IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Neutral Citation Number: [2023] EWHC 2651 (KB)

Case No. KB-2022-003798

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 3 August 2023

Before:

MR DEXTER DIAS KC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

(1) MARK RANDOLPH DYER
(2) CLARE ALEXANDRA PANDORA DYER — Applicants

- and -

(1) PATRICIA WEBB
(2) DAVID AYMAR SMALL
(3) SUSAN EILEEN SMALL
(4) DR ANDREW CROSS — Respondents

MR R MARVEN KC and MR M DAVIES (instructed by Lombard |Legal) appeared on behalf of the Applicants.

MISS A PROFERES (instructed by Charles Russell Speechlys LLP) appeared on behalf of the Respondents.

J U D G M E N T

DEXTER DIAS KC :

(sitting as a Deputy High Court Judge)

1 This is the judgment of the court on consequential orders.

2 The judgment follows the court's substantive judgment on interim relief dated 10 July 2023, Neutral Citation Number [2023] EWHC 1917 (KB). The facts are set out in detail in that judgment and this judgment should be read in conjunction with that.

3 The parties to today's hearing are as follows. The applicants in this application are Mr and Mrs Dyer. They are represented today by Mr Marven KC and Mr Davies of counsel. The respondents are Mrs Webb, Mr and Mrs Small and Dr Cross, who are represented by Miss Proferes of counsel. At the hearing on consequential orders, the applicants were represented again by Mr Marven KC and also Mr Barraclough KC. The respondents were represented by Miss Proferes.

4 By way of procedural chronology, the judgment in the interim relief hearing of 11 May 2023 was handed down in court on 10 July and the consequentials hearing was held on 28 July.

5 There are six prime issues before the court: first, indemnity costs; second, an application for a 'totally without merit' recording; third, payment on account; fourth, pre-action costs not related to the interim relief application; fifth, a species of unless order; and sixth, future service. This judgment deals with the first five of those issues. There will be further argument about future service once the judgment has been handed down.

Issue 1: Indemnity costs

6 To begin, Civil Procedures Rules 44.2 provides that:

"(2) If the court decides to make an order about costs -

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.

.....

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all of the parties.

....

(5) The conduct of the parties includes –

…..

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) and the manner in which a party has pursued its case or a particular allegation or issue."

7 The **White Book** at 44.3.8 succinctly frames the indemnity test like this: "whether it is outside the ordinary and reasonable conduct of proceedings." In *Excelsior Commercial & Industrial Holdings Limited* [2022] EWCA (Civ) 879, the court declined to give detailed assistance about the principles to be applied when ordering costs on the indemnity basis, with a view to avoiding the plain language of the rules being replaced by other phrases. Instead, the matter should be left, so far as possible, to the discretion of judges at first instance (see Waller LJ at para.38). In *Excelsior*, the court held that the making of a costs order on the indemnity basis would be appropriate in circumstances where (1) the conduct of the parties or (2) other particular circumstances of the case, or both, took the situation "out of the norm" in a way that justifies an order on indemnity costs (*per* Lord Woolf at para.31 and Waller LJ at para.39.)

8 In *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm), Tomlinson J (as he then was) noted three factors of particular significance:

> "(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.
>
> (2) The critical requirement before an indemnity order can be made in the successful [proceeding parties'] favour is that there must be some conduct or circumstance which takes the case out of the norm.
>
> (3) ...the test is not conduct attracting moral condemnation, which is *a fortiori* ground, but rather reasonableness."

I would add that this echoes the precept in *Balmoral Group Limited v Borealis (UK) Limited and & Ors*. 2006 EWHC 2531 (Comm) that: "It is not necessary that the claimant should be guilty of dishonesty or moral blame" (*per* Christopher Clarke J (as he then was) at para.1.)

9 I must be astute to identify what is actually the subject-matter of this application for indemnity costs. It is the application for a pre-action injunction. It is not in respect of the claim as a whole. In fact, in this case there is not a claim form that has been issued. This is a vital distinction. The only question is whether the conduct of the injunction application was out of the norm or in material respects not reasonable in the way that the authorities describe (or both).

10 As for 'totally without merit', the test is different and set out at Civil Procedure Rules 23.12. In short that the application was bound to fail. These concepts, I emphasise, do not stand or fall together. They are different tests and they must be evaluated separately. Consequently, I will consider each discretely. The parties argued indemnity first and then "totally without merit"; the court will adopt the same sequence.

11 First, then, indemnity. I identify the factors for and against a claim for indemnity costs in this particular case. Against the making of such an award, factors include that there is a theoretical legal basis to injunct objections to planning applications. There is evidence from Mrs Dyer, Mr Dyer, their son and Mr Scarisbrick, amongst others, about acts of alleged harassment. Mr Mehmet provided expert opinion that the respondents' objections were not genuinely motivated. Mr Mehmet concluded that application number 20P02042 ("application 20") was the "most serious" and "most concerning" example of the respondents' unreasonable and oppressive conduct, concluding also that it was motivated by personal animosity rather than genuine planning concerns. Mr Mehmet has not been cross-examined but simply assessed on the papers. He disclosed his professional connection to the applicants in the body of his report. As at the date of the hearing, on 11 May, the high hedges complaint was subject of a pre-action protocol letter.

12 Last, one should not hold errors in the applicants' consequentials skeleton against Mr and Mrs Dyer themselves. For example, the suggestion that Mr Mehmet's report was available to the applicants before issue, and thus issue was founded in expert evidence, cannot be correct. That is because the application notice was dated 26 October 2022 and Mr Mehmet's report is dated 2 May 2023. These were factual inaccuracies made by counsel. The court completely accepts Mr Barraclough's word on this and his apology. These things happen and counsel has taken responsibility. I put this matter to one side.

13 The factors in favour of an award of indemnity costs include, first, matters of principle. In their application and hearing skeleton, the applicants did not address or recognise the pre-action interim relief test (see paras.9-11 of the skeleton, where the simple *American Cyanamid* test only is stated as the "legal test"); there was a lack of urgency to justify pre-action injunctive relief; the fact that the application was issued in October and seven months later, no substantive claim has been issued; the applicants arguing that the

respondents' Convention rights were not engaged; the degree of compliance with the *Practice Guidance Interim Non-Disclosure Orders* [2012] 1 WLR 1003 (the "*Practice Guidance*"), including the lack of case management orders to bring the matter to trial; the scope of the order, which was too wide and unworkable.

14 Second, matters of fact: the abandoned the trespass allegation; the abandoned allegation of coercing Mr Baker; the abandoned inclusion of the applicants' children in the draft order; the persistence in the allegation of influencing Mr Baker to burn the hedge; maintaining that the high hedges complaint of Dr Cross was "spurious"; the failure to mention in the particulars of claim that the inspector had upheld the complaint; the instruction of Mr Mehmet despite his previously having undertaken professional work for the applicants; the allegation that the objection to application number 20 was the clearest example of the respondents being motivated by personal grievance, when in fact there was no evidence that it was objectively incorrect or not valid; the inconsistency of Mr Scarisbrick's allegation with the contemporaneous documentation; the making of the drone allegation against the respondents when the conduct was elsewhere attributed to other people; incorrectly maintaining that the respondents had objected to all the applicants' planning applications.

15 I now consider and discuss these competing factors. To begin, a distinction must be made between two types of conduct that were sought to be injuncted, Convention rights and other acts of harassment. Each of these bases has a subtly different accompanying test.

16 **Convention rights**. As to the application to restrict the respondents' conduct in respect of planning applications, there was no previous authority that was put before the court. Injuncting planning applications, particularly when the complaint is that it amounts to harassment under the Protection of Harassment Act 1997, is an unprecedented course. However, the court found that it was conceivable that in cases of serious oppression and

malice, it might be appropriate to injunct spurious and spitefully motivated objections to planning applications. Thus, as a matter of strict legal foundation, I find no support for indemnity costs. In fact, it points in the opposite direction. However, the respondents put it in this way, that the application is "firmly founded in the applicants' conduct." We will come to that shortly.

17 There is guidance that assists in these types of application. It is to be found in the *Practice Guidance* and in the **White Book** at 53PG.11. The *Practice Guidance* states, at para.30:

> "Particular care should be taken in every application for an interim non-disclosure order, and especially where an application is made without notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed including how, if at all, the order submitted departs from the model order."

18 The question here is the degree of applicants' compliance with this guidance and, in particular, the high duty to make full and fair and accurate disclosure of all material information and to put the proper legal basis in which the application is founded in front of the court. The applicants' skeleton did not speak to the question of Convention rights at all. That was plainly a significant legal aspect of this case. The applicants' skeleton did not speak about the pre-action nature of the application and the appropriate test. That, too, was a highly significant feature, yet the applicants' skeleton was silent about it.

19 I turn to the approach to Convention rights. The applicants maintained at the outset of the 11 May interim relief hearing that the Convention rights of the respondents were not

engaged. This stance was consistent with the fact that no mention of any potential infringement of the respondents' Convention rights was made in the applicants' skeleton argument. It was only when the court explored this stance that the applicants conceded that the Convention rights were engaged. During the consequential orders hearing on 28 July, Mr Barraclough stated that it had never occurred to the applicant team that the Convention rights of the respondents might be engaged. He submitted that "this was about planning objections."

20 The court must stand back and view the objective position with clarity. These applicants were applying to restrain the respondents from objecting to the applicants' planning applications and from gathering to discuss the same. This was an obvious infringement of their freedom of expression. It was an infringement of their freedom to speak to one another about the applications and their objections to it. It was an infringement of their ability and freedom to meet and to discuss. This was an obvious infringement of the rights of assembly and association.

21 The court finds it inconceivable that no thought could have been turned to an infringement of the respondents' Convention rights. These are serious infringements of Articles 10 and 11 of the European Convention on Human Rights. The true question for the court, and what should have been put in front of the court by the applicants, is whether it was nevertheless necessary and proportionate to infringe those recognised rights, looking at the balance of convenience, et cetera, due to the impact on the applicants of the alleged the improper conduct by the respondents. But the applicants failed entirely to consider the respondents' obvious protected (if qualified) Convention rights.

22 Further, the respondents were put on notice by the applicants about the importance of their right to object to such planning applications. In correspondence dated 8 December 2022, that is a few weeks after issue (see B1706), it is put this way:

> "They also see no basis upon which the rights to object or to make representations in respect of an any planning application should be fettered, for it is plain that the predominant purpose behind such actions have been, and will continue to be, a preservation of the area in which our clients live. They are not prepared to be bullied. Whilst they have no particular wish to become embroiled in litigation at this stage in their lives, in particular, they are quite simply not prepared to just sign unjustified and overly draconian undertakings to satisfy your client."

23 In conclusion, I find that the fact that the respondents' Convention rights are engaged was unmistakable, plain, elementary and obvious. The separate and enhanced test of interim injunctive relief is not concealed in arcane precedent or legal obscurity but in recognised legal sources used daily by practitioners, and especially in the **White Book**, the court's procedural bible. Just by way of example, at page 698 of the current edition, which was the relevant text, at 25.1.11, the **White Book** states:

> "*Principles and guidelines to be applied* – For extended commentary upon the principles and guidelines to be applied in applications for interim injunctions generally and in particular proceedings, see Vol.2, Section 15 Interim Remedies para.15-2."

It then continues, significantly:

> "Orders restricting freedom of expression (including 'privacy' and 'anonymity' orders) are a derogation from the principle of open justice and require 'exceptional circumstances.' Applicants for any such order will be expected to comply with *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003 (see para.53PG.11) and to use the Model Order there set out. See further paras.25.1.12.1 and 25.1.12.5 below.)"

So, the requirements and obligations are there in black and white on paper, or onscreen digitally, for all to see. The court finds it unreasonable for the applicants to have failed to

address these fundamental and serious issues and this was a material failure to comply with the *Practice Guidance.*

24 As to trespass, the allegation of trespass was withdrawn orally during the hearing. The respondents were not notified about this significant alteration. The first, indeed, that Miss Proferes heard about it was when Mr Barraclough announced it in court. This is not the way to conduct proceedings. This is no mere technical amendment to the scope of the order. The allegation of trespass made against Mr Small was one of the most serious allegations. It was withdrawn, unheralded, without explanation.

25 The order was not properly drafted. It was not effective or workable. At the outset of the hearing, it was significantly changed. It set out no time limit for the injunction sought and was too wide. During the course of argument on consequential orders, Mr Barraclough accepted that: "We cannot resist that the order proposed was too wide." The order details no or no adequate case management directions to the trial as required (see *B v D*_[2013] EWHC 1705 (QB)). Mr Barraclough accepted that the order had to be redrafted not to prohibit the respondents from communicating with their family members. Despite the applicants having decided before the hearing that there must be a number of significant alterations, no amended order was provided to the parties or the court at the hearing. Thus, the court had to go through the order with counsel to establish with certainty what remained and what was to be struck out in manuscript form. Again, this is not the way to proceed.

26 The next issue involves an allegation by the respondents that the applicants attempted to interfere with legal representation. Miss Proferes put it squarely that the applicants were "putting roadblocks in the path of legal representation." This is an extremely serious allegation. I focus on the question at hand. It is whether indemnity costs should be awarded. The evidence before the court on the issue of interference is not complete. If this

were pursued, there would need to be proper sworn evidence, an opportunity to respond and disclosure. In this case, none of that has happened. The court notes the allegation, but does not dismiss or accept it. I judge that it is not proportionate to adjudicate on such a serious allegation for the purposes of resolving a costs dispute.

27 The next question is the issue of proportionality of the costs incurred. The complaint is that the applicants have acted disproportionately and exorbitantly in instructing two KCs and a junior. There was, for example, a costs silk attending the hand-down when the court had indicated that there would be no argument on consequential orders. This, it seems to me, is best addressed during the detailed assessment of costs that both parties accept must follow. The significance of this point to the respondents is that they allege there is a pattern of "throwing the kitchen sink at a respondent" in the hope that the respondent will capitulate and then provide undertakings. They cite the other examples of undertakings having been secured against Mr Baker, the Watkinsons and Mr Hurst. While it is true that these different people featured in the evidence, and indeed in the substantive judgment of the court, the court finds that there is insufficient evidence before it to make a determination whether there is definitively a pattern of "intimidation" by the applicants, as the respondents allege, and whether this is a strategy to force people, mostly neighbours, into silence or compliance with the threat of legal action and consequences.

28 Once more, this is a very serious allegation. I must have regard to the stage of proceedings reached. This was an interim application without any live evidence whatsoever. This is a judgment on consequential orders and, principally, costs. These are matters that are properly litigated and determined at trial. I focus, therefore, on the way in which the case was presented before me and turn to the other aspects of conduct.

29 With regard to David Leslie Baker, there are two aspects that the court must examine. First, the question of the respondents' influence. In the bundle there is a letter from the applicants' solicitors, Lombards. This is dated 16 August 2022 at B1635-36. It states that the applicants were not alleging that the respondents had influenced Mr Baker, mentioning the hedge burning the previous summer. The applicants' solicitors state in terms:

> "We would point out that our clients are not implying that your clients are responsible for this or that your clients influenced Mr Baker."

In light of this, at the hearing in May, the court asked applicant counsel explicitly whether it was being said that the respondents had influenced Mr Baker in respect of the hedge burning. It was said that Mr Baker had been so influenced. Therefore, this allegation was revived. The court had to consider the allegation, and found that there was no proper evidential basis to indicate that the respondents had influenced Mr Baker. This allegation is one of great seriousness and amounts to an encouragement or an incitement to an act of arson. The respondents were explicitly told that it would not be pursued; then, at the interim relief hearing, it was resurrected without any credible evidential foundation.

30 The second aspect in respect of Mr Baker is coercion. In the draft order put before the court, coercion was pleaded. However, when the court asked applicant counsel on what basis coercion was pursued and whether it still was, the court was informed that coercion would not be pursued - that is, pursued at the hearing. But it was pleaded in the particulars of claim. The court finds the conduct of the applicants in respect of Mr Baker to be unreasonable.

31 I turn to the question of the high hedges complaint by Dr Cross. In no statement prior to the hearing did either the applicants or their legal team bring to the court's attention that Dr Cross's high hedges complaint had been upheld by the inspector, save for a modest revision

of the council's decision on the height of the hedge. This is particularly pertinent since Mr Dyer mentioned an inspector's visit in his statement. This was used as a basis to launch another allegation, here about Mr Small chopping wood. Given that the inspector was mentioned and the claim was that Dr Cross's complaint was "spurious", it was incumbent on the applicants for the purposes of the main hearing to inform the court that the inspector substantially upheld the complaint and to explain how it was nevertheless maintained that the complaint was "spurious".

32 Instead, it was up to the court to seek clarification from applicant counsel of how the allegation could be sustained in the teeth of the inspector's decision. In her statement to the court, Mrs Dyer claims that a reduction in hedge height would have "no material impact and the improvement of light" in Dr Cross's property. Yet, the applicants' allegation cannot live with the conclusions of the independent inspector. He found that Mrs Dyer's hedge was "highly likely" to cause an unacceptable loss of light to Dr Cross's garden and also to the living rooms in the Doctor's property. Further, Mrs Dyer's hedge was a "serious visual intrusion into Dr Cross's field of view" and "adversely affects the reasonable enjoyment of the complainant's (Dr's Cross) property."

33 On 12 April, the applicants settled particulars of claim. These particulars were signed on 7 May, the decision of the inspector was sent out on 10 March (all 2023), thus, a good month before settling the particulars and almost two months before signing. Yet, in these particulars, the applicants persist in making the spurious hedge allegation (see para.12(f) at B1519). The applicants failed to mention at any point that the inspector upheld the complaint, yet there was extensive detail provided about the inspector's visit in the particulars of claim at para.30., it states:

"On 31 January 2023, during a site visit of the allocated planning inspector, the second defendant made his presence very visible."

It was then said that Mr Small (the second respondent/defendant) was said to be in

"…his car port, chopping up wood with a large hand axe, later a chain saw. The second defendant carefully positioned himself in such a way to have a line of sight into Brook Lane and Dr Cross's property."

34 It then continues:

"The claimants fail to see any reason why the second defendant was overseeing proceedings, given that he had no interest in the matter and was not invited to participate in the site visit."

This, therefore, has been pleaded with an intense level of factual particularity. There is mention of the two types of tools that Mr Small was using or wielding. In the April particulars of claim, it is astounding that, at no point, is there mention of the central fact that, despite the claim of spuriousness or that Dr Cross's complaint was allegedly without merit, the inspector upheld it.

35 I fail to see how this complies with the high duty of candour to the court in an interim application and, in particular, in an application that seeks significant interference with Convention rights. To persist in such a claim in the face of an independent expert assessment and not to acknowledge it at any point, has, in the judgment of the court, the vital hallmarks of a lack of reasonableness. It also lacks full and frank disclosure in accordance with the *Practice Guidance*.

36 At first in argument at the consequential hearing, counsel for the applicants submitted that there was no need in the particulars to descend into the detail of the outcome of the inspector's decision. However, one just simply has to look at the particulars and the detailed factual account of what had happened at that visit to understand that this was an insupportable submission. The court sought justification for this stance and Mr Barraclough conceded, quite properly, two things: first, that these were very detailed particulars of

claim, in fact, they extended just into 17 pages; second, that the inspector's decision should have been mentioned. It was not. The court finds that this was an unreasonable omission, especially given that the high hedges complaint was one of the marquee allegations of oppressive and unreasonable conduct alleged against the respondents and, in this instance, Dr Cross particularly. The applicants contended resolutely during the interim hearing that the high hedges complaint was indeed spurious. To support a continuing deprecation of Dr Cross's complaint, the court was informed in the hearing that the inspector's decision was the subject of a claim in judicial review. That was factually wrong. The inaccuracy was challenged by Ms Proferes. In fact, what had happened was that a few days before 11 May hearing, a pre-action protocol letter was served. That is a very different matter. Thus, no claim had been issued by the time of the hearing in May.

37 I turn to the approach to application 20. There was no evidence that the application was objectively incorrect or without validity in principle, yet it was submitted in the course of the hearing that objection to it by the respondents was "spurious". The basis of maintaining that submission was the evidence of Mr Mehmet. It is to his evidence that the court turns. It was entirely at the election of the applicants which planning expert they sought to instruct. They could have instructed an expert before issue in October 2022. They did not. Then, from October until the May interim relief hearing, they could have chosen any planning expert. They chose to instruct a planning consultant who had advised them on previous planning applications and appeals. It must have been entirely foreseeable to the applicant team that the court would harbour serious concerns about the independence of Mr Mehmet when it was very so clearly compromised. Yet, even during the course of the hearing in May, the applicants sought to maintain that Mr Mehmet was independent. This was a manifestly unsustainable stance. It is no answer to advance the fact, as the applicants do, that Mr Mehmet has not been cross-examined. No witnesses have. This was an application for interim relief. The case was considered from all quarters on the papers. No application

was made for the applicants to call any evidence live in front of court. Further, during the course of argument on costs, it was submitted on behalf of the applicants that:

> "We say it was, in the circumstances, reasonable to instruct Mr Mehmet because he had a wide knowledge of the circumstances and, thus, could give an opinion."

38 Therefore, the applicants still failed to recognise or accept a crucial flaw in the evidence of Mr Mehmet, his lack of independence and objectivity. Of course, any individuals may have a deep or profound knowledge of the circumstances of any case. That would not qualify them as suitable experts. The court finds that the instructions of Mr Mehmet, their own planning consultant, to provide such crucial expert advice upon which so much rested in their application for interim relief was clearly a course that was not reasonable. It is a course that proper reflection would have unmistakably revealed as a significant procedural misstep.

39 **Other acts of harassment**. The applicants sought to reach back to 1998 in pleading acts of harassment. The most recent act of direct harassment against Mrs Dyer herself was the "Boris Johnson conversation" in March 2020. That was two-and-a-half years before the application for injunction was issued. It was alleged that the respondents had been responsible for flying drones over the applicants' property. Mr Dyer, in his statement, stated:

> "...these overflying drones make my wife anxious as it was another form of being watched and monitored. This is another example of the defendants harassing my wife."

40 Mr Dyer put the allegation against the respondents like this at B1239:

"We have been targeted by your gang and will no longer be your sport."

Mrs Levinson (Mrs Dyer's mother) states:

"It is clear that the gang is controlled and led by Mr Small."

Mr Dyer, in his second statement, at B1193. para.13, states that Mr Small is the "self-appointed road captain in this 'history of a vendetta.'" Yet, in the solicitors' correspondence with the neighbours, the Watkinsons, it was alleged that it was still other neighbours, the Kellys, who were responsible for flying the drones. This demonstrates that the drone allegation against the respondents was inherently weak and misconceived.

41 The allegation about the dog dispute at Velvets Cottage involved the Scarisbricks, who were at that point tenants at the premises. Mr Scarisbrick stated in a second witness statement that it was the conduct of Mrs Webb that caused him and his family to leave their rental home. However, in an earlier e-mail to the estate agents, he made it clear that the property was not suitable and, therefore, they were looking for other property in other areas. This predated the dog incident. Thus, the contemporaneous documentation (and this is a material factor for the court to take into account in deciding indemnity costs) undercuts the applicants' case on this point. Nevertheless, the applicants maintained the allegation up to and including the May hearing.

42 It was alleged in Mr Dyer's second statement that the respondents had objected to all the applicants' applications for planning, but that was incorrect. It was pointed out by the respondents' solicitors that here was a clear factual inaccuracy. Nevertheless, the allegation was maintained.

43 The court now pulls the strands of this together. The court finds that, in all the respects identified, the conduct of the applicants was out of the norm and not reasonable: the applicants' flawed and remiss approach to Convention rights; the failure to engage with the

pre-action injunctive relief test; the instruction of an expert who was not independent; the intransigent reliance on the high hedges complaint that had been independently determined in favour of Dr Cross; not mentioning the decision by the inspector; a failure to alert the court either through the particulars of claim or in the updating statement or the skeleton argument about the outcome of the inspector's decision; a failure to establish any credible basis for urgency; the fact that there was no proper interests of justice basis here and the fact that interests of justice was not pleaded in any event, but it was incumbent on the court to review and dismiss it. The applicants failed on both limbs of the test at Civil Procedure Rules 52.2(2)(b) for the grant of a pre-action injunction.

44 In this short recapitulation, I do not mention everything that I have just examined. The allegations made by the applicants were of great seriousness. It was alleged that the respondents influenced David Leslie Baker in the burning of Mrs Dyer's boundary fence. These allegations were pursued with determination, stridency and a conviction that was not justified. There was no adequate evidence to support these allegations. There were other serious allegations, such as coercion of Mr Baker and, also, trespass by Mr Small. These were withdrawn without explanation.

45 Consequently, the court has no hesitation in concluding that this is a case where the award of indemnity costs is justified. The court exercises its broad discretion and makes such award.

Issue 2

46 I turn to the second issue, that is the issue that this application should be recorded as 'totally without merit'. The Civil Procedure Rules at 23.12 set out how the court should adjudicate such an application. Rule 23.12 provides:

"If the court dismisses an application (including an application for permission to appeal or for permission to appeal for judicial review) and it considers that the application is totally without merit –

(a) the court's order must record that fact; and

(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

47 In *R (Grace) v Secretary of State for the Home Department* [2014] EWCA (Civ) 1021, the Court of Appeal held that the proper test for determining whether an application is totally without merit was whether it was "bound to fail". It is not necessary to show that the application was abusive or vexatious. Here, the applicants sought an injunction at the pre-action stage. To make good such an application, it must conform to Civil Procedure Rules 25.2(2)(b). This provides insofar as it is material:

"(b) the court may grant an interim remedy before a claim has been made only if –

(i) the matter is urgent; or

(ii) it is otherwise desirable to do so in the interests of justice."

48 At the May hearing, the applicants stated in terms when asked by the court that the situation was "urgent." The urgency relied upon was never adequately explained. In the consequential orders hearing, the court gave Mr Barraclough an opportunity to address why it was that the applicants claimed urgency. Mr Barraclough said: "There is nothing I can say." This is a telling statement. There was, in truth, no urgency here. The application notice was issued in October 2022. As at the interim relief hearing, six to seven months later, no claim had been issued. If this were truly a situation of pressing urgency, it is inconceivable that no claim would have been issued in the interim. Instead, at the consequentials hearing, the court was told, in effect, that the applicants "wanted to see the result of the interim relief application" and to reflect upon it before deciding whether to issue. If this was indeed the situation, it is a misconceived approach. An interim relief

hearing is not a test run; it is not a dress rehearsal. It is interim to something and that is to a substantive claim that the applicants, as claimants, undertake to issue within a clear, identifiable and invariably proximate time frame. Yet now, over eight months after the application notice on 26 October 2022, no claim has been issued.

49 Returning to urgency, the last act of direct harassment that was alleged was March 2020, in respect of Mrs Dyer. The applicants confirmed at the hearing that they were not envisaging making any imminent planning applications, so there cannot be urgency to protect them from objections on that footing. Since the arrival of the new tenants at Velvets Cottage, there have been no incidents that the applicants complain of, and yet the applicants' case at the interim relief hearing was that the court should intervene immediately as the injunctive relief sought "cannot await final trial". It was a bold stance to take, and one that was bound to fail. Thus, for a pre-action injunction, the urgency limb is not available to the applicants on the facts of this case.

50 In their skeleton argument, dated 9 May 2023 and thus before the interim relief hearing, the applicants did not argue interests of justice as an alternative basis. What happened was that, instead, and in fairness to the applicants, the court of its own motion and endeavoring to be fair, considered the case in detail to see if, despite the applicants not pleading such a basis, there might be an interests of justice basis open to the applicants. The court considered it. It provided a detailed judgment about it and rejected that basis.

51 The question for a "totally without merits" recording is whether this application or this basis in respect of interests of justice was bound to fail. The relevant factors are, first, the interests of justice basis was not relied upon by the applicants in their skeleton argument. Second, what was sought in respect of the restraint on Convention rights was serious and it was not acknowledged that such rights were engaged until the court sought clarification.

There was no credible argument advanced about how the infringements of Article 10 and Article 11 were justified because the point had not been considered. It was only accepted by way of concession. As Mr Barraclough put it: "We accept that for the purposes of the hearing the Human Rights Act applies." Third, the higher threshold that an applicant must reach for the restraint of Convention rights was never likely to be reached. It was bound to fail.

52 Further, I have previously indicated the weaknesses in the evidence of Mr Mehmet and the fact there was no evidence that the respondents' objection of "greatest concern", that is application 20, was in fact objectively incorrect or in valid. Mr Mehmet's evidence was the basis to justify the exceptional submission that the respondents should be restrained from objecting to applications even where their objections may be objectively valid. Due to these clear evidential weaknesses, the applicants never, in truth, were going to prove on a balance of a probabilities that the respondents had not proved reasonableness of conduct at trial. That is the applicable test (*UK Oil and Gas Investments plc & Ors. v Persons Unknown* [2018] EWHC 2252 (Ch) at paras.146-150). Fourth, there was a stubborn persistence to pursue the high hedges complaint in the teeth of the contradictory evidence. Fifth, I must consider the alternative basis of the pre-action injunction sought in respect of other acts of harassment. As indicated, in respect of these, there was not any urgency. The last act of harassment directed against Mrs Dyer was two-and-a-half years before issue. Looking at the interests of justice, I must take into account the nature of the allegations made, more accurately, the allegations which remained. The trespass allegation against Mr Small is abandoned. The allegation of coercion against Mr Baker was not pursued. The court found there was no credible evidence of the respondents' influencing him to set fire to the hedge. There was no other credible evidence of influence of Mr Baker. The Scarisbricks' dogs' incident at Velvets Cottage was significantly weakened by the contemporaneous documentation that cast a different light: that the Scarisbricks' motive in leaving the cottage

was not related to acts of harassment. There is no allegation of acts of violence against the respondents, nor allegations that the respondents themselves had engaged in threats of violence. Sixth, the court also found that damages would have been an adequate remedy and, indeed, the applicants sought, as part of the relief in the case and as pleaded in the particulars of claim, damages.

53 Therefore, standing back, I judge that the application for a pre-action injunction in respect of the acts of harassment in this case and the objections to the planning applications was bound to fail on the basis of interests of justice. The evidential foundation was simply not there. The court is therefore satisfied that the application for interim relief was fatally flawed and was bound to fail. Thus, it is totally without merit. This finding must be recorded in the order for the purposes of Civil Procedure Rules 23.12(a).

54 As to a civil restraint order, there is no application by the respondents for such an order against the applicants. However, independently, the court has a duty to consider whether such a restraint order is merited. Civil Procedure Rules 23.12(b) provides:

> "(b) the court must at the same time consider whether it is appropriate to make a civil restraint order."

I have decided that it is not appropriate. Another court may take a different view. But I have considered the totality of the evidence in detail. I am satisfied that this application was fundamentally misconceived rather than intrinsically malicious. A civil restraint order does not inevitably follow from the totally without merit recording.

Issue 3: Payment on Account

55 The parties agreed that the reasonable figure should await the determination of the basis of the costs award. The court has ruled that it should be on an indemnity basis. The figure of

costs incurred presently is approximately £200,000. The competing figures for the appropriate sum for payment on account are, in short, as follows. First, the respondents: Ms Proferes submits that, "It is hard to see how it should be less than 60 to 70 per cent," so between £120,000 to £140,000. The applicants submit that on a standard basis it should be £80,000 approximately, but on an indemnity basis £90,000 approximately. The court has a wide discretion. It must ensure that the sum is reasonable, not that it is the "irreducible minimum". Ms Proferes is quite right about that.

56 I indicated at hearing that the figure the court had in mind was approximately £90,000. I have listened carefully, however, to the submissions of counsel and I take into account the fact that the court has found for the respondents on the question on indemnity. Thus, I judge that a reasonable figure is £100,000 in terms of a payment on account. The court is confident that the respondents will comfortably recover this figure. But, even if they do not, each of them is a homeowner and there is little doubt that they will be able to make good any shortfall, which I cannot envisage occurring, given the indemnity award.

Issue 4: Pre-action costs

57 The court granted Ms Proferes liberty to provide the court with any authority or argument to justify the payment of pre-action costs. But, between the hearing and today, there has been nothing further submitted. I emphasise that this is not a criticism. The applicants submit through Mr Marven that there is no jurisdiction to make such award. In other words, as Mr Marven attractively put it, this is a root and branch objection to the jurisdiction. The proper basis to make such award has not been identified or put before the court. As such, a court is not in a position to make such award.

Issue 5: Unless order

58 The respondents seek directions from the court about how and when the applicants should issue future proceedings. Given the chequered history of this case and the deep level of acrimony in which they have been mired, it is entirely understandable that the respondents seek certainty and an end to the spectre of further litigation. It should be noted that the applicants are yet to issue proceedings and that they wish to reflect on the substantive judgment on interim relief. However, to grant the respondents the future comfort they seek requires a proper legal basis. Ms Proferes, with commendable realism, acknowledges that the species of unless order she seeks is "a slightly unusual unless order." The fact is that it has, however, been two years since the letter before action to Mr and Mrs Small and, even today, the applicants, it appears, are not prepared to say whether they will proceed. It is also true that the overriding objective requires that cases are dealt with expeditiously.

59 Here, the court has refused interim relief. Paradoxically, if the court had granted interim relief, then it would be able to set a deadline for the issuing of this substantive claim. That would be because there would be a very serious and potentially punitive interim order hanging over the respondents' head. But, here, the court has dismissed the application. This presents a different forensic picture. No authority has been laid before the court which provides precedent or justification for the relief that the respondents seek. It seems to me that the proper remedy in case of undue delay would be to submit that any such claim has become an abuse of the process of the court. Therefore, I find that the court does not have legal power to grant an unless order with a time limit after which issuing proceedings by the applicants would be required.

60 That is the judgment of the court in respect of five of the six issues identified.

L A T E R

61 Mr Marven KC applies on behalf of the applicants for permission to appeal the Totally Without Merit recording. I have found that the original interim relief application was bound to fail. It was an application for a pre-action injunction. There was no urgency (Limb 1). Interests of justice (Limb 2) was not relied upon by the applicants. Nevertheless, the court did consider the interests of justice and that limb was not satisfied either. Therefore, the application was bound to fail. There was no real prospect of success in appealing the decision, and there is no other compelling reason for granting permission. [The court provided the N460 with fuller reasons the next day – Friday 4 August 2023.]