IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2020] EWHC 2279 (QB)

No. QB-2019-004704

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 19 March 2020

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

ANDRES FERNANDO BRAVO & ORS — Claimant

- and -

AMERISUR RESOURCES PLC — Defendant

MR R. LORD QC and MR B. WOOLGAR (instructed by Leigh Day) appeared on behalf of the Claimant.

MR A. MACLEAN QC and MS M. F. TINTA (instructed by Norton Rose Fulbright) appeared on behalf of Defendant.

A P P R O V E D J U D G M E N T

****This transcript has been approved by the Judge (subject to Judge's approval)****

MR JUSTICE MARTIN SPENCER:

1 This is an application for costs by the claimants in what would have been the return date for final consideration of the claimants' application for a freezing order, but which has been resolved by the parties in that regard leaving outstanding only the issue of costs. The freezing order application was first before Steyn J on 9 January 2020.

2 I start with the background to this claim. The claims relate to alleged contamination by oil and/or industrial residues of land and waterways in the Putumayo Province of Columbia. The claimants are farmers in, and residents of, communities in the vicinity of the sites of the defendant, which is a United Kingdom company, and which carries on the business of oil drilling, extraction and transportation, whether by itself or its subsidiaries. I have been provided with a number of witness statements dated either 15 or 16 December 2019 from some of the claimants in the matter setting out their position so far as the contamination of the river is concerned and the effect that it has had on their livelihoods.

3 The claimants' solicitors, Leigh Day, have a renowned international department headed by their partner, Mr Meeran. In 2019 the solicitors were in preliminary discussions with non-governmental organisations on the issues raised in relation to this action, that is, potential contamination in breach of duty and the effect on the various inhabitants of the surrounding area.

4 It was thought that there was time to investigate the matter at their leisure, but towards the end of November 2019 the defendant, Amerisur, announced that an offer had been made to acquire it by another oil company, the GeoPark Group. The date for the hearing in the Companies Court in relation to that was 14 January 2020. This gave an impetus to the investigations and as a result personnel from Leigh Day visited Columbia in mid-December, met the individuals (or some of them) involved, signed up 15 original claimants, including those whose witness statements are in the bundle, and they also obtained an expert report from a Professor Blanca Laffon, who is a professor at the University of A Coruna in Spain and who has myriad qualifications, including spanning the areas of pharmacology, toxicology, genetics, and the like. I make no comment on the appropriateness or otherwise of her as an expert, but she has been able to produce a report which is supportive of a claim by these claimants and this has formed the basis for the claim which is made.

5 Having thus marshalled some of the evidence, Leigh Day were able to put together a letter of claim which was served on the defendant on 18 December 2019. That is in the bundle both at p.1191 and also p.1295. The letter set out the basis of the claim, describing the damage alleged to have been suffered by local people from contamination, environmental contamination, from oil exploration and exploitation activities carried out by the defendant, referring to the local communities who had been adversely affected.

6 The letter made it clear that the claim would be pursuant to Colombian law, which must be right, and alleged both economic and non-economic damage. The letter referred to the impending sale of Amerisur to a subsidiary of the GeoPark Group, and stated as follows:

> "By reason of the impending transfer and consolidation into a different corporate structure our clients now face the imminent risk that Amerisur PLC will soon either cease to exist altogether or will be left without sufficient assets, whether in the United Kingdom or elsewhere, to meet its liabilities to them. In the circumstances, our clients would be entitled to obtain a freezing order from the English High Court

to prevent this. The available time to address this matter is now very short, and we trust that you will recognise that the reason for this is the timetabling urged by the Offer, of which we are now aware . Our clients do not and did not wish to be rushed into commencing proceedings against Amerisur PLC but will take all appropriate steps to protect their legitimate interests."

7 In those circumstances, Leigh Day invited Amerisur's urgent consideration to put together a fund, whether in a joint escrow account or otherwise, to protect the claimants by reference to available assets, and the sum proposed was £7.22 million plus VAT. The way in which that was calculated was a potential claim for each claimant of £6,500, 500 likely claimants, thus amounting to £3.25 million, interest bringing that sum up to £4.22 million, and then legal costs expressed to be up to £3 million plus VAT (where applicable) making a total of £7.22 million plus VAT (where applicable).

8 Amerisur instructed solicitors, Rosenblatt, who were able on 19 December 2019 to respond, and, perhaps not surprisingly, given the short time available, the initial response was to resist the application. They wrote that there is no basis for the claimants to apply for injunctive relief. They stated:

> "If, as we believe unlikely, your clients were to obtain an injunction and the effect of the injunction was to disrupt the completion of the offer transaction and it was later determined by the court that the injunction was unjustified, your clients would be liable to pay damages to our client and/or its shareholders. Those damages may realistically run to tens of millions of pounds. You will also no doubt be acutely aware that your firm, and/or any third-party funder, might personally become liable for such damages. As we mentioned above, you say the legal fees could be up to £3 million plus VAT. We highly doubt, based on the description of your clients in the letter "a number of individuals including local community leaders living in farming communities in reg Departmento of Putumayo" that your clients have the resources to fund such legal costs."

9 The reference by Rosenblatt to the funding of the claim by Leigh Day was inappropriate, and it is well established that law firms such as Leigh Day, who proceed on the basis of conditional fee agreements and thereby assist claimants who would otherwise be unable to fund litigation themselves, do not thereby leave themselves open to adverse costs orders against the firm personally. However, the reference to what was effectively the need for a cross-undertaking in damages was an apposite one given the potential disruption to the takeover process which the claimant might have involved.

10 There was then further correspondence between the parties. Leigh Day responded in a letter of 19 December, that is the same day, and referred to the risk of dissipation, suggesting that a clear risk of dissipation could be inferred. Also, they referred to the undertaking in damages, saying:

> "We are aware of the normal position and our clients have instructed us that they will, if required, be willing to provide a cross-undertaking. There is, however, no basis upon which this firm would become liable to pay damages to Amerisur or its shareholders. We confirm there is no third-party funder involved either."

11 There was further correspondence, and on 29 December Leigh Day obtained a witness statement from a lawyer in Columbia, one Juan Ignacio Gamboa, who is a partner in the law firm of Gamboa & Others and is an expert on Columbian law, which will be the proper law

of the tort and therefore the law which would be applied in the English court. With that evidence, the claim was issued on 30 December 2019.

12 Most properly, if I may say, in an e-mail of 30 December 2019 Mr Richard Meeran wrote to Simon Walton at Rosenblatt with a share file link to the claim form, the application notice, the affidavit in support and the exhibits, thereby giving the defendant access on-line to the material which was behind the application that was being made.

13 On 6 January 2020 Mr Meeran swore his first affidavit in the matter, which was an affidavit in support of the urgent but, as he described it, on notice application for a freezing injunction. It is not necessary for me to go into the contents of that affidavit in any detail, but it gave very full information about the nature of the claim and the background, and it was supported by exhibits which probably amounted to 1000 pages, or so, including various documentation relating to the takeover. I cannot pretend to have read all of those documents. In particular, a large number of them are in Spanish and I do not have Spanish as a second or other language.

14 It is in those circumstances that the application for a freezing order came before Steyn J on 9 January 2020. Shortly before that hearing, Mr Meeran swore a second affidavit dated 9 January. The parties were represented by leading counsel, each of whom with their assistants, or their juniors, provided skeleton arguments for the court. I have read the skeleton arguments and indeed the transcript of the proceedings before Steyn J.

15 By the time of the hearing there were a number of remaining issues relating to, for example, the cross-undertaking to be given by the claimant (if at all) and the quantum of the injunction should a freezing order be made, and also the issue of dissipation. It remained the defendant's case that no order should be made because there was no risk of dissipation which justified the making of an order. In that regard, Steyn J was against the defendants, and I refer to her judgment.

16 There was also an issue in relation to the notice that had been given. Whilst on a formal basis no proper notice had been given because the notification of the e-mail link did not amount to formal service of the proceedings, and the date of service was probably 7 January, that did not give the necessary three days' notice. However, Steyn J, referring to the e-mails to which I have referred, said that it was clear that the defendant's solicitors in fact received and had no difficulty in accessing the documents on the evening of Monday, 30 December. That was clear because they responded saying that there was no draft order included, and Mr Meeran was able to put that right immediately by giving them access to the draft order, which showed that the defendant's solicitors had been able to get into the shared file and access the documents. In those circumstances, Steyn J said:

> "In my judgment, adequate notice has been given such that it is appropriate to abridge time for formal service of the application notice and supporting evidence. The defendant's solicitors in fact received the application notice and the supporting evidence 10 days ago having had prior notice of the claimants' intention to make such an application. They have been in a position to submit evidence in the skeleton argument and to instruct leading and junior counsel for the hearing, albeit, I accept, that given the complexity of the claims it is appropriate for the substantive hearing of this freezing order application to be fixed for a later date. Accordingly, in my judgment, this falls to be regarded as an on-notice application."

17 Thus, the application before her fell into a strange, or unusual, category. It was not an *ex parte* application for an injunction, but nor was it an on notice return date for the hearing

after an *ex parte* injunction had been obtained, it was an on notice application but a first application for an injunction.

18 This brings me to a point, which I wish to make at this stage, concerning the conduct of the parties. Generally, I consider that overall, both sides have behaved wholly responsibly, rationally, and appropriately, both in the way in which this application and the subsequent applications have been made and have been responded to. So far as the claimants are concerned, it was wholly admirable that they gave notice in the way that they did, gave access to the share filed link, and put the defendant into a position whereby they were able to respond on notice to the application on 9 January. Equally, in relation to the defendant, I do not accept the criticism that they have resisted this application tooth and nail, as Mr Lord QC put it at one stage. They have responded appropriately, they have raised matters which they were entitled to raise, and they have made concessions at various points as appropriate.

19 Prior to the hearing before Steyn J an offer was made by the defendant for the sum of £2.5 million to be the subject of a freezing order, subject to cross-undertakings being given by the claimants. That was not acceptable to the claimants, who persisted with seeking an injunction in the sum of £7.2 million. An issue that arose before Steyn J was whether the injunction should relate to the 15 claimants who were on face of the proceedings or should relate to the 500 claimants that it was estimated would be joined in the proceedings at some stage in the future. Clearly, that has a significant affect upon the quantum of the injunction, if one was to be granted. Thus, on the basis that the amount for each claimant was £7,800, the amount for 15 claimants would be significantly different to the amount for 500 claimants.

20 In the event, Steyn J relied upon Mr Meeran's second affidavit in which he referred to a further 72 claimants that had instructed Leigh Day to add them to the claim. She said:

> "I consider that these 72 claimants should be treated in the same way as the first 15 claimants, so that brings the number of claimants to 87 giving a claim value of £522,000. I accept Mr Meeran's evidence that it is likely that the number of claimants will reach about 500. Nevertheless, it does not seem to me that it would be legitimate for the court to grant a freezing order to the current claimants in the sum intended to cover claims brought by, as yet unidentified potential claimants. Of course, if further claimants are added the amount specified in the freezing order can be amended by agreement or, if necessary, by the court."

21 She went on to decide that there was a risk of dissipation, and I refer to para.21 of her judgment where she stated that on the basis of the evidence before her, and in particular the first affidavit of Mr Meeran, the risk of dissipation had been established. She then went on to consider the question of whether it is just and convenient to make a freezing order, and she said this at para.22:

> "I would not have been prepared to grant a freezing order if the claimants were not prepared to offer a cross-undertaking. However, Mr Lord has made clear that they are prepared to give such an undertaking in damages, and in those circumstances it seems to me that it is jut and convenient to make an interim freezing - and I think then we should add the word "order"."

22 The reference by Steyn J to Mr Lord's concession in relation to an undertaking is reflected in the passage from the transcript of the hearing at p.33 of the bundle, where Steyn J raised the question of cross-undertakings and asked the question: "Is that something that is being offered or are you seeking to argue against that?" The answer from Mr Lord was as follows:

> "The short answer is yes, if it is necessary. We make plain in our letter of 19 December that we would be willing to offer an undertaking if so required. There is a reason why it is not in the draft order. That is because there is authority, to which we have referred in our skeleton, that it is always a matter of discretion, and that in certain circumstances, which may include claimants without resources, or environmental cases, or legally aided cases, it may be inappropriate to offer an undertaking. But I do not think it is necessary to dwell on the detail of that. The short answer to the question you have asked me, my Lady, is yes, we offer an undertaking if the court requires it."

23 To that Steyn J responded:

> "Well, I think you can take it that as things currently stand it would seem to me that it would be necessary. If you wish to persuade me that it is not then obviously we can go into it, but I have looked at the authorities mentioned in your skeleton argument, and subsequent to any argument from you as to why a cross-undertaking would not be necessary at the moment. My provisional view is that it would be necessary."

24 Thus, it seems to me to be quite clear that the claimants were not offering a cross-undertaking for damages generally to the defendant, but at all times, as shown not only by that passage but by the correspondence as well, were prepared to give a cross-undertaking if it was required by the court. Once Steyn J had indicated that she did so require such a cross-undertaking, it was only at that stage that the cross-undertaking was forthcoming.

25 Steyn J then went on to consider the question of the amount to be subject to a freezing order. She had decided that the principal amount should be £522,000 on the basis of Mr Meeran's second affidavit. Of course, critical to that was the fact that Mr Meeran referred to the 72 extra claimants who were to be joined in the action. Without the extra 72 claimants the principal amount would have been only £117,000.

26 She referred to the claimants' submission that the sum of £3 million should be added, and the fact that the claimants consider that to be a conservative estimate, relying on the second affidavit of Mr Meeran where he had given a breakdown of the costs estimated to trial. That document is at p.1223. She referred to Mr Maclean QC's submission on behalf of the defendant that the figure in respect of costs should be modest. She said:

> "It seems to me that in principle the figures specified in the freezing order should include an estimate of the reasonable costs if the claimants succeed in their claim. The current estimate is of course based on the figure of 500 claimants. Although I accept the likelihood that somewhere in the region of 500 claimants will join the claim, it seems to me at this stage I should reduce the sum in respect of costs to £2.5 million. In doing so I have had regard to the current number of claimants, the evidence of Mr Meeran as to the likely costs, and the fact that a substantial portion of the costs will be incurred irrespective of the number of claimants."

27 In those circumstances, the quantum of the freezing injunction was £3,178,600. It seems to me that although this figure exceeded the figure which had been offered on behalf of the defendant at £2.5 million, the offer that had been made was, in the context of this claim, a reasonable one. It is not completely clear to me at this stage whether when the offer was made the defendant had been served with Mr Meeran's second affidavit, and therefore whether that offer was made on the basis of 15 claimants or 87 claimants. If it was made on

the basis of 15 claimants, then the £2.5 million of costs and the £117,000 of damages would have been very, very close to the sum that was offered, which was £2.5 million, and the difference could almost have been regarded as *de minimis* in the context of this claim. The difference was not, in the end, *de minimis* because of the additional 72 claimants who were joined, as it were, at the last minute, thanks to Mr Meeran's affidavit. I mention this to reinforce the point I have made, which is that I take the view that the defendant was taking generally a responsible and appropriate approach to the claim for a freezing injunction. Thus, they were right to insist upon a cross-undertaking as to damages, and they were right not to concede that the sum of the freezing injunction should be £7.2 million. They made an estimate of what it should be, and their estimate was not far wrong, on the basis of the information which I assume they had at the time the offer was made

28 However, for the purposes of the hearing before Steyn J they did persist in resisting the claim altogether on the basis of the issue of dissipation, and in that respect they were unsuccessful because Steyn J found that there was a risk of dissipation justifying the making of a freezing order. Thus, it seems to me that in the end the claimants were successful in their application, but only conditionally successful, that is conditionally on being prepared to give a cross-undertaking in damages, which they had not done unequivocally until the actual hearing when they were backed into a corner to do so by Steyn J, if I can put it that way, and also conditionally in the sense that the quantum of the freezing injunction was significantly lower than that which had been sought by them in the application.

29 The next stage was the events of 12 and 13 January 2020, when on Sunday 12 January Leigh Day wrote the letter which is to be found at p.1382 in the bundle. This letter referred to the fact that the team at Leigh Day were in the process of obtaining additional instructions from members of the communities who wished to pursue claims of the same nature as the 87 individuals already entered. A schedule was attached to the letter identifying the claims of 97 individuals, further individuals, by whom Leigh Day had been instructed, bringing the total number of 184, and they stated:

> "We would ask you to confirm by 8.00 a.m. tomorrow morning that your client will agree to vary the order to increase the amount covered by £7,800 per individual over and above the 87 clients whose claims are already covered, and in the absence of such confirmation they propose to apply without further notice to the court on an urgent basis to seek such a variation."

30 They followed that up by arranging with the court for a hearing before Steyn J at 12.30 p.m. the following day. Now, it could be said that to require in a letter sent on a Sunday a response by 8.00 a.m. on the Monday, failing which an application would be made at 12.30 p.m. on the Monday, was somewhat unreasonable, although Leigh Day made it clear that the context was the imminent hearing on 14 January to approve the scheme and therefore their need to protect these further clients who had been signed up.

31 The response of Rosenblatt on 13 January referred to the fact that only the previous week there had been the hearing before Steyn J and now already, just a few days later, Leigh Day were proposing to add a total of 169 additional clients from the original 15 and move matters on in this way at short notice. Rosenblatt wrote:

> "Any application issued by your clients would be premature and unwarranted. Your clients are generously protected by the current interim freezing injunction as well as the information provided in respect of our client's assets. Moreover, the fact of the scheme hearing on Tuesday does not lead to the urgency you suggest. You may be well aware from the timetable for the scheme that it is subject to further regulatory

> steps this week. In any event, the cash, and cash equivalents, held by our client in England and Wales more than sufficiently cover any obligations in connection with the scheme and the value of any claims to be asserted in full."

32 That was met by the letter from Leigh Day, which is at 1399, referring to Steyn J being approached for a short hearing later that day to deal with any urgent application.

33 In the event, at p.1404 there is a second letter from Rosenblatt of 13 January, which stated at para.9:

> "So as to provide comfort to your clients in this regard while allowing our client a proper opportunity to consider whether it is appropriate for the freezing order to be varied, following your clients' complying with proper procedural requirements our client is willing to provide an undertaking that until 22 January it will not take steps that reduces its unencumbered assets in England and Wales to below £1.33 million in addition to the sum covered by the freezing order, thus affording your clients more than adequate protection and affording our client the time necessary to consider its position in light of the information requested from you."

34 In his skeleton argument in support of today's application, Mr Lord QC said at para.17:

> "On 12 and 13 January further claimants did seek to join. Amerisur refused to consent to increase the amount of the offer of the order necessitating an application to court resolved by a last-minute undertaking."

35 It seems to me that this was an unfair and misleading description of what happened on 12 and 13 January, and what Amerisur in fact did was respond to an application which was made on the Sunday afternoon with a threatened hearing at 12.30 p.m. on the Monday appropriately, and gave an undertaking which although described as last minute was of necessity last minute because of the precipitous nature of the application that had been made.

36 As I say, I do not criticise Leigh Day at all for making the application the way they did given what they understood to be the impending hearing before Mr Justice Zacaroli on 14 January and the need to protect their new clients' interests as well as their existing clients' interests. What I do criticise is the suggestion that the defendant played fast and loose with the claimants or the court in any way by only giving their undertaking at the last minute, and I agree with Mr MacLean's submission that it was wrong to describe that as a last minute undertaking.

37 The reason I have gone into that matter is because the costs associated with that application before the court is the second strand of the costs application that is before me today.

38 The third strand is the third hearing which was before Steyn J on 3 February 2020. In that hearing, which covered a number of matters, she granted a joinder of 255 claimants and varied the freezing order so as to increase the amount up to £4,460,699. There were two other matters covered by the hearing. Firstly, an application by the claimants for time to serve the particulars of claim, and also consideration was given to the making of a group litigation order. I say nothing about those two aspects, which are not part of the application or hearing before me.

39 In his submissions, Mr MacClean referred to the defendant's skeleton argument at p.1281 for the purposes of the hearing on 3 February, in which he referred to the full requirements required for an application to join a party as provided by CPR Part 19.4(2)(a):

> "In support of such an application the applicant must file evidence in support and on that evidence the court has to be satisfied that it is desirable to add the new party, and so forth. Furthermore, it is required that the proposed new claimants must give their consent in writing and that consent has to be filed at the court."

40 It appears clear that there had been no formal compliance with the requirements of the Civil Procedure Rules, in that the proposed new clients' consent in writing had not been filed at the court.

41 Mr MacClean also referred to the order of Steyn J at p.88 and said that the freezing order aspect of the hearing on 3 February was intimately associated with the application to add claimants, because until the claimants have been added there is no basis to extend the freezing order.

42 I refer to the judgment of Steyn J, which is at p.158 and following. She says at para.11 as follows:

> "When the application was filed on 16 January no signed written consent forms were filed on behalf of any of the proposed new claimants. That remains the position at the hearing today. However, Mr Meeran's evidence in his fourth witness statement filed last Friday, 31 January, was that 182 written consent forms had been obtained. The forms were inspected by the defendant's solicitors on 31 January. Further, Mr Lord tells me that as of today the total is now 215 consent forms. So, although the application was not filed together with signed written consent forms, they are ready imminently to be filed in respect of all save 40 of the proposed new claimants."

43 She referred to the fact that the claimants relied on para.2.2 of Practice Direction 19A, which provides:

> "Where the court makes an order adding or substituting a party as claimant but the signed written consent of the new claimant has not been filed, the order and the additional substitution of the new party as claimant will not take effect until the signed written consent of the new claimant is filed."

44 She then said this at para.19:

> "In circumstances where the return date is not until 19 or 20 March the defendant has not offered an undertaking in respect of the additional sum the claimants seek to freeze, and there is no evidence before me to indicate that any risk of dissipation is unlikely to result in dissipation before the return date, I consider it is just and convenient to adjust the amount in accordance with the freezing extension application."

45 Thus, again, the claimant was successful on the application on 3 February, but the context of that success was that it was necessary to rely upon the proposed joining of the additional claimants, and there had been no compliance with the formalities required for such joinder, and in those circumstances the extension of the freezing order was, in one sense, an indulgence on the part of the court to the claimants where they had not formally joined the additional claimants to the proceedings. I have no doubt that had they been so joined the

defendant would have conceded the matter and have given the necessary consent or undertaking, and, as Mr MacClean submitted, that part of the hearing taken up with the freezing order was really very short indeed.

46 It is in that context then that the matter comes before me on the question of costs. The first point to make is that as the parties have agreed, and it is conceded, that costs are in the discretion of the court. A point of principle which arises between the parties is whether this is an application which is akin to normal interim injunctions where the court makes assumptions on the facts and also makes reference to the balance of convenience, both of which may at the final hearing be considered quite differently when the full evidence and trial has been heard, so that it is appropriate to reserve the costs so that the position when the interim injunction was made can be viewed retrospectively in the light of the matters which have emerged at trial and in respect of which the court has made its adjudication; or whether applications for freezing orders are a discreet form of order upon grounds which are not susceptible to significant re-evaluation at trial so that an order for costs can and should be made in relation to the freezing injunction rather than await the outcome of the trial.

47 In this regard, there is surprisingly little authority, it must be said, and whether that is because, as Mr Lord submitted, no authority is needed because the answer is too obvious, namely, that the court should make an order for costs, I am not in any position to judge. Mr Lord relies upon a *dictum* from the decision of the Court of Appeal in *Taylor v Burton* [2014] EWCA Civ 21, where the court considered, from para.35, the question of the costs of an interim injunction that had been made. The judge at first instance had, the court found, fallen into error in ordering that the defendant, Mr Taylor, should pay the costs of the claimants, and they set aside that part of the judge's order. They then went on to say as follows at para.43:

> "We had no argument to the effect that, on the contrary, the [claimants] should pay the [defendants'] costs of that application. Nor in my view would any such argument be justified. I interpret the sense of Judge Moloney's order as being that the claimants should have their costs if they satisfy the costs condition, but that if they did not, the parties should be left to bear their own costs on the interim application. The defendant may regard this as hard but in fact Judge Moloney's order was relatively favourable to him. Whereas in times gone by "costs in cause" orders, or "claimants' costs in cause" orders were commonly made on interim injunctions, nowadays they are more rarely made, and the winner of an interim application will commonly be awarded his costs there and then, regardless of what happens at the trial. If Judge Moloney had followed this practice, the defendant would have been ordered to pay the costs of the interim application. Judge Moloney, however, decided against such an order. The defendant should be grateful for that."

48 Mr Lord relies on this *dictum* as showing that what is true of an application for an interim injunction should be even more true of an application for a freezing order, and that the modern approach is to deal with the costs at the time rather than making an order such as costs in cause, or claimant's costs in cause, or indeed the order which is sought by the defendant, namely, costs reserved.

49 For his part, Mr MacClean QC relies upon the judgment of Neuberger J (as he then was) in *Picnic of Ascot v Kalus Derigs* [2001] Fleet Street Reports p.2. In that case, which Mr Lord correctly points out is some 20 years old, having been decided in February 2000, Neuberger J offered guidance from the cases to which he had been referred, making eight points of principle. It is not necessary to refer to all eight, but the first point he made was where he said as follows:

> "In a case without any other special factors, where a claimant obtains an interlocutory injunction on the basis of the balance of convenience, the court normally reserves the costs. While one can see an argument, particularly under the new regime, for saying that an order more favourable to the claimant should be made on the basis that the claimant has won the issue in respect of which the costs have been directly incurred - namely, whether an interlocutory injunction should be granted or not - it seems to me that the reasoning of the Court of Appeal in the so far unreported case of *Richardson v Desquenne et Giral UK Ltd.*, indicates that an order reserving the costs is appropriate."

50 Neuberger J referred to the judgment of Morritt LJ in the *Richardson* case where he had said:

> "There are certain costs orders which the court will commonly make in proceedings before trial. The following table sets out the general effect of these orders" – and then follows costs in cause, costs reserved, and costs thrown away.

51 The Neuberger J went on to say this:

> "One can see the force of that, particularly when one bears in mind that the balance of convenience will often be determined by reference to facts which may be contested, and the court may at trial conclude that it had been persuaded to grant an interlocutory injunction on the basis of assumed facts which turn out to be inaccurate, or even in the context of a claim which should never have been brought."

52 It seems to me that this is enough to show that the decision in *Picnic at Ascot* is not wholly apposite claims for freezing orders where the balance of convenience is not an issue, and where in relation to the merits of the case the court has regard to the question of whether there is a good arguable case on behalf of the claimants or not. That is sufficient for the court to determine whether a freezing order should be made, and even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. On the contrary, those two findings are wholly consistent with each other, or maybe wholly consistent with each other. Nor is there any reference to the balance of convenience. The question is whether it is just and convenient to make an order.

53 Therefore, I agree with Mr Lord that the regime for the making of Freezing orders is different to the general position where interim injunctions are sought based upon balance of convenience and holding the ring pending the trial. There are, obviously, overlapping features, holding the ring being one of them. The purpose of a freezing injunction is to avoid a successful claimant being unable to enjoy the fruits of his success because there are no assets left against which the judgment can be enforced, but that is a different kind of holding of the ring to that which is involved in the usual interim injunction and balance of convenience type case.

54 In the circumstances, I do not consider that it is appropriate to make an order reserving the costs as I do not consider that a judge at trial is going to be in any better position than I am to adjudicate upon the costs of these applications, armed, as I am, with the information that I have, the judgments of Steyn J, and the arguments with which I have been presented.

55 So far as the hearing of 9 January is concerned, it is my view that the claimants were successful on that application, that it was an application which was opposed by the

defendant, unsuccessfully, but that, nevertheless, there were aspects to that hearing which the claimants did not succeed on, compared to the position it took before the hearing, and in particular the position so far as undertaking in damages is concerned, and the position so far as the quantum is concerned. In those circumstances, I am going to order that the claimants should have the costs of that hearing but only 70% of those costs when they are eventually assessed.

56 I do not consider that it is appropriate to make any order in relation to the hearing on 12 January because of the circumstances in which that hearing arose and because the defendant acted wholly reasonably in response to the application that was made, including giving an undertaking which in the circumstances were timeless.

57 So far as the hearing on 3 February is concerned, again the claimants were successful, but only because the court granted an indulgence where they had not complied with the rules. It seems unlikely that the costs of that hearing are very great in any event. But, in my judgment, it would be appropriate for the claimants to have 50% of the costs of that hearing.

58 I do not consider that it is appropriate to order a forthwith assessment. The matter is much too complicated and there will be issues as to the extent to which costs relating to the application for a freezing order overlap or are extinguished by costs relating to the claim as the whole. The appropriate time for that to be sorted out is when the final assessment is made, assuming that the claimants are successful, in the trial.

59 However, it is just that there should be an interim payment on account of the costs, and that involves my having to make some kind of assessment of the likely costs. In that regard, I have had a look at the various cost schedules and the way in which the claim has been put. The cost schedule behind tab 9 at p.167 makes reference to total costs of £447,672, but on the basis of what I have seen, and certain inconsistencies between parts of the items which make up that claim, and, for example, a cost schedule for 9 January 2020 appended to Mr Meeran's second affidavit, which is at p.C5 in the bundle, I cannot possibly assume that the final costs will be the figure of £447,000, or anything like it. In my judgment, an appropriate sum to order by way of an interim payment on account of costs at this stage would be £125,000, and that is the order that I make.

60 I am aware that I said that before I reached a sum, I would give the claimants an opportunity to submit further evidence as to the distribution of the costs between the various hearings. If the claimants still want to do that in the light of this judgment then I give liberty to do so and then I will revisit the quantum of the interim payment in the light of any such further evidence or submissions that are made. But absent any such further submissions or evidence, that is the sum which I have determined should be paid by way of an interim payment.

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This transcript has been approved by the Judge