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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 3010 (QB)

No. QB-2021-003648

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 7 October 2021

Before:

MR JOHN KIMBELL QC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

LAW BY DESIGN LIMITED — Claimant

- and -

SAIRA ALI — Defendant

____

MR S. BLOCH QC and MR N. GOODFELLOW (instructed by Fox & Partners Solicitors LLP) appeared on behalf of the Claimant.

MR A. BURNS QC (instructed by BBS Law Limited) appeared on behalf of the Defendant.

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J U D G M E N T

(via Microsoft Teams)

THE JUDGE:

Introduction

1 This is an application for wasted costs arising out of an application for an interim injunction. A consent order granting the relief sought by the Claimant in an application notice dated 28 September 2021 and providing for directions for a speedy trial was approved by me yesterday. The substance of the order had been agreed at 18.27 the previous evening.

2 The Claimant, represented by Mr Selwyn Bloch QC and Mr Nicholas Goodfellow, says that the interim injunctions and directions sought ought to have been consented to last week and, at the latest, by 4pm on 1 October. It, therefore, seeks its costs incurred from that time until yesterday afternoon. The Claimant also seeks a summary assessment of those wasted costs on an indemnity basis.

3 The Defendant, represented by Mr Andrew Burns QC, says that the proper order in a case of this type is 'costs reserved'. If, contrary to his primary submission, it is appropriate to award costs, he submits that any costs order that is made ought to be subject to detailed assessment and on the standard basis.

The parties

4 The Applicant/Claimant ('**LBD**') is a firm of solicitors which offers specialist employment law advice and other legal services predominately to NHS bodies, such as trusts and hospitals. LBD is based in Manchester and most of its clients are in the northwest of England. The founder and principal shareholder in LBD is Ms Susan Morrison.

5 The Defendant is a solicitor who qualified in April 2006. She joined LBD in 2013. In 2016, she and some other solicitors working for the firm became shareholders so she signed a shareholders' agreement dated 31 March 2016. This contained, in clause 6.1, a series of restrictive covenants, including a non-competition covenant lasting 12 months as well as a non-solicitation and a non-dealing clause.

6 In February 2021, the Defendant was promoted from associate director to director and her salary was increased from £70,000 a year to £90,000 a year. On 18 February 2021, the Defendant signed a new service agreement. Clause 19.1 of that agreement also contained restrictive covenants. They were of broadly the same type but were not identical to those in the shareholders' agreement. There were non-competition, non-solicitation and non-dealing clauses. Each covenant had a duration of 12 months. That was an increase from six months in her previous service contract with LBD.

7 On 4 May 2021, the Defendant gave notice in writing of her intention to leave LBD. She informed Ms Morrison that she intended to join Weightmans Solicitors. Weightmans is a rival firm of solicitors based in the northwest and it also offers employment law advice to NHS bodies. The period of notice set out in the service contract was six months and, therefore, it is common ground that the Defendant will cease to be employed by LBD on 3 November 2021. She was not put on 'garden leave' and has continued to work for LBD.

Events between 4 May 2021 and D's consent to the order sought

8 Because of the way the application is put, it is necessary for me to describe the communications between the parties between 4 May 2021 and the Defendant's consent to the order sought provided at 18.27 on 5 October 2021 in some degree of detail. Most of the

correspondence I refer to is attached to the witness statement of Susan Morrison dated 28 September 2021. Neither the Defendant nor her solicitors submitted a witness statement either in response to the substantive application or in response to the application for wasted costs.

9 The Defendant's notice of resignation was acknowledged on 4 May 2021. Then, on 10 May 2021, Ms Morrison raised the issue of restrictive covenants:

> "I understand that you have accepted a position as a partner with Weightmans in Manchester and, as you are aware, they are direct competitors of LBD. You are in possession of commercially sensitive information and that is confidential to our business, which is the principal reason for the restrictions in your shareholder and service agreements alongside the non-compete/non-solicit covenants."

She went on to say:

> "You will appreciate that I have to take whatever steps I can to protect the business and the jobs of those within it. I hope we can resolve conflicting positions in an amicable way, so I invite your proposals as to how to suggest we achieve this."

10 The Defendant's response to that email was sent the next day:

> "I have discussed the matter with Weightmans, who are fully apprised of my restrictive covenants. Neither they nor I consider that there has been a breach of my covenants (I appreciate there is a difference of opinion on the enforceability of the non-compete) nor will there be. Please be assured that I have no intention of breaching my covenants. As such, I am hopeful that we can reach an amicable agreement."

11 Ms Morrison responded to that as follows:

> "I have no wish to interfere with your career plans, and so, in order to protect the legitimate business interests of LBD, I will require written undertakings from both you and their senior partner on behalf of the firm that you will abide by the restrictive covenants, non-compete/non-solicit/not act for, etc., and that they will not induce you to breach the same. I need to know in very early course if you and they are prepared in principle to give these, after when I will send you draft undertakings for your consideration."

12 On 24 May, Ms Morrison wrote to the Defendant explicitly about cl.19.1(d) in the service agreement:

> "Clause 19.1(d) to which you agreed very recently and for which you were granted a significant salary increase states that you will not be involved in any capacity with any business concern which is or intends to be in competition with any restricted business. This applies to Weightmans. There are similar restrictions in the shareholders' agreement."

13 The Defendant responded a few days later:

> "I have given careful consideration to your request, but, as I will act lawfully when I join Weightmans, I do not consider that undertakings are necessary or appropriate."

So, at that stage, the Defendant was not prepared to give any undertakings at all.

14 In July 2021, Ms Morrison returned to the question of the covenants and said to the Defendant:

> "I am genuinely puzzled by the stance both you and they are taking. I do not understand how either you or they can simply dismiss the enforceability of the covenants both in the shareholder and service agreements."

Later on, she said:

> "You have referred in your emails to me and in our conversation that there is a difference of opinion on the issue of enforceability of covenants. I have stated all along that I wish to try and resolve the matters amicably without the need to take formal action. That is why we invited you to give undertakings not to breach the covenants."

15 On 15 July 2021, the Defendant said this:

> "I am conscious that I have not responded substantively to your email yet. It is on my radar. I just simply have not had time to turn to it. I am hoping my workload will cease a little next week."

Ms Morrison chased for a substantive answer to her request for undertakings on 22 July, and the Defendant responded:

> "Hi Sue, I will come back to you as soon as ever possible. Please be assured that I am not dragging my heels. I am pulled out with work. This week did not ease off as expected."

On 29 July, the Defendant said:

> "I have managed to contact Weightmans, but the managing partner is on holiday. I will come back to you once he has returned."

16 There then passed almost an entire month without any communications between the parties. That ended on 24 August 2021 when LBD sent a formal "letter of claim" to the Defendant on its own headed paper. That letter referred back to the exchange of emails and was expressed as being a letter in accordance with the practice direction on pre-action conduct and protocols contained in the Civil Procedure Rules.

17 The letter refers to the covenants in both the shareholders' agreement and the service agreement, and then says this:

> "The company [that is to say LBD] have been advised by Selwyn Bloch QC that the believes that the relevant covenants are enforceable and is prepared to test this advice in court if necessary. Given the potentially serious adverse

> impact on the company's business should you join Weightmans or any other competitor, the company does not believe it has the luxury of waiting until nearer your termination date to resolve the issue."

Ms Morrison asked for a response on the draft undertaking supplied under cover of that letter within seven days, that is to say by 1 September 2021.

18 Before I go on to the Defendant's response to the 24 August 2021 letter of claim, Mr Bloch submitted that, during this period of May and July, the Defendant was being evasive. I do not accept this. In an email dated 27 August 2021, the defendant describes the difficulties that she was having at work dealing with IT and the consequences of the Covid pandemic. I have no evidence which would justify me in concluding that what she says there and in other emails about being run off her feet at work is anything but true.

19 I will return to the chronology. The Defendant's response to that formal letter of claim, perhaps unsurprisingly given that she is herself a solicitor, was to instruct a firm of solicitors, namely BBS Law Limited ('**BBS**'). They acknowledged receipt of the pre-action protocol letter and asked for some further time to respond until 10 September. Although Ms Morrison explained in her witness statement that she was somewhat frustrated at having to wait yet more time for a substantive response, she was prepared to wait and see what they had to say.

20 BBS did respond on 10 September 2021 as they promised, and the letter contained three points of importance. First of all, they said this:

> "I am informed that Sarah has never suggested that all the post-termination restrictions are unenforceable, but rather that the non-competition restrictions are unenforceable."

Then, secondly:

> "As Sarah has previously intimated, she will comply with the non-solicitation and non-dealing provisions as set out in both the service agreement and the shareholders agreement. However, at this time, we can see no reason why undertakings are required as the restrictions in the respective agreements are sufficient."

Then, thirdly:

> "I am advised that Weightmans currently act for a number of NHS clients for whom LBD also acts. In respect of these clients, we will endeavour to provide a list early next week. We trust that LBD has no objection to Sarah dealing with these clients on the basis that they are already clients of Weightmans."

21 As Mr Bloch pointed out in submissions, the third point in that letter was tantamount to an admission that the Defendant did intend to act in competition with LBD. The letter ended in the hope that some amicable terms could be agreed.

22 LBD's response to that letter was to instruct their own solicitors, namely Fox & Partners Solicitors ('**Fox & Partners**') based in Manchester.

23 Fox & Partners informed BBS five days later, on 15 September 2021, that an application for injunctive relief was in the course of being prepared, and they asked BBS to confirm that they

were authorised to accept service of proceedings. BBS's response to this was to repeat that the Defendant was prepared to give undertakings in relation to the non-solicitation and non-dealing covenants but was not prepared to give any such undertaking in relation to the non-compete covenants.

24 On 20 September 2021 and in relation to the present application, BBS said this:

> "In addition, we consider that, on balance, the court would not be minded to grant interim relief on the balance of convenience where to do so would prevent Ms Ali from earning a living in her capacity as a specialist employment lawyer and where an injunction would most likely, even if the matter was dealt with by way of a speedy trial, deprive our client of the opportunity of joining Weightmans altogether."

25 It seems to me that, by 20 September, at least internally at BBS, a view had been formed as to the likely prospects of an application for interim injunctive relief. In response to that, Fox & Partners acknowledged receipt of the undertakings in relation to the non-solicit and non-dealing covenants but said:

> "Our client is in the process of finalising its application for injunctive relief to prevent your client joining Weightmans in breach of her non-compete covenants. Please now confirm you are instructed to accept service, as requested in our earlier correspondence."

26 BBS responded:

> "For the avoidance of any doubt, it is not acknowledged or accepted that your client will suffer any loss by reason of our client joining Weightmans. The point that was made was that, by Ms Ali giving the non-solicitation and non-dealing undertakings as requested, your client would be properly protected and would not suffer any loss."

At the end, Mr Stedman says:

> "I would again invite you to enter into proper dialogue with us in advance of the issue of proceedings."

27 That was on 21 September 2021. On 28 September, the application that I have already referred to was issued along with the claim form. The claim form sought interim and final injunctive relief to restrain the defendant from acting in breach of her contractual obligations and, in particular, cl.6.1(i) and 6.1(ii) of the shareholders' agreement and cl.19.1(d) of the service agreement. In other words, it was a claim concerned exclusively with the non-compete covenants.

28 The claim form was accompanied by an application notice in N244 form and, in box three of that application, the following appears:

> "The claimant seeks the following orders:
>
> (i) An interim injunction to restrain the defendant from acting in breach of her non-competition covenants contained in clauses 6.1(i)

and 6.1(ii) of the shareholders' agreement dated 31 March 2016 and cl.19.1(d) of her service agreement with the Claimant;

(ii) An order that the costs of the application be paid by the Defendant and;

(iii) An order that the trial of this matter be listed on a speedy basis together with directions for trial."

29 Annexed to the application was a full draft order. That application was served on the BBS the following day, that is to say 29 September 2021 i.e. Wednesday last week.

30 The accompanying witness statement of Ms Morrison is 40 pages long and is a detailed document. It set out the background to LBD's business, the shareholding acquired by the Defendant and the service agreement recently signed by her as well as describing the work that she does for LBD. Crucially for the purposes of an application for interim relief, the witness statement contained:

(a) in paragraph 142, evidence as to why LBD was concerned about the potential damage to its business if the Defendant was not prevented, at least on an interim basis, from not complying with her non-competition covenant;

(b) in paragraphs 131 to 135, the reasons why LBD said that damages would not be an adequate remedy and why there was reason to believe that, even if they could be assessed, whether the Defendant would be unable to pay those damages.

(c) evidence backed with accounting documents about LBD's ability to pay any damages to the Defendant in the event that the non-compete covenants were held to be unenforceable pursuant to the usual undertaking.

31 BBS acknowledged the receipt of the witness statement and the other documents. Curiously, the only thing that BBS remarked upon in response was the time estimate of two hours given in the application notice. BBS suggested that a more realistic estimate might be half a day.

32 Later that day (i.e. 29 September 2021) at about 6 o'clock in the evening a letter was sent by Fox & Partners to BBS which is of particular importance to the LBD's application for costs. Under the heading "Consent Order" it said this:

> "In order to avoid the need for an interim hearing at all, we invite Ms Ali to enter into a consent order giving undertakings to the court in the form set out in paragraphs (1) and (2) of the draft order attached to the client's injunction application, thereby agreeing to be bound by the terms of that order giving effect to the non-compete covenants until trial or further order. Even if Ms Ali disputes the enforceability of the non-compete covenants, as indicated in your email of 17 September 2021, we are confident that the court will grant our client interim relief until the outcome of a speedy trial. Our client's proposal will avoid the cost to both parties caused by contested interim hearings as well as avoiding the unnecessary delay to a final determination of the matter, which is clearly in both parties' interests."

It goes on:

"This approach is supported by the guidance of Lord Justice Balcombe in the case of *Lawrence David v Ashton* [1989] ICR 123 that a defendant who has entered into contractual restraint should seriously consider offering an appropriate undertaking until a speedy trial. Should Ms Ali refuse to give undertakings to the court pending a speedy trial, our client will be seeking its costs of and occasioned by the need for a contested interim hearing, which are likely to be considerable."

33 It goes on under the heading "Directions to Trial" to say this:

"We understand from the court [that is to say the Queen's Bench Division] that it will be possible to list a three-to-four-day trial towards the end of November/December 2021. Accordingly, in the interest of the parties reaching an agreement on directions, we propose the following directions [and then there is a list of standard directions leading to a trial commencing on 13 December].

In the event that your client is willing to give undertakings to the court pending the outcome of a speedy trial, we will provide you with a draft consent order for agreement encompassing the above draft directions. We look forward to hearing from you by no later than 12pm tomorrow, 30 September."

34 I say it is an important letter because, in my judgment, it set a concrete framework for any proper assessment of the balance of convenience for the purposes of the application for an interim injunction. In particular, by the time this letter was written, the Claimant and the Defendant were both aware that a speedy trial of the underlying dispute was possible in December 2021.

35 In fact, it was even open to the Defendant to argue for a tighter set of deadlines, because what it appears the Claimant had been told was that the Queen's Bench Division could accommodate a trial even earlier than December, possibly at the end of November. Given that the Defendant's term of employment would end on 3 November 2021, there was a real prospect of a trial taking place within a matter of weeks of that date. Allowing for two or three weeks for judgment, that would still mean that a resolution of the real dispute between the parties about the enforceability of the non-compete covenants was possible within 4 – 8 weeks from the end of her employment with LBD

36 BBS responded to that letter the following day by email. They said in that email that counsel has been instructed and is considering the papers. They suggested that, because the employment was not going to end until 3 November, there would be no prejudice if the hearing for an interim injunction was postponed to the next available date. Mr Stedman of BBS then said:

"I shall revert to you tomorrow with regards to whether at this stage my client is willing to provide an undertaking pending a final hearing. But, in the interim, we would seek your confirmation that your client will agree to a postponement of the hearing next week."

I should say that, in the same email, there is a reference to the application for interim relief being listed for a hearing on Wednesday, 6 October 2021.

37 In their response to that, Fox & Partners did not entirely dismiss the possibility of a postponing the application, but said this:

> "Until your client has clarified whether or not she will provide undertakings, our client is not in a position to agree any such postponement on the following grounds:
>
> (a) If your client is going to provide the undertakings, there will be no need for a contested interim hearing and next week's listed hearing may be vacated and;
>
> (b) If your client is not going to provide the undertakings and instead intends to serve evidence, our client will need to know when such evidence will be served before agreeing to a postponed hearing date in this regard in order that a realistic hearing date and timetable for evidence and skeleton arguments may be agreed between the parties.
>
> In the circumstances, we await your client's urgent confirmation as to whether undertakings will be provided."

38 So that was where matters stood on 30 September, that is to say Thursday of last week.

39 The next day, Friday 1 October, BBS sent an email to Fox & Partners saying this:

> "Unfortunately, counsel is tied up in an ongoing matter and we will not be able to consider and review the position until later this afternoon at the earliest."

40 It is probably fair to say that that email led to possibly some degree of exasperation on the part of Fox & Partners. Their response later that morning was to say that the approach of the Defendant was unsatisfactory for a number of reasons (with emphasis added by me because it is of importance to the application for costs):

> "Your client has had several months to consider providing undertakings. The matter is not complicated, and your client told us as early as May that they had taken advice on her legal position. Our client is continuing to expend legal costs in preparation for Wednesday's hearing, including finalising a skeleton argument and authorities bundle preparation of the weekend. **Accordingly, we are granting a final extension until 4pm today for your client to clarify her position. If appropriate undertakings are provided as late as Monday, we will seek an order for wasted costs**."

41 That email was sent at 11.23 on Friday morning and set a deadline for a substantive response by 4pm the same day. BBS's response arrived at 4.23 pm that afternoon. It was quite short. It was sent by a senior associate at BBS:

> "Further to your email below, we are presently working on revised undertakings and we will revert further in that regard on Monday. If you wish to discuss further today, please contact me on my mobile number below."

42 Fox & Partners' response was sent on the Saturday morning at 10 o'clock and, as requested, it was sent to the senior associate, Mr Mellor. It appears from the email that two solicitors at Fox & Partners had attempted to call Mr Mellor's mobile number on Saturday morning but

did not receive any answer. They had also tried to contact Mr Mellor through the BBS switchboard. They made the following point:

> "In circumstances where an interim injunction hearing is only two working days away, your failure to engage is entirely unsatisfactory. As we have not been able to discuss it with you, we make the following points in relation to our client's position."

I will not set those points all out because they are a recapitulation of LBD's position as expressed in the previous week. The e-mail concluded:

> "In light of the above, our client is not hopeful that a hearing on Wednesday can be avoided and, therefore, has no choice but to proceed with its necessary preparation between now and Monday. Accordingly, our client also reserves its right to proceed with a wasted costs order, as indicated in the previous email."

43 On Monday morning, 4 October 2021, Mr Stedman of BBS apologised for the delay in reverting to Fox & Partners. Mr Stedman offered a single composite undertaking which covered both the shareholders' agreement and the service agreement. The short answer to that that came back at 3 o'clock on Monday from Fox & Partners was "No". LBD was insisting on undertakings in the order that reflected the separate provisions of the shareholders' agreement and the service agreement.

44 At 8.42 in the morning of Tuesday 5 October 2021, i.e. the day before the hearing of the application, BBS sent an email containing a number of points and saying that, in relation to costs, they should be the normal order, namely that they be reserved to the trial judge at the hearing of the application for permanent injunctive relief.

45 The email also contained a marked-up copy of the draft order, including, for example, striking through the penal notice and making some other suggested changes. These were rejected at 1.30 pm on 5 October by Fox & Partners in these terms:

> "I refer to your email and revised draft order containing proposed undertakings received less than one business day before the hearing listed in relation to our client's application for an interim injunction dated 28 September 2021. As you are aware, the bulk of preparation has now been undertaken and our client will shortly be in a position to exchange skeleton arguments. The proposals in your email are, in any event, unacceptable to my client and we will revert separately in this regard shortly."

46 Twenty minutes after that email was sent, I received the claimant's skeleton argument and the claimant's hearing bundle, which ran to some 387 pages, together with equally bulky authorities bundle. I made enquiries as to where the Defendant's skeleton argument was. It was not received until 5.30 pm. When I did receive it, it suggested that the only issue remaining was the costs of the application. This reflected an email sent by BBS at 18.27 that evening to Fox & Partners essentially conceding all the remaining points on the draft consent order, leaving only costs as an issue between the parties.

47 So, net result was that, by 18.27 on Tuesday, 5 October, that is to say the evening before the hearing listed for two hours the following day, the Defendant had retreated to a position that was no better than she would have been if she had consented to the application for interim relief on 29 September 2021.

Submissions

48 On the morning of the hearing, I received a further skeleton argument from Mr Bloch and Mr Goodfellow responding to the skeleton argument of the Defendant in relation to costs and I received yet a further bundle of authorities relating to costs.

49 Mr Bloch's submission was that wasted costs ought to be ordered for essentially four reasons.

50 First, he submitted that the balance of convenience in the case ought to have been crystal clear to the Defendant from the outset. He submitted that the Defendant had not mounted any argument that the Claimant does not overcome the "serious issue to be tried" threshold or that damages would be an adequate remedy. Both arguments would, he submitted, have been hopeless in view of the evidence.

51 Secondly, he submitted that the Defendant was herself an employment solicitor and she was assisted from the earlier stages by a firm with a specialist employment law department so she ought to have been aware of the sort undertakings that would be appropriate if it became clear that a speedy trial was possible.

52 Thirdly, he submitted that there was no doubt that the delay in agreeing to the order has caused costs to be wasted. He referred to the unsatisfactory undertakings offered by 4pm on Friday, 1 October, and submitted that the costs of substantial brief fees and preparation of skeleton arguments over the weekend would not have been incurred had the Defendant agreed on Friday 1 October, instead of waiting until nearly 6.30 on Tuesday evening to do so.

53 Finally, he submitted that, even if the Defendant were to succeed at trial, it would not be unjust for costs to be ordered in favour of the Applicant. He submitted there would be no issue of disgorgement of any costs order made in favour of the Applicant, no matter what happened at trial. As he put it, whatever happens at trial, the Defendant's unreasonable behaviour has wasted costs, time and money.

54 Mr Burns' submissions boiled down, I think, to five points. Four of these were contained in his short skeleton argument dated 5 October 2021.

55 The first and really his main point was that the court should reserve the interim costs to the trial judge where the application is decided on the balance of convenience and the judge is simply holding the ring pending a trial or other determination.

56 Second, the risk with a costs order at this stage is that it may later transpire that the injunction was obtained on an incorrect basis

57 Thirdly, he pointed out that the Court of Appeal in *Wingfield Digby v Melford Capital Partners (Holdings) LLP* [2021] 1 WLR 1553 has recently reaffirmed the *Desquenne* approach of reserving costs for interim injunctions. He summarised it in this way.

> "In a disputed case in which the underlying issues are impossible to determine at the interim stage, it is wrong to try and identify a winner and loser, and so costs should generally be reserved unless there are some special factors in play."

Fourthly, which is in some ways a variation on point three, he submitted that:

> "In this case, there is a hotly disputed issue about whether the non-competition covenant is enforceable or not. This will need to be decided at the speedy trial and this order is purely to hold the ring until then. Only then will it be clear whether the application was rightly brought or not."

58 So those are the first four points in his skeleton.

59 His fifth point which he made only in his oral submissions was that LBD has acted in a somewhat bullying manner and the application for costs was, in reality, an attempt to stifle the Defendant's opposition.

Analysis

60 In an ordinary case, a respondent to an application who throws in the towel the night before the application is due to be heard would be expected to have to pay the costs of the application. That follows from the general rule in CPR 44.2(2) that the unsuccessful party generally be ordered to pay the costs of the successful party.

61 However, it is common ground between the parties that that is not the general rule in relation to applications for interim injunctions. As Mr Burns correctly pointed out, the position in relation to applications for interim injunctions is governed by a different principle as confirmed in *Melford Capital Partners LLP v Wingfield Digby* [2020] EWCA Civ 1647; [2021] 1 WLR 1553. At para.35 in that judgment, the Court of Appeal quoted and approved a passage from paragraph 44.6.1 from the 2020 edition of **Civil Procedure**:

> "Where an interim injunction is granted, the court will normally reserve the cost of the application until the determination of the substantive issue (*Desquenne* ...). However, the courts hands are not tied and, if special factors are present, an order for costs may be made and those costs summarily assessed."

62 Mr Burns specifically drew my attention to paragraph 41 over the page and this passage:

> "Whenever a claimant successfully seeks an interim injunction preventing the defendant from doing something (whether using a right of way, working for a competitor or infringing a patent) the defendant will be stopped from doing whatever it is for the time being. That was precisely the case in both *Desquenne* and *Picnic at Ascot*. However, the judge's decision that he was unable to resolve the merits of the disputes means that the basis on which those orders were obtained and continued, without objection from the Appellant, may prove in the end to have been unfounded. 'Success' of this type is only a provisional one. On the other hand, a 'costs reserved' order does not mean that claimants generally, or these Respondents in particular, will never recover the proper proportion (if not all) of their claimed costs: the matter is open and the costs have been neither won nor lost by either side at this stage."

63 Mr Bloch for his part relied specifically on paragraph 46 from the same case. In paragraph 46, the Court of Appeal cited what Neuberger J had to say, as he then was, in *Picnic at Ascot v Derigs* [2001] FSR 2:

> "There will obviously be circumstances where it is right to depart from the general approach. Thus there may be cases where the balance of convenience is so clear, and the outcome of the hearing of the application for the

interlocutory injunction should be so plain to the parties, that the court should conclude that an order should be made against the defendant for wasting time and money in fighting the issue (whether or not the defendant eventually concedes)."

64 Turning to the report of that case, that it is to say *Picnic at Ascot v Derigs*, Neuberger J, as he then was, went on to say this at paras.19, 20 and 21:

> "[19] In light of the modern approach to litigation embodied in the Civil Procedure Rules, and particularly where the timetable for interlocutory proceedings is as comparatively lengthy as it was in the present case, it seems to me that, if a defendant decides only virtually at the last minute that it will not contest an issue for which one-and-a-half days have been set aside, he must appreciate that he will be very much at risk on costs. In my judgment, in such a case that there is obviously a strong basis for saying that, at least in the absence of any cogent explanation, the court will inevitably be attracted to the argument that there was no good reason why the defendants could not have made their position clear earlier, thereby avoiding the need to prepare for and have a hearing."

> "[20]In my judgment, if a defendant accedes to an injunction, once all the evidence is in, reasonably promptly on the basis of the balance of convenience, then, in the absence of any other special factors, the proper course for the court to take on costs is to follow the approach suggested by the Court of Appeal in *Richardson*, and to reserve the costs. However, where, as here, the timetable is comparatively relaxed - which it was certainly not in *Richardson* - and the defendant waits until very shortly before trial before acceding to the application, then he must give the court a satisfactory explanation for that delay if he is to be at all confident of avoiding an adverse order for costs, reflecting the fact that he has delayed unreasonably."

In the facts of that particular case, the conclusion which was reached was that:

> "The right order is that costs be reserved, save insofar as the costs relating to today's and yesterday's hearing, in respect of which the costs should be the claimants' in any event."

65 So, in essence, it seems to me that the dispute between the parties in this case boils down to whether the case falls within the general rule described in paragraph 35 of *Melford Capital Partners v Wingfield Digby* or whether it falls in the exception exemplified in *Picnic at Ascot*. I have no hesitation in concluding that this case falls within the *Picnic at Ascot* exception and that the Claimant is entitled to its costs since 4pm on 1 October of this year, in any event, for the following reasons.

66 First, by Wednesday, 29 September 2021, the Defendant and her advisors had all the necessary information to form a view on whether she ought to consent or not to the interim relief sought. In particular, they had all the information in the witness statement of Ms Morrison which I have already described and they knew by that date that a speedy trial was going to be possible which could be concluded within a matter of weeks after the conclusion of her contract of employment.

67 Secondly, in my judgement, Mr Block is right to emphasise the importance of the guidance given by Balcombe LJ in *Lawrence David v Ashton* [1989] IRLR 22:

> "I reiterate there is no special rule relating to interlocutory injunctions in cases of restraint of trade. The normal rule in *American Cyanamid* and the exception to that rule apply. A defendant who has entered into a contractual restraint which is sought to be enforced should seriously consider when the matter first comes before the court offering an appropriate undertaking until the hearing of the action provided that a speedy hearing of the action can be fixed and the plaintiff is likely to be able to pay any damages on his cross-undertaking. It is only if a speedy trial should not be possible that it would then be necessary to have a contest on the interlocutory application. I do not believe that, in this comparatively limited type of case (limited in numbers that is), the courts at first instance will not be able to arrange for a speedy hearing of the action and thus avoid time being spent, usually unnecessarily, on contested interlocutory applications."

68 Mr Bloch also drew my attention to the comments of Seymour QC HHJ sitting as High Court Judge in the case of *Underwriting Exchange Limited v Newall & Ors.* [2015] EWHC 948, in which he said of that paragraph:

> "The guidance of Balcombe LJ in the *Lawrence David* case is notorious in this area of law and practitioners are well acquainted with the principles. The difficulties which prompted Balcombe LJ to give this guidance which he did are notorious. They are encountered in just about every case of this type. It is guidance which is intended to reduce the number of times that the court is troubled with this type of application and to reduce the costs to the parties by pointing to an appropriate interim resolution pending a speedy trial."

69 It is clear from those two quotations that one of the key elements is whether or not a speedy trial is possible. In this case it was clear to both parties by 29 September that a speedy trial certainly was possible in either late November or early December of this year.

70 Fourthly, the defendant has at no stage served any evidence to counter what is said by Ms Morrison in her witness statement, either as to the damage that LBD might suffer if the Defendant were not prevented, at least on an interim basis, from competing with LBD by joining Weightmans before the end of the covenant period or any evidence which casts any doubt on the assertion concerning the Defendant's ability to meet any damages award. Nor was there any challenge mounted at any stage as to the ability of LBD to satisfy any cross-undertaking in damages in the event that the non-compete covenants were held to be unenforceable.

71 So, in my judgement, once it became clear that a speedy trial was obtainable, the guidance in paragraph 54 of *Lawrence David v Ashton* became applicable. Any practitioner in this area would know that they would have to have either some evidence to challenge the evidence concerning the balance of convenience or provide some other reasonably arguable ground why interim relief should not be granted. The Defendant's attention was specifically drawn by Fox & Partners to the principles in *Lawrence David v Ashton* in their letter of 29 September 2021, even though the Defendant was an employment solicitor employing her own independent solicitor with expertise in the area.

72 Fifthly, even after this point had been reached, namely that a speedy trial was possible and the Defendant had all the information it needed to assess the position on the balance of convenience, the Defendant still had two further full days to consider the position. It was, in my judgment, entirely reasonable for the claimant to set a deadline of 4pm on 1 October

2021, given, as I have set out, Fox & Partners had been told that counsel was already instructed, the papers had been considered and the issue of undertakings had been under discussion since May, shortly after the Defendant handed in her letter of resignation.

73 Sixthly, it seems to me that, on a proper analysis of what seems to have happened between 4pm on 1 October and the final capitulation at 6.30 on Tuesday 5 October, there was nothing more than a series of backward steps towards what has been asked for on 29 September. In other words, not only was there no evidence to counter anything that was being said on the balance of convenience, but there was not even anything being said in correspondence or any explanation being given as to why the interim relief should not be granted.

74 Seventhly, I have not been provided with any cogent reason, to use the language used by Neuberger J in the *Picnic at Ascot* case, for why it took until 18.27 on 5 October for the Defendant to realise that it had no grounds to resist the application for interim relief. I have seen no evidence of any material change in the defendant's circumstances between Friday, 1 October, and 18.27 on 5 October. As I said, none of the correspondence engages in any way and it seems that the best that one can do, looking at the correspondence, is to say that there was a reluctance on the part of the Defendant to provide interim relief, but no proper attempt to explain why she should not.

75 Eighthly, I accept that Mr Bloch is right to say that it is a special circumstance or factor here that the Defendant herself is a specialised employment lawyer. She must have realised after 15 years as a solicitor and a good many years working in the specialist employment law field that she did not have any realistic grounds to resist the interim relief application pending a speedy trial. She must also have well understood why it was that Ms Morrison was concerned about the restrictive covenant against competition. Indeed, even at the hearing of the application on costs, Mr Burns could not muster a single argument, or at least I did not detect one if he did, as to why it was that the balance of convenience did not fall very obviously and plainly in favour of granting the interim relief sought.

76 Ninthly, I reject the submission that was made that an interim costs award gives rise to any sort of unjust situation potentially arising after the trial of the claim for permanent relief. It seems to me that there is no finding that could possibly be made at trial which will undo the delay in agreeing to the interim relief. Mr Burns tried to suggest that the finding of unenforceability of the non-compete covenant might put, as he put it, a different colour on the defendant's stance in relation to interim relief. I disagree. It seems to me that, even if it is held ultimately unenforceable, that does not provide either in law or in fact a retrospective justification for her stance in relation to interim relief. If the non-compete covenant is held to be unenforceable, her remedy at that stage will be to call on the cross-undertaking in damages. The issue or whether interim relief ought to be granted or not granted will never be litigated again.

77 Finally, I also reject the suggestion that there is any aspect of stifling to this costs application. For one thing, any such suggestion would have to be supported by evidence. I have no evidence of the Defendant's financial position, save for her current salary. I have no idea whether Weightmans will agree to pay her salary from 4 November or whether it is indemnifying her in whole or in part in relation to this litigation.

78 So, for all of those reasons, in my judgement, the position is that there are special factors in this case which take it outside the normal rule for costs in relation to interim injunctive relief. I find that it was clear and obvious in this case that, at the very latest, on 29 September 2021 interim relief was appropriate and, secondly, that there was an inexplicable delay which certainly has not been explained cogently or at all as to why it was that the Defendant could

not have agreed to the interim relief by 4pm on 1 October, which was the deadline reasonably set by the Claimant.

79 I do think it is appropriate to cross-check this conclusion by asking whether what I am proposing to do, namely to exceptionally award costs in favour of the applicant for interim relief, is in accordance with the overriding objective. I find that it is.

80 It is well-known that part of the overriding objective is to ensure that the parties are on an equal footing. Here, as Mr Bloch submitted, the Claimant throughout set out its position extremely clearly in correspondence as to what injunctive relief it was seeking and why it was seeking it. It never really got an answer from the Defendant as to why it should not be granted. Instead the Claimant was provided with nothing more than a series of possible suggestions for doing something else, but no real substantive engagement. To that extent, there was both a failure both of cooperation and to further the overriding objective as the parties are required to do, and an inequality between the parties.

81 Also, in my judgement, the conduct of the defendant impacted on the court's resources. There was more than a hint from the way in which the Defendant and her advisors dealt with this case as if the court could be put on hold until they had, in their own good time, decided to concede. But the net effect of that was a half-day slot in the court's timetable, which could have been available to other court users, was not available because the Defendant had not agreed to application. That is not consistent with para.1.1(2)(e) of the overriding objective.

82 Finally, of course, both parties were under an express obligation to act in way as to save time and expense. It seems to me that the way that the Defendant dealt with things was at best lackadaisical and, in particular as the hearing approached, was not in accordance with that obligation either. So, under the overriding objective, there is no question in my mind that this is the appropriate costs order to make.

Basis of assessment

83 As I mentioned in the introduction, Mr Bloch contended for the indemnity basis, albeit he did not pursue that very strongly in oral submissions. Mr Burns submitted that any costs should be assessed on the standard basis.

84 Mr Bloch, of course, referred me to para.39 in the case of *Excelsior Commercial and Industrial Holdings Limited v Salisbury* [2002] CP Rep 67 where the following appears:

> "The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

85 It was also pointed out in submissions by Mr Bloch that, in *Underwriting Exchange v Newall* HHJ Seymour QC went on to hold in relation to costs that indemnity costs ought to be ordered:

> "The norm in this type of case is to comply with the guidance given by Balcombe LJ and, for those reasons, there will be an assessment on the indemnity basis."

86 On the other hand, it is clear that in the *Picnic v Ascot v Derigs*, having held that an exceptional order ought to be made for costs, it seems that Neuberger J simply awarded those costs on the standard basis. This shows that if an exceptional order is made for costs in any

event for resisting an application for interim injunctive relief, it does not follow, that those costs will always be on an indemnity basis.

87 It seems to me that the position is that it is necessary to stand back and look to see whether the conduct of the case is such as to warrant an award of indemnity costs. Since the *Excelsior* case, there have obviously been, as are set out in the commentary on the Excelsior decision in the **White Book**, a number of decisions adding glosses and particular examples of when indemnity costs are and are not appropriate.

88 In *Bank of Tokyo-Mitsubishi UFJ, Ltd & Anor. v Baskan Gida Sanayi VE Pazarlama AS* [2010] 5 Costs, Briggs J, as he then was, provided a summary of the principles in relation to indemnity costs. He said this:

> "The primary consideration is whether the conduct of the party against whom the order is sought is such to take the case out of the norm and, secondly, whether that party's conduct can properly be categorised as either deliberate misconduct or conduct which is unreasonable to a serious degree."

89 The same point was made in another case, *Elvanite Full Circle Ltd v Amec Earth & Environmental (UK) Ltd* [2013] 4 Costs LR 612 at paragraph 16:

> "Indemnity costs are appropriate only where the conduct of a paying party is unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight."

90 I am not satisfied here that the conduct of the defendant was unreasonable to a high degree. It just, it seems to me, falls the other side of that line, for these reasons. Firstly, it seems to me, on a fair reading of the correspondence, neither she nor her solicitors were in any way playing games or being disingenuous or tricky.

91 I reject the submission made by Mr Bloch that the defendant herself was being evasive at any stage. The other submission he made was that she was playing hardball. It seems to me that almost the opposite is true. Either she or her solicitors at the crucial stage between Friday and finally conceding on 5 October almost stopped playing ball at all and were simply seeking a number of different ways of dressing up the defeat in more or less acceptable terms.

92 The impression that I gained from the correspondence is rather that there was a somewhat inert and casual response to the application, at least from the period of 29 September. In other words, it was a failure to act quickly and to engage fully with the relevant test, namely whether interim relief was likely to be granted or not rather than any sort of deliberately obstructive behaviour.

93 Secondly, there was a level of engagement from the defendant and dialogue. Letters were not ignored and, for the most part, when BBS said they were going to respond, they did or they explained why they could not.

94 Thirdly, the application was conceded in the end. The defendant did not ultimately waste the time of the court by seeking to argue the impossible against interim relief. No doubt, at some stage, she received some fairly firm advice that that was impossible and no such argument was made.

95 So, taking a step back and looking at the relevant conduct, I reject the submission that this was behaviour that was unreasonable to a high degree so as to be outside the norm and to

justify an assessment on an indemnity basis. Costs will therefore be assessed on the standard basis.

Summary or detailed assessment?

96 Finally, then the final issue is whether or not to assess the costs summarily. Mr Bloch has drawn my attention to para.19.2 of PD 44, which states that the general rule is that, for a hearing of less than one day, a summary assessment is appropriate. Although Mr Burns bravely suggested that I ought to put this off to a detailed assessment, at which point some further information may be available to the costs judge, I do not accept that.

97 I have got a standard statement of costs. It sets out the precise number of hours and what was going on and the hourly rates in the usual way and when it was being done. The costs have been incurred over a very short period of time, namely from 4pm on 1 October up until the hearing yesterday. So I reject the suggestion that any further information is going to become relevant or available to any other judge. I am at least as good a position as anyone else, to assess the costs, so I will do so summarily in accordance with the ordinary rule.

The assessment

98 There has been no challenge to the hourly rates for the solicitors involved and not much challenge to the time that they spent. It is consistent with what I have seen in the correspondence, not only ordinary working hours, but working on Saturday and over the weekend to ensure that the application was properly prepared and put before the court. In relation to counsels' fees, again, there was not any specific criticism of Mr Bloch or Mr Goodfellow's fees for the application.

99 On the other hand, it does seem to me that, first of all, I need to consider proportionality. There was, in my judgment, something of a tension between Mr Bloch's primary submission, which was this was such an obvious case that really he did not even need to turn up to argue it because it was so obvious, and, at the same time, saying that two counsel were necessary to argue the substantive application for interim relief.

100 However, I think the reality of the situation is that, particularly in these sorts of applications, counsel have to cover all possible eventualities, and it is not unusual in this sort of case for a last-minute long witness statement to be put in and new points to emerge. So, although I think probably there was some overmanning in relation to having a silk and a junior, I would not go as far as to say that it was a case that only required a junior.

101 The other point that concerned me was it does seem to me that I have to be clear that I am only awarding costs for costs that are genuinely wasted. Although Mr Bloch is right to say that many of the points covered by the skeleton, as will be held, will only arise once, namely in relation to the application for interim relief, it does seem to me that there is still nevertheless quite a lot of background material which will be relevant to the pleadings that are going to follow in short course.

102 So, taking all those matters together and doing the best that I can to be fair to both parties, I propose to summarily assess the costs in the sum of £50,000. This will be payable within 28 days.

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