and the Stay Application, the successful party was plainly Brooke Homes.

74. The position immediately following the December 2021 Order was that the parties and the court contemplated that payment of all sums pursuant to the order, including the sums owed to the Desiman parties, would wait until the P3 parties had received sufficient payments upon sale of the Land (or some part of it). That was logical. Brooke Homes had no means of paying the Desiman parties other than from a payment made to it by the P3 parties. An enforcement process against Brooke Homes was highly unlikely to result in payment being made any sooner. Moreover, Brooke Homes had its own judgment against the P3 parties and had been granted charging orders. Enforcement steps against the P3 parties would be likely to disrupt the process of selling the Land, which could prejudice the interests of the Desiman parties. Since the Land is apparently worth well in excess of the combined sums owed to the Desiman parties and Brooke Homes, it appears to be in everyone's interests to facilitate an orderly sale and await payment out of the proceeds.

75. Once the P3 parties were all in administration, it became practically impossible for Brooke Homes to enforce its judgment against them. At that point, the Desiman parties changed tack, pursued a detailed assessment of the costs owed to them by Brooke Homes and, on the back of an order for a payment on account, issued the Petition. They were entitled to do so. I will not speculate as to their motives, which are irrelevant. But it was a bold approach. Despite knowing that Brooke Homes had no means of immediate payment, they were saying that it "*must either pay or be wound up,*" as Underwoods put it in correspondence.

76. In the end, however, Brooke Homes has neither paid, nor been wound-up. The August 2023 Order contemplates that the Desiman parties will, after all, wait to be paid the sums due to them until the P3 parties have received from Cala what has been described as the "*Deferred Payment*" in February 2025. In my judgment, that is, to all intents and purposes, what the parties and the court all originally contemplated. In those circumstances, the Petition has achieved nothing of substance.

77. I am not persuaded by Mr Amey's submissions, eloquently though they were put, that the Undertakings materially improved the Desiman parties' position and that those Undertakings would not have been obtained if the Petition had not been issued.

78. I accept that the Undertakings gave the Desiman parties something they did not previously have, but it was self-evidently not equivalent to payment of the debt. Nor did the Undertakings result in a possibility of payment being made any earlier than would otherwise have happened. As I have said, I am prepared to assume that the Undertakings gave the Desiman parties a binding security interest. In different circumstances, that might well have been significant. In my judgment, however, on the facts of this case there was no material risk, even without the Undertakings, that the P3 parties might have received the Deferred Payment from Cala and used it to pay Brooke Homes the outstanding judgment debt and costs, without the Desiman parties also being paid what they were owed by Brooke Homes.

79. The Desiman parties have made common cause with the P3 parties from at least the time of the trial of the Main Action onwards, even using the same solicitors until administrators were appointed over the P3 parties. It was the Desiman parties who appointed the joint administrators of the P3 parties. They were the senior creditors of the P3 parties. Mr Amey frankly explained that the property department of Underwoods continues to act for the administrators of the P3 parties in regard to conveyancing matters. There is plainly continuing close co-operation between the Desiman parties and the joint administrators. I do not suggest that the administrators are acting, or would act, improperly in any way, or that they simply do what the Desiman parties tell them. The reality, though, is that their close co-operation makes it most unlikely, in practice, that Brooke Homes might be paid in full by the P3 parties, without the Desiman parties first being able to ensure payment of the debt owing to them. If Brooke Homes refused to co-operate, the Desiman parties would have had warning of any payment and the opportunity to obtain assistance from the court, by way of a third-party debt order, or a freezing order, if necessary.

80. Mr Amey argued that the court's assistance might not have helped if, for example, Brooke Homes had entered an insolvency process and money due to it had to be distributed amongst other creditors. In those circumstances, said Mr Amey, the security interest provided by the Undertakings may be of real value. In my judgment, this is fanciful. The judgment debt owed to Brooke Homes by the P3 parties is £13.4 million, which Mr Amey correctly described as "*a receivable worth considerably in excess of our debt, so there ought not to be any doubt about the debt being paid full.*" The only other known creditor of Brooke Homes is Lloyds Bank, with a debt of around £50,000 to £60,000. I have seen no evidence to suggest that, if the P3 parties pay £13.4 million to Brooke Homes, Brooke Homes will not have more than sufficient funds to pay the Desiman parties a sum of less than £300,000.

81. Mr Amey also suggested that Brooke Homes could, for example, have sold the receivable from P3 to a third party without providing for any payment to the Desiman parties, whereas the Undertakings would prevent that. It is, of course, possible to speculate about scenarios in which the Desiman parties might have found it more difficult to ensure payment of the debt owed to them. It is equally possible to speculate about remedies which might have been available to the Desiman parties in such circumstances. But I have been shown no evidence from which it might be possible to infer that, in the absence of the Petition, Brooke Homes intended to take steps which might have frustrated enforcement of the sums due to the Desiman parties. On the contrary, as explained above, in HA Law's letter of 12 Setpember 2022 Brooke Homes offered to authorise the administrators to pay the Desiman parties directly out of any sums due from the P3 parties to Brooke Homes. That might not have been expressed in a way which would have created a binding security, but it is inconsistent with any notion that Brooke Homes was looking for ways to avoid paying the Desiman parties.

82. In my judgment, whilst the Undertakings certainly reduced risks for the Desiman parties, those risks were more theoretical than real. I agree with Mr Jefferis that the Desiman parties most likely accepted the Undertakings because Mr Sims had declined to dismiss Brooke Homes' objections to the Petition on a summary basis and there was at least a real risk that he might go on to dismiss the Petition. If the provision of an irrevocable undertaking had been the Desiman parties' objective, they would

surely have asked for that at an early stage, instead of insisting on immediate payment or a winding-up order. Taking the Undertakings on offer at the hearing was a means of salvaging something from the Petition and was preferable to the risk of losing and incurring further costs in the process. That is a sensible decision, but it does not amount to success.

83. As to the argument that the Undertakings would not have been given but for the Petition, I am not in a position to make a finding as to what would have happened if the Desiman parties had asked Brooke Homes for an irrevocable undertaking in September 2022. I have some difficulty with the submission that Brooke Homes should have known what offer it ought to make. In my judgment, it is not realistic for the Desiman parties now to argue that Brooke Homes only offered the Undertakings because of the Petition, when they dismissed out of hand the offer which was made.

84. I have, so far, focussed on the Petition. In my judgment the determination of the overall winner should be the same for the Brooke Application as for the Petition. Although the Brooke Application sought a variety of orders, I agree with Mr Jefferis that the principal relief sought was a stay, and that was the way that Mr Sims understood it. It would be fruitless, on the facts of this case, to consider whether winding-up petitions can normally be stayed pursuant to CPR 83.7(4). The circumstances in which Brooke Homes found itself, and the terms of the December 2021 Order, justified its approach of applying for a stay in the Main Action. That approach certainly had the desired effect, in practice. The January 2023 Order prevented any winding-up order being made until the merits of the Petition could properly be considered. Moreover, the effect of issuing the stay in the Main Action was that the Petition was listed before Mr Sims, who was aware of, and able to take into account, the connections between the defendants and the unusual background. In my judgment, the Brooke Application was effective in preventing a winding-up order being made.

85. For these reasons, Brooke Homes was the successful party in relation to both the Petition and the Brooke Application, and the general rule is that the Desiman parties should pay its costs.

Further considerations

86. In accordance with CPR 44.2(4), however, I must take into account all the circumstances, including in particular that the Desiman parties succeeded in relation to a number of matters. First, and most importantly, the relief sought against the Desiman parties in the Brooke Application went beyond the Stay Application, but it was only the Stay Application which was successful. The Disclosure Application was the subject of argument at the hearing on 12 January 2023 and it was ultimately refused. As explained above, although there is not much evidence of the reasons for that refusal, the evidence does not suggest that the costs of dealing with the Disclosure Application were substantial by comparison with the costs of the Stay Application and the Petition as a whole. I also bear in mind that the application to appeal out of time was unsuccessful, although there are limited references to it, and it does not seem to have been the subject of much argument.

87. Secondly, Brooke Homes failed in relation to some issues which were raised in the course of the hearings. The first item in this category was Brooke Homes' oral

application at the hearing on 12 January 2023 to stay the detailed assessment process, which was unsuccessful. The second item is Brooke Homes' argument at the hearing on 27 June 2023 to the effect that indemnity principle had been breached, which Mr Sims rejected. The third item is the argument at the hearing on 27 June 2023 about whether Brooke Homes should have permission to rely on the witness statements served shortly before the hearing. So far as I can tell on the available evidence, the first two of these items were relatively minor points which did not cause substantial additional costs to be incurred.

88. The argument about the witness statements served shortly before the 27 June 2023 hearing was plainly more significant and does appear to have had material costs consequences for the Desiman parties, not least because they filed a witness statement from Ms Aoife Reid in response to the late evidence. I make no finding as to whether there was actually a breach of CPR 31.22 or 32.10, but I observe that Brooke Homes does not appear to have anticipated that there might be a difficulty in this regard, so no steps were taken to avoid costs being incurred unnecessarily. Nevertheless, Mr Sims did not finally resolve the question whether the statements could be relied on, deciding only that the statements could not be relied upon at the hearing on 27 June 2023. I cannot, therefore, assume that Brooke Homes' costs of preparing this evidence, or the Desiman parties' costs of responding to it, would ultimately have been wasted, had the matter proceeded to a final hearing.

89. I am not persuaded by Mr Jefferis' submission that the issues I have referred to above on which the Desiman parties were successful took up so little court time that no account should be taken of them. In my judgment, those issues do warrant disallowing a proportion of Brooke Homes' costs of the Petition and the Brooke Application. In all the circumstances, it is impractical to attempt to calculate with any precision the costs caused by each of the relevant matters. Doing the best I can, with the application of a broad brush, a deduction of 20% fairly reflects the impact of all the points on which the Desiman parties succeeded. I do not consider it would be worthwhile, in the circumstances of this case, to try to attribute that 20% amongst each of the individual points.

90. I must also take into account, pursuant to CPR 44.2(4), the conduct of the parties. I am not, however, persuaded that the three aspects of Brooke Homes' conduct relied on by Mr Amey justify any further deduction from its costs of the Petition and the Brooke Application. His first point related to Brooke Homes' reliance on documents derived from Cassadian's application to remove the joint administrators, said to be in breach of CPR 31.22 and 32.12. I am not in a position to make any findings as to whether there was such a breach, and neither party attempted to show me any evidence relevant to that question. In so far as Brooke Homes' failure to anticipate and address this issue caused the Desiman parties to incur costs unnecessarily, I have taken that into account in my 20% deduction above.

91. Mr Amey's second point related to the inadequate time estimate and the urgent listing. Regrettably, time estimates for hearings of applications are often insufficient, but I do not consider Brooke Homes' estimate was so inadequate as to deserve censure by some deduction of costs. If the estimate had been accurate, the same costs would have been incurred. As to urgency, it was justified, in my judgment, for Brooke Homes to seek to have the matter listed before Mr Sims at the earliest reasonable opportunity. Mr Sims might otherwise not have been available to determine it before

the Petition came on for hearing. Moreover, it is unlikely that the Desiman parties' costs have been materially increased by the urgent listing, given that the hearing ultimately took place over a month after the application was issued (albeit with the Christmas holiday intervening).

92. Mr Amey's third point related to the late provision of the deed of undertaking. This was a breach of the Undertakings, but reasons for the delay were given and I was not shown any evidence which suggested that the delay was deliberate or that Brooke Homes was somehow seeking to avoid compliance. Ultimately the deed was provided to the satisfaction of the Desiman parties. Mr Amey accurately described this in his oral submissions as a small point. Nothing I say is intended to condone a breach of undertakings given to the court, but it would not be appropriate to impose a costs penalty on Brooke Homes in the circumstances of this case.

Indemnity costs

93. In the final paragraph of his skeleton argument, Mr Jefferis submitted that the Desiman parties should be ordered to pay costs on the indemnity basis, because the conduct of the Desiman parties and the circumstances of the case took the situation out of the norm (citing the notes in the White Book at paragraph 44.3.9).

94. Brooke Homes also served a witness statement from Mr StJohn Murphy, of HA Law, in support of the application for indemnity costs. That statement makes many criticisms of the Desiman parties. These include an alleged lack of information from the Desiman parties about what sums will be paid and when on the sale of Phase 1 to Cala; an alleged failure to disclose a further advance of £500,000 in December 2021; and an allegation that some of the Land included in the sale is being sold at an undervalue. There is also an allegation that the Desiman parties had misled the court about their intentions in various witness statements, particularly in the light of the discovery of a WhatsApp message sent on 12 February 2022 by Mr Fellows, a director of Desiman, to Mr Nardelli. That message said that Desiman's intention in charging a default rate of interest was not to prejudice the P3 Parties, but that "*only Brooke gets kicked down the road by it.*"

95. Mr Jefferis did not develop these points in his oral submissions before me; indeed, he hardly referred to them, although he did mention the WhatsApp message in passing. That was consistent with the common ground at the hearing that I could not, and should not, make findings of fact. In any event, many (although not all) of the points raised by Mr StJohn Murphy are complaints about the conduct of the Desiman parties more widely, rather than their conduct of the Petition and the Brooke Application. As I have said, the issue of the Petition was a bold step by the Desiman parties but, in my judgment, there is nothing in the Desiman parties' conduct of it (or their response to the Brooke Application) which takes the case sufficiently out of the norm to justify an award of indemnity costs.

Conclusion

96. For the above reasons, I will order the Desiman parties to pay 80% of Brooke Homes' costs of and incidental to the Petition and the Brooke Application on the standard basis, to be the subject of detailed assessment if not agreed. Mr Jefferis did not seek a payment on account.

97. In the interests of trying to avoid further costs being incurred, I will indicate my provisional view that the costs of the hearing before me should be included as part of the costs of the Petition and Brooke Application to which the above order will apply, including the 80% proportion. If either of the parties contends that it would be appropriate to make a different order relating specifically to the costs of that hearing, they should provide short, written submissions (of no more than 3 pages) at the same time as they submit any corrections and I will then rule on the point (or give further directions for the resolution of the point, if appropriate).