Neutral Citation Number: [2022] EWHC 1882 (TCC)

Case No: HT-2020-000107

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 19/07/2022

Before:

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

OMYA UK LIMITED

Claimant

- and –

(1) ANDREWS EXCAVATIONS LIMITED

(2) DANIEL ANDREWS

Defendants

- -

Ian Bridge and Adam Porte (instructed by **Geldards LLP**) for the **Claimant**
Philip Sissons (instructed by **Gentle Mathias LLP**) for the **Defendants**

Hearing dates: 1 July 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archive. The date and time for hand-down is deemed to be Tuesday 19th July 2022 at 10.30am

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MR ROGER TER HAAR QC

Mr Roger ter Haar QC:

1. In this action judgment was handed down remotely under the Covid-19 Protocol on 17 December 2021. This judgment deals with consequential matters. It will be apparent that there has been considerable delay between the handing down of judgment and the argument on the consequential matters (and therefore this judgment). This arose because of difficulty in finding a date convenient to myself and counsel.

2. In the judgment handed down, I held that both Defendants were liable to the Claimant in the sum of £765,094.40 (the full amount claimed by the Claimant).

3. Since that judgment was handed down, the Defendants have paid the judgment sum in full, and have paid £300,000 on account of costs.

4. The following matters now arise for decision by me:

   (1) Whether the consequences as set out at CPR r 36.17(4)(a)-(d) apply pursuant to the Claimant's Part 36 Offer dated 12 June 2020;

   (2) Insofar as not determined by the answer to question (1), whether costs should be assessed on the standard or the indemnity basis;

   (3) What interest rate should apply;

   (4) Whether I have jurisdiction to grant the Defendants permission to appeal;

   (5) If the answer to question (4) is that I do have jurisdiction, should the Defendants be granted permission to appeal;

   (6) Who should pay the costs of the application for a freezing injunction dated 14 October 2021, and upon what basis should such costs be assessed;

   (7) Should I discharge the freezing injunction?

The Claimant's Part 36 offer and its consequences

5. CPR 36.17 (1) (b) applies where a claimant obtains a judgment against the defendant that is at least as advantageous as the proposals contained in a claimant's part 36 offer.

6. The Defendants accept that my judgment awarding £765,094.40 to the Claimant exceeds an offer made by the Claimant on 12 June 2020 in the sum of £756,287.05. The Defendants say that the judgment exceeded the Claimant's offer "albeit by a very small margin".

7. By CPR 36.17 (4) in these circumstances the Court, must, unless it considers it unjust to do so, order that the Claimant is entitled to interest at an enhanced rate (not exceeding 10% above base rate), costs on the indemnity basis, interest on those costs at an enhanced rate and an additional amount calculated as a specified percentage of the sum awarded in damages.

8. CPR r 36.17 sets out five factors the Court must take into account whether it would be unjust to make the normal order, namely:

   (a) the terms of any Part 36 offer;

   (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

   (c) the information available to the parties at the time when the Part 36 offer was made;

   (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

   (e) whether the offer was a genuine attempt to settle the proceedings.

9. The principal point taken by the Defendants is the contention that the offer relied upon the Claimant was not a genuine attempt to settle the proceedings.

10. In paragraphs 8 to 12 of his skeleton argument, Mr. Sissons, for the Defendants, argues as follows:

> 8. In assessing whether an offer was a genuine attempt to settle, it is not appropriate for the judge to embark on a mini-trial to try and assess how the parties might have assessed the risks at the time the offer was made. However, the purpose of the rule is to avoid the potential abuse involved in a claimant making a very high offer in a binary case, simply with the aiming of securing the additional benefits of CPR 36.17 (4) in the event of victory. As Jonathan Parker L.J. explained in Huck v Robson [2003] 1 WLR 13 at [63]:
>
> > "*a claimant's Part 36 offer must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives….*"
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> 9. In the same case, Schiemann LJ said (at [81]):
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> > "*I do not consider that Part 36 was intended to produce a situation in which a claimant was automatically entitled to costs on the indemnity basis provided only that he made an offer pursuant to rule 36.10 in an amount marginally less than the claim*."
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> 10. An offer is only to be regarded as a genuine attempt to settle, if it involves *"some genuine element of concession on the part of the claimant, to which a significant value can be attached in the context of the litigation"* (AB v CD [2011] EWHC 602, per Henderson J at [22] (Emphasis added)).

11. In the circumstances of this case, C's offer ought not to be regarded as a genuine attempt at settlement because:

(a) The offer was to accept a discount of just £8,806.95 (1.15%) against the amount claimed

(b) Even if interest is taken into account the offer was still derisory. At the date offer was made the accrued interest assuming –a (generous) commercial rate of 2.5% was £33,957.23. On this basis the offer was to accept 95% of the total amount claimed inclusive of interest.

(c) Accordingly, in the context of the total value of the claim, the concession offered cannot realistically be regarded as having any *significant* value.

(d) There was no explanation as to how the offer was calculated. It did not involve any assessment of litigation risk but merely discounted a very small and apparently arbitrary amount from the total claim. This suggests a tactical attempt to catch Ds on the hook of Part 36 rather than a genuine effort at settlement.

(e) This case was always a binary one; C would either recover the whole of the sum claimed or nothing at all. The offer did not reflect a possible outcome of the litigation. Accordingly, the amount offered created no real inducement or incentive for acceptance.

12. Furthermore, the other factors referred to in CPR 36.17 (5) are either irrelevant to the facts of this case or also suggest it would be unjust to impose the full force of the additional sums/penalty interest. Thus, the offer required almost total capitulation and was made shortly after Ds had filed their Defence and, accordingly, long before there had been disclosure or the exchange of witness statements. This case turned on the facts rather than legal principle. At the date the offer was made, Ds did not know the quality or extent of the witness evidence which C would produce.

11. For the Claimant, Mr. Bridge and Mr. Porte for the Claimant argues as follows in paragraphs 14 to 17 of their skeleton argument:

14 Correspondence suggests **[11/A193-A194**, **11/A202-203** that Ds say the normal order should not be made as the offer was not a genuine attempt to settle the proceedings as it amounted to a very high percentage of the total sum claimed.

15 The court should avoid applying a strict mathematical approach to this issue as Ds appear to demand. Rather than devoting too much attention to the

precise percentage concession, the court should take a broad-brush view informed by its own assessment of the strength of the case as to whether, in all the circumstances, the offer was in fact a genuine one to settle the claim.

16 The following extracts from the White Book at 36.17.6 give a flavour of the factors the courts have taken into account:

> *'In AB v CD [2011] EWHC 602 (Ch)… [the claimant made an] offer seeking 100% recovery…Henderson J refused to order Part 36 consequences, observing that the concept of settlement involved "an element of give and take" and that a settlement offer must involve some genuine element of concession. He castigated the "offer" in that case as a demand for "total capitulation".*
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> *'While 100% offers do not work, in Huck v Robson [2002] EWCA Civ 398; the majority of the Court of Appeal allowed the claimant's appeal and made orders under what is now r.36.17(4) in a personal injury claim where the claimant had made a 95% offer… The focus of the additional enquiry is as to whether the offer was a genuine offer to settle, and not on whether it was or was not "tactical".'*
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> *'In Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd [2016] EWHC 167 (TCC) a 95% was effective in an open-and-shut case. In JMX v Norfolk & Norwich Hospitals NHS Foundation Trust [2018] EWHC 185 (QB) Foskett J accepted that a 90% offer was effective, holding that 10% was not "a token discount" in a clinical negligence case likely to be worth several million pounds.'*
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> *'In Rawbank SA v Travelex Banknotes Ltd [2020] EWHC 1619 (Ch) J accepted that a 99.7% offer was a genuine attempt to settle a very strong case where there was "clearly no defence" and success was a "near-certainty".'*

17 As set out in the 4th witness statement of Paul Hackney **[13/A26-29]**, the offer included some give and take and offered a significant discount to Ds. Ds should have taken the offer particularly in circumstances where the Reply was filed and served on 6th July 2020. The Defendants do not appear to have addressed the detailed replies to the Defence set out in the Reply until trial.

12. There is some authority to assist me. By way of general approach to CPR r. 36.17, Briggs J. in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch) said:

> "The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

13. As to the identified criterion of whether the offer was a general attempt to settle the proceedings, Tuckey LJ said in *Huck v Robson* [2002] EWCA Civ 398; [2002] 1 WLR 1340 at [71]:

> "I would however add that if it was self-evident that the offer made was merely a tactical step designed to secure the benefit of the incentives provided by the rule (e.g. an offer to settle for 99.9% of the full value of the claim) I would agree with Jonathan Parker LJ that the judge would have a discretion to refuse indemnity costs. But that cannot be said of the offer made in this case, which I think did provide the defendant with a real opportunity for settlement even though it did not represent any possible apportionment of liability."

In the same case in the first, but dissenting, judgment, Jonathan Parker L.J. said at [63]:

> "a claimant's Part 36 offer must represent at the very least a genuine and realistic attempt by the claimant to resolve the dispute by agreement. Such an offer is to be contrasted with one which creates no real opportunity for settlement but is merely a tactical step designed to secure the benefit of the incentives …"

14. In *AB v CD* [2011] EWHC 602 (Ch), Henderson LJ said at [81] that an offer is only to be regarded as a genuine attempt to settle if it involves:

> "…some genuine element of concession on the part of the claimant, to which a significant value can be attached in the context of the litigation."

15. In *Rawbank SA v Travelex Banknotes Ltd* [2020] EWHC 1619 (Ch), Zacaroli J. said at [28] and [29]:

> 28. As I have noted, the Part 36 in this case was that TBL pay £48,290,000 (inclusive of interest to 25 May 2020). The principal amount of the claim is $60,072,000. On the first page of the Claim Form the sterling equivalent of the amount claimed was stated to be £48,311,860. I was told that on the basis that interest is payable at 2% above Barclays Bank's base rate, then, together with interest to 25 May 2020, the sterling equivalent of the amount claimed in the proceedings is £48,448,059. The discount being offered (assuming exchange rates remained constant thereafter) was therefore only £158,059, or 0.3% of the total amount claimed.
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> 29. In those circumstances, Mr Smith submitted that this was clearly not a genuine offer to settle, but was a tactical move, designed solely to engage the enhanced payments set out in Rule 36.17(4). While I see the force of that submission, I do not accept it. The critical question is not a mathematical one – the proportion of the discount – but whether it is possible to infer from the size of the discount that there is no genuine attempt to settle the proceedings."

16. As commented there, whilst the mathematical proportion of the offer to the amount claimed is a potentially relevant factor, it is not in itself determinative of whether an offer is a genuine attempt to settle the proceedings. In this case the discount was £8,806.95 (1.15%).

17. That is an admittedly small discount, but this, like the *Rawbank* case, was a case in which there was never likely to be (and in the end there was not) any significant debate as to quantum.

18. It is also relevant that if interest accrued is taken into account the discount rises to 5% (see paragraph 11(b) of Mr. Sissons's skeleton argument).

19. Further, as in *Rawbank*, it is relevant that the defence put forward lacked credibility: the Defendants' best hope was that some or all of the witnesses would not give evidence whether out of disinclination, anxiety or ill-health.

20. In my judgment the Defendants have failed to establish that the offer made was not a genuine attempt to settle: on the contrary, on the information available to me I conclude that it was indeed a genuine attempt to settle – an entirely sensible course for a commercial enterprise such as the Claimant which had no interest in the proceedings being dragged out and faced risks that important witnesses might not appear at trial. These matters indicate to me that the Claimant had every incentive to try to achieve a settlement and that this was not, as in some cases posited in the authorities, a cynical attempt to manipulate a scheme designed to encourage settlement.

21. This is one, but only one, of the factors which I must consider in deciding whether it would be unjust to apply the normal consequences of a refusal to accept a Part 36 offer.

22. The first factor set out in the CPR, the terms of any Part 36 offer, does not appear to me to have any relevance in assisting the Defendants: the Claimant's offer was a straightforward offer capable of acceptance.

23. The second and third factors overlap: there can, of course, be cases where a Part 36 offer is made at such an early stage that the Defendant cannot sensibly assess the merits of the case. In my judgment, this offer was made at a relatively early stage, which is consistent with a genuine attempt to settle.

24. It follows from my conclusions in my principal judgment that the Second Defendant, and therefore the First Defendant, was well aware that the operations giving rise to these proceedings were ongoing at the time that they took place. The Defendants might have wanted to know if they could avoid liability, but they knew full well that they were liable.

25. Accordingly there is nothing in the second or third factors which assists the Defendants.

26. The fourth factor, the conduct of the parties, strongly militates in favour of the application of the normal consequences: as set out above, in the face of a genuine attempt to settle, the Defendants persisted in defence of a claim which they well knew was a good claim.

27. For the above reasons I hold that the normal consequences of the failure to accept a valid offer must follow.

28. One consequence (agreed in the event I decide as I have done) is that £63,254.72 is payable by the Defendants pursuant to CPR 36.17(4)(d)(i), being (i) 10% of £500,000 and (ii) 5% of £265,094.40.

29. A second consequence is that the Claimant's costs will be paid by the Defendants from the date of expiry of the offer on the indemnity basis.

30. The third and final consequence is that I must consider what order I should make as to interest.

Indemnity or standard basis for costs

31. The decision I have made above answers to the question as to the basis upon which costs should be assessed after the date of expiry of the Part 36 offer, but this leaves for consideration the basis of assessment of costs up to that date.

32. The Claimant has referred me to two principal authorities.

33. First, in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston (Costs)* [2002] EWCA Civ 879 at [32] Lord Woolf explained:

> "…In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

34. Secondly, in *Noorani v Calver* [2009] EWHC 592 (QB) Coulson J (as he was) adopted the reasoning as set out in ***Excelsior*** and at [8] stated:

> "Indemnity costs are no longer limited to cases where the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation. However, such conduct must be unreasonable "to a high degree". "Unreasonable" in this context does not mean merely wrong or misguided in hindsight."

35. Having set out those authorities, Mr. Bridge and Mr Porte submit:

> 8 It is submitted that the present case is a paradigm example of one that justifies and indeed necessitates an order that the costs be assessed on the indemnity basis whether or not the Part 36 consequences bite. The court is invited to

consider C's opening **[13/A2-A25]** and closing submissions**[11/A21-A72]** but in summary:

i. Ds were responsible for organised tipping on a vast scale, activity characterised by the judge (prior to reaching any decision) as '[about] as serious an environmental crime' as could be imagined

ii. Ds denied any liability for the scheme and any knowledge of the dumping throughout

iii. Ds pleaded an utterly implausible Defence as to the existence of an alternative road into the quarry, a position it knew was wrong when pleaded as uncovered during cross examination

iv. Ds pleaded and maintained an express denial as to whether access had been gained to the quarry via a cut in the bund only to abandon this position on the first day of the trial

v. Ds' change in position meant that they advanced the absurd position as set out at [34] of C's closing submissions i.e., that the waste came through Thameside Terminal while Ds were on site, but that they knew nothing about it

vi. In the face of this absurdity counsel for Ds then set about seeking to effectively amend paragraph 10(3) of the Defence to resile from the now inconvenient admission that D1's vehicles were on site while tipping was taking place

vii. In pre-action correspondence, Ds failed to expressly deny liability for months instead choosing to take bad points about the manner in which the allegations were put

viii. D2 confirmed to the court that his witness statement dated 29 April 2021 was true despite it making no mention of the fact that D1 had taken steps to surrender its operator licences and that D2 had set about operating through a completely different company during the previous 5 months

ix. In the face of an application for a freezing injunction, D2 told the court that D1 owned unencumbered property worth £15m, a statement that was clearly untrue as it was in fact owned jointly with another company, had a value of under £2.5m and was the subject of fixed and floating charges

x. D's solicitors failed to provide the Defendants' expert witnesses with witness statements and relevant documentation with their instructions [11/205, 12/107, 110]

xi. Further examples of culpable conduct arise from the correspondence at [12/A70] onwards

9 Ds' conduct both in undertaking the dumping of c20,000 tons of waste and in the course of this litigation has been appalling. Both in terms of the nature of the litigation and the manner in which Ds have conducted it, it is self-evidently outside the ordinary and reasonable conduct of proceedings.

36. For the Defendants, Mr. Sissons submits:

"25. C's contend that Ds should be required to pay all of their costs on the indemnity basis regardless of the consequences under Part 36. Ds accept that since the claim has succeeded, they must pay C's costs, but it is disputed that the indemnity basis is justified

"26. The court has a general discretion as to when it is appropriate to award assessment of costs on the indemnity basis, but the following points should be noted:

1) Pursuing (or here defending) a claim on a basis which is found to be misconceived is not in itself sufficient to justify an award of indemnity costs (London Tara Hotel Ltd v Kensington Close Hotel Ltd (Costs) [2011] 2 Costs L.O. 197).

2) The purpose of awarding indemnity costs is to mark the court's disapproval of the parties' conduct of the litigation; it is not intended to punish a party for pursuing an ultimately unsuccessful case;

3) Accordingly, where the court is asked to award indemnity costs on the basis of unreasonable conduct, unreasonable in this context does not mean merely wrong or misguided in hindsight (Kiam II v MGN Ltd [2002] EWCA Civ 66)

"27. Bearing in mind these principles, there is no justification for an award of indemnity costs in this case because:

1) There is no proper basis for criticising Ds' conduct of the litigation (in the sense that Ds have failed to comply with rules or directions or otherwise acted unreasonably in a way that has increased the costs incurred).

2) On the contrary, it is C that has unnecessarily inflated the costs of these proceedings, for example by pursuing a witness summons to obtain evidence from Mr Hamilton and adducing the voluminous evidence disclosed by the EA. In the event, this material did not have any impact on the outcome of the case, but dramatically added to the length of the trial and the cost of preparation. The same points apply to the similar fact and hearsay evidence adduced

by C which were ultimately irrelevant to the outcome (as Ds had always contended was the case).

3) The court has found, on the balance of probabilities, that Ds were responsible for tipping waste, these are commercial proceedings in which all that was at stake was money. Ds' decision to defend that claim, though ultimately unsuccessful, is not deserving of moral condemnation and does not take this case out of the normal run of litigation.

4) It is not a relevant consideration that the same facts which give rise to a successful claim for damages *may* also involve some regulatory or criminal offence. Any such liability would involve a different standard of proof and the court ought not to pre-judge that question by relying on this as a factor justifying indemnity costs.

"28. In all the circumstances, therefore, the appropriate basis for assessment of the costs payable to C is the standard basis."

37. I accept the Claimant's submission is right that the approach that I should adopt is that set out in the *Excelsior* and *Noorani* decisions. But even if the test were to be whether there should be disapproval of the Defendants' conduct of this litigation (as submitted on behalf of the Defendants) this is a case which justifies the award of costs assessed on the indemnity basis for the reasons put forward in paragraphs 8(i) to (vii) of the skeleton argument submitted on behalf of the Claimant.

38. Accordingly insofar as the costs are not covered by my decision in respect of the application of Part 36 (or if I am wrong about the application of Part 36), the costs are to be assessed on the indemnity basis.

Rate of interest under Part 36

39. The Claimant seeks interest at a rate of 10% over base. The Defendants contend that I should either award interest at a commercial rate, or at most at a rate of 4% over base.

40. The Defendants point out that from 2018 interest rates were at .75% over base dropping to 0.1% in March 2020.

41. The Claimant referred me to the following passage at paragraph 36.17.4.1 of the White Book:

"In OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195 the Court of Appeal clarified, however, that the court undoubtedly has a discretion to include a non-compensatory element in its award under r.36.17(4)(a), but that the level of interest awarded must be proportionate to, among other factors: (a) the length of time that had elapsed between the offer and judgment; (b) whether the defendant took entirely bad points or whether it behaved reasonably, despite the offer, in pursuing its defence; and (c) the general level of disruption caused to the claimant by a refusal to negotiate or to accept the Part 36 offer. OMV was a high value fraud case in which

the defence had been founded on lies. The Court of Appeal ordered interest at the full 10% over base. There is, however, no default rule in favour of interest at 10% over base…"

42. The Defendants referred to *BXB v Watch Tower* [2020] EWHC 656 (Admin) in which Chamberlain J. awarded enhanced interest at the rate of 4% above base rate, and *Assetco Plc v Grant Thornton UK LLP* [2019] EWHC 592 in which 5% above LIBOR was awarded as enhanced interest.

43. In my judgment I am required to have regard to the factors identified in the *OMV* decision cited in the passage from the White Book above.

44. Applying those factors, I note that there was a significant period between the date of the offer (June 2020) and the date of judgment (December 2021); that the defence pursued was wholly implausible and that it was unreasonable to pursue that defence.

45. It is also relevant in this case that what was done by the Defendants was clearly done with a view to very substantial reward.

46. On the other hand, proportionality requires me to have regard to the maximum rate of enhanced interest permitted under Part 36 and prevailing commercial rates.

47. It was submitted to me, and I accept, that an appropriate range is between 4 and 8% above base. In my judgment a figure towards the bottom end of that range, i.e. 5%, is appropriate.

Do I have jurisdiction to grant permission to appeal?

48. The Defendants seek permission to appeal.

49. The Claimant submits that the Defendants are out of time to make this application to me.

50. There is authority binding upon me, namely *McDonald v Rose* [2019] EWCA Civ 4. In that case Underhill L.J. said at [21]:

> "It is the experience of the Court that the effect of the rules, as expounded in the authorities referred to above, is often not properly understood by would-be appellants. We think there is value in our summarising in this judgment the effect of those authorities and the procedure that ought to be followed in consequence by parties wishing to seek permission to appeal from the lower court (which is good practice though not mandatory). We would set the position out as follows:
>
> (1) The date of the decision for the purposes of CPR 52.12 is the date of the hearing at which the decision is given, which may be *ex tempore* or by the formal hand-down of a reserved judgment: see *Sayers v Clarke* and *Owusu v Jackson*. We call this the decision hearing.
>
> (2) A party who wishes to apply to the lower court for permission to appeal should normally do so at the decision hearing itself. In the case of a formal hand-down where counsel have been excused from attendance that can be done by

applying in writing prior to the hearing. The judge will usually be able to give his or her decision at the hearing, but there may be occasions where further submissions and/or time for reflection are required, in which case the permission decision may post-date the decision hearing.

(3) If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so: *Jackson v Marina Homes*. The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will normally decide the question on the papers without the need for a further hearing. As long as the decision hearing has been formally adjourned, any such application can be treated as having been made "at" it for the purpose of CPR 52.3 (2) (a). We wish to say, however, that we do not believe that such adjournments should in the generality of cases be necessary. Where a reserved judgment has been pre-circulated in draft in sufficient time parties should normally be in a position to decide prior to the hand-down hearing whether they wish to seek permission to appeal, and to formulate grounds and such supporting submissions as may be necessary; and that will often be so even where there has been an *ex tempore* judgment. Putting off the application will increase delay and create a risk of procedural complications. But we accept that it will nevertheless sometimes be justified.

(4) If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: *Lisle-Mainwaring*.

(5) Whenever a party seeks an adjournment of the decision hearing as per (3) above they should *also* seek an extension of time for filing the appellant's notice, otherwise they risk running out of time before the permission decision is made. The 21 days continue to run from the decision date, and an adjournment of the decision hearing does not automatically extend time: *Hysaj*. It is worth noting that an application by a party for more time to make a permission application is not the only situation where an extension of time for filing the appellant's notice may be required. It will be required in any situation where a permission decision is not made at the decision hearing. In particular, it may be that the judge wants more time to consider (see (2) above): unless it is clear that he or she will give their decision comfortably within the 21 days an extension will be required so as to ensure that time does not expire before they have done so. In such a case it is important that the judge, as well as the parties, is alert to the problem.

(6) As to the length of any extension, Brooke LJ says in *Jackson v Marina Homes* (para. 8) that it should normally be until 21 days after the permission decision. However, the judge should consider whether a period of that length is really necessary in the particular case: it may be reasonable to expect the party to be able to file their notice more promptly once they know whether they have permission."

51. In this case, as I have indicated above, the handing down took place on a remote basis on 17 December 2021. In the event, the application for permission to appeal was not made to me until 1 July 2022.

52. As I read *McDonald v Rose* I have no jurisdiction to grant permission to appeal.

Permission to appeal on the merits

53. Even if I had jurisdiction to entertain an application for permission to appeal, I would refuse it. My decision was a decision on the facts based upon the oral and photographic evidence placed before me.

Matters relating to the Freezing Order

54. During course of the trial in this matter, the Claimant made an application for a freezing order.

55. The background to this application was that it had become apparent as a result of evidence before the Court that because of a change in the business in the Andrews group of companies, steps were being taken to ringfence parts of the business of those companies. This led to legitimate concerns on the part of the Claimant that there might be an attempt already being made or to be made in the future to move the assets of the First Defendant so as to avoid enforcement of any judgment I might deliver in favour of the Claimant.

56. In the event, as I have said, during the trial an application for a freezing order was made. The First Defendant quickly agreed to give an undertaking, which was then satisfactory to the Claimant.

57. I have now to decide (1) who should pay for the costs of the application for the freezing order; and (2) whether the freezing order should now continue.

58. As to the first issue, in my view the costs should follow the event of the trial: the application was reasonable in circumstances where the Defendants were being far from transparent about aspects of the conduct of their businesses.

59. Accordingly the Defendants should pay those costs: in my judgment it makes no difference whether these costs are assessed on the standard or indemnity basis: I assess the costs payable (accepting the Claimant's cost schedule) as being £19,860.00.

60. However, as to the continuance of the freezing order, I will order it to be discharged, but not after finalisation of the order made following this judgment, as explained below.

61. It may be that as part of the order following this judgment, the Claimant will wish to apply for the amount to be paid now on account of costs to be increased from that already paid by the Defendants (£300,000) to reflect the assessment of costs on the indemnity basis. If so, any such application should be made expeditiously and before the order following this judgment is finalised.

62. In my view, the next step in these proceedings is finalisation of the order pursuant to this judgment. That will then enable the Defendants to know all the sums payable by

them except the excess of the total amount payable by way of costs after assessment of the costs over the amount paid by the Defendants already and hereafter (if a successful application is made for a further amount to be paid on account of costs) pursuant to my order.

63. My assumption is that that calculated total sum will be paid expeditiously as were the amounts already paid.

64. If any such quantified sums are not paid, the Claimant will have insolvency remedies available to protect its interests.

65. If those quantified sums are paid, then all that will be outstanding will be the difference between the finally assessed costs and any amounts paid on account of costs.

66. Given the substantial assets of the Second Defendant and the companies he controls, and the limited amount on this hypothesis remaining to be protected, my view is that the Claimant has not discharged the burden of proving that there is a significant risk of the Defendants disposing of assets with the intention of avoiding their liability to pay the residue of costs which may be held to be payable on final assessment of the costs.

67. Accordingly, I will order that the Defendants shall pay the sums due pursuant to this judgment within 28 days of its hand down. If payment is made pursuant to that order, the undertaking will be discharged. If payment is not made, the undertaking will not be discharged until 7 days after the due date of payment: this will enable the Claimant to seek whatever protection it needs in that circumstance.